

<b>Lee v Nygaard Investigations, Inc.</b>
2020 NY Slip Op 34545(U)
February 10, 2020
Supreme Court, Westchester County
Docket Number: 69967/2018
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - COMPLIANCE PART

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JANET LEE,

Plaintiff,

-against-

NYGAARD INVESTIGATIONS, INC.,  
BOB NYGAARD,

Defendants.

**DECISION & ORDER**

Index No.: 69967/2018

Motion Date: Feb. 10, 2020

Motion Seq. No. 3

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LEFKOWITZ, J.

The following papers were read and considered on defendants' motion for an order compelling plaintiff to provide the following disclosures: (i) documentary evidence responsive to Plaintiff's Discovery and Inspection [D&I] demands no. 2, 5, 6, 11, 12, 15 and 16; (ii) responses to Interrogatories No. 2, 3, 4, 6, and 12; (iii) all "responsive, nonprivileged documents in plaintiff's possession"; and (iv) name(s) of accountant(s) and authorizations for the production of plaintiff's tax returns. In the alternative, defendants requests an order to preclude plaintiff from introducing any such evidence in support of plaintiff's claims and/or defenses at trial. Defendants also request sanctions, costs, and fees associated herewith, and/or any such relief deemed just and proper by the Court.

Order to Show Cause - Attorney Affirmation - Exhibits A-C  
Affirmation in Opposition

Upon the foregoing papers and the proceedings held on February 10, 2020, the motion is determined as follows:

Plaintiff provides psychic and non-psychic services involving Marriage Counseling, Addiction Therapy, Tarot Card Readings, Palm Readings and the like. Plaintiff commenced this action alleging, inter alia, that the defendants tortuously interfered with her business by contacting plaintiff's clients to inform them that the plaintiff is a "scam" and urging them to seek refunds for any services rendered by her. It is alleged that the defendants contacted law enforcement agencies to prosecute plaintiff for fraudulent business practices. It is further alleged that, as a result of the defendants' efforts, the plaintiff went from being perceived as a well-regarded psychic/astrologist/life coach to a "gypsy con artist" who lost her Connecticut office and television series deal.<sup>1</sup>

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<sup>1</sup> NYSCEF Doc. 1.

Defendants interposed an answer containing general denials, affirmative defenses, and two counterclaims sounding in defamation.<sup>2</sup> As it relates to the counterclaims, defendants alleged that on December 12, 2018, the plaintiff sent an email to Robert Palmer which made certain false assertions that defendant Bob Nygaard is a "top swindling con artist" who does not pay taxes and "does not have a license in the State of New York" to serve as a private investigator. Defendant further alleges that on December 17, 2018, plaintiff made a false statement to Leslie Yager of the Greenwich Free Press that "Bob Nygaard is not licensed in the State of New York ... to be a private investigator. He applied for a license in Florida and was rejected." Defendant claims to have suffered monetary damages caused by such defamatory statements, and seeks an award of punitive damages.

The decision and order dated August 14, 2019 [Wood, J.S.C.] granted defendants' prior motion for dismissal of plaintiff's complaint. Accordingly, the remaining claims to be adjudicated in this matter are the defendants' two counterclaims alleging defamation.

This matter was the subject of three compliance conferences held on September 23, 2019, November 20, 2019, and December 16, 2019. Pursuant to the first compliance conference order dated September 24, 2019, plaintiff was directed to serve responses to defendants' demands dated August 5, 2019 and provide an "Interrogatory Verification" by October 7, 2019.<sup>3</sup> Pursuant to the second compliance conference order dated November 21, 2019, the deadline for such disclosures was extended to December 2, 2019 with "no further extensions" permitted by the Court.<sup>4</sup> At a third compliance conference held on December 16, 2019, the Court issued a motion briefing schedule permitting the defendants to file the instant application.

### Defendants' Motion

Defendants move to compel plaintiff to provide the following disclosures: (i) documentary evidence responsive to Plaintiff's Discovery and Inspection [D&I] demands no. 2, 5, 6, 11, 12, 15 and 16; (ii) responses to Interrogatories No. 2, 3, 4, 6, and 12; (iii) all "responsive, nonprivileged documents in her possession"; and (iv) name(s) of accountant(s) and authorizations for the production of plaintiff's tax returns. In the alternative, defendants request an order to preclude plaintiff from introducing any such evidence in support of plaintiff's claims and/or defenses at trial.

Counsel contends that the plaintiff refused to provide certain disclosures which she previously agreed to disclose in the Preliminary Conference Order, stalled the production of tax records, and asserted non-existing privilege with respect to the production of plaintiff's client information. Counsel points out the plaintiff's responses to the D&I and Interrogatories lack

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<sup>2</sup> NYSCEF Doc. 31.

<sup>3</sup> NYSCEF Doc. 68.

<sup>4</sup> NYSCEF Doc. 73.

plaintiff's signature verification and are wholly insufficient. Counsel argues that, following the two compliance conference orders, plaintiff's counsel purported to provide a "formal document response" via email dated November 30, 2019; however, no documents were annexed thereto.

### Plaintiff's Opposition

Plaintiff's counsel filed a one-page opposition. Counsel contends that plaintiff's responses to interrogatories contained answers that were "complete and factual". Counsel also states that all items in the plaintiff's possession responsive to any outstanding demands were previously provided to defendants; plaintiff was unable to locate any tax returns; and plaintiff requested any non-privileged records related to her criminal proceeding from her former counsel. Lastly, counsel argues that sanctions are not warranted, alleging that defense counsel likewise failed to attend all compliance conferences.

### Analysis

CPLR 3101(a) requires "full disclosure of all matters material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 at 1140 [2d Dept 2010]). The Court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*See Mironer v City of New York*, supra; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

CPLR 3126 provides that if any party "wilfully fails to disclose information which the court finds ought to have been disclosed," the court may, inter alia, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). "Willful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see also *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

As a preliminary matter, plaintiff's complaint alleging tortuous interference with her business was dismissed by the court's decision and order dated August 14, 2019 [Wood, J.S.C.].<sup>5</sup> Consequently, the only remaining contentions before this court are the defendants' counterclaims alleging that the plaintiff made defamatory statements regarding the defendants which resulted in

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<sup>5</sup> NYSCEF Doc. 65.

monetary damages. Based on the foregoing, the defendants have demonstrated the relevance of any alleged defamatory statements made by plaintiff to Robert Palmer [D&I Demand No. 11] and to Leslie Yager [D&I Demand No. 12]. Insofar as defendants' D&I Demands No. 11 and 12 request "all communications" with Palmer and Yager, such overly-broad demands are herein tailored to compel plaintiff to produce the following disclosures relevant to the defendants' counterclaims for defamation:

- (i) the December 12, 2018 email between plaintiff and Palmer, wherein plaintiff allegedly stated that Bob Nygaard is a "top swindling con artist", does not pay taxes, "does not have a license in the State of New York" to serve as a private investigator, and/or was "rejected" for such licensure in Florida<sup>6</sup>;
- (ii) Any statements made on/about December 17, 2018 between plaintiff and Yager, wherein plaintiff allegedly stated that Bob Nygaard "is not licensed in the State of New York... to be a private investigator" and/or was "rejected" for such licensure in Florida<sup>7</sup>; and
- (iii) any documentary evidence upon which plaintiff relied for the purported truth and veracity of such statements.

In all other respects, defendants' remaining discovery demands related to plaintiff's business client database, invoices, marketing materials [D&I Demand No. 2, Interrogatory No. 3 and 4]; all of plaintiff's business and client communications [D&I Demand No. 6, 15]; business formation documents [D&I Demand No. 5]; business records [D&I Demand No. 16]; plaintiff's prior criminal proceedings arising from her business dealings [Interrogatory No. 2]; further explanation of plaintiff's "psychic powers" [Interrogatory No. 6]; and the like constitute overly-broad demands that are neither material or relevant to the defendants' counterclaims alleging defamation of defendant Bob Nygaard and/or his investigatory business. Lastly, under the circumstances presented, the court finds that the imposition of sanctions, costs, and/or fees against plaintiff is not warranted.

In view of the foregoing, it is hereby

ORDERED that the defendants' motion is granted to the limited extent that, on or before February 28, 2020, the plaintiff is directed to provide:

- (i) the December 12, 2018 email between plaintiff and Palmer, wherein plaintiff allegedly stated that Bob Nygaard is a "top swindling con artist", does not pay taxes, "does not have a license in the State of New York" to serve as a private investigator, and/or was "rejected" for such licensure in Florida;
- (ii) Any statements made on/about December 17, 2018 between plaintiff and Yager, wherein plaintiff allegedly stated that Bob Nygaard "is not licensed in the State of New York... to be a private investigator" and/or was "rejected" for such licensure in Florida; and
- (iii) any documentary evidence upon which plaintiff relied for the purported truth and

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<sup>6</sup> See Defendants' Answer with Counterclaims at NYSCEF Doc. 31 ¶52.

<sup>7</sup> *Id.* at ¶57.

veracity of such statements.

It is further

ORDERED that, if documents sought by defendants are not in plaintiff's possession, plaintiff shall provide a *notarized affidavit* attesting that the plaintiff is not in possession of the documents, describing in sufficient detail the search conducted for the documents that plaintiff claims not to have in her possession, including providing the particular area(s) searched, how much time was spent searching for the subject documents, whether the documents were destroyed and if so, by whom, when and for what purpose, and identifying any third parties who may be in possession of such documents; and it is further

ORDERED that in the event that plaintiff fails to comply with the Court's directives herein, defendants shall serve and file on NYSCEF on or before March 6, 2020, an affirmation of noncompliance on notice to plaintiff, and the Court will issue an order precluding the plaintiff from producing any such evidence at trial in furtherance of plaintiff's denials and/or defenses to the defendants' counterclaims; and it is further

ORDERED that, in all other respects, the defendants' motion is denied. It is further

ORDERED that counsel for the parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on March 9, 2020, at 9:30 a.m.; and it is further

ORDERED that any applications not decided are herewith denied; and it is further

ORDERED that plaintiff shall serve a copy of this Decision and Order with notice of entry upon defendants within ten (10) days of entry and shall file proof of service within five (5) days of service to the NYSCEF website.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
February 10, 2020

  
HON. JOAN B. LEFKOWITZ, J.S.C.

Service upon all counsel via NYSCEF

cc: Compliance Part Clerk