

Chickpea at Penn Inc. v LJKT Enter., LTD.

2022 NY Slip Op 34121(U)

December 5, 2022

Supreme Court, New York County

Docket Number: Index No. 655546/2020

Judge: Arlene P. Bluth

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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: PART 14

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CHICKPEA AT PENN INC.

Plaintiff,

- v -

LJKT ENTERPRISE, LTD. and JOHN KRYDA.

Defendants.

INDEX NO. 65546/2020

MOTION DATE 11/29/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for DISCOVERY.

Defendants’ motion to compel discovery is denied as described below

Background

This action arises out of the eviction of plaintiff by defendant from its kiosk at Penn Station. Defendant LJKT Enterprise, LTD (“LJKT”) is a tenant at Penn Station and sublets kiosks at the Amtrak level. Plaintiff entered a sublease in December 2019 to operate a kiosk at the Amtrak level of Penn Station. Shortly thereafter, the COVID-19 pandemic plummeted plaintiff’s sales; however, plaintiff obtained a rent concession from Amtrak to halt the rental payments for the time being. By July 2020, Amtrak required that all rental payments resume. Defendants allege plaintiff did not pay rent from April 2020 through September 3, 2020, at which time defendants evicted plaintiff from its kiosk.

With the note of issue deadline looming, defendants bring this motion to compel discovery, claiming that plaintiff’s responses to defendants’ Bill of Particulars are vague and

warrant a preclusion order. Defendants seek more specificity regarding the duration of plaintiff's loss of earnings claim, details of how the loss of business opportunity could result in a \$5 million claim, and what the willful and contumacious behavior is that could warrant punitive damages as requested by plaintiff. Additionally, defendants seek specificity as to what property forms the basis for the conversion of property claim. Defendants contend they received supplemental responses from plaintiff as recently as September 16, 2022, but maintain that plaintiff is unresponsive to document demands and failed to provide a privilege log. Defendants request sanctions relating to plaintiff's alleged failures to provide relevant material.

In response, plaintiff claims it has answered defendants' interrogatories and document requests at least 3 different times. Plaintiff contends that it does not have additional information to provide because many of the documents were taken when the defendants seized plaintiff's kiosk. Furthermore, contrary to defendants' claims, plaintiff alleges it learned of the discovery deficiency for the first time on September 1, 2022. Additionally, plaintiff asserts that because none of plaintiff's objections are rooted in privilege, a privilege log is not necessary. Plaintiff contends its behavior does not warrant preclusion as it has addressed defendants' concerns, but requests in the alternative that the parties receive an extension to file the note of issue so depositions may be conducted. To date, the parties have not conducted any depositions.

Defendants' reply argues that plaintiff's excuse for not producing documents, that they were lost when defendant wrongfully seized the kiosk, is irrelevant to this discovery dispute.

Discussion

“Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof. We have emphasized that the words, ‘material and

necessary’, are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is “material and necessary”—i.e., relevant—regardless of whether discovery is sought from another party or a non party” (*Forman v Henkin*, 30 NY3d 656, 661, 70 NYS3d 157 [2018] [internal quotations and citations omitted]).

As an initial matter, the Court denies the branch of the motion that seeks sanctions arising out of the alleged non-responses submitted by plaintiff. Plaintiff asserts it is not in possession of any documents more requested by the defendants, and that plaintiff responded to defendants’ demands on three separate occasions (NYSCEF Doc. No. 62 at 6). Moreover, defendants moved to compel discovery and plaintiff contends the motion is moot because it sufficiently responded in opposition.

At this stage of litigation, the parties should have completed depositions. If defendants wanted specific answers as to damages and conversion of property, then defendants should have done something over the last two years instead of waiting to seek discovery right before the note of issue deadline approached. Although the Court recognizes that defendant Kryda’s health may complicate the scheduling of depositions, it does not explain why no one has been deposed at all.

On January 5, 2022, the Court so-ordered a discovery stipulation in which the parties agreed to complete all depositions by February 25, 2022 (NYSCEF Doc. No. 30).¹ The Court set a deadline of April 13, 2022 for the parties to update the Court about the status of discovery. For some reason, the parties ignored this deadline and failed to upload anything, so the Court

¹ The Court had previously ordered depositions to be completed by November 12, 2021 (NYSCEF Doc. No. 27).
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adjourned the April 2022 conference (NYSCEF Doc. No. 31). The parties then uploaded a proposed discovery stipulation in September 2022 that was nearly identical to the *January 2022* stipulation (NYSCEF Doc. No. 32). Despite the fact that nearly eight months had passed, the parties had not yet completed paper discovery as directed by the Court. The Court then issued a note of issue deadline of October 21, 2022 (NYSCEF Doc. No. 33). After a subsequent motion was filed (and later withdrawn), the Court extended the note of issue deadline to November 30, 2022 as indicated in a decision dated October 4, 2022 (NYSCEF Doc. No. 48).

Plaintiff has represented that it has produced all documents it has in its possession. Plaintiff is directed to make one last search and produce any document that could possibly be responsive to the defendants' demands by January 11, 2023. Any document that has not been produced by that date may not be used at trial or on any motion.

It appears the deposition of defendant Kryda is still outstanding, although he is currently ill; everyone hopes he beats this illness quickly. Plaintiff will serve whatever paper discovery it desires and defendants will respond as soon thereafter as possible. When this illness is in the rear view mirror, Mr. Kryda will be deposed.


The Court rescinds the note of issue date and will schedule another conference for March 16, 2023. Hopefully, the discovery will be completed by then and a new note of issue date can be issued.

Accordingly, it is hereby

ORDERED that defendants' motion to compel discovery responses is denied in its entirety, and any documents not produced by plaintiff by January 11, 2023 cannot be used at trial or on any motion; and it is further

ORDERED that plaintiff shall serve document demands on defendants and defendants shall respond as soon as possible (if no progress is made by the next conference, short deadlines will be ordered at that time)

ORDERED that the note of issue date is rescinded, and a further conference will be held on March 16, 2023 at 10 a.m. By March 9, 2023, the parties are directed to update the Court about the status of discovery or the conference will be adjourned.



12/5/2022
DATE

ARLENE P. BLUTH, 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