

Lis v Lancaster

2023 NY Slip Op 30117(U)

January 12, 2023

Supreme Court, New York County

Docket Number: Index No. 650855/2019

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

-----X

ANDREW J. LIS,

Plaintiff,

- v -

JASON M LANCASTER, DEBBIE LANCASTER, CECIL
SIMMONS, DEE CHASE-UNNO, GULF PREMIER
LOGISTICS LLC, OVERLAND DISTRIBUTION CO.,
INC., OVERLAND EXPRESS CO., INC., JAL
ENVIRONMENTAL SERVICES PROGRAMS, BANK OF
AMERICA NA, JP MORGAN CHASE BANK NA,

Defendant.

-----X

JASON LANCASTER, JAL ENVIRONMENTAL SERVICES
PROGRAMS

Plaintiff,

-against-

JAL ENVIRONMENTAL SERVICES PROGRAMS LLC

Defendant.

-----X

INDEX NO. 650855/2019

MOTION DATE 10/14/2022

MOTION SEQ. NO. 011

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595376/2019

The following e-filed documents, listed by NYSCEF document number (Motion 011) 501, 502, 503, 504, 505, 506, 507, 508, 523, 524, 525, 526, 527, 528

were read on this motion to/for STRIKE PLEADINGS

In Motion Seq. No. 11, plaintiff Andrew Lis and third-party defendant Environmental Supply Chain Alternative Planning Experts LLC (together, plaintiff) move for an order striking the answer of defendants Jason Lancaster, JAL Environmental Services Programs, Inc., and Gulf Premier Logistics LLC (together, defendants) pursuant to CPLR 3126.

This 2019 case has involved numerous delays and intractable discovery disputes to such a degree that there appears to be little interest in ever ending this litigation. In this motion,

plaintiff asks the court to strike defendants' answers for (a) past improper discovery practices and (b) more recent discovery failures. Preliminarily, the court declines to consider this motion to the extent that it seeks redress for any of defendants' past purported discovery failures. In resolving MS 08, the court affirmed the special referee's report and recommendations that denied plaintiff's request to sanction defendants (*see* NSYCEF Doc 444 [3/18/22 decision and order]). That decision and order was unanimously affirmed by the First Department (*see* NYSCEF Doc 532 [11/15/22 decision and order, AD1]) and will not be revisited.

The court will entertain the limited portion of this motion that pertains to the parties' discovery conduct after MS 08 was decided, specifically the conduct relating to defendants' L&L production and withheld documents. As relevant, L&L initially produced its files concerning the parties' business relationship to the defendants in Spring 2022, and defendants then made a limited production of those documents to plaintiff (the L&L production). In connection with defendants' L&L production to plaintiff, defendants served an updated privilege log and Commercial Division Rule 11-e (d) statement (*see* NYSCEF Docs 461-462). The defendants did not identify any documents that they were withholding on the basis of attorney work product privilege in that privilege log (NYSCEF No. 461 [def's 4/8/22 privilege log]). Defendants' counsel also purported to have produced all responsive documents in their possession as of April 8, 2022 in their updated Rule 11-e (d) statement (NYSCEF Doc 462 [def's 4/8/22 Rule 11-e statement]).

After defendants served their limited L&L production, they also informed the court on the record that they had produced all relevant documents in their possession (*see* NYSCEF Doc 486 at 4 [4/22/22 tr]; NYSCEF Doc 500 at 12, 21 [5/19/22 tr]).

Subsequently, in resolving MS 09, the court vacated the narrow part of its decision and order confirming the referee's report [MS 08] that precluded plaintiff from obtaining discovery from L&L directly (NYSCEF Doc 491 [5/19/22 decision and order]). Plaintiff was permitted to seek discovery from L&L "limited to the issue of whether the parties were partners or employer/employee" (*id.*). Plaintiff then obtained L&L's files directly from L&L. As it turns out, defendants' limited L&L production (*see* NYSCEF Doc 463 [def's 4/8/22 production]) failed to include a handful of relevant documents relating to the parties' business relationship, including: (a) an L&L internal email indicating that Lancaster was referred to L&L "for a corporate attorney to assist with a partnership agreement and other business matters" (NYSCEF Doc 504 at 4 [full L&L production made by L&L to plaintiff]); (b) L&L attorney Nina Skinner's handwritten notes possibly describing a joint venture or other business arrangement between Lis and Lancaster (*id.* at 48-53); and (c) emails between Lancaster and Skinner discussing, among other things, executing an NDA and a non-compete agreement with Lis and the formalization of the parties' business relationship as of Spring 2016 (*id.* at 18-31).

Plaintiff argues that defendants' "willful" and "contumacious" discovery conduct and lack of candor to the court warrant striking their pleadings pursuant to CPLR 3126. Defendants oppose the motion and cross-move for an order sanctioning plaintiff for making his own ["frivolous"] motion for sanctions.

Defendants' arguments in opposition to the motion are unavailing. They claim that several of the relevant documents are privileged as attorney work product, but never asserted that privilege until the eve of this motion when it sought to claw back certain L&L documents. The parties' confidentiality order in this case does not contain any claw-back provision governing the procedure to retract inadvertent disclosures (*see* Doc 512 [confidentiality order]). Further,

defendants do not now cross-move for a protective order to shield those documents (*see e.g. New York Times Newspaper Div. of New York Times Co. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 172 [1st Dept 2002]). Even assuming that the work product privilege applies to those documents, defendants were obligated to list them on an updated privilege log. They did not.

The other documents, including emails between Lancaster and L&L, are also not protected by privilege. While the attorney-client privilege could have applied to these emails, defendants waived that privilege (*see* NYSCEF Doc 410 [referee's report finding that defendants waived attorney-client privilege], confirmed by this court's decision and order resolving MS 08 and affirmed on appeal).

Accordingly, defendants should have produced at least some of the documents in the L&L production, and if they wanted to protect other L&L documents under the attorney work product doctrine, they should have identified them in an updated privilege log.

Nevertheless, the court declines to strike defendants' pleadings pursuant to CPLR 3126 for defendants' failures regarding their L&L production. Such a drastic remedy is not warranted here. However, the court finds that it is appropriate to impose sanctions, in the form of costs and fees, for defendants' frivolous L&L discovery conduct (*see* 22 NYCRR 130-1.1). Because plaintiff did not seek or support this alternative relief in this motion, there is no basis in this record to now award plaintiff attorneys' fees. Accordingly, plaintiff is permitted to make a new motion for sanctions, in the form of its reasonable attorneys' fees and costs for making Motion Seq. No. 09 and 10, in a new motion within 20 days of the date of this decision and order.

Defendants' cross motion is denied in its entirety. While plaintiff's motion is unnecessarily long, and plaintiff erroneously seeks to revisit this court's prior decision denying plaintiff's requests to sanction defendants for their earlier discovery conduct, plaintiff's motion is

not entirely frivolous. The court is again compelled to chastise both parties, however, that further delays and petty discovery disputes will not be tolerated in this 2019 action.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that plaintiff's motion is granted to the extent that plaintiff is permitted to make a new motion for sanctions, in the form of its reasonable attorneys' fees and costs for making Motion Seq. Nos. 09 and 10, within 20 days of the date of this decision and order, otherwise waived; and it is further

ORDERED that defendants' cross motion is denied; and it is further

ORDERED that the note of issue must be filed by 1/30/23, motions for summary judgment must be filed by 3/31/23, and the parties and their counsel must appear for a pretrial conference on 1/24/23 at 12:00 p.m. by Microsoft Teams.

1/12/2023

DATE



MELISSA A. CRANE, 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