

Patel v Patel

2023 NY Slip Op 32809(U)

August 11, 2023

Supreme Court, New York County

Docket Number: Index No. 655348/2018

Judge: Joel M. Cohen

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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: COMMERCIAL DIVISION PART 03M

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MAYURIBEN PATEL,	INDEX NO.	<u>655348/2018</u>
Plaintiff,	MOTION DATE	<u>05/15/2023</u>
- v -	MOTION SEQ. NO.	<u>010</u>
PARESH PATEL,		
Defendant.	DECISION + ORDER ON MOTION	

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325

were read on this motion to COMPEL DISCOVERY.

Plaintiff Mayuriben Patel (“Plaintiff”) moves to compel discovery and for related relief against Defendant Paresch Patel (“Defendant”) as well as non-party Jitendra R. Shah, CPA (“Mr. Shah”). Defendant opposes and cross-moves to compel discovery from Plaintiff.¹ Mr. Shah opposes. For the reasons that follow, Plaintiff’s motion is **granted in part** as against Defendant and **denied** as against Mr. Shah with leave to take Mr. Shah’s deposition. Defendant’s cross-motion is **denied**.

¹ Defendant mistakenly filed its opposition and cross-motion under Mot. Seq. No. 9 as opposed to Mot. Seq. No. 10. The Court has considered all of Defendants’ submissions on the merits (NYSCEF 256-275).

A. Background

“This case boils down to a dispute over whether Plaintiff . . . is entitled to a share of the profits generated by the sale and wind-down of M&D Pharmacy, LLC (‘M&D’)” (*Patel v Patel*, 2020 N.Y. Slip Op. 31864[U], 1 [N.Y. Sup Ct, New York County 2020]). Discovery was originally scheduled to conclude on December 19, 2022 (NYSCEF 177). On November 28, 2022, the Court extended the fact discovery deadline to March 1, 2023 (NYSCEF 196). The order provides that the “parties shall assume that these deadlines are final.” Nevertheless, the parties have not yet completed fact discovery in this five-year old case.

On September 30, 2022, Plaintiff served a subpoena on Mr. Shah (NYSCEF 210, 211). On December 22, 2022, Plaintiff submitted a Rule 14 letter (NYSCEF 216) claiming, among other things, that Defendant’s production was insufficient as to Request Nos. 1, 2, 4-7, 8-17 (NYSCE 242). The requests at issue generally seek M&D’s financial information including bank records, accounting records, tax records and corporate governance records.

On February 21, 2023, the Court granted in part Plaintiff’s motion to compel documents from Mr. Shah pursuant to the subpoena and denied without prejudice that branch of the motion seeking contempt (NYSCEF 223). The Court’s Principal Law Clerk subsequently held a pre-motion conference with the parties. Plaintiff’s motion followed.

Defendant submits an affidavit stating that Plaintiff’s husband, Bareth Patel, maintains the corporate documents sought by Plaintiff (NYSCEF 270 ¶¶7-10). Defendant further states that he completed an additional search for documents (NYSEF 270 ¶10). Additionally, Defendant requested that M&D’s prior accountant, Mr. Shah, and counsel, Daniel Goldberg, Esq., produce documents (NYSCEF 270 ¶¶11-12). Finally, Defendant asserts that he has sought to acquire M&D’s bank records from Chase Bank (NYSCEF 270 ¶13).

Mr. Goldberg produced records to Plaintiff (NYSCEF 268). Mr. Shah submits an affidavit stating that he was M&D's accountant from August 2009 – March of 2018 (NYSCEF 297 ¶5). Mr. Shah claims that certain records were lost as a result of Hurricane Ida in 2021 (Shah Aff. ¶5). Nevertheless, Mr. Shah acknowledges receipt of Plaintiff's subpoena and claims he provided all relevant documents to the parties in 2019 and participated in a teleconference with counsel to go over those documents (Shah Aff. ¶¶6-12). Mr. Shah claims that he retained counsel to oppose this motion, has conducted an additional search for documents and provided M&D's tax returns from 2014-2018 as well as general ledgers, and bank statements from 2014-2017 (Shah Aff. ¶¶13-22). Finally, Mr. Shah has consented to being deposed (Shah Aff. ¶23).

B. Plaintiff's Motion is Granted in Part

a. Defendant Shall Produce a Privilege Log, Supplemental Responses, Conduct an Additional Search for Documents and Produce a Supplemental *Jackson* Affidavit

This does not appear to be a case in which Defendant has disregarded its discovery obligations or willfully sought to impede the discovery process (*Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 221 [1st Dept 2010]). While Defendant's responses may be, in some ways, deficient, Defendant has provided context in an affidavit, sought documents from other sources and not opposed third-party discovery (*Lee v 13th St. Entertainment LLC*, 161 AD3d 631, 632 [1st Dept 2018]).

On this record, the Court does not find that Defendant waived its right to assert objections to Plaintiff's discovery demands. The Court also declines to conditionally strike Defendant's answer, award costs or issue any sanction. However, certain relief is granted.

Plaintiff argues, and Defendant does not dispute, that Defendant has not produced a privilege log. Privilege logs are required pursuant to Rule 11-b of the Rules of the Commercial

Division. Accordingly, Defendant shall produce a privilege log within twenty (20) days that complies with the Commercial Division Rules (*Ninth Space LLC v Goldman*, 2023 N.Y. Slip Op. 30532[U], 3 [N.Y. Sup Ct, New York County 2023] [citations omitted]). Alternatively, Defendant shall produce a sworn statement that it is not withholding any documents on the basis of privilege.

Where documents are not produced, a party may be compelled to produce a “*Jackson* affidavit” specifying “where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found” (*Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 1992]). The Court may also direct a further search and production of supplemental *Jackson* affidavits (*O’Keeffe’s Inc. v 400 Times Sq. Assoc., LLC*, 2022 N.Y. Slip Op. 33528[U], 2 [N.Y. Sup Ct, New York County 2022] [citations omitted]).

Defendant’s affidavit is a sufficient start towards demonstrating its efforts to comply with its discovery obligations. Defendant shall conduct a further search and produce any additional documents within twenty (20) days. Defendant shall also produce a sworn statement as to the specifics of its search; indicate that it has produced or logged all documents in its possession or that documents do not exist; identify any documents that are no longer available or inaccessible; and state whether those documents are likely to be in the possession of any source. Finally, Defendant shall produce or re-produce documents as they are ordinarily maintained, ensure that the production is Bates numbered, and supplement its responses to indicate which documents are responsive to specific requests.

b. The Motion is Denied as Against Shah with Leave to Take a Deposition

Mr. Shah provided records informally and, following the issuance of the February 2023 order, formally through retained counsel. Further, Mr. Shah has agreed to produce any additional documents he located and has consented to being deposed.

Where “the party from whom discovery is sought ultimately complies with the disputed discovery order, and satisfies its discovery obligations within a reasonable time after the issuance of the order, the imposition of sanctions is rarely warranted” (*DOE v Lenox Hill Hosp.*, 2021 N.Y. Slip Op. 30577[U], 4 [N.Y. Sup Ct, New York County 2021] [collecting cases]). Mr. Shah is a nonparty who is incurring costs as a result of a subpoena issued four years into a litigation concerning a former client, M&D. Accordingly, Plaintiff’s motion against Mr. Shah is denied with leave for Plaintiff to take a deposition of Mr. Shah within thirty (30) days, subject to Mr. Shah’s right to potentially recover any reasonable production costs (*Tener v Cremer*, 89 AD3d 75, 82 [1st Dept 2011] *citing* CPLR 3111, 3122[d]; Commercial Division Rule 11-c(e), 22 NYCRR 202.70). Finally, any claimed untimely service of documents by Plaintiff or Mr. Shah is, on these facts, excused (CPLR 2001).

c. The Discovery Deadlines Shall Be Extended

Defendant does not oppose extending the deadlines to complete discovery authorized by this order and file a note of issue (NYSCEF 257 at 2). Discovery shall close on **September 22, 2023** and Note of Issue shall be filed on or by **September 29, 2023**.

C. Defendant’s Cross-Motion is Denied

Finally, Defendant’s cross-motion is denied. Counsel for Defendant sent a deficiency letter to counsel for Plaintiff on October 12, 2022 (NYSCEF 273) concerning Plaintiff’s response

to Demand 5 for evidence of payments made by Plaintiff to Harlem Pharmacy and M&D Pharmacy and vice versa. However, Defendant never initiated the Rule 14 process. Further, the portion of Defendant’s brief in support of its cross-motion is approximately half-a-page and devoid of any legal argument. Accordingly, the cross-motion is denied.

* * * *

Accordingly, it is

ORDERED that Plaintiff’s motion to compel and for other relief is **GRANTED IN PART** as against Defendant and Defendant shall produce a privilege log, any remaining documents, a supplemental *Jackson* affidavit and supplemental responses to Plaintiff’s demands within twenty (20) days; it is further

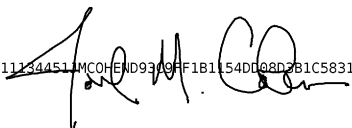
ORDERED that Plaintiff’s motion to compel and for other relief is **DENIED** as against Mr. Shah without prejudice to Plaintiff deposing Mr. Shah within thirty (30) days; it is further

ORDERED that Defendant’s cross-motion to compel is **DENIED**; it is further

ORDERED that discovery shall close on **September 22, 2023**; Note of Issue shall be filed on or by **September 29, 2023**; a joint letter selecting a settlement track pursuant to Rule 30 of the Rules of the Commercial Division shall be filed on NYSCEF with a courtesy copy to SFC-Part3@nycourts.gov by **October 6, 2023**; and any motions for summary judgment shall be filed on or by **November 3, 2023**.

This constitutes the decision and order of the Court.

8/11/2023
DATE

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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE