

Zuckerbrot v Lande

2024 NY Slip Op 33279(U)

September 12, 2024

Supreme Court, New York County

Docket Number: Index No. 655110/2020

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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TANYA ZUCKERBROT MS RD, TANYA ZUCKERBROT NUTRITION, LLC, D/B/A F-FACTOR	INDEX NO.	<u>655110/2020</u>
Plaintiffs	MOTION DATE	<u>06/20/2024</u>
- v -	MOTION SEQ. NO.	<u>009</u>
EMILY GELLIS LANDE,	DECISION + ORDER ON	
Defendant.	MOTION	

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217

were read on this motion to STRIKE ANSWER/DISMISS COUNTERCLAIM.

Plaintiffs Tanya Zuckerbrot, MS, RD's ("Zuckerbrot") and Tanya Zuckerbrot Nutrition, LLC d/b/a F-Factor's ("F-Factor") (collectively "Plaintiffs") motion to strike the Answer of Defendant Emily Gellis Lande ("Gellis") and dismiss Gellis' counterclaim pursuant to CPLR § 3126 is **granted in part**. Gellis' Answer is conditionally stricken. Gellis may avoid a default by complying with the conditions set forth below.

This motion – Plaintiff's third attempt to strike Gellis' Answer – concerns Gellis' failure to produce electronically stored information ("ESI"), in particular her Instagram account, in native form. Fortunately, the ESI does exist, and Gellis belatedly offered to produce it, with conditions, after Plaintiffs filed this motion. Therefore, Gellis will once again stave off dispositive relief, provided she complies with the conditions set forth in this order. As explained below, Gellis must produce the ESI subject to the terms set forth below and offset Plaintiff's costs and fees in the amount of \$5,000.

A. Background

a. Gellis Has Failed to Comply with Multiple Discovery Orders

On April 15, 2022, the Court entered a Preliminary Conference Order (NYSCEF 69) providing for discovery to close on December 2, 2022. On August 3, 2022, Plaintiffs made a Rule 14 submission indicating that Gellis had not responded to discovery requests served on April 25, 2022 (NYSCEF 70). On August 22, 2022, the parties filed a stipulation providing Gellis through September 15, 2022, to respond to Plaintiffs' discovery requests and serve requests of her own (NYSCEF 71).

On October 3, 2022, counsel for Plaintiffs made another Rule 14 request for a pre-discovery motion conference indicating that Gellis failed to respond to Plaintiffs' discovery requests notwithstanding the extension (NYSCEF 72). Following additional correspondence from the parties (NYSCEF 73-74), Plaintiffs filed their first motion to conditionally strike Gellis' Answer and compel discovery.

Shortly after Plaintiffs' motion was filed, prior counsel for Gellis moved to withdraw, and that motion was granted on December 15, 2022 (NYSCEF 107). Current counsel for Gellis filed an appearance on January 23, 2023 (NYSCEF 109). Although Gellis had previously been afforded an extension of time to respond to Plaintiffs' motion, the Court granted "a final extension" on February 15, 2023 (NYSCEF 112).

By order dated March 30, 2023, the Court granted Plaintiffs' motion in part (*Zuckerbrot v Lande*, 2023 N.Y. Slip Op. 31029[U], 1-2 [N.Y. Sup Ct, New York County 2023]). The Court determined that Gellis' "utter failure to participate in the discovery process is plainly sanctionable" but afforded Gellis "a final opportunity to correct course" or suffer "significant sanctions (potentially including a default judgment against her) . . ." (*id.* *1). Additionally, the

Court found that “[b]y failing to timely respond, Defendant has waived all objections to Plaintiff’s discovery ‘other than privilege or palpable impropriety’” (*id.* *2 quoting *Khatskevich v Victor*, 184 AD3d 504, 505 [1st Dept 2020]). Accordingly, the Court directed that Gellis respond to Plaintiffs’ demand and “provide a sworn certification that production is complete” within forty-five (45) days (*id.* *3).

Thereafter, a dispute arose concerning Gellis’ production, including the production of ESI, and Plaintiffs filed a second motion to strike. By order dated March 6, 2024, the Court directed Gellis to “provide (1) any outstanding written discovery responses; (2) a privilege log; and (3) all relevant ESI in native form or, in the alternative, appropriate authorization(s) for Plaintiffs and their expert to access to her relevant social media accounts” within twenty days (*Zuckerbrot v Lande*, 2024 N.Y. Slip Op. 30712[U], 5 [N.Y. Sup Ct, New York County 2024]). The Court further directed “that should it be determined that native ESI is unavailable, in whole or in part, Defendant shall provide her electronic devices to Plaintiff’s expert for forensic review” (*id.*).

On May 23, 2024, counsel for Plaintiffs filed a Rule 14 submission seeking leave to make a third motion to strike (NYSCEF 183). The Rule 14 submission indicates that, by letter dated May 7, 2024, counsel for Plaintiffs advised counsel for Gellis that she had not completed her production of ESI as directed. In particular, the letter indicates that Gellis had received a link to download her Instagram account in native format but failed to produce discovery to Plaintiffs as required by the Court’s order.

In response, on May 8, 2024, Gellis’ counsel proposed producing the native ESI on June 11, 2024. Plaintiffs were subsequently authorized to move “after June 11, indicating whether or not the ESI has been produced” (NYSCEF 184).

On June 8, 2023, counsel for Gellis requested that Plaintiffs consent to an additional three weeks to produce ESI (NYSCEF 187). On June 17, 2024, the Court denied Gellis' request for an extension of time to produce discovery and reiterated that Plaintiffs were authorized to file their motion (NYSCEF 187).

Plaintiffs filed the instant motion on June 20, 2024. On June 27, 2024, counsel for Gellis produced 13,000 files from Gellis' Instagram account download (NYSCEF 210). Counsel for Gellis also offered Plaintiffs' counsel "access to the master file folder containing all native files from her Instagram account download in the manner Instagram provided it to Ms. Gellis" subject to the following three conditions

1. the master file folders are not shared with anyone outside of your employ. Meaning nothing from those file folders (not previously produced in the recent production) is shared with Zuckerbrot or Bloom until you first provide me copies of the files you did additional key word searches for subject to the period to review and object as per below.
2. That any additional files you believe relevant for production from the master file folder be provided to me and that I am allowed 10 days to review and object to the files use and release on the basis of relevancy and/or privilege.
3. That nothing from the recent production is used by Ms. Zuckerbrot or Ms. Bloom for posting on social media or disclosed publicly until trial.

B. Discussion

a. The Parties' Procedural Arguments are Without Merit

Gellis argues that Plaintiffs' motion should be denied because Plaintiffs did not request a conference with the Court's Principal Law Clerk or meet and confer with her counsel prior to filing the instant motion (NYSCEF 207 at 4). Gellis' arguments are rejected. The May 23, 2024, Rule 14 submission and the Court's subsequent authorization for Plaintiff to make this motion eliminate any of Gellis procedural arguments.

Plaintiffs argue that Gellis' opposition is untimely. On July 1, 2024, the Court granted Gellis' application for an extension of time and directed that opposition be filed on Friday, July 12, 2024 (NYSCEF 203). According to the confirmation notices filed on NYSCEF, Gellis' began filing opposition at 11:59 p.m. on July 12, 2024, and filing was complete by 2:31 a.m. on Saturday, July 13, 2024. The reasons for the delay are set forth in Gellis' counsel's July 19, 2024, letter (NYSCEF 217). The Court deems Gellis' opposition to have been filed timely (CPLR 2004).

However, in addition to explaining the circumstances for the delay, Gellis' counsel's letter improperly addresses argument made in Plaintiffs' reply. Sur-reply papers are not permitted absent leave of Court pursuant to Rule 18 of the Rules of the Commercial Division. Accordingly, those portions of Gellis' counsel's July 19, 2024, letter (NYSCEF 217) that do not concern the delay (i.e., pages 3-5 and the attachments) have not been considered in adjudicating this motion.

b. Plaintiffs' Motion to Strike is Conditionally Granted

CPLR 3126 provides, in relevant part:

If any party. . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed. . .the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses;

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

The First Department has instructed courts to be “proactive” in situations like this where “a party has repeatedly failed to comply with discovery orders” (*Figdor v City of New York*, 33 AD3d 560, 560 [1st Dept 2006]). In that case, the First Department conditionally struck an answer where discovery responses were “inexcusably lax” and determined that “[w]hile discovery has trickled in . . . the cavalier attitude of defendant, resulting as it has in substantial and gratuitous delay and expense, should not escape adverse consequence” (*id.* [citations omitted]). Accordingly, the First Department directed the defendant to pay \$10,000 in costs to avoid having their answer stricken (*id.*). The First Department subsequently cited *Figdor* for the proposition that, when a party engages in “continued discovery abuses,” that the sanctions including the “reasonable legal fees incurred in discovery” may be warranted (*Maxim Inc. v Gross*, 179 AD3d 536, 537 [1st Dept 2020] citing *id.*)

Gellis has repeatedly violated the Court’s orders and disregarded her discovery obligations. In both the 2023 and 2024 orders granting Plaintiffs’ prior motions, the Court afforded Gellis a “final” opportunity to fulfill her obligations. In response, Gellis has partially complied, offered excuses, and pled for leniency. As set forth in the 2023 order, Gellis has waived all objections other than privilege and palpable impropriety.

Based on the foregoing, Plaintiffs’ motion is granted to the extent that Gellis’s Answer and Counterclaims will be struck unless, within 30 days after service of a copy of this order with notice of entry, Gellis pays Plaintiffs’ attorney \$5,000 as a discovery sanction (*Figdor*, 33 AD3d at 560). Based on the facts and circumstances of this case, the Court finds that such a monetary sanction is “proportionate to the conduct at issue” (*Young v City of New York*, 104 AD3d 452,

454 [1st Dept 2013] [awarding \$5,000 in sanctions where plaintiffs were required to make two motions for sanctions and discovery was not proffered until after the second motion was filed]). Continued discovery defalcations may well lead to sterner sanctions.

In addition, Plaintiffs should not bear the burden of conducting an initial search of Gellis' "master file folder containing all native files from her Instagram account," which presumably includes an enormous volume of irrelevant material (*U.S. Bank Nat. Ass'n v GreenPoint Mtge. Funding, Inc.*, 94 AD3d 58, 63 [1st Dept 2012]). Accordingly, Plaintiffs may provide a list of ESI search terms to Gellis's counsel within 7 days. Gellis, through her counsel or discovery vendor, shall complete a search of the "master file folder containing all native files from her Instagram account download in the manner Instagram provided it to Ms. Gellis" and produce responsive documents in native format within 14 days, with no conditions other than those available in the standard form confidentiality order included in the Commercial Division Rules (if one has not already been entered in this case). That is how discovery is supposed to work, rather than a data dump combining relevant and irrelevant material for the receiving party to sort through at great expense.

Third, to the extent not already done, Gellis must serve a privilege log – consistent with the Commercial Division Rules – and any other outstanding discovery responses within fourteen days of this order.

To the extent any disputes arise, the parties must promptly meet-and-confer and, if necessary, submit Rule 14 letters to the Court. Gellis' failure to abide by the foregoing directives may result in additional sanctions, including but not limited to increased monetary sanctions *and* the striking of her Answer.

* * * *

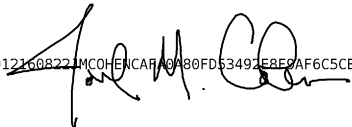
Accordingly, it is

ORDERED that Plaintiffs' motion is **GRANTED** to the extent that Gellis' Answer and Counterclaims **will be stricken** unless, within 30 days, Gellis pays \$5,000 to Plaintiff's attorney as a sanction for her repeated discovery failures and delays; it is further

ORDERED that Plaintiffs provide ESI search terms to Defendant within seven days and that Defendant complete a search and produce responsive ESI in native format within 14 days thereafter; and it is further

ORDERED that the parties file a status update letter, including proposed dates for the completion of all discovery, including expert discovery, the filing a note of issue and summary judgment motions, within thirty (30) days of this order.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

9/12/2024

DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE