

FX Funding LLC v Fox RX Inc.
2022 NY Slip Op 34138(U)
December 1, 2022
Supreme Court, New York County
Docket Number: Index No. 656779/2016
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

FX FUNDING LLC,

Plaintiff,

- v -

FOX RX INC., AMERICAN TELEHEALTH NETWORK, INC.,
DR. REENA NANDI, and DR. DIPAK NANDI,

Defendants.

-----X

INDEX NO. 656779/2016

MOTION DATE 08/08/2022

MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230

were read on this motion to/for DISCOVERY.

The plaintiff in this breach of contract action, FX Funding, LLC, moves pursuant to CPLR 3126 to strike the answers of the individual defendants, Dr. Reena Nandi and Dr. Dipak Nandi, unless they respond fully to the plaintiff's Notices to Admit and Second Demand for Production within ten days of the determination of the motion, and to extend the Note of Issue deadline. The defendants oppose the motion. The motion is granted to the extent provided herein.

This is an action to recover upon three promissory notes issued by the plaintiff, a litigation funding company, to the corporate defendant Fox Rx, Inc. (Fox), for the funding of certain qui tam / whistleblower actions on behalf of Fox. The court (Crane, J.), by order dated December 4, 2020, granted a motion by the plaintiff for partial summary judgment against Fox and defendant American Telehealth Network, Inc. (ATN), the guarantor under the notes, as to two of the notes (MOT SEQ 001). On February 1, 2021, judgment was entered against those two defendants in the sum of \$3,936,002.06.

By order dated June 28, 2021, this court denied as an improper successive summary judgment motion the plaintiff's motion for partial summary judgment as against the same defendants on the third note (MOT SEQ 004). That order was reversed, and the motion for summary judgment granted as against the corporate defendants, by an order of the Appellate Division, First Department, dated April 28, 2022.

By order dated July 2, 2021, the court denied the defendants' motion to dismiss the complaint as against the individual defendants, whom the plaintiff seeks to recover from on a

veil piercing theory. On January 18, 2022, the Appellate Division, First Department, affirmed the court's July 2, 2021, order. Thus, the only issue remaining for discovery and disposition in this matter is the individual defendants' liability for the corporate defendants' breach of all three notes.

A preliminary conference was held on January 6, 2021, requiring the completion of discovery, and the filing of the Note of Issue, by April 30, 2021. A second conference order was issued on May 13, 2021, extending the deadlines for discovery and setting a new Note of Issue deadline for October 1, 2021. In its order dated July 2, 2021, however, this court noted that "the defendants are still resisting disclosure," and found that their April 9, 2021, response to the plaintiff's discovery demands provided "mostly objections, even though the discovery sought is relevant to the issues presented in this litigation." The court cautioned the defendants that failure to disclose relevant information, particularly after a court order has been issued, may constitute conduct warranting striking of the answer pursuant to CPLR 3126. Nonetheless, at a third discovery conference on September 23, 2021, discovery remained incomplete, and the Note of Issue was extended until December 31, 2021.

By letter dated December 28, 2021, the plaintiff sought leave of the court to further extend the Note of Issue deadline to permit additional fact discovery due to (1) newly acquired information regarding transfers of the plaintiff's loan proceeds into accounts in the name of Princetec, Inc. (Princetec), a company 100% owned by Dr. Reena Nandi but, according to the plaintiff, managed by Dr. Dipak Nandi, and (2) the "evasive and incomplete responses offered by the defendants" to the plaintiff's interrogatories. The plaintiff represented in a further letter dated January 25, 2022, that it also learned days before that the law firm Fox purported to pay for representation in the *qui tam* litigation advised that it never represented Fox in any such litigation. By order dated January 24, 2022, the court granted the plaintiff's letter request to the extent that it directed the parties to confer and complete outstanding discovery by March 25, 2022, cautioned the defendants that failure to comply with all discovery directives may result in sanctions pursuant to CPLR 3126, and extended the Note of Issue deadline until March 25, 2022, noting that "no further extensions shall be granted."

On or about February 18, 2022, the plaintiff served two Notices to Admit (the notices to admit) upon Dr. Dipak Nandi and Dr. Reena Nandi, respectively, and a Second Demand for Production (the second demand) on all defendants. The defendants responded to the notices to admit and the second demand but did not agree to produce all information sought. First, the defendants objected to all items in the notices to admit referencing 30 CPS, LLC (CPS), another entity owned and controlled by the individual defendants, on the ground that CPS "has no involvement in this matter." However, the plaintiff alleges it has discovered that loan proceeds were transferred from Fox to Princetec and ultimately into an account in the name of CPS, which was used primarily for the personal expenses of the individual defendants. Second, the defendants refused to produce or stated that they were not in possession of documents responsive to a majority of the items in the second demand. The defendants objected to producing, *inter alia*, documents concerning the formation, governance, and actual operation of Fox, ATN, Princetec, CPS, and four other corporate entities with which the individual defendants

are associated and to which the plaintiff learned Princetec transferred loan proceeds; invoices issued by Princetec to Fox or ATN; invoices issued by CPS to Princetec; and decisions, orders, and judgments related to the qui tam lawsuits.

Because the defendants did not produce documents responsive to the plaintiff's demands, discovery was not completed and the Note of Issue could not be filed by the final deadline of March 25, 2022. The instant motion ensued.

CPLR 3101 provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." "The words 'material and necessary' as used in CPLR 3101(a) are 'to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy' (Allen v Crowell-Collier Pub. Co., 21 NY2d 403, 406 [1968])." Matter of Steam Pipe Explosion at 41st Street and Lexington Avenue, 127 AD3d 554, 555 (1st Dept. 2015). CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" and that "a failure to comply with discovery, particularly after a court order has been issued, may constitute the "dilatatory and obstructive, and thus contumacious, conduct warranting the striking of the [a pleading]." Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1st Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1st Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1st Dept. 2004). The court can infer willfulness from repeated failures to comply with court orders or discovery demands without a reasonable excuse. See LaSalle Talman Bank, F.S.B. v Weisblum & Felice, 99 AD3d 543 (1st Dept. 2012); Perez v City of New York, 95 AD3d 675 (1st Dept. 2012); Figiel v Met Food, 48 AD3d 330 (1st Dept. 2008); Ciao Europa, Inc. v Silver Autumn Hotel Corp., Ltd., 270 AD2d 2 (1st Dept. 2000).

As the Appellate Division, First Department, described in its January 18, 2022, order affirming the denial of the defendants' motion to dismiss, the plaintiff's claims against the individual defendants arise from its allegations that, with respect to Fox, "the individual defendants disregarded corporate formalities, intermingled corporate and personal funds, used loan proceeds for personal matters rather than corporate uses, and undercapitalized the corporation." The First Department also noted the plaintiff's allegation that Dr. Dipak Nandi "had used loan proceeds to service his personal mortgages on two Long Island homes and to pay personal tax bills." The plaintiff now claims more specifically that the individual defendants' chosen means of abusing the corporate form was to funnel loan proceeds from Fox through various other entities under their control, ultimately using the proceeds for their personal benefit rather than to fund the qui tam lawsuits.

While it is far from apparent that the plaintiff will be able to prove the foregoing claims, the plaintiff is entitled to pursue discovery upon them. The plaintiff's submissions establish that the requested discovery is material and necessary to the prosecution of this action and that its demands are tailored and are not overly broad or burdensome. Thus, the defendants are directed to respond in full to the notices to admit and the second demand within 20 days of the date of this order or they shall be subject to sanctions pursuant to CPLR 3126, including, but not

limited to, striking of their answers. To the extent the defendants cannot locate documents demanded, the defendants are to produce a Jackson affidavit detailing where and how documents of the type sought are maintained, who maintains them, what good faith, diligent search efforts were made to locate them, and the results of the search. Any inadequacy in the Jackson affidavit will subject the defendants to sanctions pursuant to CPLR 3126.

Further, the Note of Issue deadline is extended by 30 days from the date of this order, to January 1, 2022, and shall not be further extended. While the most recent Note of Issue deadline was marked final, the failure to complete discovery prior to the deadline was the fault of the defendants. To be sure, the record in this matter reflects the defendants' long history of reticence and delay in the production of discovery. In this regard, extension of the Note of Issue deadline is warranted to prevent undue prejudice to the plaintiff, who has complied with court orders regarding discovery.

The defendants' objection to discovery on the basis that some of the entities that are the subject of the plaintiff's demands were only discovered upon the plaintiff's issuance of a post-judgment subpoena on Chase Bank is without merit. The subpoena in question was properly tailored to obtaining financial records related to the assets of Fox and ATN, the judgment debtors. Moreover, while a post-judgment subpoena cannot be used to obtain pretrial discovery, (see Law Firm of Ravi Batra, P.C. v Rabinowich, 77 AD3d 532 [1st Dept. 2010]), the subpoena was never quashed and it is not the vehicle by which the plaintiff now seeks further discovery. The defendants cite to no authority for the proposition that information gleaned from an appropriately issued post-judgment subpoena cannot inform the scope of a pretrial disclosure demand in an action to pierce the corporate veil.

The court has considered the defendants' remaining objections and finds them equally meritless. While the court declines to issue sanctions and attorney's fees against the defendants at this juncture, to the extent not granted, the plaintiff's motion is denied without prejudice. The defendants are referred to CPLR 3126 and 22 NYCRR 130-1.1(a) for guidance.

Accordingly, upon the foregoing papers and the court's prior orders, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3126 for sanctions and for other relief is granted to the extent that (1) the defendants are directed to respond in full to the plaintiff's demand dated February 18, 2022, and the notices to admit to defendants Dr. Reena Nandi and Dr. Dipak Nandi, each dated February 18, 2022, within 20 days of the date of this order or they shall be subject to sanctions pursuant to CPLR 3126 including, but not limited to, striking of their answers, (2) to the extent the defendants cannot locate documents demanded, the defendants shall produce a Jackson affidavit detailing where and how documents of the type sought are maintained, who maintains them, what good faith, diligent search efforts were made to locate them, and the results of the search, within 20 days of the date of this order, and (3) the Note of Issue filing deadline is extended to January 1, 2022, and shall not be further extended; and the motion is otherwise denied without prejudice.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

12/1/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER