

Marcone APW, LLC v Servall Co.

2012 NY Slip Op 33744(U)

September 11, 2012

Supreme Court, Erie County

Docket Number: 2010-7257

Judge: John A. Michalek

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This opinion is uncorrected and not selected for official publication.

At a Special Term of the Supreme Court, held in and for the County of Erie, at the Erie County Hall, 25 Delaware Avenue, Buffalo, New York on the 14th day of June, 2012.

PRESENT: HON. JOHN A. MICHALEK, J.S.C.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

MARCONE APW, LLC,

Plaintiff,

vs.

SERVALL COMPANY, KARL P. ROSENHAHN,
and MARK J. CREIGHTON,

Defendants.

MAR-CONE APPLIANCE PARTS COMPANY,

Plaintiff,

vs.

KIM K. ADLER, MICHAEL G. MANGAN, and
KEVIN J. SULLIVAN,

Defendants.

ORDER

Consolidated Under
Index No.: 2010-7257

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ERIE COUNTY
CLERK'S OFFICE

Defendants Servall Company, Karl P. Rosenhahn and Mark J. Creighton, by their attorneys, Jaeckle Fleischmann & Mugel, LLP, having moved by a Notice of Motion dated May 21, 2012 for partial summary judgment and relief *in limine*; Plaintiff Marcone APW, LLC a/k/a Mar-Cone Appliance Parts Company ("Plaintiff"), by its attorneys, Phillips Lytle LLP, having moved by an Order to Show Cause granted on May 25, 2012 and having moved separately by a

Notice of Motion dated June 1, 2012 for various relief pursuant to CPLR 3126 (collectively "Plaintiff's motions"); Defendants Servall Company, Karl P. Rosenhahn and Mark J. Creighton, by their attorneys, Jaeckle Fleischmann & Mugel, LLP, having moved by an Order to Show Cause granted June 8, 2012 for relief pursuant to CPLR 3108 and 3113; Defendant Kevin J. Sullivan having moved by a Notice of Motion dated June 6, 2012 for relief pursuant to CPLR 3212; and Defendant Kim K. Adler having moved by a Notice of Motion dated June 11, 2012 for relief pursuant to CPLR 3212;

NOW, upon reading the Notice of Motion for Partial Summary Judgment and *In Limine* dated May 22, 2012; the Affirmation in Support of Defendants' Motion for Partial Summary Judgment and *In Limine* of B. Kevin Burke, Jr., Esq. dated May 21, 2012, together with the exhibits thereto; the Opposing Affirmation of Alan J. Bozer, Esq. dated June 8, 2012; the Reply Attorney Affirmation in Further Support of Defendants' Motion for Partial Summary Judgment and *In Limine* dated June 12, 2012, together with the exhibits thereto; Plaintiff's Order to Show Cause granted May 25, 2012; the Affirmation of Christopher L. Hayes, which is undated but recited in the Order to Show Cause of May 25, 2012 as having been dated May 24, 2012, together with the exhibits thereto; the Attorney Affirmation of B. Kevin Burke, Jr., Esq. dated June 8, 2012, together with the exhibits thereto; the Affidavit of Jeff Meyers, sworn to June 6, 2012; the Affidavit of Steven Carlson, sworn to June 7, 2012; the Reply Affirmation of Christopher L. Hayes, Esq. dated June 12, 2012, together with the exhibits thereto; the Reply Affidavit of Craig R. Bowman, sworn to June 12, 2012, together with the exhibit thereto; Plaintiff's Notice of Motion dated June 1, 2012; the Attorney Affirmation of Christopher L. Hayes dated June 1, 2012, together with the exhibits thereto; the Responding Attorney Affirmation of B. Kevin Burke, Jr. dated June 12, 2012, together with the exhibits thereto;

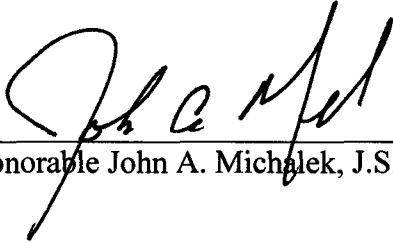
Defendants' Order to Show Cause granted June 8, 2012; the Attorney Affirmation of B. Kevin Burke, Jr. dated June 7, 2012, together with the exhibits thereto; the Affirmation Responding to Order to Show Cause for Grant of Commissions and Letter Rogatory of Alan J. Bozer, Esq. dated June 12, 2012; Defendant Kevin J. Sullivan's Notice of Motion dated June 6, 2012; the Affirmation of Susan C. Roney in Support of Motion for Partial Summary Judgment dated June 6, 2012, together with the exhibits thereto; Defendant Kim K. Adler's Notice of Motion dated June 11, 2012; the Affirmation of Dennis C. Vacco, Esq. dated June 11, 2012, together with the exhibits thereto; and after hearing Phillips Lytle LLP (Alan J. Bozer, Esq. and Christopher L. Hayes, Esq., of counsel), attorneys for Plaintiff; Jaeckle Fleischmann & Mugel, LLP (B. Kevin Burke, Jr. and Dennis K. Schaeffer, of counsel), attorneys for Defendants Servall Company, Karl P. Rosenhahn, and Mark J. Creighton; Duke Holzman Photiadias & Gresens LLP (Patricia Gillen, Esq., of counsel), attorneys for Defendant Michael G. Mangan; Nixon Peabody LLP (Susan C. Roney, Esq., of counsel), attorneys for Defendant Kevin J. Sullivan; Lippes Mathias Wexler Friedman LLP (Dennis C. Vacco, Esq., of counsel), attorneys for Defendant Kim K. Adler; and due deliberation having been had thereon, and pursuant to the decision of the Court delivered in open court from the bench on June 14, 2012, a copy of the certified transcript of which is attached hereto as **Exhibit A**, it is hereby,

ORDERED, that Plaintiff's motions are hereby granted in part, as follows: A hearing will be held on October 15, 16, and 17, 2012 in Part 26, 25 Delaware Avenue in order to address the question of whether Servall has spoliated or failed to produce properly demanded, discoverable, and potentially relevant electronically stored information ("ESI") and, as more particularly set forth in the June 22, 2012 correspondence from the Court attached hereto as **Exhibit B**, to address the question of whether Servall has complied with the Court's preservation orders

to
specifically with respect ^{to} all emails and, if the said emails were in fact preserved, why, if properly demanded, they were not produced to Plaintiff; and it is

FURTHER ORDERED, that the Order to Show Cause granted on June 8, 2012 and made on behalf of Defendants Servall Company, Karl P. Rosenhahn, and Mark J. Creighton seeking relief under CPLR 3108 and 3113 and the issuance of certain open commissions is hereby granted in its entirety; and it is

FURTHER ORDERED, that the Court reserves decision on the motions for partial summary judgment made on behalf of Defendants Servall Company, Karl Rosenhahn, Mark Creighton, Kim K. Adler and Kevin J. Sullivan.

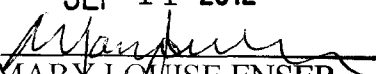


Honorable John A. Michalek, J.S.C.

ENTER

GRANTED

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BY 
MARY LOUISE ENSER
COURT CLERK