Janes v Let's Get Ready
2017 NY Slip Op 31125(U)
May 23, 2017
Supreme Court, New York County
Docket Number: 154559/15
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

----------x

WILLIAM JANES,

Plaintiff,

-against-

LET'S GET READY and LAURI NOVICK,

Defendants.

----------x

Index No. 154559/15

Motion seq. no. 002

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Robert L. Herbst, Esq.
Herbst Law PLLC
420 Lexington Ave., Ste. 300
New York, NY 100170
646-543-2354

For respondents:
George O. Richardson, III, Esq.
Mitchell C. Stein, Esq.
Sullivan & Worcester LLP
1633 Broadway, 32nd fl.
New York, NY 10019
212-660-3000

By notice of motion, defendants move pursuant to CPLR 3124 for an order compelling the production of documents and interrogatory responses withheld based on any objection other than attorney-client privilege, and materials that will remedy plaintiff's allegedly deficient responses. Defendants also seek, pursuant to CPLR 3122(b), a privilege log. Plaintiff opposes.

I. CONTENTIONS

During the pendency of this motion, the parties exchanged discovery, leaving in issue request 25, for documents plaintiff took from defendants' office, and request 33, for documents concerning legal claims plaintiff made against his former employer. (NYSCEF 44). They contend that these documents are material and necessary to their case and that absent plaintiff's timely objection to their requests, he has forfeited his right to challenge them on any basis other than attorney-client privilege. (NYSCEF 28).

Defendants assert that documents responsive to request 25 must be produced as they include emails and attachments that plaintiff sent from his work email account to his personal email account, and thus were taken from defendants' office. As plaintiff habitually sent work-related emails to his personal account, defendants argue, they should have been returned upon his termination. Documents responsive to request 33, defendants contend, will show whether plaintiff settled a similar age discrimination claim against his former employer. (NYSCEF 28).

In opposition, plaintiff argues that the emails and attachments defendants seek are not within the scope of request 25, as emailing documents from defendants' office to his personal email account to enable him to work at home does not constitute a taking. He observes that, in any event, defendants possess the emails and attachments as sent emails. (NYSCEF 40).

Plaintiff also maintains that documents relating to his prior employment are irrelevant, immaterial, inadmissible, and prejudicial, as they are sought solely to demonstrate that he performed poorly at his prior job, and he observes that his motion to prohibit discovery of such documents from his nonparty prior employer pends. He does not explain his failure to register a timely objection to defendants' document requests or address whether he may challenge those requests on grounds other than attorney-client privilege, and concedes that he did not invoke a privilege in objecting to defendants' discovery demands. (NYSCEF 40).

In reply, defendants contend that they are entitled to the production of all documents in plaintiff's possession, regardless of whether they possess them and, relying on a letter found on plaintiff's work computer, maintain that documents responsive to request 33 will reflect not only whether plaintiff performed poorly at his prior job, but whether plaintiff settled an identical age discrimination claim against his former employer. Whether or not such discovery may be

obtained from his prior employer is irrelevant to whether he may obtain it directly from plaintiff. (NYSCEF 44).

II. ANALYSIS

CPLR 3122 provides, in relevant part, as follows:

> Within twenty days of service of a notice . . . under rule 3120 . . . , the party or person to whom the notice . . . is directed, if that party or person objects to the disclosure, inspection or examination, shall serve a response which shall state with reasonable particularity the reasons for each objection.

(CPLR 3122 [a] [1]). Where a party does not object to a disclosure demand within the 20-day period prescribed by CPLR 3122, inquiry into the propriety of the demand is limited to determining whether the information sought is privileged under CPLR 3101, or whether the demand is palpably improper. (*Saratoga Harness Racing, Inc. v Roemer*, 274 AD2d 887, 888-89 [3d Dept 2000]; *Haenel v Nov. & Nov.*, 172 AD2d 182, 183 [1st Dept 1991]). A demand may be palpably improper if it is, *inter alia*, "overly broad, unduly burdensome, irrelevant, or vague." (*McMahon v Cobblestone Lofts Condo.*, 134 AD3d 646, 646 [1st Dept 2015], citing *Accent Collections, Inc. v Cappelli Enterprises, Inc.*, 84 AD3d 1283, 1284 [2d Dept 2011]; *Haller v North Riverside Partners*, 189 AD2d 615, 66 [1st Dept 1993]).

As it is undisputed that plaintiff failed to object or move for a protective order within 20 days of service of the notice, review is limited to whether the materials sought are privileged or whether the demands are palpably improper. (*See Saratoga Harness Racing, Inc.*, 274 AD2d at 888-89 [defendant failed to object within period specified by CPLR 3122; court's review limited to whether materials privileged or demand palpably improper]). As it is also undisputed that plaintiff does not claim that the information sought is privileged, the only issue for review is

whether defendants' requests are palpably improper. (*See id.* [absent claim of privilege, only issue was whether demand palpably improper]).

Absent any indication that the documents defendants seek in request 25 are relevant to the case, or any authority for the proposition that documents emailed from office to home are "taken" from the office, request 25 is palpably improper. (*See Barroso v City of NY*, 228 AD2d 379, 380 [1st Dept 1996] [where emergency response vehicle collided with private vehicle, demand for information as to happenings at site of emergency irrelevant and thus, palpably improper]; *Cornex, Inc. v Carisbrook Indus., Inc.*, 161 AD2d 376, 377 [1st Dept 1990] [plaintiff's demand palpably improper where information irrelevant and in plaintiff's possession]).

Having failed to demonstrate that a propensity for poor work performance and an alleged prior suit against a former employer are relevant, request 33 is palpably improper. (*See Barroso*, 228 AD2d at 380 [demand for irrelevant information palpably improper]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion is denied.

ENTER:

Barbara Jaffe, JSC

HON. BARBARA JAFFE

DATED: May 23, 2017
New York, New York