

Goldman v Chop't Creative Salad Co. LLC

2019 NY Slip Op 33731(U)

November 22, 2019

Supreme Court, Bronx County

Docket Number: 22716/17E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - PART IA-14

-----X
ALLISON GOLDMAN,

Plaintiff,

INDEX NO: 22716/17E

- against -

DECISION & ORDER

CHOP'T CREATIVE SALAD COMPANY LLC
and CHOPT UES LLC,

Defendants.
-----X

John R. Higgitt, J.

Plaintiff commenced this action to recover damages for personal injuries she allegedly sustained as a result of contracting an E. Coli infection from food products she purchased from one of defendants' restaurants on or about April 18, 2015. Plaintiff claims, among other things, that defendants did not store spinach at a reasonably safe temperature, that the failure to properly store the spinach caused the E. Coli bacteria to grow on and contaminate the spinach, and that plaintiff ingested the spinach and contracted an E. Coli infection from it. Defendants joined issue, and the parties have engaged in discovery proceedings.

By the present motion, plaintiff seeks to compel defendants to comply with the following directives in the January 30, 2018 compliance conference order (Douglas, J.) ("CCO"): (1) conduct a search of electronically-stored information ("ESI") of 10 specified individuals (Boarini, Crocitto, LaPlaca, Lederer, Luna, Marsh, Parada, Redbatt, Rocha and Stevenson) using specified search terms to find documents concerning plaintiff or E. Coli, and produce pertinent documents;¹ (2) search and produce text messages concerning plaintiff or E. Coli; and (3) produce documents called for by paragraphs 1, 4, 6, 7, 8, 10, and 12 of the appendix to the CCO. Also, plaintiff seeks to compel defendants to respond to plaintiff's May 16, 2018 discovery demand, produce a witness knowledgeable about subjects specified in plaintiff's June 11, 2018 notice of

¹ Plaintiff requests that defendants be directed to employ the following specific search terms in conducting the ESI search: "Goldman, coli, e.coli, ecoli, e. coli, EPEC, STEC, escherichia, enteropathogenic, shiga, foodborn! or food /1 born!, spinach, greens, temperature, 41°, 41 degrees, Fahrenheit, (open upright) /s display."

deposition, and produce an e-mail from defendants' third-party food safety inspector to defendants.²

Defendants oppose the motion. They do not address each of the subjects delineated by plaintiff in her motion papers; rather, defendants argue that they have provided approximately 200 pages of material in response to the discovery demands and orders in this action, and that most of the discovery plaintiff seeks by way of this motion is irrelevant to this action. With their opposition papers, defendants submitted their October 2, 2017 response to the preliminary conference order, and their September 12, 2018 response to plaintiff's May 16, 2018 discovery demand.

In *Forman v Henkin*, 30 NY3d 656, 661 (2018), the Court of Appeals reiterated the fundamental principles applicable to civil discovery:

“Disclosure in civil actions is generally governed by CPLR 3101(a), which directs: ‘[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.’ We have emphasized that ‘[t]he words, “material and necessary,” are ... to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason’ (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see also Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746 [2000]). A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is ‘material and necessary’—i.e., relevant—regardless of whether discovery is sought from another party (*see* CPLR 3101[a] [1]) or a nonparty (CPLR 3101 [a] [4]; *see e.g. Matter of Kapon v Koch*, 23 NY3d 32 [2014]). The ‘statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise’ (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 376 [1991]).”

“[C]ompliance with a disclosure order[, such as the CCO here,] requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully” (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]).

The court will consider plaintiff's requests in turn.

² Plaintiff sought the deposition of Parada, one of defendants' district managers. Parada was deposed shortly after the motion was submitted. Therefore, that aspect of plaintiff's motion seeking to compel Parada's deposition is moot.

Search of ESI (including e-mails) of 10 specified individuals (Boarini, Crocitto, LaPlaca, Lederer, Luna, Marsh, Parada, Redbatt, Rocha and Stevenson) employing specified search terms, and produce documents concerning plaintiff or E. Coli

This item (save for the specified search terms) was required under paragraph 3 of the appendix to the CCO. In their opposition papers, defendants failed to demonstrate sufficient compliance with this directive. Notably, defendants appear to have conducted an overly restrictive search for potentially relevant information.

To facilitate an appropriate, meaningful search, defendants are to undertake a search of ESI in the control or custody of the 10 individuals specified above for the one-year period prior to the April 18, 2015 incident through the present using the search terms specified on page eight of plaintiff's August 24, 2018 memorandum of law in support of her motion. Pursuant to the CCO, defendants are to disclose to plaintiff *all* ESI concerning plaintiff, E. Coli or both. Additionally, under paragraph 3, defendants must produce any e-mail from defendants' third-party food safety inspector to defendants concerning plaintiff.

In responding to this directive, defendants are to provide an affidavit by one with firsthand knowledge of the search detailing the search that was undertaken for ESI, including the search terms used (which should, of course, include the terms specified at page 8 of plaintiff's memorandum of law), the accounts searched, the date of the search, and the results of the search.

All text messages concerning plaintiff or E. Coli

This item was clearly (albeit tacitly) required under paragraph 3 of the appendix to the CCO. In their opposition papers, defendants failed to demonstrate compliance with this directive.

To facilitate an appropriate, meaningful search, defendants are to undertake a search of the text messages in the control or custody of Boarini, Crocitto, LaPlaca, Lederer, Luna, Marsh, Parada, Redbatt, Rocha, and Stevenson, for the one-year period prior to the April 18, 2015 incident through the present using the search terms specified on page eight of plaintiff's August 24, 2018 memorandum of law in support of her motion. Pursuant to the CCO, defendants are to disclose to plaintiff *all* text messages concerning plaintiff, E. Coli or both.

In responding to this directive, defendants are to provide an affidavit by one with firsthand knowledge of the search detailing the search that was undertaken for text messages, including the search terms used (which should, of course, include the terms specified at page 8 of plaintiff's memorandum of law), the accounts searched, the date of the search, and the results of the search.

All relevant insurance policies

This item was required under paragraph 1 of the appendix to the CCO. In their opposition papers, defendants failed to demonstrate sufficient compliance with this directive. Defendants are required to disclose any potentially relevant insurance *policies* (not simply certificates of insurance), including excess coverage.

In responding to this directive, defendants are to provide an affidavit by one with firsthand knowledge of the search detailing the search that was undertaken for potentially relevant insurance policies, including the date of the search, and the results of the search.

All documents concerning transmission or alleged transmission of illnesses at defendants' restaurants

This item was required under paragraph 4 of the appendix to the CCO. In their opposition papers, defendants failed to demonstrate sufficient compliance with this directive. This directive includes any incident reports prepared by defendants, yet no such reports appear in defendants' discovery responses.

In responding to this directive, defendants are to provide an affidavit by one with firsthand knowledge of the search detailing the search that was undertaken for the documents concerning the transmission or alleged transmission of an illness occurring at defendants' restaurants, including the date of the search, and the results of the search.

All documents concerning defendants' investigations, reviews or audits concerning food safety at the subject restaurant

This item was required under paragraph 6 of the appendix to the CCO. In their opposition papers, defendants failed to demonstrate sufficient compliance with this directive. The court notes that this directive includes any internal investigation, internal review or internal audit concerning food safety at the subject restaurant.

In responding to this directive, defendants are to provide an affidavit by one with firsthand knowledge of the search detailing the search that was undertaken for the documents concerning defendants' investigations, reviews or audits concerning food safety at the subject restaurant, including the date of the search, and the results of the search.

All documents regarding any complaints concerning illness, food preparation, food handling, food temperature, personal hygiene of workers or vermin control at the subject restaurant from April 18, 2013 to the present

This item was required under paragraph 7 of the appendix to the CCO. In their opposition papers, defendants failed to demonstrate sufficient compliance with this directive. The court notes that the CCO requires disclosure of *all* documents concerning complaints concerning illness, food preparation, food handling, food temperature, personal hygiene of workers or vermin control at the subject restaurant from April 18, 2013 to the present. Defendants' response to this directive indicates that some but not all of the relevant documentation was disclosed.

In responding to this directive, defendants are to provide an affidavit by one with firsthand knowledge of the search detailing the search that was undertaken for documents concerning any complaints concerning illness, food preparation, food handling, food temperature, personal hygiene of workers or vermin control at the subject restaurant from April 18, 2013 to the present, including the date of the search, and the results of the search.

All documents concerning the sewage disposal system, anti-siphonage device or backflow prevention device at the subject restaurant

This item was required under paragraph 8 of the appendix to the CCO. In their opposition papers, defendants failed to demonstrate sufficient compliance with this directive. The court notes that the CCO requires disclosure of *all* documents concerning the sewage disposal system, anti-siphonage device or backflow prevention device at the subject restaurant. Defendants' response to this directive indicates that some but not all of the relevant documentation was disclosed.

In responding to this directive, defendants are to provide an affidavit by one with firsthand knowledge of the search detailing the search that was undertaken for the documents concerning the sewage disposal system, anti-siphonage device or backflow prevention device at the subject restaurant, including the date of the search, and the results of the search.

All documents providing defendants' safety guidelines regarding food safety, including any on-line training programs and their accompanying modules

This item was required under paragraph 10 of the appendix to the CCO. In their opposition papers, defendants failed to demonstrate sufficient compliance with this directive. The court notes that documents reflecting the on-line training program (and any accompanying modules) regarding food safety must be disclosed under paragraph 10.

In responding to this directive, defendants are to provide an affidavit by one with firsthand knowledge of the search detailing the search that was undertaken for the documents concerning defendants' safety guidelines regarding food safety.

All communications with governmental or quasi-governmental entities concerning food safety at the subject restaurant

This item was required under paragraph 12 of the appendix to the CCO. In their opposition papers, defendants failed to demonstrate sufficient compliance with this directive.

In responding to this directive, defendants are to provide an affidavit by one with firsthand knowledge of the search detailing the search that was undertaken for the communications with governmental or quasi-governmental entities concerning food safety at the subject restaurant, including the date of the search, and the results of the search.

Plaintiff's May 16, 2018 discovery demands³; all documents concerning the open or upright display cases at the subject restaurant

This item was demanded in paragraph 2 of plaintiff's document requests. Defendants responded that the demand is overly broad, unduly burdensome, vague and ambiguous; not limited in time; and not reasonably calculated to yield relevant information.

In light of the nature of the claims in this matter and evidence that the food product plaintiff purchased from the subject restaurant may have been stored or displayed in an open or upright display case, plaintiff's demand may yield information that is material and necessary in the action. However, in response to defendants' concerns, the court limits the demand and directs defendants to comply with the following directive: Produce documents, in whatever form they are presently maintained, regarding maintenance to, repairs on and temperature readings of any open display cases or upright display cases that were in the subject restaurant on April 18, 2015, such documents to cover the one year period preceding the April 18, 2015 incident.

³ Because defendants responded to plaintiff's May 16, 2018 discovery demands *after* plaintiff made the present motion, plaintiff had only a limited opportunity in reply to address defendants' belated response. To the extent possible on the existing record, the court addresses plaintiff's reply arguments with respect to defendants' responses. The court's decision on this motion is without prejudice to either plaintiff or defendants seeking discovery-related relief in the DCM Part based on defendants' responses to plaintiff's May 16, 2018 demand.

In responding to this directive, defendants are to provide an affidavit by one with firsthand knowledge of the search detailing the search, including the results of thereof.

Plaintiff's June 11, 2018 notice of deposition: produce a witness for deposition who is knowledgeable about the following subjects: (a) the steps taken by defendants, if any, to address the food safety issues that were reported in [defendants' third-party food inspector's] April 6, 2015 report, including, without limitation, that the temperatures of the salad greens in the open display case were not being properly maintained; (b) the steps taken by defendants, if any, to address the food safety issues that were reported in [defendants' third-party food inspector's] July 9, 2015 report, including, without limitation, that potentially hazardous foods, particularly the salad greens, were not being maintained at the proper temperatures in the display case; (c) the measuring of the temperatures of the salad greens, including, without limitation, spinach, on April 17, 2015 and April 18, 2015; (d) defendants' decision not to report plaintiff's allegation that she contracted E. Coli from the subject restaurant to the New York City Department of Health; and (e) defendants' investigation into plaintiff's allegation that she contracted E. Coli from the subject restaurant on April 18, 2015

Defendants did not address the issue of whether they ought to produce a witness with knowledge of the five subjects listed in the June 11, 2018 notice of deposition.

The court agrees with plaintiff's argument that a witness knowledgeable about the five subjects should be produced, for those subjects are material and necessary to the prosecution of this action.

Conclusion

Accordingly, it is hereby ORDERED that the aspect of plaintiff's motion seeking to compel defendants to comply with paragraph 1 of the appendix to the January 30, 2018 compliance conference order is granted, and defendants, within 30 days after service upon them of a copy of this order with notice of entry thereof, are directed to disclose any potentially relevant insurance policies, including excess coverage; and it is further

ORDERED that the aspect of plaintiff's motion seeking to compel defendants to comply with paragraph 3 of the appendix to the January 30, 2018 compliance conference order is granted, and defendants, within 30 days after service upon them of a copy of this order with notice of entry thereof, are directed to undertake a search of ESI in the control or custody of the 10 individuals specified in paragraph 3 for the one-year period prior to the April 18, 2015 incident through the present using the search terms specified on page eight of plaintiff's August 24, 2018 memorandum of law in support of her motion, and defendants are directed to disclose any documents concerning plaintiff or E. Coli; and it is further,

ORDERED that the aspect of plaintiff's motion seeking to compel defendants to disclose text messages in the control or custody of Boarini, Crocitto, LaPlaca, Lederer, Luna, Marsh, Parada, Redbatt, Rocha, and Stevenson concerning plaintiff or E. Coli is granted, and defendants, within 30 days after service upon them of a copy of this order with notice of entry thereof, are directed to undertake a search of the text messages in the control or custody of those 10 individuals for the one-year period prior to the April 18, 2015 incident through the present using the search terms specified on page eight of plaintiff's August 24, 2018 memorandum of law in support of her motion, and defendants are directed to disclose any documents concerning plaintiff or E. Coli; and it is further,

ORDERED that the aspect of plaintiff's motion seeking to compel defendants to comply with paragraph 4 of the appendix to the January 30, 2018 compliance conference order is granted, and defendants, within 30 days after service upon them of a copy of this order with notice of entry thereof, are directed to disclose all documents concerning the transmission or alleged transmission of an illness occurring at defendants' restaurants; and it is further

ORDERED that the aspect of plaintiff's motion seeking to compel defendants to comply with paragraph 6 of the appendix to the January 30, 2018 compliance conference order is granted, and defendants, within 30 days after service upon them of a copy of this order with notice of entry thereof, are directed to disclose all documents concerning defendants' investigations, reviews or audits concerning food safety at the subject restaurant; and it is further

ORDERED that the aspect of plaintiff's motion seeking to compel defendants to comply with paragraph 7 of the appendix to the January 30, 2018 compliance conference order is granted, and defendants, within 30 days after service upon them of a copy of this order with notice of entry thereof, are directed to disclose all documents concerning any complaints concerning illness, food preparation, food handling, food temperature, personal hygiene of workers or vermin control at the subject restaurant from April 18, 2013 to the present; and it is further

ORDERED that the aspect of plaintiff's motion seeking to compel defendants to comply with paragraph 8 of the appendix to the January 30, 2018 compliance conference order is granted, and defendants, within 30 days after service upon them of a copy of this order with notice of entry thereof, are directed to disclose all documents concerning the sewage disposal system, anti-siphonage device or backflow prevention device at the subject restaurant; and it is further

ORDERED that the aspect of plaintiff's motion seeking to compel defendants to comply with paragraph 10 of the appendix to the January 30, 2018 compliance conference order is granted, and defendants, within 30 days after service upon them of a copy of this order with notice of entry thereof, are directed to disclose all documents

providing defendants' safety guidelines regarding food safety, including any on-line training programs and their accompanying modules; and it is further

ORDERED that the aspect of plaintiff's motion seeking to compel defendants to comply with paragraph 12 of the appendix to the January 30, 2018 compliance conference order is granted, and defendants, within 30 days after service upon them of a copy of this order with notice of entry thereof, are directed to disclose all communications with governmental or quasi-governmental entities concerning food safety at the subject restaurant; and it is further

ORDERED that the aspect of plaintiff's motion seeking to compel defendants to comply with the paragraph 2 of her May 16, 2018 discovery demands seeking documents concerning the open or upright display cases at the subject restaurant is granted to the extent that, within 30 days after service upon them of a copy of this order with notice of entry thereof, defendants are directed to disclose all documents, in whatever form they are presently maintained, regarding maintenance to, repairs on and temperature readings of any open display cases or upright display cases that were in the subject restaurant on April 18, 2015, such documents to cover the one year period preceding the April 18, 2015 incident; and it is further

ORDERED that the aspect of plaintiff's motion seeking to compel defendants to comply with plaintiff's June 11, 2018 notice of deposition is granted, and defendants, within 60 days after service upon them of a copy of this order with notice of entry thereof, are to produce a witness (or witnesses) with knowledge of the five subjects specified in the June 11, 2018 notice; and it is further

ORDERED that defendants are to provide to plaintiff the above-described affidavits detailing the searches they undertake to plaintiff with defendants' corresponding discovery responses; and it is further

ORDERED that plaintiff's motion is otherwise denied; and it is further

ORDERED that the parties are to appear in the DCM Part at 9:30 am on February 20, 2020 for a status conference.

This constitutes the decision and order of the court.

Date: November 22, 2019
Bronx, NY



Hon. John R. Higgitt
Acting Supreme Court Justice