

**Beachcomber Ltd. v Herrmann**

2024 NY Slip Op 34869(U)

July 22, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 603870/2023

Judge: James Hudson

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**Supreme Court of the State of New York  
County of Suffolk  
Commercial Division Part XLVI  
Memorandum Decision**

**PRESENT:**

**HON. JAMES HUDSON**  
Acting Justice of the Supreme Court

MOTION DATE: 4/3/24 (#003)  
MOTION DATE: 6/5/24 (#004)  
SUBMIT DATE: 6/12/24  
Mot. Seq. #: **003 – MD**  
**004 - MotD**

-----X  
BEACHCOMBER LTD.,

Plaintiff,

-against-

THOMAS M. HERRMANN; DUNE RESORTS,  
LLC,

Defendants.  
-----X

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Thomas M. Herrmann and Dune Resorts, LLC request an order pursuant to **CPLR 3124, 3126** 1) compelling Beachcomber Ltd. to serve complete, verified responses to defendants' December 8<sup>th</sup>, 2023 first set of interrogatories; 2) compelling Beachcomber Ltd. to serve complete responses to defendants' December 8<sup>th</sup>, 2023 first demand for the production of documents; and 3) awarding defendants the costs and attorneys' fees associated with this motion.

Beachcomber Ltd. requests an order: 1) denying and dismissing defendants' motion to compel discovery responses; 2) striking all of defendants' interrogatories and demands for documents; 3) removing NYSCEF Docs. 84, 86, and 88 from the docket; 4) compelling

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defendants to respond to plaintiff's discovery demands and cure any deficiencies; and 5) awarding attorneys' fees to the plaintiff against the defendants, jointly and severally.

This is an action alleging breach of contract by a property management company concerning the cooperative apartment corporation, Beachcomber Ltd., which operates the Beachcomber Resort at Montauk, Old Montauk Highway, Montauk, NY ("Resort"). On February 23<sup>rd</sup>, 2021 Beachcomber, Ltd. ("Beachcomber") and Dune Resorts, LLC ("Dune") executed a one (1) year agreement ("Contract"). Thomas M. Herrmann was the president of Dune. By its terms, Dune was employed as the exclusive managing agent for the resort. Its managerial duties included maintenance of the building, grounds, and equipment, including the supervision of all facility insurance policies. On October 25<sup>th</sup>, 2021 the resort suffered storm damage. Beachcomber alleges that Dune failed to properly secure the premises from the predicted storm and mishandled the associated insurance claim for the resultant damages. Beachcomber also alleges that Dune failed to provide its board of directors with claim status updates. Beachcomber amended its complaint, which Dune has answered. Dune previously unsuccessfully moved for disqualification of Beachcombers' counsel and for default judgment. The parties are now engaged in motion practice regarding discovery. Dune seeks an order compelling Beachcomber to serve responses to its interrogatories and document demands. Beachcomber seeks dismissal of that motion and requests, *inter alia*, an order compelling Dune to respond to its discovery demands.

Generally, the scope of pre-trial discovery is broad; with specific exceptions for material determined to be privileged and that which is an attorney's work product. **CPLR**

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**3101 (a)** mandates full disclosure of all matters material and necessary to an action, consistent with “New York’s policy of permitting open and far-reaching pretrial discovery” (*Neves v. Port Authority of New York and New Jersey*, 265 AD2d 393, 394, 697 NYS2d 85 [2d Dept 1999]; *M.C. v. Sylvia Marsh Equities, Inc.*, 103 AD3d 676, 959 NYS2d 280 [2d Dept 2013]).

It is within the sound discretion of the Court to resolve discovery disputes (*Carmona v. HUB Props. Trust*, 186 AD3d 1485, 1486, 131 NYS3d 710 [2d Dept 2020]). The Court must balance the need for discovery against the burden of its production (*O’Neill v. Oakgrove Constr.*, 71 NY2d 521, 529, 528 NYS2d 1, 523 NE2d 277, *rearg denied* 72 NY2d 910, 532 NYS2d 785, 528 NE2d 1231 [1988]). The Court must liberally interpret whether the disclosure sought is material and necessary. That phrase has been held to include “facts bearing upon the controversy which will assist in the preparation for trial...the test is one of usefulness and reason” (*Harrison v. Bayley Seton Hosp., Inc.*, 219 AD2d 584, 584, 631 NYS2d 182 [2d Dept 1995]). Discovery which is sought in good faith for use as evidence or in rebuttal, or for purposes of cross-examination, is permitted (*Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, 288 NYS2d 449, 235 NE2d 430 [1968]). Discovery demands which are overly broad or tend to confuse pertinent case issues should be denied (*Brandes v. North Shore University Hosp.*, 1 AD3d 550, 767 NYS2d 999 [2d Dept 2003]). The Court’s review is limited to determining where there has been an abuse of the discovery process (*Kavanagh v. Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954, 683 NYS2d 156, 705 NE2d 1197 [1998]).

The Court will first consider the defendants’ motion (seq. no. 001).

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The parties stipulated to serve all discovery responses by January 31<sup>st</sup>, 2024 (NYSCEF Doc. No. 83). On January 31<sup>st</sup>, 2024, Beachcomber filed its responses to the defendants' interrogatories. On February 22<sup>nd</sup>, 2024, by letter, Beachcomber's counsel addressed allegations by Dune that certain responses were "deficient". On March 11<sup>th</sup>, 2024, Beachcomber supplemented their responses. Dune argues that the supplemental response was deficient; and filed the instant motion to compel.

Beachcomber argues in opposition that its responses are legally sufficient. It further argues that Dune's demands are defective, overly broad, and seek information which Beachcomber already possesses or to which it is not entitled. Beachcomber contends that Dune is in default for failing to answer plaintiff's discovery demands and for not responding to correspondence from Beachcomber alleging disclosure deficiencies.

The parties have not yet filed a preliminary conference order. Beachcomber has addressed and explained their position regarding discovery in several letters which have been made part of the record.

Dune has not demonstrated willful, deliberate and contumacious refusal by Beachcomber to comply with Court ordered discovery necessary to support their motion (*Watson v. 518 Pennsylvania Housing Development Fund Corporation*, 160 AD3d 907, 910, 76 NYS3d 66 [2d Dept 2018]).

**22 NYCRR 202.7 (a)** requires that all motions relating to disclosure, including a **CPLR 3124** motion to compel, must include an affirmation by movant counsel that they have conferred with their adversary and made a good faith effort to resolve the issues raised by the motion. **22 NYCRR 202.20-f**, based upon **Commercial Division Rule 14**, states

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that absent exigent circumstances, prior to contacting the court regarding a disclosure dispute, counsel must first confer in good faith to resolve all discovery disputes. The supporting affirmation shall attest to counsel having conducted an in-person or telephonic conference, setting for the date and time of each such conference, persons participating, and the length of time of each conference. If the moving party was unable to conduct a conference due to the unreasonable failure or refusal of an adverse party, the movant shall detail his or her efforts to obtain a conference and set forth the responses received (**22 NYCRR 202.20-f [b]**).

The affirmation submitted in support of the motion does not make the necessary attestations in compliance with the Court rules and regulations. The motion is not ripe for consideration and will be denied.

The Court will next consider the plaintiff's cross-motion (seq. no. 002).

The first request, the denial and dismissal of the defendants' motion to compel, has been rendered moot.

Beachcomber next requests that the Court order the removal of NYSCEF Docs. No. 84, 86, 88 from the record. The noted documents are the plaintiff's response to defendants' interrogatories; correspondence from plaintiff's counsel to defendants' counsel regarding alleged response deficiencies; and plaintiff's supplemental responses to defendants' interrogatories. Beachcomber argues that their filing violates **22 NYCRR 202.5-b (j)**. That subsection states that, in the absence of a stipulation, responses to discovery demands shall not be filed electronically, except for excerpts, quotations or selected exhibits. A

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review of the record reveals no stipulation regarding the filing of discovery responses. The referenced documents were uploaded in their entirety.

Dune, in opposition to the requested removal, argues that **22 NYCRR 202.5-b (j)** is “not the controlling statute for such motion practice” (NYSCEF Doc. No. 99, P. 9). Dune contends that **CPLR 2214 (c)** directs that parties shall furnish to the court all papers served by that party. The Court does not agree. First, Beachcomber’s responses to the defendants’ interrogatories are not papers served by Dune. Second, **22 NYCRR 202.5-b (j)** is precisely on point, and the statutory language is clear and unambiguous. Dune attempts, without avail, to invoke **22 NYCRR 202.8-a (a)**, in support of its contention that

counsel must submit as part of their motion papers, copies of all pleadings and other documents as required by the **CPLR** and as necessary for an informed decision on the motion [especially on motions pursuant to **CPLR 3211** and **3212**] (NYSCEF Doc. No. 99, p. 10).

Dune’s motion to compel (**CPLR 3124**) is neither a motion to dismiss or one requesting summary judgment. **22 NYCRR 202.8-a (a)** deals generally with the form of motion papers and does not supersede **22 NYCRR 202.5-b (j)**. The Court will grant Beachcomber’s request.

Finally, Beachcomber requests that the defendants be compelled to respond to its discovery demands and cure any deficiencies; and that all of defendants’ interrogatories and demands for documents be struck. The affirmation in support of those requests does not comply with **22 NYCRR 202.20-f (b)**, discussed hereinabove. The requests will be denied.

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The Court has carefully considered and denies the request of the plaintiff and the defendants for any award of attorneys' fees associated with prosecuting or defending the motion or cross-motion.

In the event counsel are unable to reasonably comply with the requirements of **CPLR 3101 (a)**, the Court will send the issue of case discovery to a Special Master.

Accordingly, it is

**ORDERED**, that the motion (seq. no. 003) by defendants Thomas M. Herrmann and Dune Resorts, LLC, which requests, pursuant to **CPLR 3124, 3126** that the plaintiff, Beachcomber, Ltd. be compelled to serve complete, verified response to the Defendant's December 8<sup>th</sup>, 2023 first set of interrogatories and first demand for the production of documents, is denied in its entirety; and it is further

**ORDERED**, that the cross-motion (seq. no. 004) by the plaintiff, Beachcomber, Ltd., which requests that NYSCEF Document numbers 84, 86, 88 be removed from the docket, is granted; and it is further

**ORDERED**, that the request that the defendants' motion to compel discovery responses be dismissed, is denied as moot; and it is further

**ORDERED**, that the request that the defendants be compelled to respond to plaintiff's discovery demands and cure any deficiencies, is denied; and it is further

**ORDERED**, that the request that all of the defendants' interrogatories and document demands be struck, is denied; and it is further

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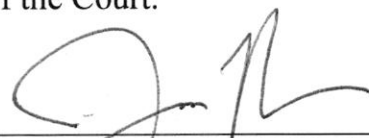
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**ORDERED**, that the request that the plaintiff be awarded its attorneys' fees associated with the cross-motion, against the defendants jointly and severally, is denied; and it is further

**ORDERED, ADJUDGED and DECREED**, that, upon receipt of this decision, the parties immediately complete and submit a preliminary conference order for consideration by the Court.

This memorandum also constitutes the Order of the Court.

Dated: July 22<sup>nd</sup>, 2024  
Riverhead, NY



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**HON. JAMES HUDSON**  
Acting Justice of the Supreme Court