Baron v Black
2015 NY Slip Op 31201(U)
July 10, 2015
Supreme Court, New York County
Docket Number: 155822/12
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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JONATHAN BARON and BARON DESIGN INC. OF NEW YORK,

Plaintiffs,

-against-

SEVEN BLACK a/k/a VITO SETTINERI,

Defendant.

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Index No. 155822/12

DECISION/ORDER

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : ______________________________

Papers	Numbered
Notice of Motion and Affidavits Annexed....................................	1
Answering Affidavits...	2
Replying Affidavits..	3
Exhibits..	4

Plaintiffs Jonathan Baron and Baron Design Inc. of New York commenced the instant action against defendant Seven Black a/k/a Vito Settineri alleging causes of action for slander, libel, tortious interference with economic advantage, abuse of process, false arrest and false imprisonment, negligence and gross negligence and intentional infliction of emotional distress arising out of alleged false statements made by defendant about plaintiff Baron. Defendant now moves for an Order (1) dismissing plaintiffs' complaint in its entirety due to spoliation of evidence; (2) pursuant to CPLR § 3126 dismissing plaintiffs' complaint based on plaintiffs' failure to fully respond to defendant's discovery demands; and (3) awarding defendant attorney's fees and the cost of bringing the motion. For the reasons set forth below, defendant's motion is denied.

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The relevant facts are as follows. Plaintiffs and defendant both reside in the condominium building located at 315 Seventh Avenue, New York, New York (the "subject premises"). The defendant owns two units in the building. Plaintiff Baron alleges that at some point during 2011, he found out that defendant was renting out the second unit in violation of the short-term rental laws and that he notified the Board of Managers of said activity. Plaintiff further alleges that in retaliation for doing so, defendant proceeded to disseminate false information about plaintiff Baron to the New York Police Department, the New York District Attorney's Office, the Board of Managers of the condominium and the condominium's Management Company, specifically, that plaintiff Baron had committed certain crimes, including menacing in the second degree and criminal possession of a weapon in the fourth degree. As a result of defendant's statements, plaintiff Baron was arrested and an Order of Protection was issued against him.

Thereafter, plaintiffs commenced the instant action alleging causes of action for, *inter alia*, tortious interference with economic advantage based on the allegation that because of his arrest based on defendant's false statements, plaintiff Baron lost a teaching job at the Fashion Institute of Technology ("FIT"). At his deposition, Baron testified that he and the faculty at FIT e-mailed about his alleged hire and that he previously applied for a job with FIT but that he was rejected and notified about said rejection by e-mail. Baron further testified that he recently deleted thousands of e-mails from his company's Gmail account without producing them for defendant's review during discovery.

Defendant then brought the instant motion asserting that certain e-mails regarding plaintiff Baron's alleged employment with FIT were not provided during discovery and thus,

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defendant "can only suppose that these were among many other relevant documents that Baron intentionally deleted."

The court first turns to that portion of defendant's motion for an Order dismissing the complaint due to spoliation of evidence. "A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33 (1st Dept 2012). Under New York law, a party is required to preserve evidence that may be relevant to pending or foreseeable litigation. *See Id.*

In the instant action, defendant's motion to dismiss plaintiffs' complaint due to spoliation of evidence is denied as defendant has failed to establish that plaintiffs' conduct rises to the level of spoliation. As an initial matter, defendant has not established that plaintiffs had an obligation to preserve the deleted e-mails as there is no evidence that the e-mails were relevant to the instant action. Further, defendant has not established that plaintiffs deleted the e-mails with a "culpable state of mind." Indeed, plaintiffs have affirmed that the e-mails were deleted only after receiving a notification from Google that e-mails needed to be deleted in order to free up space in plaintiffs' Gmail account and defendant has not presented any evidence that the e-mails were deleted for any other reason. Finally, defendant has not established that the deleted e-mails were relevant to defendant's defense in the instant action. While defendant asserts that the deleted e-mails likely involved plaintiff's alleged employment with FIT, plaintiff Baron has

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affirmed that he deleted thousands of e-mails but that he "did not delete any emails that are relevant to this litigation." Specifically, plaintiff Baron affirmed that he "specifically did not delete any emails that related to: (1) the Defendant Seven Black; (2) the 'Fashion Institute'; and (3) '315 Seventh Avenue'" and that he has provided defendant with any and all discovery related to his alleged employment with FIT.

The court next turns to that portion of defendant's motion for an Order pursuant to CPLR § 3126 dismissing the complaint based on plaintiffs' failure to fully respond to defendant's discovery demands. "[I]t is well-settled that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith." *McGilvery v. New York City Tr. Auth.*, 213 A.D.2d 322, 324 (1st Dept 1995). Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses. *See Johnson v. City of New York*, 188 A.D.2d 302 (1st Dept 1992). However, the First Department has held that "[a]ctions should, wherever possible, be resolved on the merits, and, therefore, litigants who have not replied expeditiously to notices of discovery and inspection should be afforded reasonable latitude before imposition of the harshest available penalty, the striking of pleadings." *Bassett v. Bando Sangsa Co., Ltd.*, 103 A.D.2d 728 (1st Dept 1984).

In the instant action, defendant's motion to dismiss the complaint based on plaintiffs' failure to respond to defendant's discovery demands is denied as defendant has not established that, to the extent any discovery remains outstanding, plaintiffs' nondisclosure was willful and contumacious. Indeed, plaintiff has already affirmed that he has provided defendant with all

relevant documents and discovery in this action. Specifically, plaintiff Baron's affidavit, dated October 17, 2014, states that he has "[produced responsive documents that have been bates stamped as BARON 1 through BARON 2111. To the best of my knowledge, there are no other documents that are in my possession that are responsive to the Defendant's various demands." Further, to the extent defendant asserts that there may be e-mails that are relevant that defendant would be entitled to, plaintiff Baron has affirmed that he has "engaged the services of an e-discovery team to harvest, preserve, and ultimately produce all relevant emails from both the gmail account as well as [plaintiff Baron's personal account]" and that any other e-mails not produced are not relevant to this action. Defendant's assertion that its motion should be granted because plaintiffs have not yet provided him with certain photographs plaintiff Baron allegedly took of a hallway at the subject premises, which were previously requested by defendant, is without merit. At oral argument on the instant motion, counsel for plaintiffs informed the court that defendant has already been provided with copies of the photographs. Thus, to the extent defendant is not possession of said photographs, plaintiffs shall serve defendant with courtesy copies of same.

Finally, as this court has denied defendant's motion to dismiss plaintiffs' complaint, that portion of defendant's motion for attorney's fees and the cost of bringing the motion is denied.

Accordingly, defendant's motion is denied in its entirety. It is hereby

ORDERED that plaintiffs shall produce any and all relevant e-mails obtained as a result of the search by the e-discovery team engaged by plaintiffs or provide defendant with an affidavit of someone with personal knowledge of the facts of the case detailing the search performed and that no relevant e-mails were located within sixty (60) days of the date of this

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Order or else plaintiffs shall be precluded from offering same in support of any of their claims at the time of trial; and it is further

ORDERED that plaintiffs shall provide defendant with courtesy copies of the photographs at issue within thirty (30) days of the date of this Order; and it is further

ORDERED that the parties shall appear for a status conference in this action to discuss any remaining discovery issues in Part 55 on September 29, 2015 at 11:00 a.m. This constitutes the decision and order of the court.

Dated: 7/10/15

Enter: ______________________
J.S.C.

CYNTHIA S. KERN
J.S.C.