

DPB Family LLC v Eutychia Group LLC

2023 NY Slip Op 32769(U)

August 9, 2023

Supreme Court, New York County

Docket Number: Index No. 652555/2018

Judge: Jennifer G. Schechter

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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: COMMERCIAL DIVISION**

PRESENT: HON. JENNIFER G. SCHECTER PART 54

Justice

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INDEX NO. 652555/2018

DPB FAMILY LLC, BMCPS LLC, DEA ASTON LLC,
ARISTOTLE DEFTEREOS, SPIROS DEFTEREOS,
STAVROS KALOGEROPOULOS, EDWIN PINTO, FIDI
DISTRICT LLC, COLUMBUS VILLAGE LLC, NGM
MANAGMENT GROUP LLC,

MOTION SEQ. NO. 007

Plaintiffs,

- v -

**DECISION + ORDER ON
MOTION**

EUTYCHIA GROUP LLC, EL TORO GROUP LLC, FIDI
DISTRICT LLC, COLUMBUS VILLAGE LLC, NGM
MANAGEMENT GROUP LLC,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323

were read on this motion to/for SANCTIONS.

By order dated March 3, 2023, the court directed that "by March 31, 2023, plaintiffs shall provide defendants with all documents on which Deiters relied in preparing his report, and plaintiffs shall permit defendants to depose Deiters by May 12, 2023" (Dkt. 292 [the March 3 Order]). By order dated May 30, 2023, the court noted that "neither of those things occurred" and directed that "Deiters shall be deposed, for up to two hours...so he may be asked about his prior testimony suggesting that he does in fact have documents that were not produced, and if defendants can then demonstrate that plaintiffs' representation that 'there are no documents to produce' is false, defendants may make a motion for sanctions" (Dkt. 306). Deiters was deposed on June 7, 2023 (Dkt. 315). Defendants now move for monetary sanctions and to preclude Deiters from testifying at trial due to plaintiffs' failure to comply with March 3 Order.

Setting aside whether sanctions are warranted, the court must address a few troubling issues.

First, plaintiffs baselessly contended that nothing had to be produced because defendants never served them with a "demand/request" (*see* Dkt. 314 at 5). The court does not understand how plaintiffs could have taken this position in light of the explicit production direction in the March 3 Order.

Second, Deiters testified that the first time he even saw the March 3 order was during the June 7 deposition (*see* Dkt. 315 at 10-13). It is shocking that plaintiffs did not even bother to check with their expert to ensure that all documents on which he relied had been produced. If, as discussed below, sanctions are imposed at trial, this fact will bear on whether they should also be imposed against counsel.

Third, despite regularly practicing in the Commercial Division, plaintiffs' counsel appears to misunderstand the rules governing expert discovery in this court. He avers that "this is not federal court and no report was ever needed" (Dkt. 318 at 9). Not so. Commercial Division Rule 13(c) requires disclosure of an expert report along with the information on which the expert relied and that, absent good cause, the failure to timely make such disclosures warrants preclusion at trial. In fact, "this rule was promulgated in an effort to harmonize the disclosure rules of our state and federal courts" (*Singh v PGA Tour, Inc.*, 2017 WL 2152584, at *3 [Sup Ct, NY County May 17, 2017]). The court takes this rule seriously and strictly enforces it (*Pope Invs. II LLC v Belmont Partners, LLC*, 214 AD3d 484, 485-86 [1st Dept 2023], *accord Taxi Tours Inc. v Go New York Tours, Inc.*, 2023 WL 4683116, at *2 [Sup Ct, NY County July 18, 2023]; *see Molnar v Greentech Capital Advisors, L.P.*, 2022 WL 18145538, at *1 [Sup Ct, NY County Jan. 4, 2022] [collecting cases]).

Fourth, plaintiffs complain about this situation being unusual given that their expert had only provided a report in the related action but not in this action (*see* Dkt. 318 at 6). That is true. However, over defendants' objection (*see* Dkt. 265 at 6 [objecting to plaintiffs "propos[ing] to just take Deiters' report off the shelf from the Franchisee Case, and use it and his testimony here unchanged despite the fact that the issues, claims and damages are different"]), the court permitted plaintiffs to rely on that report but, through the March 3 Order, required compliance with Commercial Division Rule 13(c) in light of defendants' objections (*see id.* at 19 n 8).

Plaintiffs further aver that reproducing the voluminous documents relied upon by the expert or identifying their bates stamps would be wasteful. The court does not disagree. The purpose of the March 3 Order was to ensure there were no documents relied upon by Deiters that were not previously produced. Deiters' prior confusing testimony about his workpapers warranted further inquiry.

The problem is the continued confusion about whether all of the documents on which Deiters relied were previously produced. Plaintiffs continue to insist that there is not a single document relied upon by Deiters that has not been produced during discovery. In their opposition brief, plaintiffs claim that "there are no documents to produce that have not already been produced by Defendants or as annexed to the report" and that the documents on which the report was based "were the same as the BATES-stamped documents produced by Defendants in this action" (Dkt. 318 at 8, 15; *see* Dkt.

315 at 54 ["I used the term workpapers or the documents I relied upon. The documents I relied upon are identified in my report, and are attached to my report"]).

Yet, in reply, defendants aver that "Deiters conceded during his deposition that he relied on documents in preparing his report which were neither attached to his report **nor otherwise produced by Plaintiffs to Defendants**" (Dkt. 323 at 6 [emphasis added]). Defendants support this assertion by citing various portions of the deposition transcript (*id.*; *see, e.g.*, Dkt. 315 at 23-24). Unhelpfully, the reply brief lacks a detailed discussion of those documents and is unclear about what documents specifically referenced in the report were not previously produced. For instance, as discussed during the deposition, there were emails referenced in the report that were not attached to it (*see* Dkt. 315 at 23, citing, *e.g.*, Dkt. 319 at 6). But defendants did not file an affirmation from counsel certifying that they have searched the document production and are unable to locate the emails referenced in the report. Thus, the court lack a basis to conclude that such documents were not produced.

While the court reviewed the complete transcript of the June 7 deposition, due to the lack of clarity in both the questions and answers, the court remains unclear about what, exactly, defendants are missing. While plaintiffs' approach to the court's orders leaves much to be desired, that is no excuse for failing to make a clear record when seeking sanctions.

Based on Deiters' testimony at both of his depositions, the court remains concerned that there are "workpapers" that have not been produced. The court's concern is amplified by the suggestion in the opposition brief that some of this information might be privileged, which would be odd to raise if nothing has actually been withheld (*see* Dkt. 318 at 13). Setting aside that any privilege would have been waived since plaintiffs contend that all of the "workpapers" were produced and since no privilege log was served notwithstanding the scope of the March 3 Order, suffice it to say that privilege will not be a defense if noncompliance with the March 3 Order is discovered at trial.

In light of these uncertainties, the court could request further submissions or schedule a hearing. The court will not do so. Given the upcoming bench trial, the court is loathe to redirect the parties from trial preparation. Both sides have made this a sideshow. Plaintiffs should have ensured their expert was capable of unequivocally clearing this up at his deposition and defendants could have more meaningfully conferred with plaintiffs rather than attempt to gain a litigation advantage from this issue, which the court suspects bears little on the merits. Leveraging reckless litigation practice to avoid an adverse merits determination is a good look for no one. Ultimately, it is a massive waste of court resources. While this approach is par for the court in this case, the parties are strongly discouraged from assuming that such an approach will benefit them at trial.

For the avoidance of doubt, the court will still closely scrutinize Deiters' testimony at trial and may itself question him on this topic. Plaintiffs are cautioned that if it is revealed at

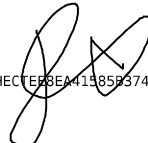
trial that Deiters reviewed anything (e.g., any sort of "workpapers") that was not previously produced the court may strike his report and testimony, order plaintiffs to reimburse defendants for the costs incurred addressing this issue, and sanction plaintiffs' counsel. But regardless of how this issue is ultimately resolved, it will not be a get-out-of-jail-free card for defendants. This case will be decided on the merits.

To be sure, before deciding to take this approach, the court again reviewed Deiters' report and observed that it is replete with citations and references to the sources of information on which the proffered contentions are based (*see* Dkt. 319). Setting aside the merits of those opinions, it is clear that the citations in the report should permit adequate cross-examination, both as to whether the sources support the assertions and whether there is other information that may undercut them. Since it was defendants that were running the restaurants they should be perfectly capable of proffering countervailing evidence that Deiters may not have considered. While that possibility is, of course, no excuse for violating the court's order, the court's skepticism about there being material prejudice from this situation coupled with the flexibility the court has in addressing this issue during a bench trial warrants deferral of any sanctions.

In the end, plaintiffs have certified that all of the documents on which Deiters relied have been produced. After further inquiry, the court and defense counsel are entitled to rely on that assurance but, if such assurance is proven false, the consequences will be significant.

Accordingly, it is ORDERED that defendants' motion for sanctions and to preclude plaintiffs' expert testimony is DENIED without prejudice.

8/9/2023
DATE


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JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	
	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER