

Mansueto Ventures LLC v Pasquali
2020 NY Slip Op 33845(U)
November 16, 2020
Supreme Court, Kings County
Docket Number: 509558/18
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 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 16th day of November, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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MANSUETO VENTURES LLC and
MANSUETO VENTURES LLC, d/b/a FASTCOMPANY.COM,

Plaintiffs,

- against -

SANDRO PASQUALI and JOHN DOE,

Defendants.
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DECISION AND ORDER

Index No. 509558/18

Mot. Seq. No. 3-4

The following e-filed papers read herein:

NYSCEF No:

Notice of Motion, Cross Motion, Affirmation in Support,
Affirmation in Opposition, and Exhibits Annexed _____

49-59, 61-62

In this action to recover damages for fraud and unjust enrichment, defendant Sandro Pasquali (defendant) moves in Seq. No. 3 for an order, pursuant to CPLR 5015 (a), 2221, and 2005, to vacate or modify the order, dated June 23, 2020 (NYSCEF #45) which granted the motion of plaintiffs Mansueto Ventures LLC, suing individually and doing business as fastcompany.com (collectively, plaintiff), to extend the time to file a note of issue (NOI) and to compel him to comply with plaintiff's supplemental discovery demands. Plaintiff cross-moves in Seq. No. 4 for an order, pursuant to CPLR 2004, setting an NOI filing date.

Background

Defendant, an independent computer programmer; allegedly ghost-billed plaintiff, a publisher of the "Inc." and "Fast Company" magazines, by approximately \$350,000 for work which he allegedly did not perform (Verified Complaint, dated May 9, 2018 [NYSCEF #1], ¶¶ 14-19). After plaintiff discovered defendant's alleged malfeasance in Apr. 2018, it brought this action against him in May 2018.

On July 5, 2018, plaintiff served defendant with a Notice of Discovery and Inspection seeking, as relevant herein, all documents and communications relating to [the] work performed by defendant for plaintiff and, in particular, “all documents and communications concerning the . . . ‘CMS’ which [d]efendant refers to in [his] affidavit dated May 21, 2018, including but not limited to work which [d]efendant claims to have performed in connection with the CMS” (D&I Notice [NYSCEF #38], ¶ 14). In the affidavit which is referred to in the D&I Notice, defendant explained that plaintiff had hired him “to build a new content management system (‘CMS’)” “to help teams of writers and editors to create, curate and circulate news, articles, data, charts, and other media” (Defendant’s Affidavit, dated May 21, 2018 [NYSCEF #17], ¶ 7). Defendant averred (in ¶ 10 of his affidavit) that: (1) “[t]he CMS project has been very time intensive and is a very valuable product”; (2) he “has in fact produced [the work product] . . . in the last two years”; and (3) he “can produce [the work product] for this Court if needed.”

Shortly before defendant’s deposition in Oct. 2019, defendant, through counsel, belatedly emailed to plaintiff’s counsel a “zipped” version of the CMS files allegedly containing defendant’s work product.¹ Plaintiff was unable to open the CMS files, although it was able to view their metadata. The metadata indicated that the CMS files were created in Sept. 2019, which was at odds with defendant’s position that he created and worked on those files from July 2016 through Apr. 2018. Defendant, at his Oct. 2019 deposition, was unable to run the CMS files on the equipment he had at his disposal at the time, nor was he able to clearly answer plaintiff’s questions about the content of the CMS files.

¹ Defendant was required to respond to plaintiff’s D&I notice by no later than Sept. 5, 2018 (PC Order, dated July 5, 2018 [NYSCEF #26], ¶ IX.6), as such date was extended to June 14, 2019 (Final Pre-Note Order, dated May 15, 2019 [NYSCEF #28]). The zipped version of the CMS files – cms_repo.zip – was attached to defendant’s counsel’s Oct. 14, 2019 email to plaintiff’s counsel (NYSCEF #37).

On Nov. 15, 2019, plaintiff served defendant with a Supplemental Notice of Discovery and Inspection seeking, among other things, the production of the original CMS files, together with their metadata showing when they were created and modified (Supplemental D&I Notice [NYSCEF #39], “Definitions and Instructions,” ¶¶ 7, 11; “Interrogatories,” ¶¶ 4-7). Plaintiff also sought defendant’s continued deposition. Met with defendant’s silence, plaintiff moved to compel discovery and to extend the NOI filing date.

On Jan. 21, 2020, the Court (Colon, J.) adjourned plaintiff’s motion, while directing in the interim that: (1) defendant must respond to plaintiff’s Supplemental D&I Notice by Feb. 11, 2020; (2) defendant must submit to a continued deposition (subject to a certain condition which was subsequently met); (3) arrangements to view the metadata/original computer entries/files (*i.e.*, the CMS files) must be completed by Feb. 14, 2020, with their actual inspection to be held by Feb. 28, 2020; and (4) “[f]ailure to comply shall be sanctioned on the return date [of plaintiff’s motion]” (Interim Order [NYSCEF #44], at 1-2 [abbreviations spelled out]).

On Feb. 11, 2020, defendant responded to the directives in the Interim Order (Responses to Supplemental D&I Notice [NYSCEF #42]).² Therein, defendant disclosed that: (1) he used only one computer – his personal 2014 Macbook Pro, serial number CO2NM2LZG3QT (the laptop) – to create the CMS files; (2) the CMS files were stored on the laptop in the five folders named “projector”, “creator”, “__creator”, “__editor__”, and “nouze” (so in the original); (3) before those folders may be opened, however, the parties must agree on the protocols for preserving metadata for those folders and the files stored therein; and (4) defendant was “willing to demonstrate the CMS on the [laptop]” (NYSCEF

² See also Defendant’s Responses to Supplemental Interrogatories (NYSCEF #43).

#42, Responses 3-4). Thereafter, the parties were unable to agree on the protocol for the viewing and inspection of the CMS files (*see* emails, dated Feb. 14, 2020 and May 4, 2020 [NYSCEF #56]). Basically, plaintiff's forensic expert wanted to make an image of the five selected folders from the laptop's hard drive and, separately, run unspecified computer searches on the entirety of the laptop's hard drive.³ The parties' failure to agree on the inspection protocol ensured that none of the deadlines established by the Interim Order were met.

On June 23, 2020, the return date of plaintiff's motion, this Court ruled, as relevant herein, that:

"If defendant failed to respond to plaintiff's post EBT interrogatories or demands by 2/11/18 [so in the original], he is precluded from testifying or offering the documents demanded into evidence.

If plaintiff contacted defendant seeking further EBT of defendant by 2/17/2020 then said EBT has not yet been held, it shall be held by 7/23/2020 or defendant is precluded from testifying.

If the metadata inspection did not occur on 2/28/2020[,] the defendant is precluded from testifying.

³ As plaintiff's counsel explained in his May 4, 2020 email to defendant's counsel, the following will be performed in defendant's presence:

"The [laptop] will be turned on and logged in. [Plaintiff's computer expert] will connect a USB hard drive to the [laptop]. All software runs from the hard drive. Utilizing AccessData's FTK [forensic toolkit] Imager, [plaintiff's expert] will add the [laptop's] hard drive as an evidence item. The list of files and folders provided by [defendant] will be selected to create a custom content image only containing the identified files. Once the collection is complete [plaintiff's expert] would verify the collection and the USB hard drive will be safely ejected from the [laptop].

[Plaintiff's] expert would also need to run various onsite searches, but this would require indexing the drive [i.e., the laptop's hard drive] with FTK, which will take time depending on the data size but is necessary to perform advance[d] searches of the files and data."

(NYSCEF #56 [emphasis added]).

NOI by 7/31/2020.”

(Subsequent Order [NYSCEF #45], at 1 [typographical errors corrected]).

On June 30, 2020, the subsequent order was served with notice of entry (NYSCEF #46). On July 28, 2020, defendant moved to vacate the subsequent order. On Aug. 17, 2020, plaintiff cross-moved to set a NOI filing date.

Discussion

Based on a review of the entire record, the Court finds that defendant has presented a reasonable excuse to justify vacating the subsequent order. Although issued on June 23, 2020, the subsequent order failed to account for: (1) defendant’s Feb. 10, 2020 response to plaintiff’s Supplemental D&I Notice, and (2) plaintiff’s May 4, 2020 email request for, among other things, unspecified searches of the entirety of the laptop’s hard drive. Further, the subsequent order assumed that defendant was late in responding to plaintiff’s supplemental demands, whereas plaintiff, in fact, was late, by several months, in replying to defendant’s response concerning his conditions for inspection. More importantly, the interim order appears to have caused confusion by its failure to establish the parameters for the review and inspection of the CMS files. Under the circumstances, the imposition of the harsh sanction of preclusion as directed by the subsequent order is unwarranted (*see e.g. Maceno v Franklin Hosp. Med. Ctr.*, 14 AD3d 663, 664 [2d Dept 2005]). In lieu of the subsequent order, a new disclosure order is issued as more fully set forth in the decretal paragraphs below.

Conclusion

Accordingly, it is

ORDERED that defendant's motion in Seq. No. 3 is *granted to the extent* that the subsequent order, dated June 23, 2020 (NYSCEF #45), is vacated in its entirety and the following order is substituted in its place and stead:

“(1) *Forensic Examination of the Laptop*. Within 30 days after electronic service of this decision and order with notice of entry on defendant's counsel by plaintiff's counsel, defendant and an analyst from plaintiff's forensic expert (Complete Discovery Source, Inc. [CDS]), together with the parties' respective counsel, shall meet at a mutually agreed-upon place where defendant shall produce for the CDS analyst the 2014 Macbook Pro, serial number CO2NM2LZG3QT (the laptop). Defendant will turn on the laptop and log in.

The CDS analyst will connect a USB hard drive to the laptop. All forensic software will run from the USB hard drive. Utilizing AccessData's FTK Imager, the CDS analyst will add the laptop's hard drive as an evidence item. The CDS analyst will select the following folders on the laptop's hard drive:

projector
creator
__creator (double underscore prefix)
__editor__ (double underscores pre and post)
nouze

to create a custom content image containing only the aforementioned folders, together with all files saved in those folders. Once the collection is complete, the CDS analyst will verify the collection and the USB hard drive will be safely ejected from the laptop.

No other forensic examination of the laptop shall be permitted without further order of the Court.

(2) *Continued Examination of Defendant*. Defendant's continued examination shall be held by no later than 30 days after CDS's completion of its in-house examination of the forensic image of the aforementioned five folders (and their files) from the laptop's hard drive.


(3) *NOI Filing Date*. Feb. 19, 2021” ; and it is further

ORDERED that plaintiff's cross motion in Seq. No. 4 is *granted to the extent* that the note of issue filing date is set for Feb. 19, 2021; and it is further

ORDERED that plaintiff's counsel shall electronically serve a copy of this decision and order with notice of entry on defendant's 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,

J. S. C. 

Justice Lawrence Knipel