

O'Connor v Society Pass Inc.

2023 NY Slip Op 33787(U)

October 14, 2023

Supreme Court, New York County

Docket Number: Index No. 656938/2019

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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THOMAS O'CONNOR, CVO ADVISORS PTE. LTD.	INDEX NO.	<u>656938/2019</u>
Plaintiff,		05/25/2023, 08/24/2023, 09/21/2023
- v -	MOTION DATE	<u>09/21/2023</u>
SOCIETY PASS INCORPORATED,	MOTION SEQ. NO.	<u>006 007 008</u>
Defendant.		

**DECISION + ORDER ON
 MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 232, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243

were read on this motion to COMPEL DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 267, 268, 269, 270, 271, 272, 277, 278, 279, 280, 281, 282

were read on this motion for TRIAL PREFERENCE.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 273, 274, 275, 283 were read on this motion to STRIKE NOTE OF ISSUE.

Defendant Society Pass Incorporated’s (“Defendant”) motions to compel and extend the time to complete discovery (Mot. Seq. No. 6) and to vacate the Note of Issue and Certificate of Readiness (Mot. Seq. No. 8) are **denied**. Plaintiff Thomas O’Connor’s (“Plaintiff”) motion for a trial preference (Mot. Seq. No. 7) is also **denied**.

BACKGROUND

This case involves an Employment Agreement between Plaintiff and Defendant (NYSCEF 212). Plaintiffs’ Complaint was filed on January 6, 2020 (NYSCEF 210). Defendant’s Answer with Counterclaims was filed on January 27, 2020 (NYSCEF 211).

Fact discovery was originally scheduled to close on December 18, 2020 (NYSCEF 19 [Preliminary Conference Order]). Defendant served a First Request for the Production of Documents and Interrogatories dated August 24, 2020 (NYSCEF 213). Plaintiff served objections and responses dated September 25, 2020 (NYSCEF 214).

On April 23, 2021, the Court granted Plaintiff's motion to compel electronically stored information ("ESI") from Defendant (NYSCEF 69, 78 ["ESI Order"]). As a result, fact discovery was extended through December 28, 2021 (NYSCEF 72). A subsequent January 18, 2022 Case Management Order extended fact discovery through August 1, 2022 (NYSCEF 81).

Thereafter, Plaintiff successfully moved to compel documents from Defendant under the terms of the ESI Order and was awarded costs and fees, including attorney's fees, (NYSCEF 182 [March 6, 2023 Order]). During the March 6, 2023 hearing on Plaintiff's motion, the Court extended fact discovery through May 31, 2023 to complete depositions (NYSCEF 200 [Tr. at 20]; NYSCEF 185 [March 8, 2023 Order]).

On March 24, 2023 – more than two-and-a-half years after serving its first requests – Defendant served a Supplemental Request for Documents and Interrogatories (NYSCEF 215, 216). On April 18, 2023, Plaintiff served objections (NYSCEF 217). Thereafter, the parties engaged in a meet-and-confer process (NYSCEF 218-221). Following an initial call, counsel for Plaintiff represented that certain documents sought did not exist or were already provided.

On May 18, 2023, the Court granted partial summary judgment in favor of Plaintiff on his First Cause of Action for breach of a Common Stock Purchase Warrant (NYSCEF 198). On May 25, 2023, a week after the Court's summary judgment order was issued – and less than a week before discovery was to close – Defendant filed its motion to compel production of

documents and responses to interrogatories and extend the deadlines to complete discovery (NYSCEF 207).

Also on May 25, 2023, the Court extended discovery through July 7, 2023 for the limited purpose of completing depositions (NYSCEF 230). On June 27, 2023, the Court granted Plaintiff O'Connor's request to be deposed remotely (NYSCEF 253). On July 5, 2023, the Court "so ordered" the parties' stipulation concerning the deposition of Defendant's representative Tan Bien Kiat in Thailand (NYSCEF 261).

On August 22, 2023, counsel for Plaintiff filed a Note of Issue and Certificate of Readiness ("NOI" [NYSCEF 266]) indicating that discovery was complete. On August 24, 2023, Plaintiff moved for a trial preference (NYSCEF 267). On September 8, 2023, Defendant moved to strike the NOI (NYSCEF 273).

On September 21, 2023, Plaintiff moved for summary judgment on his Fifth Cause of Action for breach of contract (NYSCEF 284). Also on September 21, 2023, Defendant moved to amend its answer to include a fraudulent inducement defense and to renew the Court's award of partial summary judgment to Plaintiff (NYSCEF 299).

DISCUSSION

A. Defendant's Motion to Compel is Denied

A movant seeking relief under CPLR 3124 must show that the discovery sought is "material and necessary" to their claim or defense (*Pacelli v Peter L. Cedeno & Assoc., P.C.*, 192 AD3d 560 [1st Dept 2021]). A motion to compel should be denied where it is "entirely speculative" (*Leventhal v Bayside Cemetery*, 188 AD3d 604 [1st Dept 2020] [citations omitted]).

The Court is vested with "broad discretion. . .to supervise the discovery process" (*GoSmile, Inc. v Levine*, 112 AD3d 469, 470 [1st Dept 2013] [collecting cases]). The failure to

demonstrate a good faith attempt to resolve the discovery dispute and “unreasonable delay” may warrant denial of a motion to compel (*Amato v Verizon New York Inc.*, 205 AD3d 406, 407 [1st Dept 2022]).

Defendants motion is denied. First, the pleadings in this case were filed in January of 2020 and Defendants initial discovery demands were served in July of 2020. Defendant has not offered any reason why it waited more than two-and-a-half years to serve supplemental discovery requests immediately before the already much-delayed close of discovery. No depositions were taken nor is any other fact alleged to support Defendant’s allegation that “Plaintiff is obviously attempting to hide documents in order to cover up his wrongdoing” (Moving Br., at 2 [NYSCEF 208]).

Second, the record does not indicate that any evidence has been withheld or that any of the allegedly withheld evidence is necessary for Defendant’s claims or defenses (*Gama Aviation Inc. v Sandton Capital Partners, LP*, 113 AD3d 456, 456 [1st Dept 2014]). Counsel for Plaintiff represented that certain categories of documents sought did not exist and that production was complete as to certain other categories. Following the filing of its motion, Defendant had an opportunity to depose Mr. O’Connor, including about the representations that certain documents have been produced or do not exist (*Marquez v 171 Tenants Corp.*, 161 AD3d 646, 647 [1st Dept 2018] [overturning preclusion order where testimony as to search efforts was sufficient to establish that documents were not withheld]).

Third, the record does not reflect a good faith attempt by Defendant to meet-and-confer as required by 22 NYCRR 202.7(a) as incorporated into Rule 14 of the Rules of the Commercial Division after receiving comments from Plaintiff’s counsel on May 11, 2023 (NYSCEF 221)

including representations that documents did not exist or that production was complete (*Nagi v Ninety-Fourth St., LLC* [N.Y. Sup Ct, New York County 2023] [*citing Amato*]).

Finally, the motion to compel responses to supplemental interrogatories is denied. The supplemental interrogatories are beyond the scope authorized by Rule 11-a of the Rules of the Commercial Division. Further, the information sought could and should have been the subject of questioning at Mr. O'Connor's deposition. As the narrative at the beginning of this decision makes clear, this case needs to move forward not backward into recurring rounds of discovery.

B. Defendant's Motion to Strike the Note of Issue is Denied

In light of the denial of Defendant's motion to compel, there is no basis to strike the NOI. 22 NYCRR 202.21(e) provides, in relevant part, "[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect." As discovery is closed and there are no other issues that warrant striking the NOI, the motion is denied (*500 Eighth Ave. Ltd. Liab. Co. v Resource Training Ctr. Inc.*, 214 AD3d 570, 571 [1st Dept 2023] [collecting cases]).

C. Plaintiff's Motion for a Trial Preference is Denied

Finally, Plaintiff seeks a trial preference on the grounds that this action has been long delayed and he "has a cardiac condition and his long-term survival is uncertain" (NYSCEF 268 ¶ 6). CPLR 3403(a)(3) provides, in relevant part, that "an action in which the interests of justice will be served by an early trial" is entitled to a preference. The movant bears the burden of establishing an entitlement to a preference through affidavits and other evidence (*Roman v*

Sullivan Paramedicine, Inc., 101 AD3d 443, 443 [1st Dept 2012] *citing Martinkovic v Chrysler Leasing Corp.*, 29 AD2d 636, 636 [1st Dept 1968] [permitting renewal and considering medical expert and other affidavits]).

Plaintiff’s application is submitted by an affirmation of counsel only (NYSCEF 268). The affirmation references an un-sworn doctor’s note from June 21, 2023 recommending that Plaintiff not travel overseas for his deposition because of his health (NYSCEF 258). Plaintiff’s submissions are insufficient to demonstrate a statutory entitlement to a preference. Nevertheless, if a trial is required (after summary judgment motions are decided), the Court will schedule it as expeditiously as possible.

* * * *

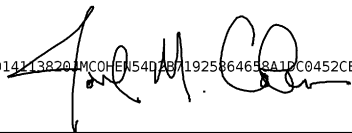
Accordingly, it is

ORDERED that Defendant’s motion to compel discovery (Mot. Seq. No. 6) is **DENIED**; it is further

ORDERED that Plaintiff’s motion for a trial preference (Mot. Seq. No. 7) is **DENIED**; it is further

ORDERED that Defendant’s motion to strike the Note of Issue and Certificate of Readiness (Mot. Seq. No. 8) is **DENIED**.

This constitutes the decision and order of the Court.

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10/14/2023		JOEL M. COHEN, J.S.C.
DATE		
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input checked="" type="checkbox"/> DENIED <input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> OTHER <input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE