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
MARC CAMPOLONGO and JACKELYN CAMPOLONGO,

Plaintiffs,

-against-

DR & RD, INC. d/b/a BRAZEN FOX, WILLIAM P. HARDING, RUDDY DELACRUZ, JOHN DOE #1, JOHN DOE #2, and JOHN AND JANE DOES #3 THROUGH #10,

Defendants.
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DECISION & ORDER

Index Number: 69170/2019
Motion Sequence No. 1

RUDERMAN, J.

The following papers were read on this motion by plaintiffs for an Order pursuant to CPLR §3124 compelling defendants to produce records responsive to plaintiffs' February 15, 2021 Post-Deposition Discovery and Inspection demands, and an Order pursuant to CPLR §3126 imposing penalties against defendants for failure to disclose:

Notice of Motion, Affirmation of Marc S. Oxman, Esq., Exhibits 1-15, Memorandum of Law in Support

Affirmation of Lori F. Graybow, Esq. in Opposition

Affirmation of Marc S. Oxman, Esq. in Reply

NYSCEF File[1]

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

[1] It should be noted that defendants submitted a letter to the Court as a surreply (NYSCEF Doc. 55). However, defendants' request to submit a surreply is denied. While plaintiffs' reply requests new relief, plaintiffs' reply fails to present any new arguments warranting a surreply (*see* 22 NYCRR 202.8-c; *Gluck v. New York City Transit Authority*, 118 A.D.3d 667 [2d Dept 2014]).

HISTORY

Plaintiffs commenced this personal injury/dram shop action on November 21, 2019 by filing a Summons and Verified Complaint (Exhibit 1, NYSCEF Doc. 27). Plaintiffs allege that on September 14, 2019, plaintiff was assaulted by one or more patrons, while a patron of Brazen Fox due to the negligent, reckless, willful, and dangerous conduct of defendants. Defendants DR & RD, Inc. d/b/a The Brazen Fox and William P. Harding filed a Verified Answer on February 13, 2020 (Exhibit 2, NYSCEF Doc. 28). On June 1, 2021, the Court (Murphy, J.) granted plaintiffs' application (motion sequence 2) to amend the complaint to add Ruddy Delacruz as an additional defendant to the cause of action for negligence (NYSCEF Doc. 61). Plaintiffs filed the Amended Complaint on June 2, 2021 (NYSCEF Doc. 62). Defendants DR & RD, Inc. d/b/a The Brazen Fox, William P. Harding and Ruddy Delacruz filed a Verified Answer to the Amended Complaint (NYSCEF Doc. 64).

On or about February 15, 2021, plaintiff served the following post-deposition demands for discovery and inspection:

1. Copies of complete personnel files for William Harding and Rudy *[sic]* Delacruz including, but not limited to copies of the following: a. Employment contracts, agreements and/or other writings containing terms and conditions of employment; b. Applications for employment; c. Licenses issued by New York State for security employment; d. TIPS certifications *[sic]* e. New York State Labor Department 1-9 *[sic]* forms; f. Written acknowledgments of receipt and understanding of Employee Handbooks; g. Job performance assessments and ratings; h. Disciplinary records; i. Incident reports.
2. "Warning File" maintained by Brazen Fox, including entries relating to William Harding and Rudy *[sic]* Delacruz.
3. "Scheduling Records" of Brazen Fox covering the period from September 13, 2019, 10:00 P.M., to September 14, 2019, 3:00 A.M.
4. Video images from all on-premises cameras covering the period from September 13, 2019, 10:00 P.M. to September 14 *[sic]*, 3:00 A.M.
5. Name(s) and address(es) of the company(s) that installed and/or provided maintenance for the security surveillance system at Brazen Fox
6. Point of Sales records covering the period of September 13, 2019, 10:00 P.M. to September 14 *[sic]*, 3:00 A.M.
7. Credit card records covering the period of September 13, 2019, 10:00 P.M. to September 14 *[sic]*, 3:00 A.M.
8. State Liquor Authority (SLA) records covering complaints, investigations, and other actions relating to the incident of September 14, 2019 at the Brazen Fox.
9. SLA records relating to complaints, investigations and actions against the Brazen Fox for a period of five (5) years prior to the incident.

(Exhibit 6, NYSCEF Doc. 32). Defendants provided a response dated March 3, 2021, wherein in addition to objecting to the demands as, *inter alia*, overly broad, unduly burdensome, and irrelevant, defendants responded that the items requested were either not in defendants' possession or previously provided to plaintiffs. Specifically, items numbered 1, 2, 5, 8, and 9 are not in defendants' possession and items numbered 3 and 4 were previously provided and are in plaintiffs' possession (Exhibit 7, NYSCEF Doc. 33). On or about April 6, 2021, defendants provided an affidavit supporting and supplementing the March 3, 2021 response (Exhibit 8, NYSCEF Doc. 34).

INSTANT MOTION

Plaintiffs seek an Order pursuant to CPLR §3124 compelling defendants to produce all records responsive to plaintiffs' February 15, 2021 Post-Deposition Discovery and Inspection demands. Plaintiffs also seek an Order pursuant to CPLR §3126 imposing penalties against defendants for willfully and deliberately failing to respond to plaintiffs' post-deposition demands. Plaintiffs argue that the issue is whether defendants can avoid discovery by merely asserting they are not in possession of the requested material, in light of testimony of Seamus Skeffington, to the contrary. According to plaintiffs, defendants deny possession of video tapes without which plaintiffs are disadvantaged from proving their claims. Plaintiffs accuse defendants of destruction of evidence regarding the videotapes and untruthful denial of possession. Plaintiffs further argue that sanctions pursuant to CPLR §3126 are warranted due to defendants' destruction of documents and video footage after receiving a letter to preserve said evidence.

Defendants oppose the motion and contend that plaintiff Marc Campolongo was assaulted by two unknown assailants in the parking lot owned by the City of White Plains behind Brazen Fox after defendants' employees denied plaintiff entry, and there is no evidence that defendant security guards caused or contributed to plaintiff's injuries or that the assailants were intoxicated at the time of any speculative sale of alcohol. According to defendants, an order to compel or for sanctions is inappropriate where, as here, defendants timely and fully responded to the demands. Defendants argue that plaintiffs' motion seeks documents that do not exist, and the testimony of Seamus Skeffington does not contradict defendants' response to the demands or affidavit in support. Defendants further argue that the documents in defendants' possession regarding Mr. Harding and Mr. Delacruz's employment, namely the security guard licenses were previously provided; the video depicting the subject incident was previously disclosed; the name of the individual, now deceased, who installed the cameras was provided and defendants were not obligated to preserve or exchange video beyond the subject incident; and plaintiffs' demands are overly broad, unduly burdensome and a fishing expedition.

In reply, plaintiffs argue that defendants seek to avoid the mandate for full disclosure by asserting they are not in possession of material. Plaintiffs reiterate that despite defendants' representations, there is evidence to the contrary that establishes the existence of the material. According to plaintiffs, that evidence is the testimony of Seamus Skeffington. Plaintiffs contend that there are issues of fact and credibility to require an evidentiary hearing due to defendants' assertion that the evidence does not exist.

DISCUSSION

a. CPLR §3124 Compel

It is well-settled that 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 N.Y.2d 403 [1968]; *Foster v. Herbert Slepoy Corp.*, 74 A.D.3d 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" (*Foster*, 74 A.D.3d at 1140; *Gilman & Ciocia, Inc. v. Walsh*, 45 A.D.3d 531 [2d Dept 2007]). 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*, 74 A.D.3d at 1140). 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 (*see Mironer v. City of New York*, 79 A.D.3d 1106, 1108 [2d Dept 2010]; *Auerbach v. Klein*, 30 A.D.3d 451 [2d Dept 2006]; *Feeley v. Midas Properties, Inc.*, 168 A.D.2d 416 [2d Dept 1990]).

Here, plaintiffs seek documents and video footage that defendants assert (1) are not in defendants' possession; (2) were previously provided to plaintiffs and are in plaintiffs' possession; or (3) plaintiffs are not entitled to. Regarding demand items 1, 2, 8 and 9, defendants contend that these documents are not in their possession. Plaintiffs' suggestion that this is untrue due to the testimony of Seamus Skeffington, the Brazen Fox manager, is unavailing. Mr. Skeffington's speculative testimony fails to support plaintiffs' demands and motion to comply. For example, regarding the personnel file for William Harding (item 1), Mr. Skeffington testified that he would "assume" that Brazen Fox has a personnel file for Mr. Harding (Exhibit 5, NYSCEF Doc. 31, pp 46-47). Regarding the personnel file for Ruddy Delacruz (item 1), Mr. Skeffington testified that he doesn't know if Brazen Fox has a personnel file or an incident report file for Mr. Delacruz and that he would "assume" that Brazen Fox has a personnel file (Exhibit 5, NYSCEF Doc. 31, p 48). The Court finds that defendants' affidavit of Declan Rainsford is sufficient to establish that defendants are not in possession of demand items numbered 1, 2, 8 and 9. It is axiomatic that a party cannot be compelled to produce discovery that does not exist or is not in the party's possession, custody or control (*see* CPLR §3120(1)(i); *Cap Rents Supply, LLC v. Durante*, 167 A.D.3d 700 [2d Dept 2018]; *Corriel v. Volkswagen of America, Inc.*, 127 A.D.2d 729 [2d Dept 1987]).

Regarding demand items 3, 4[2] and 5, plaintiffs fail to dispute defendants' contention that these items are already in plaintiffs' possession, therefore defendants should not be compelled to produce discovery already provided and in plaintiffs' possession. The Court further finds that

[2] The Court notes that as part of this demand, plaintiffs request video footage for the entire premises, and defendants contend it provided video footage for the area of the alleged assault and are no longer in possession of the remaining video footage.

defendants' affidavit of Declan Rainsford is sufficient to establish that defendants are not in possession of the remaining camera feed for the facility as demanded in item number 4. Further, defendants provided the name for the individual who installed and provided maintenance for the security system, and said individual is now deceased, so there is no further discovery outstanding regarding item number 5.

Regarding demand items 6 and 7, notwithstanding the broad discovery provisions of CPLR §3101, plaintiffs' requests should be narrowly tailored to be relevant, material and necessary to the instant action. However, plaintiffs have failed to demonstrate that the discovery of point of sales and credit card records are relevant, material or necessary to the prosecution of the instant action. The Court agrees with defendants' objection and arguments that demands items 6 and 7 are overly broad, unduly burdensome, irrelevant and appear to be a "fishing expedition."

Based on the foregoing, plaintiffs' motion pursuant to CPLR §3124, is denied.

b. CPLR §3126 Penalties

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 A.D.3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is wilful and contumacious (*Greene v. Mullen*, 70 A.D.3d 996 [2d Dept 2010]; *Maiorino v. City of New York*, 39 A.D.3d 601 [2d Dept 2007]). "Wilful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses" (*Russo v. Tolchin*, 35 A.D.3d 431, 434 [2d Dept 2006]; *see also Prappas v. Papadatos*, 38 A.D.3d 871, 872 [2d Dept 2007]).

Here, plaintiffs have failed to and cannot demonstrate an entitlement to CPLR §3126 penalties or sanctions. Despite plaintiffs' contentions, defendants timely responded to plaintiffs' February 15, 2021 demands and further provided a sworn affidavit to supplement and support the initial March 3, 2021 response. Defendants' conduct fails to raise to "wilful and contumacious" conduct warranting the imposition of penalties or sanctions.

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

Accordingly, it is hereby

ORDERED that plaintiffs' motion (motion sequence no. 1) is denied in its entirety; and it is further

ORDERED that defendants shall serve a copy of this Order with notice of entry upon plaintiffs within five (5) days of entry. Proof of such service shall be filed to NYSCEF within three (3) days of service.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
August 4, 2021

HON. TERRY JANE RUDERMAN, J.S.C.