

Bunstine v Kivimaki
2021 NY Slip Op 32030(U)
August 9, 2021
Supreme Court, Westchester County
Docket Number: 65482/2019
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

-----X
CHARLES W. BUNSTINE II ALSO KNOWN AS:
CHARLES W. BUNSTINE, CHARLES WILLIAM
BUNSTINE, CHARLES BUNSTINE,

DECISION & ORDER

Plaintiff,

Index No. 65482/2019
Seq. No. 5

-against-

ULLA-MAIJA KIVIMAKI,

Defendant.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by plaintiff (*pro se*) for an order pursuant to CPLR § 3124 compelling defendant Ulla-Maija Kivimaki to provide complete and proper responses to plaintiff's Notice to Produce and Plaintiff's Demand for Bill of Particulars and for such other and further relief as this Court deems just and proper:

- Notice of Motion - Affidavit in Support - Exhibits A-K
- Affirmation in Opposition - Exhibits A-B
- Affirmation in Further Support
- Affidavit of Service

Upon the foregoing papers, this motion is determined as follows:

Plaintiff commenced this action against the defendant by the electronic filing of a Summons and Verified Complaint on September 27, 2019. Issue was joined by service of a Verified Answer on behalf of the defendant dated November 13, 2019.

In a lengthy affidavit, plaintiff argues his theory of the case through a comprehensive recitation of the facts and a summary of the law. In addition, plaintiff details at length what he believes to be defendant's counsel's misrepresentations to the Court. To the extent the affidavit submitted in support of the motion addresses the discovery at issue, plaintiff argues that defendant failed to provide complete and proper responses to plaintiff's Notice to Produce and Demand for a Bill of Particulars.

With respect to the Notice to Produce, plaintiff seeks supplementation of Request #2 regarding "all communications between the parties"; Request #5 regarding documents in the defendant's possession relevant to the defendant's statement that plaintiff is guilty of, or

committed fraud; Request #6 regarding documents supporting defendant's statement published on defendant's website alleging that plaintiff is guilty of a crime, and state that plaintiff's actions as a professional were fraudulent, unfair and unethical; Request #11 seeking copies of the code of the website www.lotusoflapland.com as of October 28, 2016, June 30, 2017, October 16, 2018, and February 9, 2019; Request #12 seeking copies of the code of the webpage www.lotusoflapland.com/document-2.html as of October 28, 2016, June 30, 2017, October 16, 2018, and February 9, 2019; and Request #13 seeking copies of the code of the webpage www.lotusoflapland.com/document-3.html as of October 28, 2016, June 30, 2017, October 16, 2018, and February 9, 2019. Defendant provided a response to plaintiff's Notice to Produce on December 17, 2020. However, to the extent plaintiff seeks supplementation, defendant provided a supplemental response on May 3, 2021. In the supplemental response, defendant objected to those items for which the demand was vague, overbroad, unduly burdensome or not reasonably calculated to lead to the discovery of admissible evidence. Without waiving the objection, however, defendant provided additional documentation where it was in her possession or control. To the extent defendant did not have responsive documents, such was indicated in the response.

With respect to plaintiff's demand that defendant supplement her response to plaintiff's Demand for a Bill of Particulars, defendant argues that she is not responsible to provide amplification of counter claims not plead in her answer. By way of example, in Paragraph 15 of the Demand for a Bill of Particulars, plaintiff states the following:

On defendant's website www.lotusoflapland.com in "THE BOOK: A Short Summary", she states "She became a victim of fraud and of conspiracy to destroy her life and her career and take everything she had built." (a) State who committed the fraud. (b) State in detail what fraud was committed. (c) State in detail what complaints were made by defendant by jurisdiction. (d) Provide all legal documents, notices and filings relative to this fraud. (e) State who conspired against the defendant. (f) State in detail what conspiracy was committed. (g) State in detail what actions were taken by defendant against the conspirators. (h) Provide all legal documents, notices and filings relative to this conspiracy.

In his affidavit in support of the motion, plaintiff explains he is seeking to gain evidence of the crime defendant claims on her website the plaintiff committed, despite the fact that defendant has not counter claimed against plaintiff regarding this issue.

Similarly, in Paragraph 35, plaintiff states:

Recognizing the Order from the United States District Court for the Southern District of New York dated September 18, 2002, state in detail who and how defendant's 'sadistic adversaries' "stop(ped) her from working, designing and competing with the company she had made successful and which carries her (first) name.

Again, plaintiff's demand does not relate to a pleading in this case and, as such, defendant argues the demand is improper for a Bill of Particulars.

Legal Analysis/Discussion

This motion requires the Court to determine whether defendant should be compelled to provide supplemental responses to plaintiff's Notice to Produce and Demand for a Bill of Particulars. Upon consideration of the submissions and the relevant law as set forth below, the motion is denied.

CPLR § 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." 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 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). "It is incumbent on the party seeking disclosure 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 [2d Dept 2010]). The trial 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 (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

As stated in *Vargas v Lee*, 170 AD3d 1073, 1075 [2d Dept 2019]

[i]f there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or for cross-examination or in rebuttal, it should be considered [matter] 'material' in the action" (*Shutt v Pooley*, 43 AD2d at 60; see *Fell v Presbyterian Hosp. in City of N.Y. at Columbia-Presbyt. Med. Ctr.*, 98 AD2d 624, 625, 469 NYS2d 375 [1983]; see also *Manzo v Westchester Rockland Newspapers*, 106 AD2d 492, 492, 482 NYS2d 834 [1984]; see generally 6-3101 Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 3101.07). "Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists" (*Forman v Henkin*, 30 NY3d at 664). "In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence" (*id.*). "A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is . . . relevant" (*id.* at 661).

The purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial. A bill of particulars may add specific statements of fact to a general allegation in the pleading, but cannot add or substitute a new theory or cause of action (*Castleton v Broadway Mall Props., Inc.*, 41 AD3d 410, 411 [2d Dept 2007]; *B&F Leasing Co. v Ashton Cos.*, 42 AD2d 652, 653 [2d Dept 1973]; see *Melino v Tougher Heading & Plumbing Co.*, 23 AD2d 616, 617 [2d Dept 1965]; *Sebring v Wheatfield Props. Co.*, 255 AD2d 927, 928 [2d Dept 1998]).

With these principles in mind, the Court now turns to the plaintiff's motion. Plaintiff argues that defendant should be compelled pursuant to CPLR § 3124 to provide "complete and proper responses" to plaintiff's Notice to Produce and Demand for a Bill of Particulars. Defendant responded to plaintiff's combined demands on December 17, 2020. To the extent plaintiff seeks supplementation of defendant's responses, defendant, without waiving her objections to the all-encompassing nature and relevance of the documents demanded, provided additional documents in her possession or control on May 3, 2021. In addition, defendant averred that if additional documents were located they would be provided in due course.

With respect to plaintiff's Demand for a Bill of Particulars, the Court agrees with defendant that supplementation of her Bill is not required. Plaintiff's demands seek information improper in a Bill of Particulars. Specifically, a majority of plaintiff's requests seek evidence regarding statements on defendant's website which were not asserted as defenses to the action or as counter claims in defendant's answer.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this Court, notwithstanding the specific absence of reference thereto.

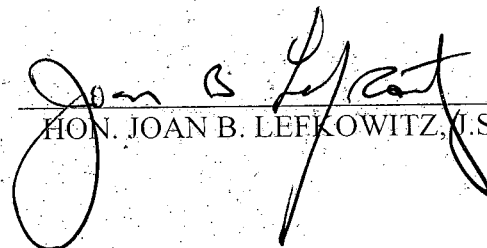
Accordingly, it is

ORDERED that plaintiff's motion is denied, and it is further

ORDERED that counsel are directed to appear for a virtual conference via Microsoft Teams before Court Attorney Referee Robert Pierson on August 23, 2021 at 3:00 P.M.; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendant with notice of entry within 10 days of entry.

Dated: White Plains, New York
August 9, 2021


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

TO:

All Counsel by NYSCEF

cc: Compliance Part