

Designs by F.M.C., Inc. v Unique First Ltd.

2022 NY Slip Op 31578(U)

May 11, 2022

Supreme Court, New York County

Docket Number: Index No. 652129/2019

Judge: Robert R. Reed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 43

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DESIGNS BY F.M.C., INC.,

Plaintiff,

- v -

UNIQUE FIRST LTD., ABC COMPANIES, JOHN DOES,

Defendant.

INDEX NO. 652129/2019

MOTION DATE 12/08/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

-----X
UNIQUE FIRST LTD.

Plaintiff,

-against-

DESIGNS BY FMC, INC. D/B/A FASHION MARKETING CO.
A/D/B/A SILVERSPECK.COM, WILLIAM NUSSEN, 1529-33
60TH STREET LLC, BEYOND WORDS COLLECTION, LLC

Defendant.

Third-Party
Index No. 595361/2019

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51
were read on this motion to/for DISCOVERY

HON. ROBERT R. REED:

Defendants move, pursuant to CPLR §3124, to compel plaintiff/counterclaim defendant Designs by F.M.C., Inc. (“FMC”) and third-party defendants Fashion Marketing Co., Silverspeck.com, William Nussen, 1529-33 60th Street LLC, and Beyond Words Collection, LLC (collectively, the “third-party defendants”) to respond and produce documents. In the alternative, defendants seek an order, pursuant to CPLR §3126, striking FMC’s complaint.

On December 10, 2019, the court entered a preliminary conference order directing the parties to produce documents by March 6, 2020. On March 6, 2020, the parties mutually agreed

to produce documents and serve responses by April 10, 2020. Because of the COVID-19 pandemic, case activities did not resume until this court scheduled a status conference for November 19, 2020, which the parties jointly requested to adjourn to December 23, 2020. A new status conference was not scheduled, so the parties agreed to complete outstanding discovery among themselves.

On February 11, 2021, FMC agreed to produce documents by March 5, 2021, but they did not do so. On September 3, 2021, defendants sent a letter to this court outlining the discovery dispute. The court directed defendants to file a motion to compel.

Since then, FMC has changed counsel, and on November 21, 2021, FMC served responses to defendants' demands. Defendants maintain that FMC's responses are insufficient. Defendants argue that the responses fail to meet the requirements of Commercial Division Rule 11-e, because they offer neither specific objections nor direct responses to the individual demands. Defendants also take issue with FMC's failure to produce internal communications (including emails), communications between the FMC entities, and communications with third parties that are purportedly relevant to this case.

DISCUSSION

CPLR §3124 states, “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.” In order to strike a pleading for failure to respond to discovery pursuant to CPLR §3126, there must be a showing that the nonresponding party's failure to comply was willful, contumacious or in bad faith (*Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]; *see also Maiorino v City of New*

York, 834 NYS2d 272, 273 [2nd Dept 2007] [inferring willful and contumacious conduct from repeated failures to comply with court orders directing disclosure]).

Since the initial delay in production of documents was caused by the COVID-19 pandemic, and considering FMC's recent change of counsel, defendant's motion to strike the complaint fails to show that FMC acted in bad faith or willfully disregarded its discovery obligations. Defendants' motion to strike the complaint is denied.

Defendants' motion to compel document production, however, is granted in part. Rule 11-e of the Commercial Division states that when responding to document requests, parties must state either that the production will be made as requested, or must identify the grounds for objection to the production with reasonable particularity.

FMC's written responses consist of five paragraphs and three general pro forma objections. FMC offers no specific objections and fails to provide direct responses to defendants' individual demands. FMC's responses are not compliant with Commercial Division Rule 11-e.

Accordingly, it is

ORDERED that defendants' motion to strike FMC's complaint is denied; and it is further ORDERED that defendants' motion pursuant to CPLR 3124 to compel discovery responses is granted to the extent that FMC must provide supplemental discovery responses that comply with Rule 11-e of the Commercial Division and provide a response regarding relevant emails and communications by May 26, 2022; and it is further

ORDERED that counsel shall appear for a virtual status conference on June 2, 2022, at 11:00 AM.

5/11/2022

DATE



ROBERT R. REED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE