

Denson v Donald J. Trump for President, Inc.

2021 NY Slip Op 30229(U)

January 11, 2021

Supreme Court, New York County

Docket Number: 101616/2017

Judge: Francis A. Kahn III

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS A. KAHN, III PART IAS MOTION 32
Acting Justice

-----X
JESSICA DENSON INDEX NO. 101616/2017
MOTION DATE n/a
MOTION SEQ. NO. 008, 009

Plaintiff,

- v -

DONALD J. TRUMP FOR PRESIDENT, INC.,
Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 162-171, 173-176;
(Motion 009) 177-198, 200-211
were read on these motions to/for AMEND PLEADINGS and DISCOVERY

Upon the foregoing documents, Plaintiff's motions and Defendant's cross-motion are resolved as follows:

Plaintiff Jessica Denson is the former Director of Hispanic Engagement for Defendant, the corporate entity of Donald J. Trump's 2016 presidential campaign. Plaintiff claims in her complaint that while working for Defendant, she endured a hostile work environment and experienced sex discrimination. Plaintiff further asserts that after she complained internally of this purported treatment, supervisory personnel within the Defendant retaliated against her.

As a condition of her employment, Plaintiff was required to sign a non-competition, non-disclosure, non-disparagement agreement ("NDA"). This agreement prohibited Plaintiff from disclosing, disseminating or publishing any confidential information unfavorable to Donald J. Trump, his family or his businesses. Likewise, Plaintiff could not demean or disparage Trump, his family or his businesses publicly. As per this agreement, any dispute arising under or relating to the NDA, at the sole discretion of Defendant was to be resolved by binding arbitration.

Plaintiff commenced this action pleading violations of the New York City Human Rights Law against the campaign, including sexual discrimination, a hostile work environment, and retaliation. She also asserted claims of defamation, defamation *per se*, and intentional and negligent infliction of emotional distress, also arising out of events that occurred during her employment.

Plaintiff claims that after she commenced this action Defendant retaliated against her by bringing an arbitration proceeding wherein Defendant sought determination of its claims that Plaintiff breached the NDA through disclosure of confidential information and by disparaging statements made in connection with this lawsuit. In response, Plaintiff commenced a second action against Defendant in Federal District Court wherein she sought a declaration that the non-

disparagement agreement was void and unenforceable as against public policy. The District Court granted Defendant's motion to compel arbitration, finding that the parties had agreed to proceed with binding arbitration and it was up to the arbitrator to rule on whether the arbitration agreement was valid (*see Denson v Donald J. Trump for President, Inc.*, 18-CV-2690 (JMF), 2018 WL 4568430 [SDNY 2018]). After the arbitrator found in Defendant's favor and awarded \$50,000 as damages, Plaintiff's motion in this action to vacate that award that was denied by Judge Bluth of this Court (*see Denson v Donald J. Trump for President, Inc.*, 2019 NY Slip Op 30611[U] [Sup Ct. New York County, 2019] [Bluth, JJ]). The Appellate Division, First Department reversed Justice Bluth and vacated the arbitration award holding that it was "partly made in violation of public policy, and otherwise in excess of the arbitrator's authority" (*see Denson v Donald J. Trump for President, Inc.*, 180 AD3d 446 [1st Dept 2020]). Specifically, the Appellate Division found that while the demand to arbitrate was limited to Plaintiff's statements made in connection with this state action, the arbitration award was made in the context of the federal action in which she sought a declaration that the non-disparagement agreement was unenforceable¹ (*id.*, at 454). The balance of the award was based upon certain Twitter "Tweets" and statements on a GoFundMe page that were irrelevant since they occurred after the date of the demand to arbitrate and clearly fell outside the scope of the arbitration as set forth by Defendant.

Plaintiff now moves (Motion Seq. 008) to file and serve a "supplemental complaint" to add a retaliation claim based on Defendant bringing the arbitration proceeding.

Leave to amend a pleading under CPLR §3025 [b] is to be freely given "absent prejudice or surprise resulting directly from the delay" (*see e.g. O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83 [1st Dept 2017]; *Anoun v City of New York*, 85 AD3d 694 [1st Dept 2011]; *see also Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). All that need be shown is that "the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). To justify denial of such a motion, the opposing party "must overcome a heavy presumption of validity in favor of [allowing amendment]" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]).

In opposition, Defendant posits that Plaintiff's new cause of action fails for three reasons. First, Defendant claims that the proposed supplemental claim is pre-empted by the New York Constitution which prohibits a party from asserting a city law claim "that attempts to thwart or penalize a party's exercise of state law rights." Second, Defendant argues Plaintiff's accusation that Defendant's arbitration was retaliatory had been expressly rejected by this Court and the Appellate Division. Third, Defendant claims that since Plaintiff continues to litigate the instant matter, she necessarily has not been deterred from engaging in any protected activity.

Plaintiff's motion is granted as Defendant in its opposition has failed to demonstrate that Plaintiff's proposed pleading is palpably insufficient or clearly devoid of merit. To set forth a

¹For this portion of the award, the First Department held, "By concluding that the allegations in the federal action are tantamount to disclosure of confidential information violative of the [non-disparagement agreement], the arbitrator improperly punished plaintiff for availing herself of a judicial forum. Defendant is hard-pressed to explain how plaintiff could have pursued her rights without setting forth necessary factual statements for the federal court to consider" (*see Denson v Donald Trump for President, Inc.*, 180 AD3d at 454).

claim of retaliation under New York City Human Rights Law, Plaintiff must plead that: (1) she participated in a protected activity known to Defendant; (2) Defendant took an action that disadvantaged her; and (3) a causal connection exists between the protected activity and the adverse action (*see* New York City Administrative Code §8-107 [7]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51–52 [1st Dept 2012]). Here, Plaintiff pled in her proposed supplemental complaint that immediately upon commencing this action, the protected activity, Defendant started the arbitration proceeding, indicating that it was in connection with the lawsuit. Plaintiff has pled that Defendant acted in an attempt to deter her from engaging in this litigation and to disadvantage Plaintiff economically.

Contrary to Defendant's arguments, Plaintiff's new cause of action is not pre-empted by the state constitution. While Defendant's right to arbitrate was upheld by this Court as well as in Federal District Court, the arbitration proceeding failed to result in a determination that Plaintiff breached the non-disparagement clause of the agreement since the evidence relied upon by Defendant in support of its claim concerned matters outside the scope of the arbitration. In keeping with Plaintiff's claim that Defendant brought the arbitration to retaliate against her, in vacating the arbitration award the Appellate Division found that it was in violation of public policy since it improperly punished Plaintiff for bringing legal action.

As to this issue of whether Defendant's motivation to arbitrate was retaliatory is not barred by collateral estoppel. "To successfully invoke this doctrine, two requirements must be met. First, the issue in the second action must be identical to an issue which was raised, necessarily decided and material in the first action. Second, the party to be precluded must have had a full and fair opportunity to litigate the issue in the earlier action" (*Kim v Goldberg, Weprin, Finkel, Goldstein, LLP.*, 120 AD3d 18, 23 [1st Dept 2014] *citing City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 128 [2007]).

In the case at bar, the Appellate Division noted that the record for that issue was not developed due to Plaintiff's failure to participate in the arbitration. This does not mean that the issue of Defendant's motivation was raised, considered and rejected. Indeed, the Appellate Division specifically stated that it would not examine this as it would unlawfully require an extended factual analysis (*see Denson v Donald Trump for President, Inc.*, 180 AD3d at 453). Moreover, contrary to Defendant's assertions, neither District Judge Furman nor Judge Bluth considered the issue of Defendant's motivation to arbitrate when Plaintiff's motions to void the arbitration agreement or to vacate the arbitration award were decided. As such, Defendant failed to meet its burden to establish the identity and decisiveness elements were satisfied so as to justify preclusion of this claim (*Kim v Goldberg, Weprin, Finkel, Goldstein, LLP.*, 120 AD3d at 24; *see also Ryan v New York Tel. Co.*, 62 NY2d 494, 501 [1984]).

Accordingly, Plaintiff's motion to file and serve a supplemental summons and amended complaint is granted. Plaintiff shall file and serve the amended new pleading in the form annexed to the moving papers within 30 days of the e-filing of this order.

Plaintiff also moved (Motion Seq. 009) to challenge Defendant's "confidential" designation to Bates Stamped pages DEF 00014-02309 of Defendant's document production under the parties' confidentiality discovery stipulation. Further, Plaintiff seeks to compel

production of other documents, interrogatory responses and depositions. Plaintiff also seeks the appointment of a referee to supervise discovery. Defendant cross-moved to compel Plaintiff to provide HIPAA compliant authorizations for the records of her mental health care providers.

The parties agreed to the production and exchange of certain information under a confidentiality agreement which took the form of a so-ordered stipulation dated August 21, 2019. As per the stipulation, confidential information is defined as documents, testimony and other information that “contain trade secrets, proprietary business information, competitively sensitive information or other information the disclosure of which would, in good faith judgment of the party or, as appropriate, non-party designating the material as confidential, be detrimental to the conduct of that party’s or non-party’s business or the business of any of that party’s or non-party’s customers or clients.” The agreement states, “[n]otwithstanding anything herein to the contrary, the producing party bears the burden of establishing the propriety of its designation of documents or information as confidential information.” The stipulation provides that the receiving party is obligated to notify the producing party if it does not concur with the confidential designation. If the producing party does not agree to declassify within seven days of the written request, the receiving party is required to make a motion seeking “an order declassifying those documents or materials.”

On October 2, 2019, the parties exchanged document discovery. Defendant disclosed 2,309 pages of documents, of which Bates Stamped pages DEF 00014 to 02309 were marked confidential. Plaintiff objected to the confidential designation as excessive and on February 11, 2020, a compliance conference stipulation was reached by the parties. As per the compliance conference stipulation, both parties agreed to “exchange lists identifying by Bates [Stamp] number which specific documents that Defendant is willing to declassify and that Plaintiff believes should be declassified.” These lists were to be exchanged by February 28, 2020. Plaintiff complied with this stipulation and communicated with Defendant and indicated that the documents, Bates Stamped pages DEF 00014-02309, needed to be declassified. However, it appears Defendant never exchanged its list as per the compliance conference stipulation. In its cross-motion, Defendant objected to this portion of Plaintiff’s motion as a breach of Defendant’s First Amendment associational rights, but this argument is unavailing. Parties are free to relinquish constitutional rights by contract (*see 159 MP Corp v Redbridge Bedford, LLC*, 160 AD3d 176, 186-187 [2d Dept 2018] [“A bedrock principle of our jurisprudence is the right of parties to freely enter into contracts ... Indeed, our jurisprudence provides citizens with the freedom and opportunity to abandon rights and privileges ... of both constitutional and statutory dimension, includ[ing] many that are otherwise inviolate.”]). As such, Defendant was not free to blithely disregard the procedure contained in the two court approved stipulations it willingly entered.

Thus, the branch of Plaintiff’s motion regarding the declassification of confidential documents is granted to the extent that pursuant to the so-ordered stipulation dated August 21, 2019, Defendant is required to demonstrate that the exchanged documents, as specifically identified by Plaintiff, Bates Stamped pages DEF 00014 to 02309, marked confidential “contain trade secrets, proprietary business information, competitively sensitive information or other information the disclosure of which would, in good faith judgment of the party or, as appropriate, non-party designating the material as confidential, be detrimental to the conduct of that party’s or

non-party's business or the business of any of that party's or non-party's customers or clients." Defendant has 30 days from the e-filing of this order to either provide Plaintiff its rationale for confidentiality for each page of the classified material or to consent to the material removal of the confidential designation for these documents.

As for the branch of the motion concerning other discovery demands and responses, it centers on Defendant's May 14, 2018 responses to Plaintiff's document demands 2, 3, 5, 10, 12, 14-18 and 25-50 as well as to interrogatories 6, 8-10, 13-16, 20-24 and 26-44. Defendant opposes this motion claiming that it either fully responded to Plaintiff's discovery demand or else that Plaintiff's discovery demands are objectionable and seek irrelevant information.

CPLR §3101 (a) provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by a party, or the officer, director, member, agent or employee of a party." "The phrase 'material and necessary' should 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 Publ. Co.*, 21 NY2d 403, 406 [1968]; *see also Andon v 302-304 Mott St Assoc.*, 94 NY2d 740, 746, [2000]).

"The CPLR does not set forth any order of priority as to the use of the various disclosure devices. A party is generally free to choose both the devices it wishes to use and the order in which to use them" (*Barouh Eaton Allen Corp. v International Business Machines Corp.*, 76 AD2d 873 [2d Dept 1980]; *see also Edwards-Pitt v. Doe*, 294 AD2d 395 [2d Dept 2002]). Similarly, there is no express limitation to the number of times a discovery device may be engaged (*see L.K. Comstock & Co. v New York*, 80 AD2d 805, 806 [1st Dept 1981]). However, the prerogative of a party to chart its own course through discovery is subject to the Court's power to regulate discovery to prevent abuse (*see Samide v Roman Catholic Diocese*, 16 AD3d 482, 483 [2d Dept 2005]). "[A] trial court is given broad discretion to oversee the discovery process" (*see Cioffi v S.M. Foods, Inc.*, 142 AD3d 526 [2d Dept 2016] *quoting Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007] *quoting Castillo v Henry Schein, Inc.*, 259 AD2d 651, 652 [2d Dept 1999]; *see also Berkowitz v 29 Woodmere Blvd. Owners', Inc.*, 135 AD3d 798, 799 [2d Dept 2016]).

Contrary to Defendant's objections, Plaintiff's document demands were proper (*see generally Allen v Crowell-Collier Publ. Co.*, 21 NY2d at 406). Plaintiff's demands numbered 2, 3, 5, 17 and 28 ask for the complete personnel files of Sandoval and Delgado, all employee handbooks, manuals, guidelines or policies of Defendant, the job descriptions for the jobs Plaintiff was hired for, all documents relating to any formal or informal complaints made against Defendant for sex discrimination, sexual harassment or retaliation and all documents relating to the basis of any claim by Defendant that Plaintiff violated the non-disparagement agreement in any way. All these demands are relevant to Plaintiff's asserted claims and require a response (*see In re Verdugo*, 184 AD3d 441, 442 [1st Dept 2020]).

Plaintiff alleges in her amended complaint that Defendant's staff had attempted to steal Plaintiff's personal laptop and her personal files. Plaintiff asserts that on one occasion

Defendant gained unauthorized access to Plaintiff's laptop while it was in Trump Towers. She further accuses Defendant of sabotaging her work, blocking her from a national supporter database and making multiple unauthorized attempts to reset the password on Plaintiff's Spanish Twitter account. Plaintiff's document demands numbered 10 and 12 pertain to the alleged unpermitted access to Plaintiff's laptop and other electronics and the potential Trump Tower surveillance footage of it. Plaintiff also alleges in her amended complaint that employees of Defendant were considered for positions in presidential transition team or positions in the Trump administration. Plaintiff's document demands 14-16 and 18 pertain to Plaintiff being potentially hired by the 2016 incoming Presidential Administration and the investigation of the leaking of President Trump's tax information and are relevant to Plaintiff's claims of tortious interference with prospective economic advantage and defamation, respectively. Similarly, document demands numbered 31-50 pertain to Defendant's affirmative defenses and are proper (*see generally, Kookmin Best Insurance Co., Ltd. US Branch v Greater New York Mutual Insurance Co.*, 68 Misc3d 1208[A] [Sup Ct. New York County, 2020]).

Defendant is required to disclose all aforementioned materials by formal response within 60 days of the e-filing of this order. To the extent that Defendant claims any records were previously provided, it shall identify the responsive documents by their corresponding Bates Stamp. In the event any of these materials cannot now be located and disclosed, Defendant is to provide a *Jackson*² affidavit to demonstrate the efforts taken to locate these materials.

Turning to Plaintiff's Interrogatories this discovery device is similarly limited to evidence necessary in the prosecution or defense of this action (*see Mijatovic v Noonan*, 172 AD2d 806 [2d Dept 1991]). Interrogatory number 6 pertains to complaints made against Defendant for sex discrimination, sexual harassment or retaliation. Interrogatories numbered 8-10 seek information about software programs or applications Defendant used or provided its employees. Interrogatories numbered 13-16 regarded Defendant employees that were considered for positions with the transition team or Trump administration. Interrogatories numbered 20-24 pertained to reports made against Denson and the non-disparagement agreement. Interrogatories numbered asked for facts supporting Defendant's affirmative defenses. Since all of these interrogatories were relevant and narrow in scope, they are proper and require a response from Defendant (*compare to Salter v Sears, Roebuck and Co.*, 77 AD3d 449, 450 [1st Dept 2010]).

Accordingly, the branch of Plaintiff's motion to compel interrogatory responses is granted to the extent that Defendant is required to fully respond and disclose all materials that correspond to these demands within 60 days of the e-filing of this order. To the extent that Defendant claims any records were previously provided, it shall identify the responsive documents by their corresponding Bates Stamp. In the event any of these materials cannot now be located and disclosed, Defendant is to provide a *Jackson* affidavit to demonstrate the efforts taken to locate these materials.

As to the branch of Plaintiff's motion to compel depositions, the examinations before trial of all parties will occur in order of the caption within 60 days of the disclosure of documents and interrogatories required herein. Parties are reminded of their obligation to produce a witness

² *see Jackson v City of New York*, (185 AD2d 768, 770 [1st Dept 1992]).

with knowledge for this proceeding (*see generally Loeb v Assara New York I L.P.*, 118 AD3d 457 [1st Dept 2014]).

As to the branch of Plaintiff's motion for the appointment of a referee to oversee discovery, it is denied without prejudice. While CPLR §3104 authorizes this Court to appoint a referee to oversee discovery, this "supervisory power" is meant to be used "sparingly" and not in "the absence of special circumstances" *DiGiovanni v Pepsico, Inc.*, 120 AD2d 413, 414 [1st Dept 1986]). As this is the parties' first discovery dispute necessitating a formal, written decision of the Court and it does not otherwise appear the parties are acting hostilely or repeatedly frustrating discovery, a referee is not presently necessary (*compare to Kogan v Royal Indemn. Co.*, 179 AD2d 399, 400 [1st Dept 1992]).

Lastly, the branch of as for Defendant's cross-motion to compel Plaintiff to provide HIPAA compliant authorizations for the records of mental health care providers is granted. In her amended complaint, Plaintiff asserts "negligent infliction of emotional distress" as well as "severe emotional distress" and seeks as a component of her damages "mental anguish." Since Plaintiff has put her mental history relating to her emotional distress at issue, any privilege is waived and Defendant is entitled to authorizations for those medical providers who treated Plaintiff for her "severe emotional distress" and "mental anguish" (*see Donovan v New York City Housing Authority*, 178 AD3d 640 [1st Dept 2019]; *Rosen v MHM Realty, LLC.*, 166 AD3d 428 [1st Dept 2018]; *Spierer v Bloomingdale's*, 37 AD3d 371 [1st Dept 2007]).

Accordingly, to the extent Plaintiff sought any treatment for her alleged severe emotional distress and mental anguish, Plaintiff is ordered to provide Defendant a HIPAA compliant authorization for said treatment records within 30 days of the e-filing of this order.

1/11/2021
DATE

CHECK ONE: CASE DISPOSED DENIED NON FINAL DISPOSITION OTHER

APPLICATION: GRANTED GRANTED IN PART SUBMIT ORDER FIDUCIARY APPOINTMENT

CHECK IF APPROPRIATE: SETTLE ORDER INCLUDES TRANSFER/REASSIGN REFERENCE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.