

Sutton v Houllou
2020 NY Slip Op 33566(U)
October 26, 2020
Supreme Court, Kings County
Docket Number: 513118/15
Judge: Lawrence S. Knipel
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At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of October, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X
DAVID SUTTON and MAX SUTTON,

Plaintiffs,

- against -

ALBERT HOULLOU,
AMH RETAIL, LLC,
AMD VENTURES, LLC, and
F&E TRADING LLC,

Defendants.
-----X

DECISION AND ORDER

Index No. 513118/15

Mot. Seq. No. 6

The following e-filed papers read herein:

NYSCEF No.:

Notice of Motion, Affirmation, Memorandum of Law,
and Exhibits Annexed _____

121-133

Affirmation in Opposition, Memorandum of Law
and Exhibits Annexed _____

138-146

Reply Affirmation, Memorandum of Law,
and Exhibits Annexed _____

148-153¹

In this action for breach of contract and other relief, plaintiffs David Sutton and Max Sutton (collectively, plaintiffs) move in Seq. No. 6 for an order (1) extending the discovery deadlines in this action by at least sixty days; and (2) directing that defendants Albert Houllou (Houllou), AMH Retail LLC, AMD Ventures, LLC, and F&E Trading LLC (collectively, defendants) pay the costs of the videographer whom plaintiff hired for Houllou's deposition. Defendants oppose the motion.

¹ "Defendants' Reply in Further Support of Their Cross-Motion to Preclude Expert Testimony," dated Aug. 24, 2020 (NYSCEF #154), which, as relevant herein, objected to plaintiffs' motion, is disregarded because it was filed, without plaintiffs' consent and without leave of the Court, after the instant motion had been fully submitted on Aug. 14, 2020 (*see* CPLR 2214 [b], [c]).

Background

According to plaintiffs' complaint, defendant AMD Ventures, LLC (AMD) sells electronics through various internet market places, including amazon.com. AMD is owned 30% by plaintiffs (through their wholly owned LLC) and 70% by defendant AMH Retail LLC (AMH), which is the retail division of defendant F&E Trading LLC (F&E) (Complaint [NYSCEF #1], ¶¶ 35-36; 26). The majority ownership of F&E is held by Houllou and his family (*id.*, ¶ 27).² The dispute is essentially over the amount of distributions F&E owes plaintiffs from their business venture with Houllou.

Commenced on Oct. 27, 2015, this action has been pending for nearly five years to date. On Aug. 30, 2018, plaintiffs filed a note of issue and certificate of readiness, with a proviso that certain discovery was then outstanding (NYSCEF #88).³ On Feb. 18, 2020, the Court issued what it underscored to be "the final discovery order" (NYSCEF #107) (the Feb. 18, 2020 order). Therein, the Court addressed the then-outstanding document production and depositions, as well as the urgency to establish a firm trial date. With respect to document production, the Court unequivocally indicated that "[a]ll documentary discovery [was] deemed completed (any not provided as per prior orders [was] deemed waived." With respect to the depositions, the Court established the following time line:

- (1) Depositions of each plaintiff to be held during the week of Feb. 25, 2020;
- (2) Depositions of Houllou and the entities not controlled by him to be started and completed during the week of Mar. 2, 2020; and
- (3) Third-party depositions to be held during the week of Mar. 16, 2020.

The trial date was set for Apr. 1, 2020.

² According to Houllou, AMH is one of "our companies under our umbrella," but he could not elaborate on its exact ownership structure (see Houllou EBT tr at page 22, line 17 to page 24, line 2 [NYSCEF #151] [highlighted sections]).

³ The case-management order, dated June 22, 2018, directed the filing of a note of issue and certificate of readiness by no later than Aug. 31, 2018 (NYSCEF #78).

The Feb. 18, 2020 order is final and binding on each side.⁴

Before the COVID-19 pandemic intervened, the depositions of each plaintiff had been completed. Also completed, pre-pandemic, was the deposition of defendant Houllou, albeit its scope was unilaterally narrowed by defendants' counsel to his individual capacity only.⁵ Plaintiffs' attempt to videotape Houllou's deposition was precluded, at defendants' objection, by Justice Jimenez-Salta on account of plaintiffs' failure to comply with 22 NYCRR 202.15 (c).⁶

To date, depositions of the LLC defendants' designees and those of third parties remain outstanding. As to the LLC defendants, their current chief financial officer, Gedaliah Waxler, who is familiar with their ownership structure and operations,⁷ may serve as their designee. As to third parties, plaintiffs have not deposed: (1) Moshe Posner, the LLC defendants' former chief financial officer (whose deposition was scheduled for Mar. 16, 2020 but was canceled because of the pandemic); and (2) Roy Raphaeli, a former employee of AMD whose reconciliation of its books and records against those of nonparty Amazon

⁴ Subsequently, defendants failed to convince the Second Judicial Department to stay this action until their appeal from the Feb. 18, 2020 order, as well as their pending appeal from a prior order denying their pre-answer motion to dismiss, were determined (*see Sutton v Houllou*, 2020 NY Slip Op 64903[U] [2d Dept, Mar. 18, 2020]).

⁵ *See* Houllou EBT tr at page 21, line 3 (statement of defendants' counsel that Houllou was not produced as "a corporate designee") (NYSCEF #150 [unmarked sections]).

⁶ Whereas 22 NYCRR 202.15 (c) requires, in relevant part, that "[e]very notice . . . for the taking of a videotaped deposition shall state . . . the name and address of the videotape operator," plaintiffs' deposition notice failed to state the name and address of the videotape operator. Contrary to plaintiffs' contention, defendants' failure to object to the videotaping within three days after receiving plaintiffs' deposition notice did not preclude Justice Jimenez-Salta from exercising her broad discretionary power to issue a protective order against videotaping (*see Miller v Saha*, 151 AD3d 1316, 1318 [3d Dept 2017]).

⁷ *See* Houllou EBT tr at page 22, line 17 to page 25, line 23; page 44, lines 11-13 (NYSCEF #151 [highlighted sections]).

indicated a possible \$6 million loss in the “Fulfillment by Amazon” inventory.⁸ On the defense side, defendants have not completed a deposition (commenced on Aug. 3, 2020) of nonparty Alex Blaker who currently employs plaintiffs through his two wholly owned entities, nonparties UniMaven, Inc. and Technology Supplier, Inc.⁹

Discussion

(1)

The record reflects that both sides have diligently proceeded with discovery in a good faith attempt to meet deadlines despite the unavoidable delays presented by the COVID-19 health crisis which began in earnest in the United States in March 2020 and which has created significant disruptions throughout the country. Under the circumstances, a sixty-day extension to conduct (and, where appropriate, complete) the outstanding depositions is warranted; namely: (1) Gedaliah Waxler on behalf of the LLC defendants; (2) Moshe Posner; (3) Roy Raphaeli; and (4) Alex Blaker. The COVID-19 health crisis presents “unusual or unanticipated circumstances” warranting the post-note discovery directed herein (*see* 22 NYCRR 202.21 [d]). No further document discovery is permitted in accordance with the Feb. 18, 2020 order.

In light of the currently available technology and the serious health risks posed by the COVID-19 virus, depositions should be conducted remotely unless all parties agree to face-

⁸ *See* Houllou EBT tr at page 95, line 4 to page 98, line 24 (describing Roy Raphaeli’s reconciliation of the FBA inventory) (NYSCEF #150 [unmarked sections]).

⁹ *See* Plaintiffs’ Reply Affirmation (NYSCEF #148), ¶ 20. *See also* *Matter of Sutton v Houllou*, Docket No. BER-L-111-20 (NJ Sup Ct, Bergen County, Mar. 27, 2020) (denying Alex Blaker’s motion to quash nonparty subpoenas served by defendants on him and his two wholly owned entities) (NYSCEF #152).

to-face depositions with the appropriate social distancing (*see e.g. Fields v MTA Bus Co.*, ___ Misc 3d ___, 2020 NY Slip Op 20203, *4 [Sup Ct, Westchester County 2020]; *Disbrow v Metropolitan Tr. Auth.*, 2020 WL 5521070, *1 [Sup Ct, NY County 2020]).

(2)

As a general matter, “[t]he cost of videotaping . . . shall be borne by the party who served the notice for the videotaped . . . recording of the deposition” (22 NYCRR 202.15 [k]). As noted, videotaping here was precluded on account of plaintiffs’ failure to comply with 22 NYCRR 202.15 [c]).

Defendants have offered no explanation as to why they failed to timely seek a protective order against a videotaped deposition until it was about to start. As a result of defendants’ delay, plaintiffs incurred an expense in retaining a videographer and in having a fully-equipped video operator attend the deposition. Defendants’ delay warrants an award of the actual costs incurred by plaintiffs’ counsel for the videographer for Houllou’s deposition (*see Miller v Saha*, 50 Misc 3d 1218[A] [Sup Ct, Clinton County 2016], *affd* 151 AD3d 1316 [3d Dept 2017]).

Conclusion

Accordingly, it is

ORDERED that plaintiffs’ motion in Seq. No. 6 is *granted to the extent* that: (1) the depositions of Gedaliah Waxler (on behalf of the LLC defendants), Moshe Posner, Roy Raphaeli, and Alex Blaker shall all be completed by no later than **Thursday, Dec. 17, 2020**; and (2) defendants shall reimburse plaintiffs’ counsel for the cost of the videographer for

Houllou's deposition within 20 days after electronic service of a copy of the videographer's invoice therefor on defendants' counsel; and it is further

ORDERED that in light of the continuing health risk posed by the COVID-19 pandemic, each deposition set forth herein shall be held by video conference, unless all parties involved in that particular deposition agree that such deposition may be held face to face with the appropriate social distancing; and it is further

ORDERED that defendants' counsel shall electronically serve a copy of this decision and order with notice of entry on plaintiffs' counsel, and shall electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,



J. S. C.

Justice Lawrence Knipel