

**Screen Media Ventures, LLC v Capella Intl., Inc.**

2020 NY Slip Op 30965(U)

April 15, 2020

Supreme Court, New York County

Docket Number: 654358/2012

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

SCREEN MEDIA VENTURES, LLC,
Plaintiff,
- v -
CAPELLA INTERNATIONAL, INC.,RALF HARTMANN
Defendant.

Table with 2 columns: INDEX NO., MOTION DATE, MOTION SEQ. NO., DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102

were read on this motion to/for STRIKE PLEADINGS.

Upon the foregoing documents, and for the reasons set forth below, Capella International, Inc. (Capella) and Ralf Hartman’s motion for an order (i) (a) striking the answer of Screen Media Ventures, LLC (Screen Media) pursuant to CPLR § 3126 for failure to comply with the court’s decision and order dated, April 22, 2019 (the April 22 Order) granting the defendants’ motion to compel or (b) ordering Screen Media to produce responsive documents by a date certain or have its pleadings stricken, (ii) appointing a judicial hearing officer or referee pursuant to CPLR § 3104, at Screen Media’s expense, to oversee Screen Media’s production and supervise its compliance, and (iii) awarding the Defendants’ reasonable attorneys’ fees and costs in connection with the instant motion pursuant to CPLR § 3126 and 22 NYCRR § 130.1-1 (a) is granted in part as set forth below. Capella and Mr. Hartman shall hereinafter be referred to collectively as the Capella Parties.

### THE RELEVANT FACTS AND CIRCUMSTANCES

Reference is made to a certain Letter of Agreement (the **Letter Agreement**), dated June 27, 2002, as amended by an Amendment Agreement (the **Amendment Agreement**; the Letter Agreement together with Amendment Agreement, collectively, the **Agreement**), dated June 28, 2002, by and between Capella and Screen Media pursuant to which (i) Capella granted Screen Media the exclusive rights to license and distribute nine motion pictures (the **Motion Pictures**) for a period of 15 years, and (ii) Screen Media made an upfront payment to Capella (advanced against Capella's share of future gross revenue) and agreed to provide an accounting of all gross revenue earned and fees and costs incurred in distributing the Motion Pictures.

After entering into the Agreement with Capella, Screen Media commenced marketing and licensing the Motion Pictures by entering into licensing agreements with third-party sublicensees. However, in May of 2012, Screen Media alleges that it learned that Mr. Hartman, the owner and manager of Capella, directly contacted a number of Screen Media's sublicensees stating that he had terminated the Agreement, sued Screen Media, and that Screen Media no longer had the rights to distribute and license the Motion Pictures, and otherwise solicited sublicensees to the Motion Pictures directly from Capella. Screen Media sued Capella alleging breach of contract, tortious interference with prospective economic advantage, breach of the implied covenant of good faith and fair dealing, tortious interference with contract, trade defamation and libel, and unjust enrichment. Capella and Mr. Hartman filed an answer and asserted counterclaims against Screen Media for breach contract, alleging that Screen Media

failed to furnish accounting statements as required under the Agreement and failed to make several payments of distribution fees to Capella.

On January 29, 2019, the Cappella Parties brought a motion to compel Screen Media to produce documents responsive to the Cappella Parties' First Notice of Request for Production of Documents, dated December 13, 2013 (the **Document Requests**). The following day, on January 30, 2019, the parties appeared for a status conference in this matter, and the court issued an order stating: "[Screen Media] will provide [the Capella Parties] with [a] detailed affidavit re: no additional documents w/in 2 weeks" (NYSCEF Doc. No. 95). Screen Media submitted the affidavit of its controller, Gary Sakalian (NYSCEF Doc. No. 96). Mr. Sakalian stated that upon a review of Screen Media's files, Screen Media realized that there were certain financial reports for sublicensees My Video, Clipfish, BskyB, Viewster, and Timeless Media Group that had not previously been disclosed (Sakalian Aff., ¶ 31). Beyond those documents, which Screen Media provided to the Capella Parties, Mr. Sakalian stated that Screen Media had no other responsive financial reports (*id.*, ¶ 32).

Subsequently, in Mr. Sakalian's affidavit in opposition to the motion to compel, he stated that Screen Media had produced all responsive documents relating to sublicensee Popcornflix and that with respect to any other requested agreements, it would conduct a search and turn over any responsive documents to the extent any were located (Sakalian Aff. in Opp., ¶¶ 36, 41). In February 2019 and March 2019, Screen Media produced thousands of additional documents (Lebowitz Aff., ¶ 15).

Following a hearing on the motion to compel, the court issued the April 22 Order granting the motion and ordering that:

the Plaintiff shall produce all documents previously requested by the Defendant within 30 days from the date of this order. Plaintiff shall demonstrate that all License Agreements disclosed were included in the previously disclosed spreadsheet and [shall] tie each agreement to the fiscal periods to which they relate. If Plaintiff fails to do so, the cost of bringing this motion to compel shall be borne by the Plaintiff (NYSCEF Doc. No. 93).

Notwithstanding the discovery requests of the Capella Parties, the discovery orders of the court over this approximately nine year litigation, and this court's April 22 Order, the Capella Parties assert that incredibly Screen Media has once again failed to comply with its court-ordered discovery obligations. Specifically, the Capella Parties argue that Screen Media should be held in contempt and should face sanctions for failing to produce four categories of documents: (i) license agreements and related reporting, (ii) information regarding allocation of revenue among "packaged" pictures, (iii) back-up information regarding verifiable out-of-pocket expenses, and (iv) documents relating to correspondence between Screen Media and third parties regarding Screen Media's rights. For the avoidance of doubt, these documents form the basis for establishing the damages that the Capella Parties indicate that they are entitled to as part of their share of the revenue pursuant to the Agreement.

And, in support of their motion for sanctions, the Capella Parties, through their own independent research, have identified at least 22 license agreements that they allege Screen Media has failed to disclose (Lebowitz Aff., ¶ 21). In addition, the Capella Parties have requested unredacted agreements concerning revenue allocation, but none have been produced (*id.*, ¶¶ 27-32).

Although Mr. Sakalian states that he previously produced back-up information showing Screen

Media's out-of-pocket costs, the Capella Parties assert that they have searched Screen Media's prior document productions and cannot locate any such documents (*id.*, ¶¶ 33-36). The Capella Parties also allege that, after initially disclosing documents evidencing communications between Screen Media and a third party telling them not to do business with the Capella Parties, Screen Media has failed to produce any other communications with third parties (*id.*, ¶¶ 38-40). Moreover, the Capella Parties allege that Screen Media has made no attempt to demonstrate that the license agreements produced in response to the compel order were on the previously disclosed spreadsheet as directed pursuant to the April 22 Order (*id.*, ¶¶ 42-45). And, finally, the Capella Parties assert that Screen Media simply ignored the portion of the April 22 Order directing it to tie each agreement to the fiscal periods to which they relate (*id.*, ¶ 46).

### DISCUSSION

Pursuant to CPLR § 3126, if a party refuses to obey a discovery order or willfully fails to disclose relevant information that should have been disclosed, the court may impose any penalties as are just under the circumstances. Appropriate penalties may include: (1) an order deeming the issues to which the evidence is relevant to be resolved, (2) an order precluding the use of evidence at trial, or (3) an order striking the pleadings, staying the proceedings, or dismissing the action, among other sanctions (CPLR § 3126 [1]-[3]). In addition, "a court has inherent power to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice" (*CDR Créances S.A.S. v Cohen*, 23 NY3d 307, 318 [2014]).

Striking a party's pleadings however is an extreme and drastic sanction and should only be imposed upon a showing of willful and contumacious conduct or bad-faith in failing to comply with discovery obligations (*Orlando v Arcade Cleaning Corp. by Initial Contract Servs., Inc.*, 253 AD2d 362, 363 [1st Dept 1998]). And, as the First Department has explained, the sanction imposed must be proportionate to the party's conduct (*Young v City of New York*, 104 AD3d 452, 454 [1st Dept 2013]). The burden lies with the moving party to come forward with "a clear-cut showing of willfulness" (*Orlando*, 253 AD2d at 363.). CPLR § 3126 however "broadly empowers a trial court to craft a conditional order—an order 'that grants the motion and imposes the sanction 'unless' within a specified time the resisting party submits to the disclosure' (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 79 [2010], quoting Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3126:10; *see also* CPLR § 3042 [d]).

In their opposition papers, Screen Media argues that the drastic sanction of striking Screen Media's pleadings is not warranted. Screen Media has attempted to comply with its discovery obligations to the best of its ability by responding to the items that have been specifically identified by the Capella Parties and attempted to produce those items. In addition, Mr. Sakalian explains, that Screen Media is a small company with a small staff and they have been completely overwhelmed by the Capella Parties' numerous document requests and follow up requests (Feb. 7 Sakalian Aff., ¶¶ 4-11). To date, Screen Media has produced more than 29,602 pages of documents in response to the Capella Parties' numerous document requests (Porter Aff., § 18). In addition, Screen Media describes the actions that it has taken to comply with its discovery obligations with respect to each of the 22 items listed by the Capella Parties (Feb. 7 Sakalian Aff., ¶¶ 33-35). Mr. Sakalian states that for each item, Screen Media either had no

responsive documents or has already produced them, and out of an abundance of caution, resubmitted the items that it does have to the Capella parties (*id.*).

In other words, in the almost nine years of protracted litigation that this matter has been pending, Screen Media continues to maintain the untenable position that it is only required to produce items specifically identified and requested by the Capella Parties (*see., e.g., Sakalian Aff.*, ¶ 17 [explaining that certain license agreements and financial reports were not produced because they were not specifically listed in prior requests]). This is not how discovery works, particularly here where the counter-claims concern unaccounted for revenue. The notion that Screen Media can simply choose to disclose only those items that the Cappella Parties already know about given the allegations twists logic beyond all recognition. Simply put, the Capella Parties have no way of knowing the amount of revenue that Screen Media failed to report that the Capella Parties claim that they are entitled to pursuant to the Agreement. Put another way, they don't know what they don't know. Therefore, if Screen Media fails to produce (i) any outstanding license agreements, including any related financial reporting, (ii) information regarding allocation of revenue among "packaged" pictures, (iii) back-up documentation relating to out-of-pocket expenses, and (iv) communications between Screen Media and third parties concerning Screen Media's rights under the Agreement, and for any items for which it does not have any responsive document, and (v) an affidavit setting forth its efforts to search for such responsive documents and that none were located, within 90 days of this decision and order, their answer shall be struck.

In addition, Screen Media's consistent failure to comply with its discovery obligations and inexcusable delay in producing responsive documents merits monetary sanctions in the amount of the reasonable attorneys' fees and costs incurred by the Capella Parties in bringing the instant motion (*Lucas v Lawrence Stam, Susan Gordon, Martin Clearwater & Bell, LLP*, 147 AD3d 921, 926 [1st Dept 2017]; *Martin v City of New York*, 46 AD3d 635, 635-36 [2d Dept 2007]); *Young v City of New York*, 104 AD3d 452, 454 [1st Dept 2013] [imposing monetary sanction for "inexcusably slow" document production in response to several court orders]; *Shapiro v Fine*, 102 AD2d 735, 735 [1st Dept 1984] [holding that defendant's failure to produce certain documents did not warrant striking answer but imposing of monetary sanction]).

To the extent that the Capella Parties urge this court to appoint a referee at Screen Media's cost to oversee Screen Media's compliance with its discovery obligations, this simply is not warranted. Pursuant to CPLR § 3104, "[u]pon the motion of any party or witness on notice to all parties or on its own initiative without notice, the court in which an action is pending may by one of its judges or a referee supervise all or part of any disclosure procedure" (CPLR § 3104 [a]).

The First Department has explained, however, that where the parties do not consent to the appointment of a referee, "[t]he supervisory power conferred by [CPLR § 3104] should be exercised sparingly and its exercise is not warranted in the absence of special circumstances" (*DiGiovanni v Pepsico, Inc.*, 120 AD2d 413, 414 [1st Dept 1986]). Inasmuch as there are no special circumstances here that would justify the significant expense and further delay of appointing a referee to oversee Screen Media's compliance with its discovery obligations, this request is denied. As discussed above, Screen Media has produced a significant volume of

documents to date and should Screen Media fail to further comply with its discovery obligations, its answer shall be struck.

Accordingly, it is

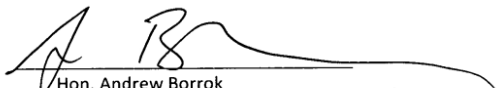
ORDERED that the motion is granted to the extent that Screen Media shall pay the reasonable attorneys' fees and costs incurred in bringing the instant motion, and Screen Media's answer shall be struck unless Screen Media produces (i) any outstanding license agreements, including any related financial reporting, (ii) information regarding allocation of revenue among "packaged" pictures, (iii) back-up documentation relating to out-of-pocket expenses, and (iv) communications between Screen Media and third parties concerning Screen Media's rights under the Agreement, within 90 days of the date of this decision and order, and it otherwise denied; and it is further

ORDERED that the issue of the amount of reasonable attorneys' fees and costs incurred in connection with bringing the instant motion to which the defendants are entitled to recover is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the defendants shall, within 45 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet (available at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)), upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

Dated: April 15, 2020

  
Hon. Andrew Borrok  
J.S.C. Hon. Andrew Borrok