

<b>Terex Corp. v McGillewie</b>
2012 NY Slip Op 32030(U)
July 25, 2012
Sup Ct, NY County
Docket Number: 116350/10
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

TEREX CORPORATION, et al.,

Plaintiffs,

-v-

GARTH MCGILLEWIE, SR, et al.,

Defendants.

INDEX NO. 116350/10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. (004)005

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

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

1, 4

Answering Affidavits- Exhibits \_\_\_\_\_

2, 5

Replying Affidavits \_\_\_\_\_

3, 6

CROSS-MOTION: YES  NO

**FILED**

Upon the foregoing papers, it is ordered that this motion is:

AUG 02 2012

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION NEW YORK COUNTY CLERK'S OFFICE

Dated:

1/26/12

*Donna M. Mills*  
J.S.C.

Check one: \_\_\_\_\_ FINAL DISPOSITION

\_\_\_\_\_ DONNA M. MILLS, J.S.C.  
NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

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TEREX CORPORATION, a Delaware  
Corporation and HYDRA PLATFORMS MFG,  
INC., a North Carolina Corporation,

Plaintiffs,

- against -

GARTH MCGILLEWIE, SR. and GARTH  
MCGILLEWIE, JR.,

Defendants.  
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INDEX NO.  
116350/10

**FILED**

AUG 02 2012

NEW YORK  
COUNTY CLERK'S OFFICE

DECISION/ORDER

DONNA M. MILLS, J:

Motion sequence numbers 004 and 005 are consolidated for disposition.

In motion sequence number 004, plaintiffs' move, pursuant to CPLR § 3124 and § 3126, to strike defendants' pleadings or precluding them from offering any evidence upon the trial of this action in support of the particulars.

In motion sequence number 005, defendants' move, pursuant to CPLR § 3103 for a protective order striking plaintiffs' demand for authorizations dated May 9, 2012 and for an order pursuant to CPLR § 3124 compelling discovery demands.

The parties agreed in a written stipulation dated July 20, 2012 that defendants' consented to the conducting of the depositions of the non-party financial institutions named in plaintiffs' motion to compel and for an open commission, pursuant to an open commission issued by this court. The parties also agreed to conduct the deposition of plaintiffs in the County of New York on or before October 1, 2012.

This action involves the sale of Hydra Platforms Mfg., Inc., a manufacturer of specialized equipment for underbridge inspection and work, to Terex Corporation by defendants. According to the complaint, plaintiffs allege, among other things, that defendants breached the sales agreement and engaged in prohibited competitive activity.

Specifically, plaintiffs claim that defendants engaged in certain off-book sales, rentals and buy-back agreements, which they failed to record.

In motion sequence number 004, plaintiffs seek unrestricted authorizations of certain bank records. In opposition, defendants claim to have provided the unrestricted authorizations. Upon review of the authorizations that have been provided, this Court finds that they are sufficient in scope and purpose to allow for meaningful discovery at this time.

In motion sequence 005 defendants seek a protective order striking plaintiffs demand for authorizations pertaining to bank accounts. Defendants also seek documents from plaintiffs that have been previously demanded.

The determination as to terms and provisions of discovery and the prevention of abuse by protective orders pursuant to CPLR 3103(a) rests in the sound discretion of the court (Nitz v. Prudential-Bache Securities, Inc., 102 AD2d 914, 915 [3d Dept 1984]). The burden of showing that disclosure is improper is upon the party asserting it (Koump v. Smith, 25, NY2d 287 [1969]).

CPLR 3101 (a) provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” The phrase “material and necessary” should be interpreted liberally, and the test is one of “usefulness and reason” (Kooper v. Kooper, 74 AD3d 6, 10 [2010]). Unlimited disclosure, however, is not required (see Spohn-Konen v. Town of Brookhaven, 74 AD3d 1049 [2010]), and the rules provide that the court may issue a protective order “denying, limiting, conditioning or regulating the use of any disclosure device” to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (CPLR 3103 [a]).

In the instant action defendants have failed to meet its burden of establishing that the records sought would be improper. On the contrary the evidence is clearly relevant in the prosecution of this action. Defendants have established however that plaintiffs have

not fully complied with discovery and that branch of the motion should be granted.

Accordingly it is

ORDERED that the plaintiffs' motion to strike defendants' answer is denied; and it is further

ORDERED that, pursuant to CPLR 3108, a commission issue in this action to a Justice of the Superior Court, State of North Carolina, or any other authorized person who may administer oaths pursuant to the laws of that state, to take the deposition upon oral questions of American Community Bank/Yadkin Valley Bank, of 2406 W. Roosevelt Boulevard, Monroe, NC 28110, as witness on behalf of plaintiffs in this action in that he/she return the transcript of the testimony subscribed by the witness, certified to be correct, annexed to said commission, with any exhibits produced and proved before him [her], to the Clerk of the Supreme Court of the State of New York County of New York, 60 Centre Street, New York, New York, by certified or registered mail, with all convenient speed; and it is further

ORDERED that, pursuant to CPLR 3108, a commission issue in this action to a Justice of the Court, State of South Carolina, or any other authorized person who may administer oaths pursuant to the laws of that state, to take the deposition upon oral questions of Clover Community Bank, of 124 North Main Street, Clover, SC 29710, as witness on behalf of plaintiffs in this action in that he/she return the transcript of the testimony subscribed by the witness, certified to be correct, annexed to said commission, with any exhibits produced and proved before him [her], to the Clerk of the Supreme Court of the State of New York County of New York, 60 Centre Street, New York, New York, by certified or registered mail, with all convenient speed; and it is further

ORDERED that, pursuant to CPLR 3108, a commission issue in this action to a Justice of the Court, states of Georgia and South Carolina or any other authorized person who may administer oaths pursuant to the laws of that state, to take the deposition upon

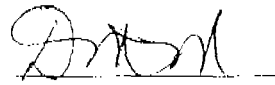
oral questions of SCBT, N.A., of P.O. Box 1900, Cornelia, GA 30531 and 817 Dave Gibson Boulevard, Fort Mill, SC 29708, as witness on behalf of plaintiffs in this action in that he/she return the transcript of the testimony subscribed by the witness, certified to be correct, annexed to said commission, with any exhibits produced and proved before him [her], to the Clerk of the Supreme Court of the State of New York County of New York, 60 Centre Street, New York, New York, by certified or registered mail, with all convenient speed; and it is further

ORDERED that, pursuant to CPLR 3108, a commission issue in this action to a Justice of the Court, states of South Carolina and Virginia, or any other authorized person who may administer oaths pursuant to the laws of that state, to take the deposition upon oral questions of Wachovia Bank/Wells Fargo, of 203 Bethel Street, Clover, SC 29710 and 7711 Plantation Road, Roanoke, VA 24019, as witness on behalf of plaintiffs in this action in that he/she return the transcript of the testimony subscribed by the witness, certified to be correct, annexed to said commission, with any exhibits produced and proved before him [her], to the Clerk of the Supreme Court of the State of New York County of New York, 60 Centre Street, New York, New York, by certified or registered mail, with all convenient speed; and it is further

ORDERED that plaintiffs are directed to fully respond to the outstanding discovery requests within thirty days of receiving a copy of this order with notice of entry; and it is further

ORDERED that defendants' motion for a protective order is denied.

Dated: 7/25/12

ENTER:  


J.S.C.  
J.S.C.