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| Keane v Russo & Toner, LLP |
| 2021 NY Slip Op 34294(U) |
| March 1, 2021 |
| Supreme Court, Westchester County |
| Docket Number: Index No. 51043/2020 |
| 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
SUSAN KEANE AND THOMAS F. KEANE,

Plaintiffs,

- against-

DECISION AND ORDER

Index No. 51043/2020
Motion Seq. Nos. 4, 5

RUSSO & TONER, LLP, ALAN S. RUSSO
AND STEPHEN B. TONER,

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on plaintiffs’ motion (sequence 4) seeking an order 1. pursuant to CPLR 3126 striking defendants’ answer for their failure to provide court-ordered discovery; or in the alternative, 2. pursuant to CPLR 3124 directing defendants to fully respond to all of plaintiffs’ demands or precluding them from testifying at trial; and 3. for such other and further relief as the Court deems just, proper, and equitable:

- Notice of Motion; Affirmation in Support; Exhibits A-H;
- Affirmation in Opposition of Josh H. Kardish, Esq.; Affirmation in Opposition of Alan S. Russo; Exhibits A-K
- Reply Affirmation
- NYSCEF File

The following papers were read on defendants’ motion (sequence 5) for an order pursuant to CPLR 3103 granting a protective order and for such other and further relief as the Court deems just, proper, and equitable:

- Notice of Motion; Affirmation in Support of Josh H. Kardish, Esq.;
- Affirmation in Support of Alan Russo; Exhibits A-K
- Affirmation in Opposition
- NYSCEF File

Upon the foregoing papers these motions are determined as follows:

Facts and Relevant Procedural History

Plaintiff Thomas Keane (“Keane”) was an equity partner in the law firm of Russo, Keane and Toner, LLP (“RKT”). He left RKT on or about September 15, 2011, at which point the remaining partners Alan S. Russo (“Russo”) and Stephen B. Toner (“Toner”) reformed the law firm as Russo & Toner, LLP (the “firm”). Plaintiffs¹ commenced this action by the filing of a summons and complaint on January 21, 2020 seeking payment of amounts allegedly due pursuant to a loan made by Keane to RKT while he was a member of RKT in the amount of \$105,000.00 (NYSCEF Doc. #1). Defendants served a pre-answer motion to dismiss pursuant to CPLR §3211(a)(5) (NYSCEF Doc. #2). That motion was denied by this Court (Lefkowitz, J.) on July 14, 2020 (NYSCEF Doc. #30). Defendants filed their answer with counterclaims on July 24, 2020 (NYSCEF Doc. #31). Plaintiffs filed an amended complaint on July 24, 2020 (NYSCEF Doc. #33). Defendants served their answer to the amended complaint with counterclaims on July 27, 2020 (NYSCEF Doc. #34).

On July 27, 2020 plaintiffs served a Demand for a Bill of Particulars concerning defendants’ affirmative defenses and a Demand for Discovery and Inspection (Exs. A and B, respectively). On July 28, 2020 plaintiffs served a Demand for Party Address for Toner (Ex. C).

A preliminary conference was held on August 3, 2020 during which the parties were advised to confer and provide a stipulation concerning discovery to be so-ordered by the Court. The parties were unable to stipulate to the PCO necessitating a further Preliminary Conference.

On August 19, 2020 plaintiffs served a First Set of Interrogatories for each of the named defendants (Exs. D, E, and F, respectively). On August 26, 2020 defendants moved to dismiss the complaint as against the individually named defendants pursuant to CPLR 3211(a)(7) (NYSCEF Doc. #44). By Decision and Order dated October 7, 2020 that motion was denied (Lefkowitz, J.) pursuant to CPLR 3211(e) (NYSCEF Doc. #59).

Pursuant to the PCO entered on September 10, 2020, the parties were directed to, inter alia, exchange responses to discovery demands, names and addresses of all witnesses, and statements of opposing parties by September 30, 2020 and to complete party depositions by November 20, 2020 (Ex. G). The PCO also provided that defendants anticipated the need for a Confidentiality Agreement concerning defendants’ books and records, including QuickBooks and other accounting tools of the defendants which they would prepare and circulate on or before September 23, 2020.

By email dated September 24, 2020 defendants provided plaintiffs with a proposed confidentiality agreement (the “agreement”) (Ex. F). The agreement provided, inter alia, that in the event any discovery deemed confidential by a party was sought to be used as an “exhibit to a motion or as part of any other document that will be filed with the Court, the opposing party agrees to execute a So-Ordered Stipulation sealing the Confidential Discovery Responses so that the general public will not have access to them or, if the party objects to the claim of confidentiality, submitting said Confidential Discovery Responses for an in-camera inspection prior to submitting same” (Ex. H).

¹ Plaintiff Thomas Keane appears pro se and as attorney for his wife, plaintiff Susan Keane.

By letter dated October 30, 2020 plaintiffs sought the following outstanding discovery: Mr. Toner's address, responses to the demand for Discovery and Inspection, responses to the PCO, and a bill of particulars concerning defendants' affirmative defenses (Ex. H). It is undisputed that plaintiffs have refused to execute the agreement and that defendants have refused to respond to plaintiffs' discovery demands until the agreement is executed. These motions are brought pursuant to discovery motion briefing schedules issued by the Court on December 5, 2020 (NYSCEF Doc. ## 76, 77).

Contentions of the Parties

Plaintiffs' Motion

In support of their motion plaintiffs argue that defendants' answer should be dismissed based upon their failure to comply with discovery orders and plaintiffs' discovery demands without any excuse. Plaintiffs assert that to date defendants have not provided any discovery and that the following discovery remains outstanding: responses to plaintiffs' demands for a bill of particulars concerning defendants' affirmative defenses, the notice for discovery and inspection, Toner's address, the first set of interrogatories for each of the named defendants, as well as a response to the Preliminary Conference Order and defendants' depositions. Plaintiffs argue that the discovery they seek is material and relevant to the prosecution of this action. Plaintiffs also assert that defendants have engaged in motion practice, which they characterize as frivolous, in order to thwart the discovery process. Plaintiffs also object to the sealing provision contained in the agreement. They further argue that alternatively, the court should issue a conditional order directing defendants to provide responses to the PCO and plaintiffs' demands within 15 days or be precluded from testifying at trial.

In opposition defendants first assert that their prior motions were not frivolous and that neither decision issued by the court characterized them as such. Defendants contend that the PCO allows defendants to transmit the agreement to plaintiffs for execution as a precondition to providing discovery responses. Defendants contend that given the nature of this action and the nature of the private, proprietary, confidential, and privileged information which is integral to the defendants' firm and the ease with which that information could be disseminated, a confidentiality agreement is necessary. Defendants contend that their conduct was not willful and contumacious and the circumstances do not warrant striking their answer and that they have not disobeyed any court orders. Defendants argue that plaintiffs are not entitled to Toner's home address because he is represented by counsel.

Plaintiffs contend that the only excuse proffered by defendants for their failure to provide the outstanding discovery is plaintiffs' refusal to execute the agreement. Plaintiffs contend that the filing of the motion for a protective order only stayed discovery as to those discovery items in dispute, however, plaintiffs contend that defendants have failed to provide documents not covered by the agreement. Plaintiffs state that defendants' contumacious conduct is further evidenced by their failure to provide Toner's home address because CPLR 3118 authorizes the production of Toner's address regardless of whether he is represented by counsel.

Defendants' Motion

Defendants cross-move for an order requiring plaintiffs to execute the proposed agreement as a prerequisite to defendants' compliance with plaintiffs' demands. Defendants contend that plaintiffs'

refusal to execute the agreement is evidence of their intent to disseminate the information contained in defendants' discovery responses for purposes beyond this litigation. Defendants contend that plaintiffs' discovery demands seek information that goes beyond the issue of whether or not defendants owe plaintiffs money pursuant to the loan. Defendants state that the demands request proprietary financial information dating 15 years prior to Mr. Keane's departure from RKT and contend that such demands are overly broad, unduly burdensome and meant to harass defendants. Defendants stated, without waiving any of their objections, that they are requesting plaintiffs sign an agreement committing not to disclose the firm's private financial information beyond this litigation.

In opposition plaintiffs contend that the purpose behind defendants' motion is that they desire a sealing order and not an order of protection. Plaintiffs state that this is evidenced by the provision in the agreement which references an automatic seal whenever documents subject to the agreement are filed with the court. Plaintiffs argue that this automatic sealing provision violates 22 NYCRR 216.1 which requires, inter alia, the party seeking a sealing order to establish good cause. Plaintiffs dispute defendants' contentions that there is acrimony between the parties or that plaintiffs intend to disseminate the responsive documents beyond this litigation.

Analysis

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]). 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 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 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 AD3d 431, 434 [2d Dept 2006]; see also *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

The Court does not find that plaintiffs have established a pattern of conduct sufficient to warrant the striking of defendants' answer. However, although the PCO provided the agreement was to apply only to "books and records including QuickBooks and other accounting tools of defendants" defendants have improperly failed to provide any discovery.

"Trial courts are vested with broad discretion to issue appropriate protective orders to limit discovery" (*Cascardo v Cascardo*, 136 AD3d 729, 729-30 [2d Dept 2016]). "For a protective order to be issued, the party seeking such an order must make a factual showing of unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice" (*Cascardo v Cascardo*, 136 AD3d at 729 [internal citation omitted]). Defendants as the parties seeking the protective order bear the burden to show entitlement to the order (*Jridi v Minaj*, 2019 N.Y. Slip Op. 33613[U], [Sup Ct, New York County 2019]). Defendants have failed to make the factual showing necessary for issuing a protective order compelling plaintiffs to enter into the proposed confidentiality agreement. General and conclusory statements by defense counsel implying that plaintiffs will use this information for purposes beyond this action, are insufficient to warrant the issuance of a protective order compelling

the execution of a confidentiality agreement (*Sheldon v Kimberly-Clark Corp.*, 111 AD2d 912 [2d Dept 1985]). Lastly, the self-executing sealing provision of the agreement is improper pursuant to 22 NYCRR 216.1.²

CPLR 3118 provides that “A party may serve on any party a written notice demanding a verified statement setting forth the post office address and residence of the party...”. Defendants have proffered no legal authority for their position that relieves Toner from providing his address on the basis that he is represented by counsel. Accordingly, defendants shall provide the post office address and residence for Toner as demanded (*Ramos v Lopez*, 2018 N.Y. Slip Op. 33458[U] [Sup Ct, Westchester County 2018]).

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

Accordingly, it is:

ORDERED that plaintiffs’ motion (sequence 4) is granted to the extent that on or before March 19, 2021 defendants shall respond to the outstanding items of discovery including the Demand for a Bill of Particulars concerning defendants’ affirmative defenses, the Demand for Discovery and Inspection, the demand for Stephen Toner’s address, the interrogatories served on each of the defendants, and the discovery directed by the Preliminary Conference Order; and it is further

ORDERED that defendants’ motion seeking a protective order is denied; and it is further

ORDERED that plaintiffs shall serve a copy of this Order with notice of entry upon defendants within seven (7) days of entry and shall file proof of service to the NYSCEF website within three (3) days thereof; and it is further

ORDERED that in accordance with the Virtual Courtroom Protocol implemented in the Ninth Judicial District counsel for the parties shall appear for a virtual compliance conference via Microsoft Teams on March 31, 2021, at 3:30 p.m., or as the Court may otherwise direct.

The foregoing constitutes the Decision and Order of this Court.

DATED: White Plains, New York
March 1, 2021

Joan B. Lefkowitz

Digitally signed by Joan B. Lefkowitz
DN: CN=Joan B. Lefkowitz, E=jlefkow@nycourts.gov
Reason: I am the author of this document
Location: your signing location here
Date: 2021.03.01 13:11:24-0500
Full: PhantomPDF Version: 10.1.0

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

To: Service upon all counsel via NYSCEF

² The Uniform Rules for the New York State Trial Courts “[e]xcept where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof.”