

Cooke v Greenhouse Hudson LLC
2023 NY Slip Op 35278(U)
November 24, 2023
Supreme Court, Columbia County
Docket Number: Index No. E012022018190
Judge: Sara W. McGinty
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF COLUMBIA

ERIN GOLDMAN COOKE,

Plaintiff,

vs.

GREENHOUSE HUDSON LLC, GREEN STREET FLORAL LLC,
JENNIFER MOJO (individually and as aider and abettor)
and DAVID MOJO (individually and as aider and abettor),

Defendants.

GREEN STREET FLORAL LLC,

Third-Party Plaintiff,

vs.

ERIN GOLDMAN COOKE, GG&G FLOWER CO. and DARREN
COOKE,

Counterclaim-Defendants,

Appearances:

Carlo A.C. de Oliveira, Esq., attorney for plaintiff Erin Goldman Cooke

Phillip G. Steck, Esq. (Cooper Erving & Savage LLP) for plaintiff Erin Goldman Cooke,
counterclaim defendants GG&G Flower Co., LLC and Darryn Cooke

Edward J. Phillips, Esq. (Keane & Beane, PC), attorney for defendant/third-party plaintiff
Greenhouse Hudson LLC and defendants Green Street Floral LLC, Jennifer Mojo and
David Mojo

McGINTY, S., ASCJ

This is a decision/order on two motions filed by plaintiff Erin Goldman Cooke
("plaintiff") to compel depositions and document discovery and one motion by defendants to
compel document production by plaintiff.

The undisputed facts insofar as they are relevant to this decision are as follows.

Defendants Jennifer and David Mojo (jointly, the “Mojos”) purchased a retail flower shop (the “Business”) from plaintiff, along with the real property where the Business was conducted.

Defendant Green Street Floral LLC now operates the Business and defendant Greenhouse Hudson LLC owns the real property (jointly, the “LLC’s”).

The Mojo’s primary residence was then in Seattle, Washington. Their plan was to spend more time in Hudson after their youngest child graduated from high school. Plaintiff’s post-closing employment by the Business was a material aspect of the Mojo’s decision to buy the Business and real property.

Under the terms of a post-closing employment agreement dated September 30, 2021 (the “Agreement”), the plaintiff agreed to work for the Mojos after the sale, managing its day-to-day operation. The term of plaintiff’s employment began on the date of the Agreement and was to end on June 30, 2022. The Agreement provided for a base salary of \$35 per hour and plaintiff was to work a minimum of 30 hours per week. Paragraph 7.1 of the Agreement expressly provides that plaintiff was hired on as an “at will” employee.

Although not referenced in the Agreement, the Court takes judicial notice of the fact that all of the events relevant to this action took place during the COVID-19 pandemic.

In an email dated December 15, 2021, plaintiff advised the Mojos that she had an “underlying health issue” rendering her “immunocompromised.” She sought the Mojos’ consent to her operating the Business remotely, either from her home or from the apartment located above the retail store. The apartment was then being used by the defendants for their visits from their home in Seattle. Plaintiff met with the Mojos on February 12, 2022 and advised

them that she was terminating her employment effective February 14, 2022. Plaintiff sent an email on February 13, 2022 confirming her plans. From and after February 13, 2022, plaintiff did not work for the defendants.

Plaintiff seeks unspecified consequential, compensatory, punitive and other damages for (1) “unlawful discrimination” based on her unidentified disability and denial by defendants of reasonable accommodations therefor; (2) breach of contract; and (3) “retaliation.”

Defendants’ answer, in relevant part, included counterclaims against plaintiff and the third-party defendants for breach of contract; breach of the duty of good faith and loyalty and conversion against defendant and third-party defendant GG&G Flower Co., LLC; breach of contract against Darren Cooke; and tortious interference with a business relationship by plaintiff.

In previous decisions in this action, plaintiff Cooke and third party defendants Darren Cooke and GG&G Flower Co. LLC moved to dismiss certain of the counterclaims and third-party claims made by third-party plaintiff Green Street Floral LLC. By a decision/order dated August 30, 2022, Hon. Henry F. Zwack denied the motions to dismiss. A subsequent motion to reargue filed by plaintiff, third party defendants Darren Cooke and GG&G Flower Co. LLC was also denied by Judge Zwack by his decision/order dated October 28, 2022.

With the issuance of a preliminary conference stipulation and order on April 21, 2023, the parties embarked on discovery. The four motions before the Court followed in short order. They are identified in NYSCEF as motions 3, 5 and 6 and are as follows:

Motion 3 to compel discovery. Plaintiff seeks an order compelling defendant Jennifer Mojo, who resides in the State of Washington, to return to the County for further examination

regarding discussions she had with her attorney and co-defendant David Mojo during recesses of her deposition on July 27, 2023.

Motion 5 to compel document production. Plaintiff seeks an order compelling defendants to produce documents relevant and material to defendants' counterclaims for damages.

Motion 6 motion to compel discovery filed September 20, 2023. Defendants seek an order pursuant to CPLR 3124 directing plaintiff to produce all documents and information responsive to defendants' second notice for discovery and inspection of documents dated August 17, 2023.

CPLR 3101(a) sets the tone for discovery and disclosure, requiring that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action."

Motion 3. Defendant Jennifer Mojo appeared in Valatie, New York on July 27, 2023. Her deposition started at 10:00 am and ended at 5:36 pm. Plaintiff reports that recesses (including a lunch break) comprised 1 hour 33 minutes. Two of the recesses, totaling 14 minutes were called by plaintiff's counsel.

On Jennifer Mojo's return from a recess, plaintiff's counsel resumed his questions by asking her if she had discussed her testimony with her attorney during the recess. Her attorney directed her not to answer the question. In Motion 3, plaintiff seeks Jennifer Mojo's return from Seattle, Washington to provide testimony regarding her discussions with her attorney and her co-defendant, David Mojo, during the multiple recesses on July 27, 2023.

In support of Motion 3, plaintiff's counsel cites Uniform Rule 221.3 (22 NYCRR 221.3), which bars counsel from interrupting a deposition to speak with their client. However, as this Court previously ruled in a telephonic conference with counsel, and as asserted in the affirmation of Jennifer's counsel, the recess in question was not taken to provide an opportunity for Jennifer's attorney to speak with her. It was a recess, on consent, after two

hours of testimony in what was reportedly an “exceedingly hot” room. Defendant’s attorney reports he sought a break because he needed to use the restroom.

Jennifer Mojo’s attorney has agreed that his client would be available to continue her deposition virtually for a period not to exceed 57 minutes. Plaintiff’s counsel insists that she return to Columbia County for the additional testimony, a journey that Ms. Mojo’s attorney reports would require 13 hours travel time.

The conduct of pretrial depositions is governed by CPLR 3113 et seq. and by the Uniform Rules for the Conduct of Depositions found in Part 221 of the Uniform Rules for Trial Courts. The Court finds no reason to revisit its ruling provided to the parties mid-deposition that, in the absence of any proof that the recess was requested by Jennifer Mojo’s attorney for purpose of consulting with her, Uniform Rule 221.3 is inapposite. Such a consultation is not, in and of itself, barred by statute or rule (*Brightzman v. Corizon, Inc.*, 72 Misc3d 1213(A) [Sup Ct NY Cty 2021]).

Having searched the record, the Court finds no statement by defendant’s counsel that the recess was sought for purposes of consulting with his client: he had to use the restroom, which is a purpose reserved to him. Nor was there reason to suspect that Ms. Mojo’s attorney used the recess to improperly coach his client, as may be reasonably surmised when a deponent’s testimony changes after a conference with counsel (*Pape v. Suffolk Cty Soc’y for Prevention of Cruelty to Animals*, 2022 US Dist LEXIS 68430 (EDNY 2022). Absent such an allegation, deponent was under no obligation to disclose the contents of her conversation with counsel (*Pape* at 2022 US Dist LEXIS at *15) and her attorneys’ direction not to answer plaintiff’s counsel’s question about the content of her discussion with her attorney, if any, was

proper and did not violate Uniform Rule 221.3. Plaintiff's motion to compel Jennifer Mojo to submit to further examination on the contents of her discussion with counsel during a recess on consent is therefore denied.

As a general matter, depositions of parties are to take place in the county where the action is pending under CPLR 3110(1), provided, however, that an exception is created for a party who resides without the state and who can demonstrate "undue hardship" in appearing for examination in New York (*Jones v. Memorial Sloan Kettering Cancer Ctr.*, 186 AD3d 1851 [3d Dept 2020]). Remote depositions were the rule during the COVID public health emergency and practitioners have become accustomed to using the necessary software in every aspect of their practice (*Rodriguez v Montefiore Med. Ctr.*, 70 Misc 3d 991, 995 [Sup Ct Bx Cty 2020]). Indeed, videoconferencing technology has been found to offer counsel "a reasonable and sufficient opportunity to observe the deponent and assess the credibility of [their] responses" (*Rubin v. Sabharwal*, 2021 NY Misc LEXIS 520, *3 [Sup Ct NY Cty 2021]; *Jones v. Memorial Sloan Kettering Cancer Ctr.*, 186 AD3d 1851: "if the COVID-19 pandemic has proved anything, it is the usefulness (if not preferability) of conducting matters via video").

Here, defendant would require plaintiff to travel cross-country for 13 hours to appear for a one-hour continuation of her deposition. The cost to her in time and money to appear for less than an hour would create an undue hardship for plaintiff. Ms. Mojo shall be permitted to appear virtually for any further depositions in this action.

Motion 5. Defendants' counterclaims seek economic damages and loss of revenue based on counterclaim defendants' conduct after plaintiff's employment ended. Their counterclaims seek compensatory damages and, in some cases, punitive damages, arising from

(1) plaintiff's failure to turn over custody and control of the Square and GoDaddy accounts owned by the Business, which are among the tangible and intangible assets purchased by third party plaintiff Green Street Floral LLC (Third Counterclaim); (2) plaintiff and GGG's breach of implied covenant of good faith and fair dealing (Fourth Counterclaim); (3) Darryn Cooke's breach of a contract with defendants for 12 months of computer support services (Fifth Counterclaim); and (4) tortious interference with the Business' longstanding relationship with Bates & Anderson Funeral Services (6th Counterclaim).

Among the documents sought by plaintiff in its discovery demands are bank statements from Business accounts from September 30, 2021 to "the present," tax returns for the Mojos and the LLC's from September 30, 2021 to the present; and point of sale information for the Business for the relevant period; QuickBooks ledgers, profit and loss statements; the travel and entertainment expenses included in "business expenses" on the Mojo's individual tax returns; invoices for repairs or renovations to the building occupied by the Business.

Defendants contend that plaintiff's demands seek irrelevant information, are overbroad and burdensome, or fail to specify with reasonable particularity many of the documents requested.

The Court is at a loss to understand the connection between the counterclaims --- which relate solely to the conduct of the counterclaim defendants and services provided to Bates & Anderson Funeral Services --- and plaintiff's broad and non-specific demands for tax returns, point of sale data, profit and loss statements and invoices for repairs and renovations.

Given their confidential nature, tax returns are generally not discoverable in the absence of a strong showing that the information is indispensable to the claim and cannot be

obtained from other sources (*Slate v. State*, 267 AD2d 839, 840-41 [3d Dep't 1999]). The tax returns sought are not limited to the activities of the Business, but instead encompass the Mojo's personal returns which are by no stretch of the imagination "indispensable" to their counterclaims. Nor are the demands for point of sale data or profit and loss statements tailored to elicit information relevant to the counterclaims.

The Court finds that the plaintiff's demands in Motion 5 are overly broad and burdensome and constitutes an "unbridled fishing expedition" (*Saratoga Harness Racing Inc. v. Roemer*, 274 AD2d 887 [3d Dep't 2000], *quoting Slate v. State*, 267 AD2d at 841). Plaintiff's motion 5 is denied.

Motion 6. Defendant's motion seeks to compel plaintiff to (1) permit defendants to inspect all documents and information responsive to defendant's August 17, 2023 demand for discovery and inspection; and (2) reimburse defendants for their costs and reasonable attorneys' fees incurred in bringing the motion.

Defendants' August 17, 2023 demands (collectively "defendants' demands") seek all communications by plaintiff Erin Goldman Cooke with (1) named third parties --- who have been identified by plaintiff as potential witnesses or otherwise purported to have knowledge the facts underlying this matter ---- after February 13, 2022¹ relating to plaintiff's allegations in this action; (2) all communications relating to a "meet and greet" for the Mojos held at the Business in September 2021; (3) all communications by plaintiff Erin Cooke announcing the end of her employment at the Business, or the "wreath party" she conducted at the Polish

¹ February 13, 2022 was the last day of plaintiff's employment in the Business. Defendants report that all communications provided by plaintiff in response to discovery demands stop at this date, which is prior to much of the conduct underlying the counterclaims.

Sportsmen Club; (4) all documents evidencing plaintiff Erin Goldman Cooke's COVID vaccination status; and (5) all communications sent by plaintiff Erin Goldman Cooke after the contracted COVID concerning her symptoms, prognosis, medications and recovery.

Plaintiff's response to defendants' demands allege that they are "palpably improper," unduly burdensome and irrelevant. The Court disagrees. As clarified by the Court of Appeals, "the words 'material and necessary' as used in section 3101 must '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'" (*Kapon v. Koch*, 23 NY3d 32, 38 [2014], *quoting Allen v. Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]). In short, the test is one of "usefulness and reason" (*Palmatier v. Mr. Heater Corp.*, 156 AD3d 1167, 1168 [3d Dept 2017], *quoting Allen v. Crowell-Collier Publishing*, 21 NY2d at 406).

Defendants' demands are limited in scope by reference to specified events and dates. Plaintiff's objection to the demands for communications regarding her vaccination status or medical conditions are not, despite plaintiff's insistence to the contrary, protected by physician-patient privilege. Plaintiff waived any such privilege by "affirmatively placing her physical condition in issue." *Vanalst v. City of New York*, 276 AD2d 789, 789 [2d Dept 2000]). Moreover, plaintiffs have already provided defendants with HIPPA waivers, which extend for the duration of this action, granting access to the records of each of her disclosed physicians.

Defendants' motion 6 is hereby granted with respect to document production.

It is, therefore,

ORDERED and DECIDED, that plaintiff's Motions 3 and 5 are denied in their entirety; and it is further

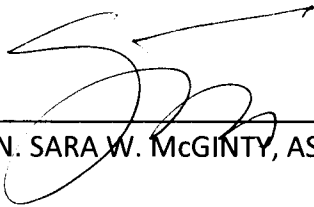
ORDERED and DECIDED, that defendants' Motion 6 is granted to the extent that plaintiff shall produce the communications and other documents demanded in the August 17, 2023 Second Notice of Discovery and Inspection of Documents within 45 days of the date of this decision/order.

The Court has reviewed the remaining arguments of the parties not addressed herein and finds them to be without merit.

This constitutes the order of the Court. All papers, including this Decision/Order, are hereby entered and filed with the Clerk of Columbia County. Counsel is not relieved from the applicable provisions of CPLR Section 2220 relating to service and notice of entry.

DATED: November 24, 2023

ENTER:



HON. SARA W. MCGINTY, ASCJ

Documents reviewed:

Motion 3

NYSCEF document no. 68: Notice of Motion

NYSCEF document no. 69: Affirmation in Support, with Exhibit A (NYSCEF document no. 70)

NYSCEF document no. 71: Memorandum in Support of Motion

NYSCEF document no. 73: Defendants' Affirmation in Opposition to Motion, with Exhibit A (NYSCEF document no. 74)

NYSCEF document no. 75: Memorandum of Law in Opposition to Motion

Motion 5

NYSCEF document no. 87: Notice of Motion

NYSCEF document no. 89: Affirmation in Support, with Exhibits A-D (NYSCEF document nos. 90-93)

NYSCEF document no. 94: Memorandum in Support of Motion

NYSCEF document no. 99: Memorandum of Law in Opposition to Motion

Motion 6

NYSCEF document no. 100: Notice of Motion

NYSCEF document no. 101: Affirmation in Support, with Exhibits A-D (NYSCEF document nos. 102-105)

NYSCEF document no. 106: Affirmation in Further Support of Motion

NYSCEF document no. 109: Affirmation in Opposition to Motion, with Exhibit 1 (NYSCEF document no. 110)

NYSCEF document no. 111: Memorandum of Law in Opposition to Motion