

JSB Partners LLC v Colabella
2012 NY Slip Op 31202(U)
April 27, 2012
Supreme Court, New York County
Docket Number: 0600524/2010
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon Joan A. M. J. J.
Justice

PART 11

Index Number : 600524/2010
JSB PARTNERS LLC
VS.
COLABELLA, ANDREA
SEQUENCE NUMBER : 005
VACATE STAY/ORDER/JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, It is ordered that this motion is decided in accordance with
the annexed memorandum Decision & Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

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Dated: April 27, 2012

J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 11

-----X

JSB Partners LLC,

Plaintiff,

Index No. 600524/10

-against-

Andrea Colabella, Steven Shapiro
and Cardea Group Inc.,

Defendants.

-----X

Andrea Colabella, Steven Shapiro,

Defendants/Counterclaimants,

-against-

Joseph Barr, Barry Taitz, JSBP, Inc.
and JSB,

Counterclaim Defendants.

-----X

Joan A. Madden, J.:

Defendants Andrea Colabella ("Colabella"), Steven Shapiro ("Shapiro") and Cardea Group Inc. (jointly "defendants") move for an order pursuant to CPLR 3104(d) vacating a decision and order of Referee Jeffrey Helewitz dated September 23, 2011 ("September 23 Order") which granted a June 2011 motion to compel by plaintiff JSB Partners LLC ("JSB") and, as to certain items of such discovery, directed that it be produced without requiring that its production be for "attorney's eyes only." The September 23 Order also denied defendants' cross motion for a protective order with respect to various sets of interrogatories and denied defendants' motion to dismiss the complaint and/or to compel

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disclosure. JSB opposes the motion and seeks an order striking defendants' pleadings or conditionally striking defendants' pleadings for failure to comply with discovery.

JSB is an executive recruiting firm in Manhattan. Colabella is a recruiter who was employed by JSB from January 7, 2008 until November 9, 2009. Shapiro was employed by JSB as a recruiter from February 7, 2006 until November 9, 2009. Defendant Cardea Group Inc. ("Cardea") is a New York corporation founded by Colabella and Shapiro to provide professional staffing.

In this action, JSB alleges that Colabella and Shapiro breached their respective employment agreements by converting JSB's confidential information for their own use in order to contact and solicit JSB's clients and job placement candidates during their employment and for 18 months after their employment with JSB ended. The complaint seeks compensatory and punitive damages and injunctive relief. Defendants answered the complaint and asserted various counterclaims, including a counterclaim seeking the recovery of unpaid commissions pursuant to Labor Law § 190.

The discovery process in this action has been arduous and, in January 2011, the court's appointed a Special Referee Jeffrey Helewitz to handle discovery disputes between the parties. On March 3, 2011, after a lengthy conference with the Special Referee, the parties entered into a stipulation regarding

discovery that was subsequently so-ordered by the court ("the March 3 Stipulation").

The March 3 Stipulation resolved defendants' objections to JSB's first set of interrogatories, and first set of document demands, as well as plaintiff's objections to defendants' first set of interrogatories and defendants' first set of document demands and required the parties provide responses within 60 days. It further provided that "the parties shall respond to all interrogatories and document requests not otherwise dealt with in this stipulation in accordance with the parties' confidentiality agreement of November 17, 2010."

In June 2011, JSB moved for an order, *inter alia*, (i)striking defendants' answer for failing to provide the discovery directed in the March 3 Stipulation, and failing to respond to JSB's second set of interrogatories dated March 16, 2011, and (ii) directing that the discovery provided by the defendants not be subject to "attorney's eyes only."

Defendants, represented by new counsel, opposed the motion and cross moved for a protective order with respect to JSB's first, second and "supplemental" set of interrogatories, and to dismiss JSB's amended complaint for failing to provide disclosure and/or to compel disclosure.

The September 23 Order denied the parties' respective requests for discovery sanctions pointing out that "there has

only been one discovery order, and that order did not indicate the possibility of sanctions" (September 23 Order at 4).

The Special Referee also granted JSB's request that the discovery provided by JSB not be for "attorney's eyes only," noting that the March 3 Stipulation required that the client information be turned over for review by plaintiff for the purpose of determining whether defendants' clients were taken from plaintiff's confidential information, and that the "attorney's eyes only" designation would "render the discovery meaningless" as the attorneys are "in no position to know the identities of the persons with whom it dealt" (Id., at 4, 5).

The Special Referee also rejected defendants' position that the information at issue should not be disclosed to JSB on the ground that it constituted a "trade secret," and noted that the disclosure was subject to a confidentiality agreement which he found would provide "all the protection that [defendants] needed regarding unwarranted use of the names so provided" (Id., at 9). The Special Referee then directed that the parties provide the disclosure required by the March 3 Stipulation within 60 days and scheduled a further compliance conference.

On September 28, 2011, defendants made this motion to vacate the September 23 Order, arguing that the March 3 Stipulation is "illegible," that the discovery ordered in the March 3 Stipulation was "too broad," and that the Referee erred in

denying defendants' cross-motion to dismiss the Amended Complaint.¹

Defendants also argue that Special Referee erred in rejecting its request that the discovery be produced for "attorneys' eyes only," and that JSB should not be permitted to have access to confidential information as JSB violated defendants' privacy by accessing the individual defendants' email after they left JSB, and that, as a result, defendants have moved for injunctive relief.

At the outset, it must be noted that although the March 3 Stipulation is written in script and parts are difficult to read, it cannot be said that it is "indecipherable" as alleged by defendants. In any event, counsel for JSB has provided a typed version of the March 3 Stipulation which defendants do not dispute accurately reflects its content.

Moreover, as after their objections to plaintiff's discovery requests were considered and ruled upon,² defendants agreed to provide the discovery in the March 3 Stipulation, albeit with different counsel, they arguably should not be able to challenge

¹The court notes that with the exception of exhibits A through D, defendants' did not include exhibit tabs, thus making it burdensome for the court to verify that the exhibits support their position.

²The Stipulation indicates that except for Interrogatories 7, 9, 74, 75, 76 and 67, all of JSB's interrogatories in the first set of interrogatories were to be answered by defendants.

it now. In addition, defendants' argument that the discovery ordered in the March 3 Stipulation is overly broad and/or burdensome as it requires defendants to produce discovery for 18 months after they left JSB's employ is unavailing. Such materials are relevant to determining whether, in violation of their employment agreements, individual defendants converted JSB's confidential information for their own use during the 18 month period. In this connection, the court notes that the relevant employment agreements provide that an employee of JSB may not, *inter alia*, during their employment and for 18 months thereafter "solicit or accept recruitment or job placement business from any client or job candidate of JSB Partners" Employment Agreement, ¶ 9.

That being said, however, a review of the interrogatories reveals that request nos. 11 through 16, 18, 19, 20, and 21 are broad and burdensome as they require defendants to provide, *inter alia*, detailed information regarding all contacts made with prospective clients/job candidates and all placement services provided to such clients/job candidates and fees paid for such services since they left JSB's employ. The response to such requests will yield detailed information regarding clients/job candidates that was not obtained in breach of the employment agreements. The difficulty in tailoring discovery in this matter arises out of the need to provide JSB with sufficient information

to enable it to identify which contacts and placements made by defendants involved the use of JSB's confidential information, while not requiring defendants to provide discovery as to all the business done by them since the individual defendants left JSB.

The record shows that JSB has identified approximately 40 clients of JSB that defendants contacted or placed in alleged violation of the employment agreements. For those clients, defendants shall be required to respond to the interrogatories 11 through 16, 18, 19, 20, and 21.

Defendants shall also be required to provide JSB with a list of all job candidates/clients solicited or placed by defendants for the 18 months after they left JSB's employ. From that list, JSB will be able to identify those individuals or entities that were contacted and/or placed allegedly using JSB's confidential information. Once those clients/candidates are identified, JSB can then request the detailed information sought in the relevant interrogatories with regard to those client/candidates.³

Next, there is no basis for vacating the September 23 Order denying defendants' request that the information be for

³Contrary to defendants' argument, the court in HPD Inc. v. Ryan, 203 AD2d 326 (2d Dept 1994) did not limit discovery in actions against former employees for breach of restrictive covenants in their employment agreements to obtaining customer lists, but simply held that under the circumstances of that case, the trial judge properly required defendant to produce a list of its customers during the two year period of the restrictive covenant.

attorneys' eyes only, particularly as the court has now limited the information required to be provided to JSB in response to certain interrogatories. As the Special Referee found, the information would be worthless unless JSB is permitted to examine it to determine if the persons/entities at issue were JSB's clients/job candidates or otherwise obtained or contacted using JSB's confidential information. Moreover, defendants failed to show that the information constituted trade secrets or information "not known in the trade or are discoverable only through extraordinary efforts" Epic Chemicals, Inc. v. Gordon, 95 A.D.2d 820, 821 (2d Dept 1983). In any event, the confidentiality agreement protects defendants from any misuse of the information. In addition, defendants' motion for injunctive relief based on documents showing that JSB used the email accounts of the individual defendants after they left JSB's employ does not provide grounds for denying JSB the relevant discovery.⁴

Defendants also request dismissal of JSB's complaint as JSB has not adequately responded to its discovery requests.

⁴ While this motion was pending, the court issued a decision and order dated February 22, 2012, denying the individual defendants' motion for a preliminary injunction except to the extent that JSB agreed not to send any further emails from the email account of the individual defendants and to advise any client or candidates sending emails to the accounts that the individual defendants are no longer employed by JSB.

Specifically defendants allege that JSB has failed to provide (1) sufficient interrogatory answers and documentation regarding clients and job applicants alleging taken from JSB, (2) adequate documentation as to hours worked by the individual defendants and records regarding commissions owed to them, or (3) answers to certain of its interrogatories.

Defendants' motion to dismiss the complaint is denied, as the record shows that JSB has provided a large portion of the discovery sought by defendants, including responses to defendants' first document demand and first and second sets of interrogatories.

That being said, however, while JSB requests that the court clarify that no discovery is required of it in response to the March 7 Stipulation, on this record, the court cannot determine the merit of such request and the Special Referee should address this issue and clarify the intent of the March 7 Stipulation in this regard. In addition, the Special Referee should address the issues raised by defendants' objections to JSB's second set of interrogatories.

In view of the above, it is

ORDERED that defendants' motion is granted only to the extent that as to interrogatories 11 through 16, 18, 19, 20, and 21 of plaintiffs' first set of interrogatories, defendants shall be required to answer such interrogatories with respect to the

clients/job candidates previously identified by JSB, and to provide a list of clients/job candidates contacted or placed by defendants, from November 2009 through May 2011, subject to defendants being required to provide further responses to interrogatories 11 through 16, 18, 19, 20, and 21 as to clients/job placement candidates identified from the list provided by defendants as former clients or job placement candidates of JSB or clients/candidates otherwise obtained allegedly using JSB's confidential information; and it is further

ORDERED that within 30 days of the date of this decision and order, defendants shall respond to the JSB's first set of interrogatories, except for items indicated in the March 7 Stipulation and as limited by the immediately preceding paragraph; and it is further

ORDERED that in the event defendants fail to comply with the immediately preceding paragraph, JSB may request a conference with Judge Madden at which time the court will impose discovery sanctions/penalties against defendants, as provided in CPLR 3126 and as detailed in the annexed order; and it is further

ORDERED that all further discovery motions regarding interrogatories and all opposition to such motions shall comply with the format in the annexed order or court shall not consider such motion and/or opposition; and it is further

ORDERED the parties shall appear for a conference before the

Special Referee on May 7, 2012 at 10:00 am, in room 562, at which the Special Referee shall address JSB's request that it be clarified as to whether any further discovery is required of it in response to the March 7 Stipulation, any issues raised by defendants' objections to JSB's second set of interrogatories, and any other discovery disputes not resolved by the instant decision and order;

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

Dated: April 27, 2012



J.S.C.

ORDERED THAT all discovery motions with respect to interrogatories shall comply with the following requirements:

1. The movant shall list each demand and/or interrogatory followed by the response and a concise statement regarding the legal and factual basis supporting each request.
2. The opposing party shall respond in the same format as described above by including each demand and/or interrogatory followed by movant's response and address each item with a concise statement regarding the legal and factual basis for the sufficiency of their response or objection.
3. For both the moving papers and opposing papers, each item shall have its own response and references to the grounds asserted in response to other questions are not permitted.

Compliance with discovery orders, including preliminary conference orders:

Failure to comply with the discovery dates and provisions in discovery orders, including preliminary conference orders, will result in the imposition of sanctions and/or penalties pursuant to CPLR 3126, including preclusion, striking the pleadings and/or the determination of issues upon which the discovery is material and relevant in accordance with the claims and/or defenses of the party obtaining the order and against the non-complying party.

DATED: April 27, 2012

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