

Marshalls of MA, Inc. v CAC Atl., LLC

2023 NY Slip Op 30646(U)

March 1, 2023

Supreme Court, Kings County

Docket Number: Index No. 500695/2022

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMM PART 8
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MARSHALLS OF MA, INC.,
Plaintiff, Decision and order
- against - Index No. 500695/2022

CAC ATLANTIC, LLC,
Defendant, March 1, 2023
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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #'s 2, 3 & 4

The defendant has moved seeking to conditionally preclude the plaintiff from introducing evidence at trial unless it fully complies with the discovery sought by defendant. The plaintiff has cross-moved seeking the production of documents requested during a deposition. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On January 31, 2015 the plaintiff lease space from the defendant at 66 Boerum Place in Kings County. A dispute arose concerning the plaintiff's share of taxes that were due and the defendant issued a notice of default on the grounds the plaintiff had failed to pay such taxes. A Yellowstone injunction was granted on April 11, 2022 and the parties proceeded with discovery.

On October 24, 2022 the defendant served the plaintiff with a deficiency letter and outlined five categories of deficiency. On December 13, 2022 the plaintiff produced more than five

hundred documents in response to those deficiencies. Further, the plaintiff informed the defendant that certain discovery they sought had not been produced. The parties engaged in discussions in attempts to resolve these discovery disputes but to no avail. These motions have now been filed.

Conclusions of Law

It is well settled that the trial court maintains broad discretion concerning the discovery process and any sanction for any violation (Bouri v. Jackson, 177 AD3d 947, 113 NYS3d 232 [2d Dept., 2019]). The severe sanction of striking a pleading is appropriate where it can be demonstrated that the failure to comply with discovery was the result of wilful and contumacious conduct (Rosenblatt v. Franklin Hospital Medical Center, 165 AD3d 862, 85 NYS3d 488 [2d Dept., 2018]). Such conduct may be inferred from a party's actions, specifically a long period of time passing without complying with the discovery coupled with the absence of any reasonable excuse to explain such failure to comply (Morson v. 5899 Realty LLC, 171 AD3d 916, 98 NYS3d 127 [2d Dept., 2019]). Generally, the failure of either party to provide sought after discovery and to follow the express order of the court demonstrates a pattern of wilful default and neglect concerning the outstanding discovery (Espinal v. New York City Health and Hospitals Corp., 115 AD3d 641, 981 NYS2d 569 [2d Dept., 2014]).

Concerning the first item of the deficiency letter, namely five emails, three of them have been produced and two of them have been deemed privileged by the plaintiff and will not be produced by them. The second item sought is "responsive email communications between CAC and Marshalls" (see, Deficiency Letter, dated October 24, 2022 [NYSCEF Doc. No. 77]). The plaintiff has asserted they have produced hundreds of emails satisfying this demand. The third item sought are draft leases. The plaintiff asserts any drafts they have discovered are privileged and will not be disclosed to the defendant. The fourth item of the deficiency letter is the failure to organize the documents already produced pursuant to CPLR 3122(c). The last item contained in the deficiency letter is the failure to produce a letter of intent from TJ Maxx. The plaintiff asserts that it does not have such letter in its possession.

Concerning the assertion of privilege, in the plaintiff's first response to defendant's discovery demand dated August 15, 2022 the plaintiff indicated that "Tenant objects to the Demands insofar as they seek, or can be construed to seek the disclosure of documents subject to the attorney-client privilege, work-product, or any other applicable privilege or information protected from discovery" (see, Plaintiff's Response to First Notice of Discovery and Inspection ¶ 1. [NYSCEF Doc. No. 57]). Further, paragraph 7 of the response states that "Tenant objects

to the Demands to the extent they seek proprietary or confidential documents subject to the attorney-client privilege" (id). Thus, defendant's argument that "at no point during the discovery conference held by the parties or during the subsequent conference held with the Court's law clerk did Marshalls disclose that it was withholding documents based on any alleged privilege" (see, Defendant's Reply Memorandum of Law, page 2 [NYSCEF Doc. No. 114]) is difficult to comprehend since they were aware of such reliance since August 22, 2022. In any event, surely no evidence of wilful or contumacious conduct has been presented. The plaintiff shall make its privilege log available to the defendant within twenty days of receipt of this order.

Concerning the fourth item of the deficiency letter, CPLR §3122(c) states that "whenever a person is required pursuant to such notice or order to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request" (id). Thus, producing numerous documents, in what is commonly referred to as a document dump, where the documents are not produced in the ordinary course of business or are not categorized as to which documents correspond to which demand is improper (H.P.S. Management Company Inc., v. St. Paul Surplus Lines Insurance Company, 127 AD3d 1018, 7 NYS3d 462 [2d Dept., 2015]).

In this case, the documents were produced in the ordinary course of business. Thus, it is difficult to discern why producing the documents in the ordinary course of business was somehow deficient. Further, NYCRR 202.20-c governs objections to discovery not compliance with discovery. Thus, when a party complies with discovery it may be done pursuant to either method outlined in CPLR §3122(c).

The plaintiff has adequately explained the efforts it has undertaken to search for the requested discovery and the explanations offered are reasonable. The plaintiff shall provide, to the extent not already provided, an affidavit delineating the search efforts conducted and the failure to discover any of the discovery, including the original letter of intent from TJ Maxx. Concerning the second item of the deficiency letter there is no way for the court to discern whether there has been compliance with the demand. The defendant's arguments in this regard are conclusory and vague. Consequently, the motion seeking any condition order of preclusion is denied.

Turning to the defendant's motion, the defendant seeks "(a) Documents and communications between CAC and its lender concerning the real estate taxes at issue in this litigation; and (b) All other commercial leases that CAC (and its affiliates) has entered into for the Building" (see, Memorandum of Law, page 9

[NYSCEF Doc. No. 110]). There really is no dispute these materials and necessary and will provide information regarding the central issue in this case, namely whether the plaintiff is correct that it should not be paying for 42.98% of the taxes on the property. The objections regarding the production of these documents deal almost exclusively with the timing of the request. Notwithstanding those procedural arguments they do not outweigh the necessity of the production. Therefore, the motion seeking to produce the documents requested is granted. Moreover, the defendant shall produce any internal communications regarding the issue of taxes. The defendant shall supply this information within thirty days of receipt of this order. The issue in this case is whether the plaintiff should be paying the taxes asserted are owed by the defendant. The parties should have the opportunity to examine all relevant information and permit the matter to be decided upon the evidence presented. It is improper to limit discovery and thereby prejudice a party's ability to pursue its claims or defenses.

Lastly, the defendant has moved seeking to compel the plaintiff to file a note of issue and also seeks recovery of \$162,060.64 that has been placed in escrow.

The motion seeking to compel the filing of the note of issue is granted. The plaintiff shall file the note of issue within thirty days of receipt of the discovery ordered in this decision.

No party's rights to file a substantive summary judgment motion will not be prejudiced by the filing of the note of issue. The motion seeking any funds from the plaintiff or from escrow is denied during the pendency of the litigation. Further, other than a motion seeking summary judgment no party may file any further motions in this case without prior court approval.

So ordered.

ENTER:

DATED: March 1, 2023
Brooklyn, N.Y.



Hon. Leon Ruchelsman
JSC.