

Hire Counsel N.Y. LLC v Owens
2012 NY Slip Op 32009(U)
July 24, 2012
Sup Ct, NY County
Docket Number: 112012/2011
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RAKOWER
Justice

PART 15

HIRE COURSE New York, LLC

INDEX NO. 112012/11

- v -

ZELDA OWENS

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JUL 31 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/24/12



HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
HIRE COUNSEL NEW YORK LLC,

Plaintiff,

Index No.
112012/2011

- against -

**DECISION
and ORDER**

ZELDA OWENS,

Defendant.

Mot Seq. 2

FILED

-----X
HON. EILEEN A. RAKOWER

JUL 31 2012

NEW YORK

This is an action by plaintiff Hire Counsel New York, LLC (plaintiff" or "Hire Counsel"), for breach of an employment agreement by defendant Zelda Owens. Owens was employed at Hire Counsel as a Managing Director of Client Relations from on or about May 30, 2006 through on or about May 13, 2011, at which time Owens voluntarily resigned from employment. Owens had been employed by plaintiff pursuant to an employment agreement effective May 30, 2006 "Employment Agreement." Owens subsequently commenced employment at Strategic Legal Solutions ("Strategic Legal"). Plaintiff contends that Strategic Legal is a direct competitor.

Under the Employment Agreement, Owens agreed that during the term of the agreement and for a period of twelve months following her ceasing to be an employee of Hire Counsel, she would not, without the prior written consent of Hire Counsel, either directly or indirectly, on her own or in the service or on he behalf of others:

"(i) solicit, divert, or appropriate or attempt to solicit, divert or appropriate to any business which is either engaged in permanent placement or temporary help or the same or substantially the same business of [Hire Counsel] or its Affiliates (a "Competing Business") any person or entity who was a client of [Hire Counsel] or any of its Affiliates and with whom [Owens] worked or had any contact while employed by [Hire Counsel] at any time during the twelve

(12) month period preceding . . . the Employee ceasing to be any employee of [Hire Counsel] . . . (iv) contact, circularize or communicate with, in any manner, directly or indirectly, any clients or potential clients of [Hire Counsel] or any of its Affiliates at any time within the twelve (12) months prior to the date of [Owens] ceasing to be an employee of [Hire Counsel].”

Plaintiff, seeks by way of Order to Show Cause, to compel compliance with the subpoena that it propounded on non-party Strategic Legal on March 1, 2012. Plaintiff specifically seeks an Order compelling Strategic Legal to produce the following six categories:

“(1) All Documents, Records and/or Communications, including but not limited to emails, sales activity logs, call reports and agreements, Concerning Strategic’s provision of any services, including but not limited to, temporary legal staffing or managed review services, to any of the following Persons: Johnson & Johnson; Deloitte; New York City Law Department; Axinn Veltrop & Harkrider LLP; Milbank, Tweed, Hadley & McCloy LLP d/b/a Milbank; Baker & Hostetler LLP d/b/a Baker Hostetler; Bernstein Litowitz Berger & Grossman LLP; Arnold & Porter LLP; Wilkie Farr & Gallagher LLP; and Mira Edelman (Subpoena Request No. 5);

(2) All Documents, Records and/or Communications Concerning any Communications made by Owens and the Persons listed in Request No. 5 (Subpoena Request No. 7);

(3) All Documents, Records and/or Communications evidencing or Concerning income earned and profits received by Strategic deriving from business services rendered to each of the Persons listed in Request No. 5 (Subpoena No. 11);

(4) All Documents, Records and/or Communications evidencing or Concerning income earned and profits received by Strategic deriving from any new business account since May 13, 2011 (Subpoena Request No. 12);

(5) All Documents or Communications Concerning educational materials, including but not limited to presentations, to which Owens contributed in any respect, for the purpose of educating customers or prospective customers of

Strategic about Strategic's capabilities as a provider of temporary legal staffing and managed review services and/or any other services (Subpoena Request No. 14); and

(6) Any lists sufficient to show customers or prospective customers to whom Owens provided or Communicated educational material or participated in providing or Communication educational material described in Request 14 (Subpoena Request No. 15)."

Plaintiff states that on April 16, 2012 Strategic served objections and responses to the Subpoena. Plaintiff states that although Strategic Legal objected to certain categories of requested documents (some of which are subject to Hire Counsel's pending motion to compel), Strategic Legal did not have any objections with respect to others. As such, plaintiff contends that Strategic Legal has waived any right to move to quash the Subpoena with respect to the documents it already agreed to produce. In addition, Plaintiff states that Strategic Legal failed to make its cross motion to quash "promptly" as required by CPLR §2304. Plaintiff also states that "these documents are directly relevant to Plaintiff's claim that Defendant is breaching her employment agreement with Plaintiff, and necessary, for Plaintiff to calculate damages provided for under Defendant's employment agreement with Plaintiff."

Strategic Legal filed a cross-motion in opposition to plaintiff's motion for an order (a) pursuant to CPLR §3204 quashing or alternatively modifying the non-party subpoena served on Strategic and (b) pursuant to CPLR §3103 granting a protective order excusing compliance with the Subpoena or alternatively directing plaintiff to pay for all production expenses (including attorney review time) in connection with responding to the Subpoena pursuant to CPLR §2305 and §3122.

Strategic Legal contends that plaintiff's instant motion is a "fishing expedition" and an attempt "to harass, and thereby deplete the resources of, its up-and-coming competitors." Strategic Legal contends that "[d]espite the overly broad and burdensome nature of nearly every single request in the Subpoena, Strategic undertook a preliminary search for ESI maintained by Defendant Owens and nine other custodians. This preliminary search, focused only on those requests for which Strategic Legal agreed to produce documents, resulted in well over 40,000 potentially responsive documents." Strategic Legal states that it alerted to plaintiff's counsel on May 1, 2012 to the costs of the search and after "initially protesting its clear obligation

to pay for these expenses, Plaintiff's counsel relented and agreed to such cost-shifting" and to "focus the universe [of the search]." Strategic Legal states that "[n]ot content with the non-party Strategic's willingness to review and potentially produce tens of thousands of documents, Plaintiff is now seeking to compel the further production of thousands of more documents in response to six Subpoena Requests that are blatantly overbroad, burdensome and not likely to lead to the discovery of relevant information."

CPLR §3101(a) generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason" (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]).

CPLR §3101(a)(4) governs non-party disclosure obligations, and states, in relevant part, that non-party disclosure is only available "upon notice stating the circumstances or reasons such disclosure is sought or required." (*See also In re New York County DES Litigation*, 171 A.D.2d 119, 575 N.Y.S.2d 19 [1st Dept 1991]). A subpoena that fails to set forth the circumstances or reasons for the disclosure demanded, is facially defective and should be quashed. (*See DeStefano v. MT Health Clubs, Inc.*, 220 A.D.2d 331, 632 N.Y.S.2d 569 [1st Dept 1999]).

However, CPLR §3103(a) provides that

The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

The party moving for a protective order bears the burden of demonstrating that the disclosure sought is improper, and must offer more than conclusory assertions that the requested disclosure is overbroad or unduly burdensome (*see Sage Realty Corp. v. Proskauer Rose, L.L.P.*, 251 A.D.2d 35, 40 [1st Dept. 1998]).

Here, Strategic Legal has already agreed to produce many of the documents requested by plaintiff. In light of the fact that the parties entered into a Stipulation and Protective Order of Governing the Production and Exchange of Confidential Information which applies to non-parties, that Order covers materials that Strategic Legal produces in this litigation.

However, as for the six categories that plaintiff specifically sought to compel and Strategic Legal has objected to, many of these requests are vague, overly broad, or seek documents that are not relevant. Others are demands that Strategic Legal has agreed to respond to or Strategic Legal has stated do not exist.

Specifically, Subpoena Request No. 5 demands: "All Documents, Records and/or Communications, including but not limited to emails, sales activity logs, call reports and agreements, Concerning Strategic's provision of any services, including but not limited to, temporary legal staffing or managed review services, to any of the following" ten entities or individuals. Subpoena Request No. 7 then demands: "All Documents, Records and/or Communications Concerning any Communications made by Owens" and these entities. Subpoena Request No. 5 is overly broad as it seeks every document that Strategic maintains to ten entities regardless of whether Owens had communicated to them or even had previously transacted business with Strategic before Owens was hired. As for Subpoena Request No. 7, which requests, that "[a]ll Documents, Records and/or Communications Concerning any Communications made by Owens and the Persons listed in Request No. 5," Strategic Legal already agreed to produce responsive documents.

Subpoena Requests Nos. 11 and 12 are overly broad. Subpoena Request No. 11 demands "All Documents, Records and/or Communications evidencing or Concerning income earned and profits received by Strategic deriving from business services rendered to each of the Persons listed in Request No. 5." This request is overly broad as it demands all information pertaining to any revenue derived from the listed entities. Subpoena Request No. 2 is overly broad as well as it demands: "All Documents, Records and/or Communications evidencing or Concerning income earned and profits received by Strategic deriving from any new business account since May 13, 2011." This request as drafted seeks financial information completely unrelated to Owens and the allegations made against her.

Subpoena Requests Nos. 14 and 15 seek all educational and presentation materials to which Owens contributed and any lists of customers or prospective customers to whom those materials were provided. According to the attorney affirmation of Scott Klein, "Strategic has already informed Plaintiff that neither Strategic nor Defendant Owens maintained any list(s) as to who was provided what information or material. Moreover, Strategic has already informed Plaintiff that, beyond possible minor cosmetic changes, Owens did not contribute to the creation or drafting of educational or presentation materials."

Wherefore it is hereby

ORDERED that plaintiff Hire Counsel New York LLC's motion to compel is granted to the extent that Strategic Legal Resources, Inc. shall produce those items which it previously agreed to produce pursuant to the cost agreement previously agreed to by the parties within thirty days of notice of entry of this Order; and it is further

ORDERED that Strategic Legal Resources, Inc.'s motion is granted to the extent that the Subpoena Duces Tecum served on them by plaintiff, dated March 1, 2012, is modified and Subpoena Requests Nos. 5, 7, 11, 12, 14, and 15 are stricken.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 7/24/12



EILEEN A. RAKOWER, J.S.C.

FILED

JUL 31 2012

NEW YORK
COUNTY CLERK'S OFFICE