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

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FURGANG & ADWAR, LLP,

Plaintiff,

- against -

S.A. INTERNATIONAL, INC.,

Defendant.

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Index No. 651192/2014
Decision and Order
Mot. Seq. 004

FURGANG & ADWAR, LLP,

Plaintiff,

- against -

DAN PURJES, JOSEPH WRONA, and SA INTERNATIONAL INC.,

Defendants.

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Index No. 651478/2014

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Furgang & Adwar LLP ("Plaintiff"), commenced the above action (bearing index number 651192/2014) on April 17, 2014 by way of motion for summary judgment in lieu of complaint. The Court denied the motion, and Plaintiff proceeded to file a complaint on October 18, 2014. The complaint seeks payment of unpaid invoices for legal services rendered to defendant, S.A. International, Inc., ("SAI") in connection with a trademark dispute between SAI and SAI's competitor. SAI interposed an answer on December 15, 2014, and a third party complaint against third-party defendant Philip Furgang, a lawyer who had represented SAI, for breach of fiduciary duties, negligence, and breach of contract.

On May 14, 2014, Plaintiff commenced a separate action under Index Number 651478/2014 against SAI, Dan Purjes ("Purjes") and Joseph Wrona ("Wrona") for libel per se, quantum meruit, anticipatory breach of contract, and civil conspiracy ("Second Action").

On October 30, 2014, Defendants filed a motion to dismiss the Second Action. Among other arguments, Purjes argued that the action should be dismissed as against him based upon lack of personal jurisdiction. At a hearing on September 3, 2015, the Court consolidated both of Plaintiff's actions. With respect to Purjes' motion to dismiss based upon jurisdictional grounds, the Court ordered jurisdictional discovery.

Presently before the Court is Plaintiff's motion for an Order pursuant to CPLR 3124 to compel Defendants to provide certain discovery – responsive answers to Plaintiff's interrogatories and responsive documents.

On October 26, 2015, Plaintiff served its interrogatories, requests to produce and notices of depositions upon Defendants. Responses were due on or before November 5, 2015. On December 15, 2015, the parties appeared for a compliance conference. An order was entered, which states that all discovery remained outstanding and directs that the parties provide proof of insurance coverage by January 4, 2016; a bill of particulars by February 2016; depositions by March 7, 2016, and discovery to be completed by May 19, 2016. By email dated February 3, 2016, Plaintiff agreed to extend the time for Defendants to provide answers to the interrogatories to February 5, 2016, and responses to all other outstanding discovery by February 9, 2016. On February 5, 2016, Defendants served answers to Plaintiff's interrogatories and produced a CD with responses to Plaintiff's document demands.

In the instant motion, Plaintiff claims that Defendants' February 5, 2016 responses to Plaintiff's discovery demands are untimely and deficient. As an initial matter, Defendants argue that Plaintiff's motion is improper because it is not accompanied by an affirmation of good faith. Pursuant to N.Y. Ct. Rules 202.7, with respect to a motion to compel discovery, a party must submit "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." A court may excuse a party's failure to include such an affirmation, where any effort to resolve the dispute non-judicially would have been futile. (*Scaba v. Scaba*, 99 A.D.3d 610 [1st Dep't 2012]).

Plaintiff further claims that Defendants' answers to its interrogatories are "unresponsive in that they did not provide the facts sought, but provided contentions" and "assert objections barred by CPLR 3122(a)." Defendants, in turn,

argue that the interrogatories are overbroad. Defendants also argue that Plaintiff's contention that they have waived their objections to Plaintiff's discovery lacks merit because "the parties agreed to stay discovery in order to pursue settlement negotiations."

Plaintiff further claims that the documents produced by Defendants were not responsive, and that Wrona failed to produce his insurance policy. In opposition, Defendants contend that the demands are overly broad, and seek privileged information.

CPLR § 3130 and 3131 permit a party to serve interrogatories that "relate to any matters embraced in the disclosure requirements of [CPLR §3101]". 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." (CPLR § 3101[a]). 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]).

Defendants' boilerplate objections to Plaintiff's discovery demands are inadequate and deficient. Defendants are directed to supplement their responses to Plaintiff's interrogatories. Regarding those responsive documents that Defendants has withheld from production based on attorney client privilege, Defendant is directed to produce a privilege log to Plaintiff in accordance with CPLR 3122(b) and, thereafter, the court shall review, in camera, the allegedly privileged documents in the privileged log. As for all other discovery demands, including requests for insurance policies, wherein Defendants have interposed boilerplate objections, Defendants are directed to supplement their production and produce responsive documents to each demand.

Defendants' Cross Motion

Defendants cross move for an Order to compel Plaintiff to respond to the initial interrogatories and requests for documents that they served on Plaintiff on February 9, 2016.

Defendants also seek a protective order pursuant to CPLR § 3103 with respect to Purjes' deposition. Defendants argue that it is unnecessary for Purjes to appear for deposition to address whether this Court has personal jurisdiction over Purjes. Defendants claim that they have already produced sufficient documentation and responses to discovery requests concerning Purjes' contacts with New York. Defendants argue that in the event that the court finds that Purjes should be dismissed, such deposition should be conducted in Utah to avoid the expense of Purjes' travel to a forum where he claims he is not subject to personal jurisdiction.

Defendants also seek a protective order concerning Plaintiff's notices to take the depositions of SAI employees, CEO Mark Blundell and CFO Rick Marden in New York. Defendants argue that the deposition of Marden is not necessary because Plaintiff has not made any allegations involving him. Defendants argue that Blundell, who was Plaintiff's primary contact with SAI is capable of addressing all relevant matters. Defendants further argue that Blundell's deposition should be conducted in Utah to avoid "unreasonable and expense."

CPLR § 3103 provides, in relevant part:

> 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.

(CPLR 3103[a]). 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 Dep't 1998]). "As a party to the action, defendant's status as a nonresident does not preclude examination in the county where the action is pending where, as here, there is insufficient showing of any hardship which would result from the conduct of the deposition in this State." (*Kahn v. Rodman*, 91 A.D.2d 910, 910-11 [1st Dept. 1983)]).

Here, Defendants have failed to meet their burden of demonstrating that a protective order is warranted concerning the requested depositions of Blundell and Marden, all of which are noticed to be taken in New York and shall take place in New York. Defendants have demonstrated that Purjes' deposition should be conducted in Utah to avoid the expense of Purjes' travel to a forum where he claims he is not subject to personal jurisdiction.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion and Defendants' cross motion for a protective order are granted only to the following extent; and it is further

ORDERED that Defendants shall supplement their responses to Plaintiff's interrogatories and document demands and produce responses to each and every demand; and it is further

ORDERED that Defendants shall produce a privilege log to Plaintiff with respect to responsive documents that are being withheld based on privilege in accordance with CPLR 3122(b) within 30 days; and it is further

ORDERED that Purjes is to be deposed in Utah on a date and during a time that is mutually agreed to by the parties; and it is further

ORDERED that CEO Mark Blundell and CFO Rick Marden are to be deposed in New York by Plaintiff on a date and during a time that is mutually agreed to by the parties; and it is further

ORDERED that Plaintiff respond to Defendant's outstanding discovery requests.

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

DATED: FEBRUARY 23, 2017

FEB 23 2017

J.S.C.

HON. EILEEN A. RAKOWER