

**Patterson Belknap Webb & Tyler LLP v Marcus &
Cinelli LLP**

2024 NY Slip Op 30109(U)

January 9, 2024

Supreme Court, New York County

Docket Number: Index No. 652711/2022

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

PATTERSON BELKNAP WEBB & TYLER LLP,

Plaintiff,

- v -

MARCUS & CINELLI LLP, DAVID P. MARCUS, BRIAN L.
CINELLI, JOHN DOES

Defendants.

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INDEX NO. 652711/2022

MOTION DATE _____

MOTION SEQ. NO. 011 012 013
014

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 011) 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 226, 229, 240, 241, 242, 243, 244, 245

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 200, 201, 202, 203, 204, 205, 206, 207, 227, 228, 230, 231, 232, 233, 234, 250

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 218, 219, 220, 221, 222, 223, 224, 225, 246, 247, 248, 249, 251

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 252, 253, 254, 256, 257, 258

were read on this motion to/for SEAL.

Motion Sequence Numbers 011, 012, 013 and 014 are consolidated for disposition.

Motions 011 (plaintiff's discovery motion), 012 (defendants Marcus and Marcus & Cinelli LLP's discovery motion) and 013 (Cinelli's discovery motion) are decided as described below. Cinelli's motion (MS014) to seal is granted without opposition.

Background

Plaintiff obtained a judgment in 2013 against non-party Barbara Stewart for over \$2 million arising out of past legal services and served her with a restraining notice in 2013. That restraining notice prohibited her from selling or transferring any property until the judgment was satisfied. Movants helped Ms. Stewart sell a diamond ring and distribute the proceeds, despite that she purportedly knew about the restraining notice. Plaintiff has not received a single payment and the judgment now exceeds \$3 million (as interest has accrued).

In this motion, the parties raise numerous disputes concerning their respective discovery demands. In motion sequence 011, plaintiff seeks to compel defendants to respond to its requests for production of documents as well as a protective order relating to the defendants' requests for the production of documents. Motion sequence 012 involves defendants Marcus and Marcus & Cinelli LLP's (the "Marcus Defendants") motion to compel plaintiff to respond to their discovery demands while motion sequence 013 is defendant Cinelli's motion to compel plaintiff respond to demands and produce a privilege log.

As these motions overlap, the Court will attempt to organize them as discussed in greater detail below.

Discussion

"CPLR 3101(a) requires full disclosure of all matter material and necessary in the prosecution or defense of an action. While trial courts undoubtedly possess a wide discretion to decide whether information sought is 'material and necessary' to the prosecution or defense of an action, such discretion is not unlimited and disclosure is required where it will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Liberty Petroleum Realty*,

LLC v Gulf Oil, L.P., 164 AD3d 401, 403 [1st Dept 2018] [internal quotations and citations omitted]).

“[U]nder New York law, the individual or entity seeking a protective order bears the initial burden to show that the information sought is irrelevant or that the process will not lead to legitimate discovery, and only then does the burden shift to the subpoenaing party to demonstrate that the information sought is material and necessary” (*id.* at 404).

Patterson’s Requests

Plaintiff served 24 document requests and claim that defendants only produced a single document in response to these requests (the Court observes that defendants insist they have uploaded relevant documents in connection with prior motion practice but do not show that they have actually done anything more with respect to Patterson’s demands).

Plaintiff stresses that in this motion, it does not currently seek any documents from defendant Cinelli, who asserts he no longer has any documents in his possession, custody or control. Specifically, plaintiff wants responses to its requests numbered 1-16, 19 and 21-22.

The Court observes that the Marcus Defendants did not upload an opposition under motion sequence 011. Instead, they included a brief opposition to plaintiff’s motion filed under a separate sequence number (012).

As an initial observation, the Court stresses that it is not the Court’s role to make arguments for parties. Here, plaintiff met its burden to show that the requests for which it seeks the production of documents are relevant. For instance, the requests for documents about the sale of the ring and the disposition of the sale proceeds are clearly relevant. The Marcus Defendants do not raise any specific objections about relevance for any of the requests highlighted by

plaintiff. Instead, the Marcus Defendants make conclusory allusions to the attorney-client privilege. But, in this Court's view, such assertions are premature and not in compliance with CPLR 3122(b), which concerns privilege logs.

Put another way, the Court cannot find that the Marcus Defendants lack any obligation to produce any documents because some might be privileged. That is simply not the procedure contemplated by the CPLR. Instead, the Marcus Defendants must search their records and produce relevant non-privileged documents. If they believe that certain relevant documents are subject to a privilege, then they should create a privilege log. Without a log, plaintiff is unable to challenge the assertion of privilege for a particular document (*see In re Subpoena Duces Tecum to Jane Doe, Esq.*, 99 NY2d 434, 442 [2003] [discussing how the creation of a privilege log aids the assessment of a privilege claim]).

To the extent that the Marcus Defendants argue that they offered to find documents via search terms, that is also premature. While search terms can be a valuable tool, they should be implemented only after the universe of documents is identified. That is, if the Marcus Defendants search their files and find some significant number of records involving Ms. Stewart (the Court makes no finding about what that number might be), then search terms can certainly be used to narrow the production. But the Marcus Defendants have put the "cart before the horse"; they have not yet cited a reason to require the use of search terms. Plaintiff argues that the Marcus Defendants have only produced a single document in response to these requests.

And, similarly, the complaint about the use of the phrase "all documents" in these requests is not a basis to not produce any documents. The Court cannot assess whether or not this claim is too broad where the Marcus Defendants have, at least on these papers, not

completed any assessment of how many documents these requests may encompass. And, of course, the fact is that the document requests only seek relevant documents.

The Defendants' Motion and Plaintiffs' Cross-Motion for a Protective Order

The Court observes that for both defendant Cinelli's motion and the Marcus Defendants' motion (as well as the branch of plaintiff's motion for a protective order), the moving papers make generalized arguments about their requests instead of specifically identifying the issues. Because the parties did not address each specific request individually, the Court declines to do so *sua sponte*. Instead, the Court will endeavor to address the generalized arguments advanced by the parties. Of course, that will likely raise issues about how these findings relate to specific document requests.

Many years ago, plaintiff obtained a judgment against Ms. Stewart for services rendered. This case is not against Ms. Stewart; this case is plaintiff trying to enforce its judgment. Therefore, the Court finds that all discovery requests related to plaintiff's representation of Ms. Stewart is not relevant to this case and so plaintiff's request for a protective order related to discovery requests that demand this information is granted. There is no dispute in this case that plaintiff secured a judgment against Ms. Stewart and that this judgment has not been paid. What happened during plaintiff's representation of Ms. Stewart back in 2009 (and earlier) has nothing to do with plaintiff's attempts to satisfy this judgment.

The Court agrees with defendants to the extent that plaintiff is not entitled to assert that it need not comply with discovery requests because it believes that some of defendants' affirmative defenses are invalid. As defendants point out, plaintiff has not yet moved to dismiss any of these

affirmative defenses. A discovery motion is not the proper venue to explore whether or not affirmative defenses are valid.

Accordingly, the Court rejects plaintiff's arguments that its knowledge about the existence of the ring and when plaintiff knew about the federal litigation (between Ms. Stewart and her daughter-in-law) are irrelevant. This appears to relate to the affirmative defenses raised by both defendants of laches (NYSCEF Doc. No. 165 at 36-37, NYSCEF Doc. No. 166 at 37). As stated above, these are still active affirmative defenses and plaintiff has not moved to dismiss any of them. That said, plaintiff may, of course, produce a privilege log to the extent it believes that certain documents are protected by attorney-client privilege. But as long as laches and related defenses are part of this case, then defendants are entitled to related discovery.

However, the Court observes that certain of defendants' arguments in these papers relate to dispositive issues that seem to have little to do with discovery demands. These include references to a case involving plaintiff and Ms. Stewart (*Patterson Belknap Webb & Tyler LLP v Stewart*, 2016 N.Y. Slip Op. 31645[U], 2 [Sup Ct, NY County 2016]) and arguments that plaintiff is collaterally estopped from asserting that Ms. Stewart is insolvent. This motion concerns discovery, it is not a motion for summary judgment or to dismiss.

Another objection raised by plaintiff is that "several of Defendants' disputed requests pertain to whether it was Stewart or her daughter-in-law, Michele, who was the legitimate owner of the Diamond Ring" (NYSCEF Doc. No. 217 at 13).¹ The Court finds that plaintiff is entitled to a protective order to the extent that it need not respond to any discovery requests pertaining to the daughter-in-law's possible ownership of the ring. Defendants do not dispute that they took

¹ As this Court has made clear in this decision, generalized references to discovery requests make it exceedingly difficult to analyze the parties' arguments. This is a prime example as there are no pincites to the requests about which plaintiff is referring.

the ring and sold it on Ms. Stewart's behalf. That the daughter-in-law may have some claim to the ring is not relevant.

Plaintiff also raises objections concerning requests that it asserts are protected by attorney-client privilege. These include defendants' requests for plaintiff's complete files for both this case and the one where plaintiff obtained a judgment against Ms. Stewart. Defendants also seek time records for the 2012 suit by plaintiff against Ms. Stewart as well as plaintiff's internal deliberations.

The Court grants plaintiff's motion for a protective order with respect to these requests. Again, there is no question that plaintiff obtained a judgment against Ms. Stewart—the instant matter is not an opportunity for a collateral attack on that judgment.

The Court recognizes that defendants argue that some of plaintiff's actions are business decisions. That is, plaintiff cannot assert a sweeping objection that every document is privileged solely because plaintiff is a law firm. (Nor can defendants make that argument just because they are lawyers and represented Ms. Stewart). The Court agrees that there is no blanket privilege. Plaintiff must respond to the extent the information encompasses issues such as when plaintiff found out about the ring sale, when plaintiff learned about defendants' involvement in that sale and when plaintiff found out about the federal case between Ms. Stewart and her daughter-in-law.

The Marcus Defendants' motion to compel also covers a notice to admit and interrogatories. However, the affirmation in support (NYSCEF Doc. No. 201 at 4-5) appears to simply make observations about plaintiff's responses to the notice to admit; it does not contain specific demands about specific items. Instead, the Marcus Defendants also offer their own view about these facts. And the memorandum of law (NYSCEF Doc. No. 207) filed by the Marcus

Defendants does not cite any specific notices to admit. Therefore, the Court is unable to compel plaintiff to do anything further with these notices to admit.

The Marcus Defendants reference interrogatory issues but the affirmation in support does not reference a specific interrogatory (NYSCEF Doc. No. 201 at 5) and the memorandum of law only mentions a single interrogatory in passing (NYSCEF Doc. No. 207 at 6 [“Interrogatory 5 and numerous document demands inquired on this subject, yet plaintiff declined to respond”]).

Similarly, Cinelli also served a notice to admit and interrogatories. However, neither the affirmation in support (NYSCEF Doc. No. 219) or the memorandum of law in support (NYSCEF Doc. No. 225) cite to specific notices to admit or interrogatories.

Summary

The vast majority of the parties’ papers make sweeping arguments about the merits of the case and, in doing so, seek indirect relief on those claims in this motion. By, at times, not highlighting the specific requests for which they seek relief and instead making generalized claims that occasionally mention a grouping of requests, the Court is simply not able to adequately address many of the issues raised in the Marcus Defendants’ motion, Cinelli’s motion and plaintiff’s request for a protective order.

For instance, as stated above, Cinelli’s memorandum of law (NYSCEF Doc. No. 225) does not cite a single reference to a specific request for document production, notice to admit, or interrogatory. If the parties make additional motions about discovery (as they are free to do), honing in on the specific requests will help ensure the Court is able to make precise findings about the issues raised by the parties in order to facilitate discovery.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted only to the extent that the Marcus Defendants must respond to the document requests from plaintiff (requests 1-16, 19 and 21-22), including producing relevant documents (as well as a privilege log if applicable) on or before February 15, 2024; and it is further

ORDERED that plaintiff's request for a protective order is granted only to the extent that it need not produce documents relating to 1) its representation of Ms. Stewart, 2) its case files for this case or for the 2012 matter against Ms. Stewart, 3) requests about the ownership of the ring, 4) any invoices or bills from plaintiff, and this request is denied to the extent that plaintiff's objections relies solely on affirmative defenses; and it is further

ORDERED that plaintiff must make a supplemental production (including a privilege log) in accordance with this decision on or before February 15, 2024; and it is further

ORDERED that the Marcus Defendants' motion (MS012) and Cinelli's motion (MS013) are granted with respect to the requests for production of documents (as described in the preceding paragraph) and denied with respect to the interrogatories and notices to admit; and it is further


ORDERED that Cinelli's motion to seal NYSCEF Doc. No. 247 is granted without opposition ; and it is further

ORDERED that the Clerk of the Court is directed, upon service on him of a copy of this order with notice of entry, to seal NYSCEF Doc. No. 247 and to separate this document and to keep it separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed document to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website)].

See NYSCEF Doc. No. 238 concerning the next conference.

1/9/2024 DATE		 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE