

**Tact Corp. of NYC v Selected Healthcare Staffing,
LLC**

2023 NY Slip Op 32676(U)

August 1, 2023

Supreme Court, New York County

Docket Number: Index No. 656349/2022

Judge: Gerald Lebovits

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

PRESENT: HON. GERALD LEBOVITS PART 07

Justice

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TACT CORPORATION OF NYC D/B/A TACT MEDICAL STAFFING,

Plaintiff,

INDEX NO. 656349/2022

MOTION DATE 06/16/2023

MOTION SEQ. NO. 001

- v -

SELECTED HEALTHCARE STAFFING, LLC and DOUGLAS LARSON,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for DISCOVERY.

Fox Rothschild LLP, New York, NY (Glenn S. Grindlinger and Timothy A. Gumaer of counsel), for plaintiff.

Davis+Gilbert LLP, New York, NY (Neal H. Klausner and Eva M. Jiménez of counsel), for defendants.

Plaintiff, Tact Corporation of NYC, moves under CPLR 3124 to compel the disclosure of documents by defendants, Selected Healthcare Staffing, LLC, and Douglas Larson, and for attorney fees. Defendants cross-move for discovery sanctions under CPLR 3126 or to compel disclosure of documents under CPLR 3124. Plaintiff’s request to compel is granted; its request for attorney fees is denied. Defendants’ cross-motion is denied.

BACKGROUND

Plaintiff specializes in the placement of healthcare professionals in healthcare facilities. In July 2018, plaintiff hired Larson as a travel-nurse recruiter. Plaintiff promoted Larson to director of client services in March 2019. As a condition of his employment, plaintiff required Larson to sign agreements containing noncompete, non-solicitation, and confidentiality provisions. (NYSCEF No. 18 at ¶¶ 20, 27.) During his employment with plaintiff, Larson formed Selected Healthcare, which also provides healthcare professionals to medical facilities. (NYSCEF No. 18 at ¶ 36; NYSCEF No. 21 at ¶ 36.) Plaintiff alleges that it terminated Larson’s employment in May 2022 after determining “that Larson was, most likely, assisting a competitor.” (NYSCEF No. 18 at ¶ 44.)

Plaintiff then commenced this action. Plaintiff has alleged that Larson violated the noncompete and non-solicitation provisions of his agreements, and that he breached fiduciary duties that he owed to plaintiff. Plaintiff also asserts claims against Selective Healthcare, including unfair competition and unjust enrichment. Defendants have counterclaimed in breach of contract and unjust enrichment. They allege that plaintiff failed to pay Larson for employee referrals that he had made to it. (*See* NYSCEF No. 34 at 3-4.)

DISCUSSION

1. Plaintiff moves to compel defendants to disclose four separate categories of documents. The first category includes “documents and communications concerning defendants’ solicitation of individuals employed by or associated with Tact.” (NYSCEF No. 32 at 9.) Plaintiff argues that these documents are material and necessary to the question of whether defendants “are actively soliciting employees and candidates about whom Larson learned while employed by Tact in violation of the Covenant Agreement and Non-Solicitation and Confidentiality Agreement.” (*Id.*)

Defendants interpret the first category of plaintiff’s document requests as including information concerning Selective Healthcare’s employment of “any person.” (NYSCEF No. 34 at 10.) Defendants argue that the scope of this request is therefore irrelevant and overly broad, “as Larson may communicate with individuals who have no connection to Tact.” (*Id.*) Plaintiff, however, asserts that, communications between the parties in November 2022 put defendants on notice that plaintiff only seeks documents pertaining to individuals with a current or prior association with plaintiff. (*See* NYSCEF No. 59 at 6.) Further, plaintiffs claim that although defendants did ultimately submit to plaintiff documents included in this first category, they only submitted documents that are relevant to “the first three months of Selected Healthcare’s approximately 17 months in operation.” (NYSCEF No. 59 at 6.)

The court concludes that because the non-solicitation and confidentiality agreement remains enforceable for two years from the termination of Larson’s employment (*see* NYSCEF No. 19 at ¶ 4 [a] [non-solicitation and confidentiality agreement]), plaintiff’s first category of document requests seeks potentially relevant information. (*See e.g. Site Safety, LLC v Gunnala*, 2020 NY Slip Op 50928[U], at *6 [Sup Ct, NY County Aug. 20, 2020] [in action to enforce non-solicitation agreement, granting plaintiffs’ motion to compel disclosure of all communications between defendants and “current or former employees of plaintiffs”].) The branch of plaintiff’s motion seeking disclosure of the first category of documents, as narrowed (or clarified) by plaintiff’s representations on this motion about the scope of that category, is granted.

2. Plaintiff’s second and third categories of document requests concern defendants’ alleged solicitation and/or business with healthcare professionals and medical facilities associated with plaintiff. Plaintiff argues that these categories of documents are relevant to “establish[ing] that Larson violated the Agreements.” (NYSCEF No. 32 at 13.)

Defendants argue that these categories, too, are overbroad, because they place “no limitation as to the subject matter of said communications.” (NYSCEF No. 34 at 11.) But plaintiff claims that, as with the first category of document requests, defendants’

communications to plaintiff in November 2022 prove that they understood the limits of plaintiff's requests. (NYSCEF No. 59 at 8 [noting that "Defendants advised Plaintiff that they would produce '[d]ocuments sufficient to show that Larson had a pre-existing business relationship with any Selected Healthcare client that, to Defendants' knowledge, *also has a business relationship with Tact*'"] [emphasis added].)

Defendants also argue that plaintiff's request for Larson's communications with any of plaintiff's "prospective" healthcare professionals would require defendants to "produce virtually all of [Larson's] communications with any candidate," because defendants would be unable "to determine whether an individual could be a *prospective Tact* healthcare professional." (*Id.*) Plaintiff responds that its use of the word "prospective" only includes those healthcare professionals "about whom Larson learned while employed at Tact," eliminating any need for speculation. (NYSCEF No. 59 at 9 [emphasis omitted].)

Because the underlying agreements explicitly refer to "prospective" clients and customers, the court concludes that this information is material to plaintiff's claims. (*See* NYSCEF No. 19 at ¶ 1 [h] [defining prospective customers as those to which the company has made or is in the process of making a proposal and about which defendants have knowledge]; NYSCEF No. 20 at ¶ 3 [A] [6] [same].) The court further concludes, based on plaintiff's representations, that plaintiff only seeks defendants' documents that concern their communications with clients who were also associated with Tact. These documents are material and necessary to establishing whether defendants breached the parties' agreements. Thus, this court grants the branch of plaintiff's motion seeking disclosure of the second and third categories of documents, narrowed to the extent described in this paragraph.

3. Plaintiff's fourth category of document requests includes "documents and communications concerning defendants' financial earnings" from November 2021 through the present. (NYSCEF No. 32 at 17, 18.) Plaintiff argues that documents concerning defendants' financial earnings are necessary to calculate damages. And although defendants again argue that plaintiff's request is overbroad and irrelevant, plaintiff claims that its request only seeks those documents pertaining to revenue that defendants received from current, former, or prospective Tact clients. The court agrees with plaintiff.

Defendants also argue that they should not be required to disclose any documents relating to the period following Larson's termination, because the restrictive covenants at issue are unenforceable. The enforceability of the parties' agreement, however, should be decided *after* the parties engage in discovery. (*See Quicksilver Capital LLC v Haley*, 2019 NY Slip Op 30373[U], *1 [Sup Ct, Kings County Feb. 19, 2019] [determining that "the parties should first engage in discovery to determine if the restrictions imposed upon the plaintiff were reasonable in light of the plaintiff's specific job and functions"].) Defendants' argument is therefore premature. The branch of plaintiff's motion seeking disclosure of the fourth category of documents is granted.

4. Plaintiff also seeks an award of attorney fees. (*See* NYSCEF No. 16 at 2.) Although plaintiffs do not identify a statutory basis for this request, this court has authority under CPLR 3126 to award fees as a discovery sanction. But this court is not persuaded that defendants'

discovery-related conduct with respect to the requests at issue on this motion warrants the award of fees under CPLR 3126. Nor do plaintiffs seriously argue otherwise. The fee request is denied.

5. Defendants cross-move to compel plaintiff to produce documents under CPLR 3124 and to strike plaintiff’s pleadings under CPLR 3126. Defendant argues that plaintiff engaged in “willful dilatory conduct” by making “misleading representations that it was engaged in an ongoing review of documents.” (NYSCEF No. 34 at 14.) Plaintiff, however, argues that its representations were not misleading, because its review encompassed over 1.74 million documents that plaintiff narrowed down to 133 pages.

Defendants also argue that because they were unable to confer with plaintiff regarding specific search terms, this court should require that plaintiff perform another review of its documents applying search terms to which both parties agree. Plaintiff, however, argues that during its initial review it asked defendants if there was any specific information that defendants believed was absent from plaintiff’s production and that defendants did not claim that any information was missing. Plaintiff further argues that performing another search would be burdensome and costly.

The court concludes that plaintiff’s conduct does not warrant this court’s issuance of sanctions under CPLR 3126. The court also concludes that because plaintiff has already disclosed all its relevant documents, defendants’ cross-motion to compel under CPLR 3124 should also be denied.

Accordingly, it is

ORDERED that the branch of plaintiff’s motion under CPLR 3124 seeking to compel document production is granted, and defendants shall within 30 days of entry of this order produce documents responsive to the four categories of plaintiff’s document requests (with the scope of those requests narrowed, or clarified, by plaintiff’s representations on this motion about their scope, as discussed above); and it is further

ORDERED that the branch of plaintiff’s motion under CPLR 3126 seeking an award of attorney fees is denied; and it is further

ORDERED that defendants’ cross-motion under CPLR 3126 and CPLR 3124 is denied.

8/1/2023
DATE


HON. GERALD LEBOVITZ
J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: