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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART 2
Justice

Sandra E Mei, 125

-v-

Padeh

INDEX NO. 113781/09

MOTION DATE

MOTION SEQ. NO. 001

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAY 25 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/23/12

_____, J.S.C.
LOUIS B. YORK

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

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: IAS PART 2

x

SCAROLA ELLIS, LLP,

Plaintiff,

-against-

ELAN PADEH,

Defendant.

x

Index No. 113781/2009

LOUIS B. YORK, J.:

The Court denies plaintiff's motion to strike the Answer and Counterclaim, grant it default judgment, and award costs including motion costs.

Denial is appropriate because of a fundamental procedural defect. Under 22 NYCRR 202.7, an affirmation of good faith must accompany all discovery motions. Moreover, subsection (c) provides that this affirmation must "indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held." In the absence of a good faith affirmation, the court must deny the motion. See Fulton v. Allstate Ins. Co., 14 A.D.3d 380, 382, 788 N.Y.S.2d 349, 351 (1st Dept. 2005). Denial of the motion is also appropriate where the motion is insufficiently detailed, does not show that the movant tried to obtain ordered discovery prior to initiating the motion or is otherwise inadequate. See, e.g., Tine v. Courtview Owners Corp., 40 A.D.3d 966, 967, 838 N.Y.S.2d 92, 93 (2nd Dept. 2007); Chervin v. Mercura, 28 A.D.3d 600, 602, 813 N.Y.S.2d 746, 748 (2nd Dept. 2006).

Here, plaintiff submits a supposed good faith affirmation which includes absolutely no evidence of good faith. The affirmation simply states, "I attest that we have made a good-faith attempt to resolve this discovery dispute with defendant prior to making this motion. This is the second request for this particular relief, though the facts have changed and become more egregious since the first such request." Zubatov Aff. ¶ 2. It does not "indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or . . . indicate good cause why no such conferral with counsel for opposing parties was held." Fulton, 14 A.D.3d at 382, 788 N.Y.S.2d at 351. In particular, it does not identify the first attempt to resolve the dispute, and it asserts that this order to show cause is the second attempt for a resolution of the dispute.

To the extent that plaintiff identifies this order to show cause as a "good faith effort," the affirmation lacks merit. The good faith requirement refers to efforts to resolve the dispute prior to motion practice. See 22 NYCRR § 202.7. Logically, then, this effort cannot include the motion itself. Moreover, the service of the Court's December 2011 discovery order with notice of entry and the service of the original demand is not a good faith effort, "as the service demand itself can never constitute a good faith effort to resolve any noncompliance with that demand." Seda v. Mall Properties, Inc., Index No. 114679/2009 (Sup. Ct. N.Y. County Oct. 28, 2011)(avail at 2011 WL 5137174, at *2). Nor can the original motion for sanctions count as an effort to nonjudicially resolve the dispute. See 22 NYCRR § 202.7. Movant has provided no other explanation of any potential good faith efforts, and the Court will not engage in additional guesswork on this issue.

The Court finally notes, on this point, that counsel's affirmation states the Court allowed the parties to file the Note of Issue with this discovery dispute pending. The Court has no record

of this but accepts counsel's word for the sake of argument. The Note of Issue was filed in November 2010, and the Court did not indicate that the parties could litigate this issue continuously for a year-and-a-half. Moreover, even if the Court gave the parties permission to resolve this issue after the Note of Issue was filed, this did not dispense with the parties' obligation to communicate with each other in good faith in an effort to resolve the disputes themselves. This is the second motion by plaintiff regarding this matter since it filed the Note of Issue, and counsel made the motion within a few months of the issuance of the December 2011 order. Thus, it does not appear that counsel has attempted nonjudicial resolution at all.

For these reasons alone, denial of the motion is appropriate. However, given the litigious nature of the parties – defendant has made two motions since the case commenced; plaintiff has made five motions, including two prior ones concerning this very discovery dispute – it is quite likely that if the Court denies this motion without touching upon the merits, plaintiff will make yet another motion for this relief, this time annexing a satisfactory good faith affirmation. As the case is on the trial calendar and has been adjourned on several occasions due to the litigation of this precise dispute, it is prudent to address the issue. For this reason, the Court concludes that, were this motion properly before the Court, it would deny it in its entirety.

In this lawsuit plaintiff seeks legal fees which it alleges are due to it. According to the Complaint, defendant hired George Zelma to represent him in a case seeking unpaid salary and real estate commissions due to him from Corcoran Real Estate ("Corcoran"). Zelma, in turn, sought the legal assistance of plaintiff's law firm. Pursuant to the terms of the agreement between Zelma, defendant and plaintiff, plaintiff was to receive 20.5% of any settlement or judgment in the case.

Ultimately, defendant and Corcoran settled their lawsuit – according to plaintiff, for a fraction of the money plaintiff could have obtained for defendant in court or through a settlement. However, defendant received substantial non-monetary consideration as part of the settlement. These benefits included the discontinuance of perjury charges which Corcoran, the defendant in the underlying lawsuit, intended to bring against defendant, his company and the company's general counsel, which also could have resulted in up to $1 million in fees due to the perjury investigation. Plaintiff states that it was not present at the settlement negotiations and did not approve of the settlement terms. According to the complaint, the ultimate settlement terms unfairly deprived plaintiff of the 20.5% percentage share it should have received under a more beneficial settlement of this contingency case. Plaintiff also notes that an agreement between itself and defendant provides, in addition to the provision for the 20.5% contingency agreement, the payment of additional fees for work performed outside the scope of the arrangement.

Defendant asserts, among other arguments, that plaintiff's combative conduct in the course of the litigation poisoned the relationship between the various parties, causing a breakdown of settlement negotiations, and this also contributed to his decision to settle for the lesser sum. Also, defendant counterclaims alleging duress. According to defendant, plaintiff badgered him into signing the second of the two contingency agreements, which provides for the payments of the additional fees, and that defendant only signed the second agreement in the face of plaintiff's threat to walk out on the case on the eve of trial. Once the agreement was in effect, however, defendant states that he forbade plaintiff from further participation and directed Zelma to enter into the settlement arrangement.

As this Court already stated, this case has been the subject of prior motion practice. As is relevant here, defendant initially moved for an order to quash a subpoena, and won on the ground that the subpoena sought privileged information and was overly broad. The Court allowed plaintiff to proceed with its second subpoena, which included a demand for computer-generated materials and emails. Defendant stated there was no available electronic discovery other than the emails and documents he'd already provided. Without detailing the prior litigation and conference history, all of which are part of the case file, the Court notes that initially defendant provided an affidavit by Tekscape owner Francis X. Walsh, who conducted the search on defendant's behalf. The affidavit reads in pertinent part:

> At the request of [defendant's attorneys], Tekscape was asked to produce or locate email transactions for the organization dating back to the period 2008-2009, which might have referred to the litigation with Corcoran or Mr. Padeh's settlement with Corcoran Group. Tekscape engineers conducted an investigation and found the following:
>
> 1. There are no email records stored locally at the client corporate offices;
> 2. There are no emails stored locally on the individual desk-top PC's;
> 3. Back-up tapes on-site contain no historical email records;
> 4. There is no email server . . . that potentially archive [*sic*] these records;
> 5. Current "hosted" email provider, named Rackspace, currently only archives records for a two-week period . . . .

Based on the above, the affidavit concluded there were no additional emails available relating to the Corcoran litigation. In addition, defendant produced nine emails between itself and plaintiff.

In response to litigation over the adequacy of the Walsh affidavit, Mr. Walsh provided a supplemental affidavit which supplemented the earlier affidavit with the following explanation of the search:

> . . . Tekscape searched files on the computers or servers kept at the company. I was also asked to check out email for Elan Padeh which might be relevant to the search.
>
> With respect to the corporate system, we find no trace of an email system being part of their internal environment. All emails are maintained by Rackspace, a Hosted Exchange system, in which Rackspace provides only one-month retention of archived or deleted mail.
>
> Elan Padeh did have archived email files in the form of .PST format saved on a shared network drive on a REGNEW file server. A search of those files yielded no additional discovery of the relevant emails.
>
> The files searched are listed as follows:
>
> Archive.pst size 1,738,001 kb
> Archive06.pst size 2,914,513 kb
> Archive.pst size 35,729kb
> Elan_backup.pst size 8,858,577 kb
> Elan_backup.pst size 8,858,577 kb
> Archive.pst size 3,061,329 kb
>
> . . .
>
> The search was performed by opening the above-listed files within Outlook 2007 and searching both sent and received items.
>
> Earlier backups included a nightly backup written to an External USB drive. These USB drives corresponded to each day of the week and were overwritten on a weekly basis. Any file that is removed can only be retrieved from the week prior. These backups do not include exchange email backups which were otherwise searched.

In addition, defendant once again submitted a personal affidavit which stated that he personally saved the nine emails from 2007 – between defendant, a representative of plaintiff, and George Zelma who had sought plaintiff's assistance with the litigation – because one or more of plaintiff's emails threatened defendant with litigation.

Plaintiff brought this latest motion, seeking to strike the answer and counterclaim and grant it judgment. Though plaintiff has not clearly articulated the focus of this motion – that is, it is not clear what precisely remains outstanding in the underlying discovery demand – it

appears that it relates principally to email and computer discovery and to the adequacy of the two Walsh affidavits and the affidavit of defendant. Plaintiff argues that the affidavits are not enough. It claims that because defendant printed out the emails in 2009, defendant either is lying about what was on his computer at the time of the discovery demand, or that he destroyed all but the most beneficial of the correspondence. Moreover, it claims that defendant's affirmation is otherwise unpersuasive and that the Walsh affidavit does not correct the deficiencies of the first Walsh affidavit.

In opposition, defendant argues that its discovery is comprehensive and its answers are sufficient. It further states that plaintiff's motion is simply another delay tactic designed to prevent or impede a trial on the merits. Defendant also notes that, though defendant feared potential litigation due to the tenor of plaintiff's emails, the emails predate the current litigation by around two years. Therefore, he saved them and allowed others to be purged from his system long before this litigation commenced. Defendant points out that the emails included plaintiff as a correspondent and therefore they and other communications of this sort should be in plaintiff's possession – if plaintiff itself retained copies of the correspondence. It also notes that, in a prior order, the Court ruled that defendant is precluded from offering any documents it has not disclosed to plaintiff.

"CPLR 3126(3) allows a court to sanction a party that refuses to comply with disclosure orders or wilfully fails to disclose information that the court concludes should have been disclosed, including the sanction of striking that party's pleadings." Courts have broad discretion in fashioning or denying sanctions, Banner v. New York City Housing Auth., 73 A.D.3d 502, 503, 900 N.Y.S.2d 857, 858 (1st Dept. 2010), although the most severe of penalties, such as the striking of pleadings, should be ordered only on "occasions when the failure to comply or

disclose is found to be wilful, contumacious or in bad faith." Cespedes v. Mike & Jac Trucking Corp., 305 A.D.2d 222, 222, 758 N.Y.S.2d 489, 490 (1st Dept. 2003). The burden to show this bad faith rests with the moving party. See Fish & Richardson, P.C. v. Schindler, 75 A.D.3d 219, 220, 901 N.Y.S.2d 598, 599 (1st Dept. 2010).

Here, plaintiff has presented a very narrow legal and factual argument: the search for emails and other electronic data, and the affidavits defendant produced to explain the search, are not compliant with the Court's most recent discovery order and therefore defendant's answer and counterclaim should be stricken. Further, plaintiff states it should be allowed to pursue its claims – that defendant's decision to settle for a smaller sum in order to avoid criminal penalties was designed not to benefit defendant but to avoid paying plaintiff its fair share of attorney's fees, and that defendant owes it additional sums for expenses not covered by the contingency fee – without any opposition by defendant.[1]

However, after carefully considering the parties' arguments and the Court's prior order, the Court concludes that defendant has not exhibited bad faith. In response to the Court's last order, defendant produced a more detailed affidavit is by the individual in charge of the electronic search. The affidavit states what materials were sought and how, and it provides a list of the databases searched and a thorough explanation of its procedure. Therefore, it is satisfactory. See Glaser v. City of New York, 79 A.D.3d 600, 600, 912 N.Y.S.2d 221, 222 (1st Dept. 2010). Plaintiff attempts to throw doubt on Walsh's credibility but its efforts are unavailing. Defendant printed out the emails he saved on October 29, 2009, approximately one month after plaintiff commenced this action, and just over one month before defendant served and filed his answer. Walsh conducted the search long after this date on which defendant printed

[1]The Court notes that plaintiff still would have to set forth a prima facie case and adequate legal support for its argument, along with a provable amount of damages.

the materials and, based on his affidavit, the materials were not recoverable at that time. The Court's order did not obligate – and should not have directed – Walsh to speculate as to what documents might have existed or as to why they were missing. Thus, the affidavit is sufficient. It makes no sense to require Walsh or defendant to continue to provide affidavits on this issue. Instead, plaintiff can raise any relevant arguments it can support adequately at the time of trial.

Even if the Court found that Walsh's search and/or his affidavit were inadequate, it still would not strike the answer. Before the Court would impose such a severe penalty, plaintiff would have to show that additional and relevant materials existed or exist and have not been provided. Here, plaintiff has failed to carry this burden. Plaintiff has not shown that relevant documents existed and have not been shared. The Court does not reach a conclusion as to whether the documents that plaintiff seeks "were in fact ever in [defendant's] possession and/or [whether they existed and/or whether they were] highly significant. The Court is unable to make these findings on this record and any such findings should in any event be left to the trier of fact." County of Erie v. Abbott Laboratories, Inc., 30 Misc.3d 837, 842, 913 N.Y.S.2d 482, 486 (Sup. Ct. Erie County 2010). At that point, if plaintiff (1) has significant evidence that (2) relevant documents were (3) deliberately destroyed or withheld, it can apply to the trial court for an adverse inference instruction. It will be up to the trial court to decide whether plaintiff has made an adequate showing. See Rivera-Irby v. City of New York, 71 A.D.3d 482, 483, 896 N.Y.S.2d 337, 338 (1st Dept. 2010).

Furthermore, even if additional documents did exist, plaintiff has not adequately explained the necessity for a further affidavit or for the additional documents. For one thing, as defendant points out, plaintiff apparently was a party to the correspondence that does exist. Therefore, plaintiff itself should be in possession of or able to obtain some or all of the material

it seeks. Accordingly, there is an insufficient showing of prejudice. See Armstrong v. Armstrong, 72 A.D.3d 1409, 1410-11, 900 N.Y.S.2d 476, 480 (3rd Dept. 2010). For another thing, plaintiff has not shown "how the absence of these documents seriously prejudices [its] ability to make a *prima facie* case or properly support it with evidence." Clark v. Bishop Francis J. Mugavero Center for Geriatric Care, Inc., Index No. 22575/2005 (Sup. Ct. Kings County Nov. 5, 2010)(avail at 2010 WL 4400055, at *10). It has extensive knowledge of the underlying litigation based on its own involvement in the case; it possesses and can make arguments based on the contingency agreements; it knows the terms of the settlement; it has conducted depositions and knows the alleged reasons for the settlement terms.

Finally, the Court notes that it already has precluded defendant from producing at trial any documents it has not disclosed to plaintiff. This prior sanction also protects plaintiff's interest. At this point, two years and nine months – and seven motions and numerous conferences – after the case's commencement, after the completion of discovery, and eighteen months after the filing of the note of issue, it is time for the parties to proceed to trial.

For all of the above reasons, it is

ORDERED that the motion is denied.

Dated: May 23, 2012

Enter:

FILED

MAY 25 2012

NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.