Rose v Wise
2012 NY Slip Op 32643(U)
October 11, 2012
Sup Ct, Suffolk County
Docket Number: 10-15854
Judge: Hector D. LaSalle
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SHORT FORM ORDER

INDEX No. 10-15854

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 6-12-12
ADJ. DATE 5-1-12
Mot. Seq. # 004 - MotD
 # 006 - MotD

CLARE ROSE,

Plaintiff,

- against -

ELLIOT WISE, ELLIOT WISE & CO., INC., PAUL BRENNAN and BOSTON BENEFIT CONSULTING, INC.,

Defendants.

ETTELMAN & HOCHHEISER, P.C.
Attorney for Plaintiff
100 Quentin Roosevelt Boulevard, Suite 401
Garden City, New York 11530

MCMANUS & RICHTER, P.C.
Attorney for Defendant Brennan and Boston Benefit Consulting
48 Wall Street, 25th Floor
New York, New York 10005

LAWRENCE WORDEN & RAINIS & BARD
Attorney for Defendant Wise and Wise & Co.
225 Broad Hollow Road, Suite 105E
Melville, New York 11747

Upon the following papers numbered 1 to 39 read on this motion to compel and this motion to preclude ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; 25- 34 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 17- 22; 36- 37 ; Replying Affidavits and supporting papers 23- 24; 38- 39 ; Other Plaintiff's Memorandum of Law 35 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#004) by the defendants Paul Brennan and Boston Benefit Consulting, Inc. and the motion (#006) by plaintiff Clare Rose, Inc. are hereby consolidated for the purposes of this determination; and it is

ORDERED the motion by the defendants Paul Brennan and Boston Benefit Consulting, Inc. for, inter alia, an order compelling the plaintiff Clare Rose, Inc. to serve a second supplemental response to their demand for a verified bill of particulars and a supplemental response to their supplemental demand for witnesses and documents dated September 21, 2011, is granted only to the extent set forth herein; and it is

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further

ORDERED that the motion by the plaintiff Clare Rose, Inc. for an order precluding the defendants Paul Brennan and Boston Consulting, Inc. from presenting evidence at trial for their failure to provide complete responses to the plaintiff's first set of interrogatories dated August 2, 2011, or, alternatively, compelling defendants to comply with its disclosure demands is granted only to the extent set forth herein.

The plaintiff Clare Rose, Inc. commenced this action against the defendants Elliot Wise, Elliot Wise & Co., Inc., Paul Brennan and Boston Benefit Consulting, Inc. to recover damages for negligence, breach of contract and fraud as a result of the design and administration of the Soft Drink & Brewery Workers Union, Local 812 pension plan. The plaintiff is a multi-brand distributor of alcoholic and non-alcoholic beverages. In or about 1998, the plaintiff entered into a collective bargaining agreement with its drivers/sales employees, who are members of the Soft Drink & Brewery Workers Union, Local 812, which required it to establish a pension plan. Thereafter, the plaintiff retained Elliot Wise and Elliot Wise & Co., Inc. (hereinafter referred to collectively as "the Wise defendants") to design and administer the pension plan. The Wise defendants designed the prototype for the pension plan, which was then implemented by the plaintiff and administered by the Wise defendants from 1998 through 2001. However, the pension plan designed by the Wise defendants was not submitted to the Internal Revenue Service ("IRS") for approval. In 2003, the plaintiff was required to restate its pension plan, so it retained Paul Brennan and Boston Benefit Consulting, Inc. (hereinafter referred to collectively as "the Brennan defendants"), which had been administering the pension plan for it since 2001, to design the prototype for the restated pension plan. Despite having received approval by the IRS, the restated pension plan, administered by the Brennan defendants, used a different formula than the one contained in the letter for approval by the IRS. In 2006, the plaintiff terminated its relationship with the Brennan defendants. Subsequently, the plaintiff hired a new third-party administrator, who discovered mistakes in the design and administration of the pension plan. Following such discovery, the plaintiff was required to file an application for a compliance letter from the IRS, and was notified by the IRS in October 2009 that to obtain a compliance letter, it was required to revise the pension plan, including retroactively eliminating the backloading. As a consequence, the plaintiff revised the pension plan, retroactively eliminating the backloading, and made additional contributions to the pension plan. Thereafter, the plaintiff instituted this action.

By its complaint, the plaintiff alleges that the pension plan was negligently designed by the Wise defendants in 1998, because it did not conform to the requirements of Section 401(a) of the Internal Revenue Code and it violated the anti-backloading provisions of the Employee Retirement Income Security Act ("ERISA"), which requires that a pension plan satisfy one of three alternative uniform accrual rules (*see* 26 USC §§ 411[b][1][A], 411[b][1][B] and 411[b][1][C]), and prevents discrimination in favor of highly compensated employees or length of service. Plaintiff further alleges that the restated 2003 pension plan created by the Brennan defendants, although approved by the IRS, contained a different formula than the one that was actually used to administer the plan, resulting in increased liability to its employees once the pension plan was revised to remove the backloading.

By order dated June 9, 2011 (Tanenbaum, J), the Court granted a motion for dismissal by the Brennan defendants to the extent that it dismissed the negligence cause of action as being barred by the statute of limitations, but denied the dismissal of the breach of contract and fraud causes of action. The

Court also granted the plaintiff's cross motion for leave to serve an amended complaint. On July 29, 2011, the Brennan defendants served a verified answer to plaintiff's amended verified complaint which asserted affirmative defenses. On September 21, 2011, the Brennan defendants served plaintiff with a demand for a verified bill of particulars and supplemental demand for witnesses and documents. On November 2, 2011 the plaintiff served its responses to the Brennan defendants' discovery demands. Thereafter, on January 10, 2012, the plaintiff's served the Brennan defendants with a supplemental verified bill of particulars in an attempt to cure any deficiencies in its original verified bill of particulars.

The Brennan defendants now move for an order compelling plaintiff to comply with their notice for discovery and inspection dated September 21, 2011. In particular, the Brennan defendants seek amplification of the allegations supporting the breach of contract cause of action, including confirmation that the breach of contract claim is not based upon the existence of a written or oral agreement to perform certain actuarial or pension plan services and clarification as to whether the contract was implied-in-fact or implied-in-law. The Brennan defendants also seek responses to their supplemental demand for witnesses and documents dated September 21, 2011, including the names and addresses of the individuals with relevant knowledge regarding the creation of the collective bargaining agreement, and the operation and administration of the pension plan. The plaintiff opposes the motion on the ground that the Brennan defendants are attempting to circumvent the express provisions of CPLR 3130(1), which prohibits the service of both a demand for a bill of particulars and written interrogatories on the same party. Specifically, the plaintiff argues that both the demand for a verified bill of particulars and the supplemental demand for witnesses and documents contain requests that are within the nature of an interrogatory. The plaintiff further contends that it has fully responded to all proper requests that sought particulars regarding its claims when it served its November 2, 2011 response and its supplemental response on January 10, 2012. The Brennan defendants, conceding that the plaintiff served them with a supplemental response to their September 21, 2011 demand for names and addresses of witnesses, have withdrawn that portion of their motion seeking to compel the plaintiff to serve a supplemental response to their supplemental demand for names and addresses of witnesses. Consequently, the branch of the motion seeking to compel the plaintiff to serve a supplemental response to the supplemental demand for names and addresses of witnesses, dated September 21, 2011, is denied, as moot.

It is well settled that actions should be resolved on the merits whenever possible (***Careccia v Metro. Suburban Bus. Auth.***, 18 AD3d 793, 793, 796 NYS2d 678 [2d Dept 2005], *quoting* ***Cruzatti v St. Mary's Hosp.***, 193 AD2d 579, 580, 597 NYS2d 457 [2d Dept 1993]; *see* ***O'Connor v Syracuse Univ.***, 66 AD3d 1187, 887 NYS2d 353 [3d Dept 2009], *lv denied* 14 NY3d 766, 898 NYS2d 92 [2010]). CPLR 3101(a) states, in pertinent part, that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof (*see* ***Cirale v 80 Pine Street Corp.***, 35 NY2d 113, 359 NYS2d 1 [1974]; ***Conte v Count of Nassau***, 87 AD3d 558, 929 NYS2d 741 [2d Dept 2011]). This provision has been liberally construed to provide disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (***Allen v Crowell-Collier Pub. Co.***, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). The trial court has broad discretion to supervise discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice (*see* CPLR 3103(a); ***Andon v 302-304 Mott St Assocs.***, 94 NY2d 740, 709 NYS2d 873 [2000]; ***Congel v Malfitano***, 84 AD3d 1145, 924 NYS2d 129 [2d Dept 2011]). However, "the principle of 'full disclosure' does not give a party the right to uncontrolled and unfettered disclosure" (***Buxbaum v***

Castro, 82 AD3d 925, 925, 919 NYS2d 175, [2d Dept 2011], *quoting* ***Gilman & Ciocia, Inc. v Walsh***, 45 AD3d 531, 531, 845 NYS2d 124 [2d Dept 2007]).

The function of a bill of particulars is to amplify or supplement the pleadings, to limit proof, and to assist in the preparation for trial so as to avoid surprise at trial (*see* ***Harmon v Alfred Peats***, 243 NY 473, 243 NYS 473 [1926]; ***Fremont Inv. & Loan v Gentile***, 94 AD3d 1046, 943 NYS2d 182 [2d Dept 2012]; ***Jones v LeFrance Leasing L.P.***, 81 AD3d 900, 917 NYS2d 261 [2d Dept 2011]). The scope of a bill of particular is limited to matters on which the requested party has the burden of proof (*see* ***Northway Engineering, Inc. v Felix Indus., Inc.***, 77 NY2d 332, 567 NYS2d 634 [1991). However, "a party need not particularize general denials" (***Northway Engineering, Inc. v Felix Indus., Inc.***, supra at 336; *see* ***Colgan v Colgan***, 94 AD3d 689, 941 NYS2d 258 [2d Dept 2012]). Further, a bill of particulars is not a means for obtaining the disclosure of evidence or for the identification of witnesses (*see* ***Hymn & Gilbert, P.C. v Greenstein***, 138 AD2d 678, 526 NYS2d 492 [2d Dept 1988]; ***Posh Pillows, Ltd. v Hawes***, 138 AD2d 472, 525 NYS2d 877 [2d Dept 1988]; ***Nuss v Pettibone Mercury Corp.***, 112 AD2d 744, 492 NYS2d 240 [4th Dept 1985]). If a party neglects or refuses to respond to a demand for a bill of particulars, the court may enter a preclusion order barring the recalcitrant party from proving any allegations that he or she failed to amplify, relieving the adversarial party from having to prove a claim that has not been clearly explained or defined (*see* CPLR 3042[c], 3124).

Here, contrary to the assertions made by its counsel, the plaintiff's responses to demands 2, 9, 10, 11, 12, 13, and 15 in the Brennan defendants' request for a bill of particulars are insufficient (*see* ***Castellano v Norwegian Christian Home & Health Ctr., Inc.***, 24 AD3d 490, 808 NYS2d 289 [2d Dept 2005]; ***Caudy v Rivkin***, 109 AD2d 725, 485 NYS2d 839 [2d Dept 1985]). Since the plaintiff has the burden of proof on each of these demands, the Brennan defendants' request for particulars regarding the plaintiff's breach of contract claim is not improper and is not beyond the scope of the information that a party is required to provide in a verified bill of particulars (*see* ***Ramondi v Paramount Fee, LP***, 30 AD3d 396, 817 NYS2d 341 [2d Dept 2006]; *cf.* ***Tully v North Hempstead***, 133 AD2d 657, 519 NYS2d 764 [2d Dept 1987]). However, with regard to demand 14, there is no need for the plaintiff to set forth with particularity the legal obligation that it contends principles of equity should impose on the Brennan defendants, since it is evidentiary in nature (*see* ***Mahr v Perry***, 74 AD3d 1030, 903 NYS2d 148 [2d Dept 2010]; ***Dellaglio v Paul***, 250 AD2d 806, 673 NYS2d 212 [2d Dept 1998]). In addition, the plaintiff's responses to demands 16 through 19 were proper, since they specifically address the damages that the plaintiff's incurred as a result of the alleged breach of contract (*see* ***Ramondi v Paramount Fee, LP***, 30 AD3d 396, 817 NYS2d 341 [2d Dept 2006]). Accordingly, the Brennan defendants' motion is granted to the extent that the plaintiff shall furnish responses to demands 2, 9, 10, 11, 12, 13 and 15 of the Brennan defendants' Demand for a Verified Bill of Particulars. The plaintiff shall produce responses to such demands within 30 days after service of a copy of this order with notice of entry. The branch of the motion seeking to compel further responses to demands 14, 16, 17, 18 and 19 is denied.

The plaintiff now moves under CPLR 3126 for an order precluding the Brennan defendants from introducing any evidence at trial to establish their defenses to plaintiff's claims. Alternatively, the plaintiff seeks an order pursuant to CPLR 3124 compelling the Brennan defendants to provide responses to its First Set of Interrogatories dated August 2, 2011. In particular, the plaintiff asserts that the Brennan defendants' numerous objections to its interrogatories are without sufficient bases and that the Brennan defendants failed

to provide answers that will allow it to prepare for trial. The plaintiff also contends that the Brennan defendants have failed to cure the deficiencies in their response to its discovery demand, and have stated in a letter, dated December 14, 2011, that they will stand by their original responses and not provide further responses. The Brennan defendants oppose the motion, arguing that interrogatories 66 through 79 of the plaintiff First Set of Interrogatories seek legal conclusions and opinions, and that interrogatories 40, 41, 47, 48, and 62 improperly seek material that is related to the standard of care applicable to actuaries and pension professionals for a claim that has been dismissed by the court.

The nature and degree of the penalty imposed pursuant to CPLR 3126 is a matter within the discretion of the trial court (*see* ***Roug Kang Wang v Chien-Tsang Lin***, 94 AD3d 850, 941 NYS2d 717 [2d Dept 2012]; ***Espinal v City of New York***, 264 AD2d 806, 695 NYS2d 610 [2d Dept 1999]; ***Herrara v City of New York***, 238 AD2d 475, 656 NYS2d 647 [2d Dept 1997]). A court may issue a preclusion order if "a party refused to obey an order for disclosure or willfully fails to disclose information that the court finds should have been disclosed upon notice" (*see* CPLR 3126[2]; ***Zakhidov v Boulevard Tenants Corp.***, 96 AD3d 737, 945 NYS2d 756 [2d Dept 2012]). However, to invoke the drastic remedy of preclusion, it must be determined that the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious (*see* ***Assael v Metropolitan Tr. Auth.***, 4 AD3d 443, 772 NYS2d 364 [2d Dept 2004]; ***Pryzant v City of New York***, 300 AD3d 383, 750 NYS2d 779 [2d Dept 2002]).

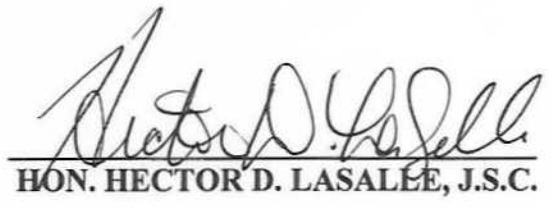
Here, the record does not demonstrate that the Brennan defendants willfully and contumaciously failed to provide answers to the plaintiff's first set of interrogatories (*see* ***Liang v Yi Jang Tan***, 98 AD3d 653, 949 NYS2d 761 [2d Dept 2012]; ***Barnes v City of New York***, 43 AD3d 1094, 841 NYS2d 793 [2d Dept 2007]). However, based upon the claims asserted and the defenses raised in the subject action, the Brennan defendants have not provided meaningful responses to the information sought by the plaintiff in interrogatories 67, 68, 69, 70, 71, 72, 73, 74, 76, 78, and 79, in which the plaintiff requests that the Brennan defendants set forth the facts underlying their affirmative defenses (*see* ***New Line Stone Co., Inc. v BCRE Servs., LLC***, 89 AD3d 581, 932 NYS2d 690 [1st Dept 2011]; ***Miracle Sound, Inc. v New York Property Ins. Underwriting Ass'n***, 169 AD2d 468, 564 NYS2d 346 [1st Dept 1991]). The Brennan defendants' responses either provide general statements of fact or no facts at all. Moreover, the Brennan defendants justification for not providing complete responses to the plaintiff's interrogatories fails to meet the burden of demonstrating that such interrogatories were improper (*see* ***Roman Catholic Church of the Good Shepherd v Tempco Sys.***, 202 AD2d 257, 608 NYS2d 647 [1st Dept 1994]). Since the plaintiff is seeking "material and necessary" information concerning the alleged claims for breach of contract and fraud, the interrogatories deserve full and complete answers. In general, a party is entitled to choose both the discovery devices it wishes to use and the order in which to use them (*see* ***Edwards-Pitt v Doe***, 294 AD2d 395, 741 NYS2d 909 [2d Dept 2002]; *see* CPLR 3102; ***Samide v Roman Catholic Diocese of Brooklyn***, 16 AD3d 482, 791 NYS2d 643 [2d Dept 2005], *lv dismissed* 5 NY2d 746, 800 NYS2d 375 [2005]; ***Falk v Inzinna***, 299 AD2d 120, 749 NYS2d 259 [2d Dept 2002]).

Moreover, the plaintiff's demands for responses to interrogatories 40, 41, 47, 48, and 62 are improper, since the claim for negligence was dismissed by the court's June 9th order. As a result, the plaintiff's are not entitled to any discovery regarding this claim, since it is not relevant to the subject litigation (*see* ***Law Offs. Binder & Binder, P.C. v O'Shea***, 44 AD3d 626, 848 NYS2d 178 [2d Dept 2007]). Accordingly, the plaintiff's motion is granted to the extent that it is entitled to further answers to

interrogatories 67, 68, 69, 70, 71, 72, 73, 74, 76, 78, and 79, but it is denied as to interrogatories 40, 41, 47, 48, 62, 66, 75, and 77. The Brennan defendants shall produce responses to such items within 30 days after service of a copy of this order with notice of entry.

The foregoing constitutes the Order of this Court.

Dated: October 11, 2012
Central Islip, NY



HON. HECTOR D. LASALLE, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**