

**Ferreira v Hudson Riv. Healthcare, Inc.**

2022 NY Slip Op 30084(U)

January 11, 2022

Supreme Court, New York County

Docket Number: Index No. 152936/2020

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET CHAN PART IAS MOTION 33

Justice

-----X

MICHELLE FERREIRA

Plaintiff,

- v -

HUDSON RIVER HEALTHCARE, INC.,

Defendant.

-----X

INDEX NO. 152936/2020

MOTION DATE

MOTION SEQ. NO. 001; 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 47, 49

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48

were read on this motion to/for DISCOVERY

In this action arising out of defendant Hudson River Healthcare, Inc.'s alleged illegal wage practices, plaintiff Michelle Ferreira moves: (i) for an order compelling defendant to provide full and responsive answers to her interrogatories and document demands and (ii) to dismiss several of defendant's affirmative defenses. Defendant, for its part, moves: (i) to compel plaintiff to provide full and responsive answers to defendant's document requests and interrogatories and (ii) for a protective order governing the treatment of confidential information. Plaintiff's motion is granted in its entirety. Defendant's motion is granted in part and denied in part. The Decision and Order is as follows:

Background

Plaintiff alleges that defendant failed to pay plaintiff for all hours worked, applicable overtime, referral fees, and relocation costs. Plaintiff also alleges defendant failed to provide accurate wage statements and a hiring notice (NYSCEF # 26). Various discovery issues were raised at conferences on June 30, 2021 and July 29, 2021, many of which remain pending, prompting this pair of motions.

In support of her motion to compel, plaintiff argues that defendant has provided incomplete responses to her First Demand for Discovery and Inspection and First Set of Interrogatories both dated August 25, 2020, which, among other

things, sought discovery as to payroll records, employee handbooks, and time schedules (NYSCEF #'s 18-19).

In support of her motion to dismiss, plaintiff argues that defendant has failed to adequately plead its affirmative defenses (NYSCEF # 17 at 8-12). Plaintiff asserts that defendant has improperly sought discovery into plaintiff's personal life and romantic relationships on the basis of a "faithless servant" defense that was not raised in defendant's answer (*id.* at 10). Plaintiff contends that even if defendant meant to plead a faithless servant defense in its answer by stating in its Third affirmative defense "[t]he complaint is barred, in whole or part, by virtue of plaintiff's conduct" (NYSCEF # 4 at 8, ¶ 3), that nonetheless such statement is insufficiently particular under CPLR 3013 (NYSCEF # 17 at 8). Plaintiff further contends that affirmative defenses numbered Fourth, Fifth, Eleventh, Twelfth, Sixteenth, Eighteenth, and Nineteenth must be dismissed as being inadequately pled (NYSCEF # 17 at 10-12).

In support of its motion to compel, defendant argues that plaintiff has failed to provide sufficient responses to its first set of discovery requests of August 24, 2020, which covered, among other items, hours worked, an alleged agreement as to relocation costs, compensation for the alleged 600 referrals, and information as to any claim or defense (NYSCEF # 23 at 5-6). Defendant also asserts that plaintiff has (i) refused to produce her smart phones and tablets for forensic imaging (*id.* at 6) and (ii) refused to identify her computer devices, cell phone number and social media accounts (*id.* at 8). Defendant asserts that responses were stipulated to be returned January 29, 2021, that plaintiff responded on February 1, 2021, and that plaintiff therefore waived its objections to defendant's requests except as to matters privileged or palpably improper (*id.* at 12-14). Defendant also contends that plaintiff has failed to engage in good faith attempts at resolving defendant's confidentiality concerns respecting its non-public and proprietary bonus and incentive plan structure (NYSCEF # 47 at 6).

Defendant also argues that plaintiff has improperly failed to respond to defendant's second set of discovery requests covering information to support its faithless servant defense (NYSCEF # 47 at 2). Defendant explains this defense as follows: "In 2019, Defendant received a patient complaint [disclosing] that Plaintiff had entered into a personal relationship with the patient and put her personal interests before her employer's when she directed that patient away from Defendant for health care services, and accepted gifts and other financial benefits from that patient" (NYSCEF # 23 at 2). Defendant contends that plaintiff failed to meet her duties to defendant in the most material and substantial part of the employment relationship such that defendant is entitled to an offset against any amounts that may be owed to plaintiff and also that plaintiff has forfeited amounts already paid to her (*id.*). Disputing the notion that it insufficiently pled any defenses, defendant

contends that any purported defects in its pleadings can be cured by amending its answer given that plaintiff has suffered no prejudice (NYSCEF # 47 at 1).

## Discussion

### *Plaintiff's Motion to Dismiss Affirmative Defenses*

As the portion of plaintiff's motion to dismiss affirmative defenses affects defendant's motion to compel, it will be addressed first. CPLR 3211 [b] governs a motion to dismiss affirmative defenses. On such a motion, "plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law. The allegations set forth in the answer must be viewed in the light most favorable to the defendant, and 'the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed'. Further, the court should not dismiss a defense where there remain questions of fact requiring a trial" (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015] [citations omitted]).

Here, defendant's Fourth, Fifth, Eleventh, Twelfth, Sixteenth, Eighteenth, and Nineteenth affirmative defenses are dismissed as they contain bare legal conclusions with no factual specificity. Defendant provides no opposition to this portion of plaintiff's motion. This dismissal is without prejudice to defendant's right to timely move for leave to replead said defenses, should it choose to do so.

Defendant has also failed to adequately plead the faithless servant defense. Defendant's answer does not speak to a faithless servant defense or a breach of loyalty defense. Defendant's third affirmative defense merely states: "[t]he complaint is barred, in whole or in part, by virtue of plaintiff's conduct" (NYSCEF # 27, ¶ 3). This is insufficiently specific to state an affirmative defense of the faithless servant doctrine. As such, defendant's Third Affirmative Defense and its faithless servant affirmative defense are dismissed without prejudice to defendant's right to timely move for leave to replead said defenses, should it choose to do so.

### *Plaintiff's and Defendant's Motions to Compel*

There shall be "full disclosure of all evidence material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]). Nonetheless, CPLR 3103 provides: "The court may at any time on its own initiative, or on motion of any party..., make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

The branch of plaintiff's motion to compel is granted in its entirety. Defendant shall provide a full response to plaintiff's document demands and interrogatories. Plaintiff has shown its entitlement to all records and responses requested.

Turning to defendant's motion to compel and for a protective order, it is denied in part and granted in part. The portion of defendant's motion to compel plaintiff to respond to its second set of document requests and second interrogatories is denied as both are predicated on the dismissed faithless servant affirmative defense. Plaintiff has no obligation to respond to defendant's request for information related to the now dismissed affirmative defense.

Next, defendant seeks access to plaintiff's smart phones and tablets for forensic imaging. This portion of defendant's motion is denied as it has "failed to show that the request was reasonably calculated to yield information material and necessary to its defense" (*see e.g. Evans v Roman*, 172 AD3d 501, 502 [1st Dept 2019]; *Pecile v Titan Cap. Grp., LLC*, 113 AD3d 526, 526 [1st Dept 2014]; *see also AllianceBernstein L.P. v Atha*, 100 AD3d 499, 500 [1st Dept 2012] [noting that providing a smart phone "would disclose irrelevant information that might include privileged communications or confidential information"]).

Next, the portion of defendant's motion to compel production of plaintiff's social media activity during the period she claims she worked uncompensated hours is denied at this time with leave to renew after the completion of other discovery and depositions. To access plaintiff's social media accounts, defendant must lay the factual predicate to demonstrate that its requests are reasonably calculated to yield material and necessary information, which defendant has so far failed to do having only offered speculative and generalized assertions that the information might contradict plaintiff's claims (*Tapp v New York State Urb. Dev. Corp.*, 102 AD3d 620, 620 [1st Dept 2013]; *Pecile*, 113 AD3d at 527; *see also Fawcett v Altieri*, 38 Misc 3d 1022, 1025 [Sup Ct, NY County 2013] [denying discovery of social media information, at least prior to depositions, where it was likely that the information obtained would not be relevant to the case]). Nonetheless, the portion of defendant's motion to compel plaintiff to identify her social media accounts so that defendant may view the public portions thereof is granted.

In a similar vein, the portion of defendant's motion to compel production of plaintiff's diaries is denied (*Lopez v Bendell*, No. 156292/2017, 2021 WL 826394, at \*4 [Sup Ct, NY County 2021] [rejecting discovery of personal diary entries as "overbroad and burdensome"]), with leave to renew after the completion of other discovery and depositions.

The portion of defendant's motion that seeks access to plaintiff's calendar and appointment books used or maintained during the time she claims she worked

uncompensated hours is granted (*see e.g. Lazan v Bellin*, 95 AD2d 751, 464 [1st Dept 1983]). This demand is reasonably calculated to produce relevant evidence.

Defendant's argument that plaintiff has waived objection to its first set of discovery demands due to an untimely response is rejected. Under CPLR 3103 (a), courts have flexibility to excuse non-compliance with the time limits of CPLR 3122 (*see e.g. Williams v Lenox Hill Hosp.*, 2010 WL 2812210 [Sup Ct, NY County 2010]). The brief delay of three days resulted in no prejudice to defendant and plaintiff's objections are deemed timely.

### *Defendant's Motion for a Confidentiality Order*

The portion of defendant's motion for a protective order is granted. While it is indeed clear that defendant has, up to this time, refused to produce non-confidential information to plaintiff, defendant has demonstrated that certain items it has yet to produce may contain confidential information. In particular, defendant has competently demonstrated that, in addition to confidential health information, plaintiff has requested items that may touch upon "trade secrets, proprietary business information, competitively sensitive information, or other information the disclosure of which would, in the good faith judgment of the party designating the material as confidential, be detrimental to the conduct of that party's business or the business of any of that party's customers or clients" (NYSCEF # 32).

### **Conclusion**

In view of the above, it is

ORDERED that plaintiff's motion to compel and motion to dismiss are granted in their entirety, and defendant's faithless servant affirmative defense and Third, Fourth, Fifth, Eleventh, Twelfth, Sixteenth, Eighteenth, and Nineteenth affirmative defenses are dismissed; it is further

ORDERED that the branch of defendant's motion for a protective order is granted; it is further

ORDERED that the parties shall be governed by an order labeled "Annex A" and titled ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION" dated today, filed separately and in conjunction with the instant Decision and Order; it is further

ORDERED that defendant respond to plaintiff's outstanding discovery demands and interrogatories by February 4, 2022; it is further

ORDERED that defendant’s motion to compel is denied in part and granted in part as stated in this Decision and Order with disclosure of confidential information conditioned on the execution of defendant’s proposed confidentiality order; it is further

ORDERED, that to the extent defendant provides responses to plaintiff’s discovery demands containing confidential health information, it shall redact patient information; it is further

ORDERED, that a compliance conference by Microsoft Teams (invite to be provided by the court) will be held on March 22, 2022 at 2:15 p.m.; it is further

ORDERED, that at least seven days prior to the compliance conference, counsel for both parties shall jointly submit a statement setting forth the status of discovery, describing (i) any significant disputes to be addressed at the conference, (ii) any non-compliance with prior order(s), and (iii) whether the parties have attempted alternative dispute resolution or other efforts at settlement.

This constitutes the Decision and Order of the court.

1/11/2022  
DATE

  
MARGARET CHAN, J.S.C.  
MARGARET CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input checked="" type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> DENIED	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT