

Canon U.S.A., Inc. v Stereo Advantage, Inc.
2020 NY Slip Op 33810(U)
November 16, 2020
Supreme Court, New York County
Docket Number: 656179/2017
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. ANDREW BORROK</u></p> <p style="text-align: right;"><i>Justice</i></p> <p>-----X</p> <p>CANON U.S.A., INC.</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>STEREO ADVANTAGE, INC.,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p>PART IAS MOTION 53EFM</p> <p>INDEX NO. <u>656179/2017</u></p> <p>MOTION DATE <u>10/13/2020</u></p> <p>MOTION SEQ. NO. <u>005</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 005) 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 148, 149, 150, 151 were read on this motion to/for SANCTIONS.

Upon the foregoing documents and for the reasons set forth on the record (11/16/2020), Canon U.S.A., Inc.'s (**Canon**) motion for sanctions is granted to the extent that Stereo Advantage Inc. (**Stereo Advantage**) shall produce its financial statements, income tax returns, and other related documents in support of its counterclaims by November 25, 2020 at 5 P.M., otherwise the court will strike the counterclaims of Stereo Advantage.

The Relevant Facts and Circumstances

On October 3, 2017, Canon commenced this action alleging claims for breach of contract and unjust enrichment to recover certain monetary rebates that Stereo Advantage was not qualified to receive (NYSCEF Doc. No. 1). In its Amended Answer, Stereo Advantage Inc. asserts counterclaims for fraud, fraud in the inducement, and breach of the covenant of good faith and fair dealing implied in the parties' dealer sales agreement (NYSCEF Doc. No. 45). In sum and

substance, Stereo Advantage alleges that Canon manipulated its rebate program, which resulted in damages of approximately \$20 million to Stereo Advantage.

Pursuant to a Preliminary Conference Order, dated February 28, 2019, the parties were directed to serve their demands for discovery by March 28, 2019, with responses due on or before June 28, 2019 (NYSCEF Doc. No. 46). Canon served its First Set of Document Requests on March 28, 2019, which sought, *inter alia*, financial statements and income tax returns of Stereo Advantage for the period January 1, 2014 to date (the **Requests**; NYSCEF Doc. No. 132).

On July 3, 2019, Stereo Advantage served its written responses to the Requests, in which Stereo Advantage objected to production of all financial statements and income tax returns because the documents were not relevant (the **First Response**; NYSCEF Doc. No. 133). No documents were provided with the First Response. Canon's counsel subsequently sent a deficiency letter to Stereo Advantage's then counsel on July 31, 2019, to which Stereo Advantage requested additional time to respond (NYSCEF Doc. Nos. 98, 99).

Pursuant to a So-Ordered Stipulation, dated August 9, 2019, Stereo Advantage was to respond to Canon's Requests by September 25, 2019 (NYSCEF Doc. No. 72). In late September 2019, Canon's counsel was advised that Stereo Advantage would be changing attorneys and following a status conference on September 27, 2019, Stereo Advantage was ordered to provide an amended response to the First Requests on or before October 4, 2019, with both parties to complete document production by November 29, 2019 (NYSCEF Doc. No. 84).

In its Amended Response, dated October 10, 2019, Stereo Advantage again objected to the production of financial statements and income tax returns because they were not relevant (NYSCEF Doc. No. 101). On November 6, 2019, Canon's counsel sent a second deficiency letter to Stereo Advantage, to which there was no response (NYSCEF Doc. No. 131, ¶¶ 23-24).

Pursuant to a So-Ordered Stipulation, dated December 5, 2019, Stereo Advantage was to advise Canon by the next day whether the requested financial documents would be produced, and Stereo Advantage agreed to produce the same by December 20, 2019 (NYSCEF Doc. Nos. 90, 103). On January 10, 2020, Stereo Advantage produced, among other items, the first page of its federal income tax returns for the years 2014 through 2018 and certain financial spreadsheets (NYSCEF Doc. Nos. 112, 113). On the same date, Canon's counsel advised Stereo Advantage that Stereo Advantage's production was deficient, and the parties were subsequently unable to resolve their dispute (NYSCEF Doc. No. 140). As a result, Canon filed a motion to compel the production of financial documents from Stereo Advantage on February 5, 2020 (*see* Mtn. Seq. 004). In opposition, among other things, Stereo Advantage argued that only the first page of the tax return was relevant and never advised either Cannon or the court that the balance of the tax returns were not available.

Pursuant to a decision and order, dated August 3, 2020, the court granted Canon's motion to compel and Stereo Advantage was ordered to produce "documents responsive to Document Request Nos. 94 and 95" and "all of its financial statements, income tax returns, and other related financial documents in support of its counterclaims seeking \$20 million for fraud and

breach of the implied covenant of good faith and fair dealing by September 3, 2020” (the **Prior Decision**; NYSCEF Doc. No. 121).

By letter, dated August 31, 2020, counsel for Stereo Advantage requested an extension of the Prior Decision’s discovery deadline because of difficulties in retrieving copies of the tax returns (the **August 2020 Letter**; NYSCEF Doc. No. 123). Stereo Advantage offered a number of explanations for its delay in production, including the disruption caused by Covid-19 and the purported sabotage of its computer systems by a former employee that had handled the tax returns (*id.*). In addition, a Form 4506-T was attached to the August 2020 Letter, indicating that Stereo Advantage had requested its tax returns on February 14, 2020 (NYSCEF Doc. No. 124). Stereo Advantage has not complied with the Prior Decision to date and as a result, Canon filed the instant motion for sanctions on October 12, 2020.

Discussion

The court may exercise its discretion to determine an appropriate sanction for a party’s failure to produce documents pursuant to CPLR 3126 (*Husovic v Structure Tone, Inc.*, 171 AD3d 559, 560 [1st Dept 2019]). However, the imposition of sanctions is contingent on a party’s willful and contumacious conduct in refusing to comply with outstanding discovery obligations (*see Sanchez v City of NY*, 266 AD2d 127 [1st Dept 1999]).

Canon seeks to (i) strike Stereo Advantage’s counterclaims or (ii) impose an adverse inference regarding Stereo Advantage’s failure to comply with the Prior Decision. In its opposition papers,

Stereo Advantage argues that sanctions are inappropriate because it does not possess the requested information at this time but will provide such information upon receipt.

Stereo Advantage relies on an affidavit of Anthony LaFornara of Tax Director of Advantage Global Resources, in which he attests that he had made an initial request for the relevant tax returns in February 2020, but has received no response from the Internal Revenue Service to date (NYSCEF Doc. No. 150). However, it is unclear what, if any relationship, Mr. LaFornara and/or Advantage Global Resources has to the defendant Stereo Advantage such that he cannot purport to possess any personal knowledge of Stereo Advantage's delay in producing the tax returns. For clarity, Stereo Advantage itself fails to proffer a proper affidavit and explanation in opposition to the instant motion, i.e., no affidavit from anyone at Stereo Advantage with first-hand knowledge of what happened to the tax returns and other financial documents, and why they cannot now be produced despite the litigation hold in this case and the company's ability to produce the first page of the return some time ago, arguing that it was the only thing that was relevant and never advising the court or the plaintiff in either of the parties' meet and confer meetings prior to the motion to compel or when the motion was brought that the documents were unavailable.

Stated differently, Stereo Advantage wholly fails to explain delays in the production of its tax returns, which tax returns were put at issue by its counterclaims of approximately \$20 million or otherwise produce any responsive documents in support of its counterclaim. Although several reasons were provided for delays in the August 2020 Letter, this was an unsworn letter written by counsel of Stereo Advantage, who did not state whether he had any personal knowledge of

the incidents described. Indeed, counsel conceded on the record that he had never been told by his client that the balance of the tax returns at issue or other financial information was not available during the prior motion practice.

Furthermore, and critically, Stereo Advantage does not reconcile how it was able to provide the first page of certain tax returns in opposition to Canon's motion to compel in March 2020, with its present position that the tax returns are not in its possession and irretrievable. Stereo Advantage simply does not explain how it cannot produce its own documents because they are not now in its possession other than it is unable to do because it willfully spoliated said documents in what amounts to willful and contumacious conduct.

Under these circumstances, Stereo Advantage's failure to produce any support for their counterclaims in a year and a half and its complete disregard of the Prior Decision evidences willful and contumacious conduct in evading its discovery obligations, and sanctions are warranted. Accordingly, Canon's motion for sanctions is granted to the extent that Stereo Advantage shall produce its financial statements, income tax returns, and other related documents in support of its counterclaims by November 25, 2020 at 5 P.M., otherwise the court will strike the counterclaims of Stereo Advantage.

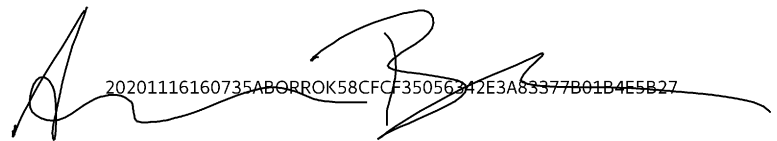
Accordingly, it is

ORDERED that Canon's motion for sanctions is granted to the extent that Stereo Advantage shall produce its financial statements, income tax returns, and other related documents in support

of its counterclaims by November 25, 2020 at 5 P.M., otherwise the court will strike the counterclaims of Stereo Advantage; and it is further

ORDERED that counsel for plaintiff will notify the court by email in advance of the next conference if the documents ordered to be produced in this decision and order have not been fully produced; and it is further

ORDERED that the parties shall appear for a remote conference on December 3, 2020 at 12:30 P.M.



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11/16/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE