

Xiao He Huang Zhang v VMC E. Coast LLC

2023 NY Slip Op 31922(U)

June 6, 2023

Supreme Court, New York County

Docket Number: Index No. 656032/2020

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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XIAO HE HUANG ZHANG,

Plaintiff,

- v -

VMC EAST COAST LLC ,ANH MANAGEMENT &
CONSULTING LLC,K & F TRAVEL & TOUR INC, MARK
TRAN, GLENN LEDET, ANH T DUONG, YAYI GUO,
KENT KWAN

Defendants.

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INDEX NO. 656032/2020

MOTION DATE 05/10/2023

MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION**

HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for DISCOVERY.

Defendants’ VMC East Coast LLC, d/b/a VMC East Coast, ANH Management & Consulting LLC d/b/a VMC East Coast, Mark Tran, Glenn Ledet, Anh T. Duong, and Yayi Guo A/K/A Yvonne Guo motion to compel discovery is denied.

Background

This case arises out of claims by plaintiff for unpaid wages. In this discovery dispute, defendants now, for the first time, claim they served discovery demands on October 19, 2021 via email and regular mail, and a demand for a bill of particulars on November 1, 2021 also via email and regular mail. Plaintiff contends it never received such demands.

The record here shows that the defendants never mentioned these supposedly outstanding demands, despite plenty of opportunity to do so. In February 2022, this Court signed off on a

discovery stipulation that ordered the parties to serve discovery demands by April 30, 2022 (NYSCEF Doc. No. 45). The stipulation made no mention of outstanding demands.

Defendants apparently did not re-serve their demands and in July 2022, defendants asked for more time to serve discovery demands (*see* NYSCEF Doc. No. 46) . Once again, there was no mention of outstanding demands. This Court granted a deadline of October 2022 to serve demands. Defendants still did not serve any discovery demands, did not re-serve any old demands, and did not even inquire about any purported outstanding demands.

Defendants now move to compel discovery responses from plaintiff for discovery demands allegedly sent in the fall of 2021 but never mentioned thereafter. Defendants argue they served these demands and plaintiff declined to submit any responses for over a year and a half.

In opposition, plaintiff claims it never received defendants' discovery demands. Plaintiff argues defendants did not provide any proof of mailing and never followed up on the discovery demands despite receiving extensions to serve discovery. Plaintiff further asserts that defendants failed to comply with the discovery deadlines and so defendants' attempt to compel plaintiff to respond must be denied.

In reply, defendants purport to submit the emails they sent to plaintiff with the discovery demands in 2021. Defendants maintain these requests were submitted on time and plaintiff should be sanctioned for failure to reply and falsely claiming it never received such requests.

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, additional evidence submitted for the first time in a reply cannot be considered by this Court. Defendants should have attached proof that they sent the discovery demands as part of their initial motion to compel; defendants did not even submit affidavits of service in connection with the moving papers. By employing “gotcha” tactics, plaintiff did not have sufficient opportunity to review its emails and oppose defendants’ position. If defendants submitted these alleged emails (which did not contain the alleged attachments) in their moving papers, then plaintiff could have checked the exact date and time when the emails were purportedly sent.

In other words, defendants did not meet their prima facie burden where they did not show, in the moving papers, any proof that they ever sent the discovery demands. Ambushing in a reply is unfair and it has long been the law that it is not allowed (*see e.g., JPMorgan Chase Bank, N.A. v Luxor Capital, LLC*, 101 AD3d 575, 576, 957 NYS2d 45 [1st Dept 2012] [declining to consider arguments raised for the first time in reply]).

Moreover, even if the Court could consider the emails included in reply, the record, as a whole, does not compel the Court to grant the instant motion. Although defendants claim that they served plaintiff in the fall of 2021, there is no evidence that they ever followed up on these


demands despite given ample opportunity. And now, suddenly, two years later defendants claim that they are owed something. Moreover, the parties entered into multiple discovery orders that wholly omitted the existence of these purported demands. The entire point of discovery orders and conferences is to address outstanding items.

This Court finds that these demands (even if they were emailed to plaintiff’s counsel) were waived because defendants ignored them for two years and did not take any steps to follow up, either with plaintiff or by demanding that they be included in discovery orders. Instead, defendants waited and ignored these demands.

Accordingly, it is hereby

ORDERED that the defendants’ motion to compel discovery responses is denied and it is further

ORDERED that depositions must be held on or before July 7, 2023 and plaintiff must file a note of issue by August 18, 2023.

<u>6/6/2023</u> DATE			 <hr/> ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE