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| Elite Serv. Group, LLC v Asphalt Green |
| 2020 NY Slip Op 30256(U) |
| January 23, 2020 |
| Supreme Court, New York County |
| Docket Number: 651955/2017 |
| Judge: John J. Kelley |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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INDEX NO. 651955/2017

ELITE SERVICE GROUP, LLC,

MOTION DATE 09/18/2019

Plaintiff,

MOTION SEQ. NO. 004

- v -

ASPHALT GREEN and KARINA MEJIA,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for DISCOVERY.

In this action to recover damages for breach of contract, in quantum meruit for services rendered, and for conversion, the plaintiff moves pursuant to CPLR 3124 to compel the defendant Asphalt Green to respond to discovery requests and comply with discovery orders. Asphalt Green opposes the motion. The motion is granted only to the extent that Asphalt Green is directed (a) to provide a response to interrogatory numbers 17 and 25, as set forth in the plaintiff's first set of interrogatories, (b) to produce the documents requested pursuant to document request number 19, and (c) to provide the plaintiff with a *Jackson* affidavit (*Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 2011]) documenting the details of its search for records that it alleges do not exist or cannot be located. The motion otherwise is denied.

The plaintiff propounded two sets of interrogatories and one set of document requests. The plaintiff contends that Asphalt Green has not answered the first set of interrogatories under oath, and that it has yet to provide any written answers to interrogatory numbers 8, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, and 27 in the first set of interrogatories. In addition, the plaintiff asserts that Asphalt Green has not responded at all to its second set of interrogatories.

Moreover, the plaintiff contends that Asphalt Green has not indicated whether it is in possession of any documents responsive to request numbers 4, 5, 6, 7, 8, 9, 10, 11, 18, 19, 25, 26, 27, 28, 29, 30, and 32 in its first request for production of documents, nor has it produced documents responsive to request numbers 12, 21, 22, and 31, despite its representation that such documents do in fact exist.

Asphalt Green opposes the motion, submitting a September 18, 2019 letter in which it: supplemented its responses to document request numbers 7, 12, 21, 22, 31, and 33; produced some of the requested documents (7, 31); informed the plaintiff, in connection with at least one request, that documents responsive thereto did not in fact exist (12); and, objected to some of the requests on the ground of relevance (21, 22, 31) and overbreadth (33). It also responded to interrogatory numbers 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 26, 27, and 29, as set forth in the first set of interrogatories, answering some (9, 13, 24, 26), objecting to others on the ground of relevance (15, 16, 18, 29), asserting that it had already responded to the question with respect to several other (21, 22, 23, 27), referring the plaintiff to documents that it had provided that contained information answering the particular question (8, 10, 11, 12, 14), or promising that it would finalize its investigation into the question asked and provide a response shortly in connection with two interrogatories (17, 25). These latter two interrogatories, respectively, sought the identity of every employee of the plaintiff who was included in a "displacement list" but were not thereafter hired by Asphalt Green, and who were, but should not have been, included in a list that the plaintiff provided to Asphalt Green on March 21, 2017. In connection with document request number 19, which sought correspondence between the plaintiff's employees and Asphalt Green's employees for the period during which the plaintiff provided services to Asphalt Green, Asphalt Green objected on the ground that the request was burdensome.

In her affirmation in opposition to the motion, Asphalt Green's attorney noted that Asphalt Green provided a verification for its response to the first set of interrogatories.

The court sustains those of Asphalt Green's objections as were based on its contention that the disclosure sought by the plaintiff was irrelevant to the dispute, both as to the first set of interrogatories and the request for production of documents, as the requested disclosure involved issues outside of the period of time in dispute (*see Washburn v A.W. Lawrence & Co.*, 222 AD2d 878, 879 [3d Dept 1995]; *Higgins v Montemurro*, 203 AD2d 799, 800 [3d Dept 1994]; *Lapidus v Hiltzik*, 160 AD2d 682, 684 [2d Dept 1990]). The court concludes that Asphalt Green otherwise has responded in full as to the remaining questions in the first set of interrogatories and the request for production of documents, except as to interrogatory numbers 17 and 25 and document request number 19, latter of which did not constitute a "burdensome" request. Hence, the motion to compel production is granted as to those items.

With respect to the documents alleged not to exist or which cannot be located, Asphalt Green must provide an affidavit from someone with knowledge as to "where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search [was] conducted in every location where the records were likely to be found" (*Jackson v City of New York*, 185 AD2d at 770).

The court denies the plaintiff's motion with respect to the second set of interrogatories. "While multiple discovery devices are permitted interrogatories should be employed 'only for the limited purpose of supplementation of discovery, not duplication'" (*Acwo Intl. Steel Corp. v Frenkel & Co.*, 165 AD2d 753, 754 [1st Dept 1990], quoting *Wagner v NFS Financial Servs., Inc.*, 96 Misc 2d 134, 136 [Sup Ct, N.Y. County 1978] [Kassal, J.]). An interrogatory that requires an extensive and detailed narrative is not one that serves the function of an interrogatory (*see Bassett v Bando Sangsa Co.*, 94 AD2d 358, 364 [1st Dept 1983] [Ross, J., dissenting]; *Breest v Haggis*, 2019 NY Slip Op 51115[U] [Sup Ct, N.Y. County, Jul. 9, 2019]; *Batan v Ball*, 2014 NY Slip Op 31992[U] [Sup Ct, N.Y. County, Jul. 28, 2014]).

Generally, where interrogatories are unduly burdensome and prolix as to be oppressive, the appropriate remedy is not judicial pruning, but vacatur of the interrogatories in their entirety

(see *Mendler v Mendler*, 135 AD2d 469, 470 [1st Dept 1987]; *Suffolk Business Ctr., Inc. v Applied Digital Data Sys.*, 128 AD2d 861 [2d Dept 1987]).

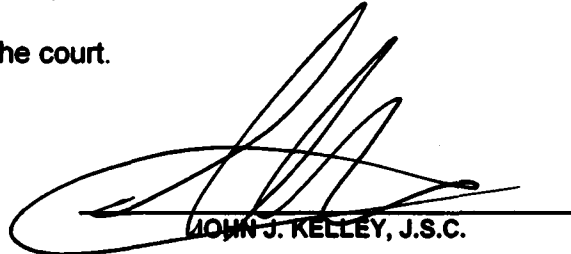
Here, although several questions in the second set of interrogatories properly request the calculation of damages, identity of witnesses, and easily reportable facts (1-7, 15-19, 21), the remaining questions seek narrative answers describing the parties' conduct or constitute a demands for disclosure that are more properly requested in a demand for a bill of particulars or a notice to admit. The court declines to engage in judicial pruning, and thus denies that branch of the plaintiff's motion seeking to compel answers to the second set of interrogatories.

In light of the foregoing, it is,

ORDERED that the plaintiff's motion to compel disclosure is granted to the extent that the defendant Asphalt Green is directed to provide a response to interrogatory numbers 17 and 25, as set forth in the plaintiff's first set of interrogatories, and document request number 19, and to provide the plaintiff with a *Jackson* affidavit documenting the details of its search for records that it alleges do not exist or cannot be located, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

1/23/2020
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE