

Sorensen v Manhattan Regional Ctr. LLC
2022 NY Slip Op 31730(U)
May 25, 2022
Supreme Court, New York County
Docket Number: Index No. 656912/2019
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART **38M**

Justice

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STEVEN SORENSEN,
 Plaintiff,

INDEX NO. 656912/2019

MOTION DATE 09/10/2021

MOTION SEQ. NO. 001

- v -

MANHATTAN REGIONAL CENTER LLC and DAVID MARX,
 Defendants.

**DECISION + ORDER ON
 MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36 were read on this motion for DISCOVERY.

Upon the foregoing documents, plaintiff’s motion to compel disclosure is granted in part and to the extent set forth herein based on the following memorandum decision.

In this action for breach of contract and violations of Labor Law § 190, plaintiff Steven Sorenson (“plaintiff”) asserts that defendants Manhattan Regional Center LLC and David Marx (“defendants”) have been deficient in their responses to plaintiff’s discovery demands. Specifically, plaintiff asserts that defendants failed to produce any documents dated between November 9, 2012 and March 30, 2014, which time period is relevant to plaintiff’s claims arising in 2013 (NYSCEF Doc. No. 13, ¶ 10). In response, defendants state that after diligent searches of their records using search terms provided by plaintiff, including a supplemental production following defendants’ first response to plaintiff’s discovery demands, no further responsive records exist (NYSCEF Doc. No. 35, ¶¶ 2-6; NYSCEF Doc. No. 33).

CPLR 3124 provides that “[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.”

Where a party “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just” (CPLR 3126). “A complete failure to disclose is not a prerequisite to the imposition of sanctions pursuant to CPLR 3126, the relevant factor being whether the failure to disclose relevant documents at issue was willful and contumacious” (*Waltzer v Tradescape & Co., L.L.C.*, 31 AD3d 302, 303 [1st Dept 2006]). Willful and contumacious behavior may be inferred from repeated disregard of the Court’s discovery orders without reasonable excuse (*Rosengarten v Born*, 161 AD3d 515, 515 [1st Dept 2018]).

Here, plaintiffs have not demonstrated that defendants have willfully failed to comply with discovery orders. While the time it has taken to reach this point in the discovery process is less than ideal, the record reflects that defendants have produced responses to plaintiff’s demands, substantial numbers of responsive documents, as well as a supplemental production following plaintiff’s allegations of deficiency (NYSCEF Doc. No. 32; NYSCEF Doc. No. 35, ¶¶ 2-6). Such conduct is simply not sufficient to warrant sanctions (*Glaser v City of New York*, 79 AD3d 600 [1st Dept 2010] [“The record reflects that the City adequately responded to discovery demands, albeit in response to several orders calling for production, as well as motions to strike”]). Plaintiff’s allegation that he is in possession of responsive documents from the relevant time period that have not been produced is not evidence that defendants must be withholding similar documents.

Defendants’ counsel represents, both to the Court and previously to plaintiff’s counsel (NYSCEF Doc. No. 33), that diligent searches of defendants’ records have disclosed no further responsive documents. Based on the record, it will be sufficient for the Court for defendants to

memorialize such representation by filing a *Jackson* affidavit documenting the searches undertaken by defendants, including “where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search [was] conducted in every location where the records were likely to be found” (*Henderson-Jones v City of New York*, 87 AD3d 498, 505 [1st Dept 2011], citing *Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 1992]). Further, the Court will preclude introduction of any documents revealed following submission of such an affidavit for use on summary judgment or at trial if such documents could have been produced beforehand but were not, absent good cause shown for the failure to timely produce the documents in question.

Accordingly, it is hereby

ORDERED that plaintiff’s motion to compel is granted in part; and it is further

ORDERED that defendants shall submit to plaintiff and the Court, on or before June 10, 2022, a *Jackson* affidavit regarding the searches undertaken by plaintiff and certifying that all responsive documents in defendants’ possession have been produced to plaintiff; and it is further

ORDERED that any documents used on a motion for summary judgment or at trial that could have been produced prior to the date of filing of the *Jackson* affidavit but were not, are precluded, absent the party relying on the documents showing good cause why they were not timely produced; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 1166, 111 Centre Street, on June 29, 2022, at 10:00 AM.

This constitutes the Decision and Order of the Court.

Louis L. Nock

5/25/2022

DATE

LOUIS L. NOCK, 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