SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

----------X

NEXUS CONNECTIVITY INC.

Plaintiff,

- v -

DENNIS THANKACHAN,

Defendant.

INDEX NO. 656417/2022

MOTION DATE 04/07/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36

were read on this motion to/for DISCOVERY.

Defendant's motion to compel discovery is denied.

Background

This action arises out of an alleged breach of a non-compete agreement. Defendant, a former shareholder, officer and co-founder of plaintiff, a telecommunications company, allegedly started a competing business shortly after leaving plaintiff. Plaintiff is a telecom company founded by defendant and non-party Alex Pugmire (who now goes by Alex Parker).

In 2018, Pugmire was sent to prison for crimes unrelated to the instant action, and transferred his shares to his shares in Nexus to his mother. When it became clear that the company could not operate with a co-founder in prison, or with his mother on the board, defendant resigned from the company and sold his shares to Pugmire's mother in 2019.

Shortly after leaving Nexus (that same year), defendant started another competing software company. Plaintiff filed a complaint alleging that defendant breached his fiduciary

duties to Nexus by creating a competing company after leaving Nexus and failing to wait at least one year before developing or working for a competing entity, per the shareholder agreement.

Defendant now moves to compel discovery, claiming that plaintiff failed to produce responses to requests for any emails between Pugmire, his mother, and his father and any emails that were produced do not include the necessary metadata for defendant to authenticate the documents. Instead, plaintiff produced PDF copies of the emails and not the original format of the emails with the metadata included. Furthermore, defendant requests documentation that explains why plaintiff is enforcing the shareholder agreement against defendant but not against Pugmire who, since his release from prison, has also started working for a competing software company.

In opposition, plaintiff argues that it has responded to defendant's requests. As to the request for communications between Pugmire and his parents concerning Nexus, defendant, or Lightyear, plaintiff contends these communications are not relevant to the ongoing litigation, but produced responsive documents, including documents between Pugmire's mother and her attorney. Plaintiff further asserts that requests for communications concerning the shareholder agreement are not specific enough for accurate responses and contend that the depositions of the parties are scheduled for the next several weeks, and defendant will be able to further specify or uncover any information at the depositions.

Additionally, plaintiff argues it has produced over 6,000 documents in response to defendant's demands. Such productions allegedly took over 20 hours and multiple staff members to review and organize. It is plaintiff's position that if defendant wants these documents produced again, he should pay for the cost of re-production or specify which particular documents should be re-produced. Plaintiff explains that it offered defendant the chance to

participate in the productions via offering search terms, but defendant did not do so in any "meaningful way." Moreover, plaintiff asserts the request for native format to maintain the metadata, as opposed to PDFs, does not easily lend itself to organizing and Bates stamping. Plaintiff maintains that the PDFs contain the same identifying information, such as the date and time, as the metadata and plaintiff did not alter the documents in any way.

In reply, defendant contends that plaintiff failed to explain why it did not produce all relevant communications between Pugmire and his parents, alleging that in its opposition, plaintiff asserted the communications were not relevant but then claimed it produced all responsive communications. Furthermore, defendant argues that plaintiff also failed to explain why it did not produce all relevant documents regarding its decision to not enforce the shareholder agreement against Pugmire. Defendant asserts it does not have to articulate what category of documents it seeks with its requests, but plaintiff must make a good-faith effort to collect and produce all responsive documents. Finally, defendant contends that the metadata on the files produced are material and necessary and producing the metadata in its original format is not something plaintiff claimed was impossible. Moreover, the time and costs of retrieving and producing the metadata should be immaterial to the decision to compel plaintiff's productions, as plaintiff chose to not fully comply with defendant's request in the first instance.

Discussion

First, as for defendant's questions about why plaintiff is not going after Alex Pugmire, that can be asked in the deposition and documents relating to that issue can be requested thereafter. It is unclear on these papers even if the year had passed between Mr. Pugmire selling his shares to his mother and leaving the company and the time he got out of prison and started his own company. And, of course, plaintiff can pick and choose its defendants.

Regarding the document production:

"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]).

The Court denies defendant's motion to compel. Defendant has not made clear to this Court what exactly is missing from plaintiff's responses—plaintiff claims it produced thousands of email communications, some of which were between a non-party and her attorney, and defendant claims these productions were not enough. Plaintiff utilized search terms to narrow down the relevant emails, and defendant does not dispute that, given the opportunity to offer search terms, defendant declined. Plaintiff produced all relevant emails between Pugmire and his parents and defendant claims plaintiff did not produce all emails.

Defendant does not dispute that he declined to participate by providing search terms; he cannot now conclusorily complain about the quality of the response. If defendant wanted such specific productions, defendant should have seized the opportunity to narrow the search for relevant information; it is in defendant's best interest to participate. It is unfair for defendant to

make such demands with little guidance and then seek an order compelling responses when plaintiff's productions are not to defendant's vague standards.

Defendant did not demonstrate that production of the metadata would yield different results than what has already been produced. Short of implying that plaintiff is dishonest, defendant asserts the metadata holds different information as to the authenticity of the documents produced. But this is misguided and does not compel this Court to require plaintiff to process and review thousands of documents again. Defendant does not specify how the material contained in metadata is a relevant issue to his defense. While Courts have allowed production of metadata where the date and time of an event were at issue (*see Ferrara Bros. Bldg. Materials Corp. v FMC Const. LLC.*, 54 Misc3d 529, 44 NYS3d 670 [Sup Ct, Queens County 2016]), here the pdf of the emails includes that information. Defendant, on these papers, has not demonstrated that the production is inadequate.

In sum, there is certainly more than enough responsive documents produced to formulate questions for the depositions and the Court sees no reason to delay the depositions.

Accordingly, it is hereby

ORDERED that defendant's motion to compel discovery responses is denied.

Next conference already scheduled for June 7, 2023 at 10:00 a.m. Please see NYSCEF Doc. No. 30 for further directives.

4/27/2023
DATE

ARLENE BLUTH, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
		GRANTED	[X] **DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**