

D2D Holdings LLC v Bridgemarket Assoc., L.P.

2022 NY Slip Op 31492(U)

May 6, 2022

Supreme Court, New York County

Docket Number: Index No. 160344/2017

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 41

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D2D HOLDINGS LLC and D2D BRIDGEMARKET
LLC,

Index No. 160344/2017

Plaintiffs

- against -

DECISION AND ORDER

BRIDGEMARKET ASSOCIATES, L.P., and
BRIDGEMARKET ASSOCIATES MANAGEMENT
INC.,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

This action concerns valuable retail space known as Bridgemarket inside the base of the Queensboro Bridge in New York County, owned by defendants. Plaintiffs purchased the lease for Bridgemarket intending to manage and sublease it, but claim they could not procure a retail subtenant, and ceased paying rent to defendants. When defendants notified plaintiffs of defendants' intent to terminate the lease, plaintiffs commenced this action to enjoin the termination and to recover damages, claiming that defendants had prevented plaintiff from procuring a subtenant, in breach of the parties' Letter of Intent and Side Letter agreements. Defendants counterclaimed and obtained an order in June 2018 requiring plaintiffs to pay the rent arrears and ongoing rent, at which point, in July 2018, plaintiffs

surrendered possession of Bridgemarket, but still maintain their claim for damages and a claim for rent reduction.

II. DISCLOSURE PROCEEDINGS

During disclosure, defendants requested plaintiffs to produce all agreements concerning their lease and the leased premises. Plaintiffs withheld from their document production, however, a "Limited Restrictive Use Agreement" dated March 22, 2016, between plaintiffs and a nonparty retail grocery business, an affiliate of supermarkets operating under the brand name "Morton Williams," and documents concerning that contract. After two years seeking documents from plaintiffs, defendants obtained the contract in November 2019 from nonparty Morton Williams. Under that contract, Morton Williams paid plaintiffs \$2.2 million in exchange for plaintiffs' agreement not to sublease Bridgemarket to a competitor in the retail grocery business. Obviously that contract in which plaintiffs agreed to restrict the pool of potential subtenants bears directly on plaintiffs' claim that defendants prevented plaintiffs from procuring a subtenant. Defendants further claim that plaintiffs failed to produce requested documents showing communications among plaintiffs' principal members and their employees concerning their efforts to sublet the premises and their alleged scheme to pressure defendants to reduce plaintiffs' rent.

A stipulated order dated December 10, 2019 (Kalish, J.),

required plaintiffs, by January 31, 2020, to produce all non-privileged (1) documents concerning the Limited Restrictive Use Agreement, (2) documents concerning potential subtenants, and (3) written communications among any of plaintiffs' principal members and employees concerning the leased premises. This last category included communications concerning attempts to sublet, as well the Limited Restrictive Use Agreement.

A Status Conference Order dated October 23, 2020 (Kalish, J.), reflects that plaintiffs had not complied with the December 2019 order. The prior order required compliance before the onset of the coronavirus pandemic in March 2020. The October 2020 order accounted for the pandemic as follows: "The court is mindful of the current Pandemic and the difficulties it has presented in complying with Court ordered discovery[;] however[,] the discovery must be done within the dates that [the] Court orders." Aff. of Joshua A. Siegel Ex. 20 ¶ 5. The court gave plaintiffs another chance to comply with the December 2019 order "by serving all the requested and ordered documents by Nov 27, 2020 along with a privilege log if the Plaintiff is claiming a Privilege." Id. ¶ 4. To facilitate compliance the court ordered (1) plaintiffs immediately to transmit to defendants the search terms being used to search for the documents that the December 2019 order required to be produced and (2) defendants immediately to respond with any modifications of additions to the search

terms. Id. ¶¶ 1-2.

Another Status Conference Order dated November 30, 2020 (Kalish, J.), reflects that plaintiffs did not comply with the October 2020 order either, having failed to serve all the required documents by November 27, 2020. Siegel Aff. Ex. 22 ¶ 2. The November 2020 order also accounted for the pandemic, emphasizing that, despite the difficulties it presented, "discovery must be done in accordance with the directives of the Court in this order." Id. ¶ 6. The court gave plaintiffs a final chance to comply with the December 2019 and October 2020 orders by December 18, 2020. Id. ¶ 3.

III. DEFENDANTS' CURRENT MOTION

Defendants now move for penalties for plaintiffs' failure to produce the Limited Restrictive Use Agreement that defendants did not obtain until November 2019 and plaintiffs' continuing failure to produce all the documents recited in the December 2019 order and reiterated in the October 2020 and November 2020 orders. Defendants point in particular to three obvious gaps in plaintiffs' production.

First, defendants claim plaintiffs' principal member Joseph Dushey and his partner worked together negotiating plaintiffs' purchase of the lease for Bridgemarket December 4, 2015. Therefore they must possess or control their internal communications surrounding the parties' Letter of Intent dated

December 3, 2015, concerning plaintiffs' purchase of the lease for \$4 million, which plaintiffs claim defendants breached. If the Letter of Intent provides that it supersedes all prior negotiations, representations, understandings, or plaintiffs stipulate that only the Letter of Intent's express terms bind the parties, however, this category of documents may be immaterial.

Second, plaintiffs point to the lack of internal communications among plaintiffs' principal members and employees beginning in June 2017, when plaintiffs initiated their alleged campaign to reduce their rent by threatening to withhold rent. These documents are material to defendants' defense of plaintiffs' claim that defendants also breached a promise to reduce the rent. Third, plaintiffs point to the lack of documents, including communications among plaintiff's principal members and employees, concerning plaintiff's attempts to sublet the premises, which obviously are material to defendants' defense of plaintiffs' claim that defendants prevented plaintiffs from procuring a subtenant.

Dushey attests that, in compiling documents in response to defendants' requests, he did not view the Limited Restrictive Use Agreement as responsive and did not intentionally withhold it. Plaintiffs admit, however, that it was responsive and, had plaintiffs' attorney supervised the search for responsive documents, it would have been produced. Therefore the failure to

produce this obviously material requested document was at least reckless.

Plaintiffs further insist that defendants' dissatisfaction with the other documents produced stems from plaintiffs' application of the search terms proposed by defendants on the electronically stored information of custodians proposed by defendants during the range of dates proposed by defendants. Plaintiffs admit, however, that they did not complete their production of the documents that the December 2019 order required using defendants' original search terms until November 25, 2020. Only then did plaintiffs employ the additional search terms defendant proposed October 27, 2020. Nevertheless, plaintiffs maintain that they complied with the October 2020 and November 2020 orders by the latter order's deadline December 18, 2020. Yet plaintiffs fail to explain the gaps in production that plaintiffs delineate, other than to blame any gaps on defendants' search terms.

IV. THE PENALTY

The key factors in determining penalties for nondisclosure, however, are not the delay in compliance per se, but whether noncompliance has prejudiced defendants' defense or counterclaims, and whether defendants have incurred costs to compel plaintiffs' compliance that defendants would not have incurred had plaintiffs complied without undue delay. Regarding

prejudice, defendants now have possessed the Limited Restrictive Use Agreement for over two years and have entered a stipulation that, assuming plaintiffs' compliance, will produce the further documents defendants claim are outstanding. Plaintiffs remain willing to produce for further depositions the two witnesses defendants claim they need to depose or redepose now that they possess the Limited Restrictive Use Agreement and once they have received all the other requested documents.

Consequently, defendants present no persuasive reason for the court to impose the ultimate penalty dismissing the complaint. C.P.L.R. § 3126(3); CDR Creances S.A.S. v. Cohen, 23 N.Y.3d 307, 321-22 (2014); Casanas v. Carlei Group, LLC, 149 A.D.3d 515, 515 (1st Dep't 2017); Peters v. Peters, 146 A.D.3d 503, 503 (1st Dep't 2017); Melcher v. Apollo Med. Fund Mgt. L.L.C., 105 A.D.3d 15, 24-25 (1st Dep't 2013). See Siegel Aff. Ex. 21, at 3-4. They are, however, entitled to any additional costs, including attorneys' fees, incurred due to plaintiffs' failure to produce the Limited Restrictive Use Agreement and defendants' belated receipt of that contract. Defendants are entitled to attorneys' fees to the extent that plaintiffs' failure to produce documents in response to defendants' requests required defendants to seek disclosure from nonparties, such as Morton Williams, to obtain the disclosure that plaintiffs failed to produce. Defendants are entitled to fees to the extent that

belated receipt of the contract necessitated re-review of documents already produced, in light of the contract; further requests for documents concerning the contract, documents plaintiffs were to have produced in response to prior requests; and the further deposition of any witness already deposed, to inquire about the contract.

Defendants also are entitled to any additional costs, including attorneys' fees, incurred in obtaining other withheld documents, efforts that would have been unnecessary had plaintiffs complied with defendants' requests and the court's December 2019 and subsequent orders without undue delay. C.P.L.R. § 3126; Maxim Inc. v. Gross, 179 A.D.3d 536, 537 (1st Dep't 2020); Maxim Inc. v. Feifer, 161 A.D.3d 551, 554 (1st Dep't 2018); Jackson v. OpenCommunications Omnimedia, LLC, 147 A.D.3d 709, 709 (1st Dep't 2017); Young v. City of New York, 104 A.D.3d 452, 454 (1st Dep't 2013). Defendants do not show that they made any motions to compel disclosure, but show instead that the orders for disclosure emanated from stipulations and Status Conferences. Therefore these additional costs would be limited to the additional communications, requests to nonparties for disclosure, and court appearances that plaintiff's delayed compliance has necessitated.

V. CONCLUSION

The parties consent that a referee may hear and determine the amount of attorneys' fees to which defendants are entitled. C.P.L.R. § 4317(a). Consequently, for all the reasons explained above, the court grants defendants' motion for penalties to the extent of awarding defendants attorneys' fees and expenses incurred due to plaintiffs' noncompliance with disclosure requirements as set forth above. C.P.L.R. § 3126. The court denies defendants' motion to the extent that it seeks a further penalty. C.P.L.R. § 3126(3). Upon the parties' consent, the court refers the issue of the amount of attorneys' fees and expenses to which defendants are entitled to the Special Referee Clerk for placement on the calendar of the Special Referees' Part (SRP) on the earliest possible date. C.P.L.R. § 4317(a). At the initial appearance the SRP shall assign this issue to an available Judicial Hearing Officer or Special Referee to hear and determine.

Within 15 days after entry of this order, defendants shall serve it on the Special Referee Clerk in Room 119, 60 Centre Street, along with the Information Sheet accessible at the "References" link on the court's website. The Special Referee Clerk then shall advise the parties of the date to appear on the SRP calendar.

DATED: May 6, 2022



LUCY BILLINGS, J.S.C.

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