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

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ALPHONSE FLETCHER, JR. and FLETCHER ASSET MANAGEMENT, INC.

Plaintiffs,

- against -

THE DAKOTA, et al.,

Defendants.

Index No. ~~101298/11~~ 101289/11

DECISION and ORDER

Mot Seq. 16

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HON. EILEEN A. RAKOWER

Plaintiffs Alphonese Fletcher, Jr. ("Fletcher") and Fletcher Asset Management, Inc. ("FAM") (collectively, "Plaintiffs") commenced this action on February 1, 2011. Plaintiffs' action concerns the Board of The Dakota's denial of Fletcher's application to purchase an apartment adjacent to the one (Apartment 50) he owns for purposes of combining the two. Fletcher has been a resident of The Dakota and a shareholder of the corporation since 1992 and has previously served on the Board of The Dakota, including two terms as Board President. Fletcher alleges that The Dakota discriminated against him, inter alia, based on his race, in their refusal to approve his application to purchase the adjacent apartment. Fletcher also alleges retaliation against him for his protecting the rights of others, including minority and Jewish shareholders and applicants of The Dakota. Fletcher alleges that in early 2007 he objected to the discriminatory treatment of a Jewish couple applying to purchase an apartment and in another instance protested the Board's unjustified denials of an African-American shareholder's requests to fix her bathroom. Fletcher also alleges that during the period in which his application was pending, Defendants defamed Fletcher by making numerous false statements to others regarding his financial condition in order to taint consideration of his application, including that he had not fulfilled binding charitable commitments; that Fletcher was "playing the race card" and using his status as an African-American to persuade the Board to approve his application; that Fletcher's assets were illiquid and difficult to value; and that FAM's business loans left it overextended and at risk of collapse.

Certain claims and defendants were dismissed by this Court in an order dated July 21, 2011 and additional claims were dismissed, on appeal of that order, by the Appellate Division, First Department, by decision dated July 3, 2012. The claims currently remaining in the action are as follows:

- As to The Dakota, claims of discrimination, retaliation, tortious interference with contract, and defamation based upon statements made before the filing of the Complaint that Fletcher had not fulfilled binding charitable pledges but instead "owed" money to charity, that Fletcher was living on "borrowed money," and that "[b]ased on the financial information submitted by Fletcher," approving Fletcher's application was not in the best interest of The Dakota;

- As to defendant Barnes, discrimination; and

- As to defendant Nitze, defamation based only upon the statement allegedly made to Craig Hatkoff that Fletcher had not given the money he promised to give to charity and that "he owes it."

More specifically, as for Plaintiffs' fifth cause of action for defamation, the Appellate Division held that the following defamatory statements are pleaded with sufficient particularity:

> "[At an April 14, 2010 board meeting,] one or more of the Individual Defendants told the other members of the Board that Fletcher had not fulfilled binding charitable commitments and pledges, that Fletcher's assets were all illiquid and difficult to value, and that FAM's business loans left it over-extended and at risk of collapse ...
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> "[On or before May 7, 2010, Nitze told Dakota shareholder Craig Hatkoff that Fletcher] "had not actually given the money he had promised to give [to charity] and 'he owes it'...
>
> "[At some point between June 24, 2010 and September 2010] one or more of the Individual Defendants falsely and maliciously stated to Hatkoff that

> Fletcher had 'checked out of his business' and was living on 'borrowed money' ...
>
> "On September 14, 2010, ... the Board sent a letter to certain Dakota shareholders ... [It stated, inter alia,] '[b]ased on the financial information submitted by Fletcher, the Board concluded that approving such a purchase would not be in the best interest of The Dakota' ... [The letter] also contained the false and misleading statement that Fletcher had declined the Board's request to provide additional financial information."

The Second Amended Complaint alleges that because of the alleged defamatory statements made by Defendants, Fletcher and FAM have each suffered damages to their respective reputations as a "trusted and successful investment advisor" and "a successful investment firm," and that this injury has had a "damaging effect on relationships with current and prospective investors and on resulting profits."

Defendants The Dakota, Inc. ("The Dakota"), Bruce Barnes, and Peter Nitze (collectively, "Defendants") now move by way of Order to Show Cause pursuant to CPLR §3126(c) for an Order striking the Fifth Cause of Action (Defamation) of the Second Amended Complaint for willful failure to comply with the Court's prior discovery orders and failure to produce documents and information relevant and material to said claims, or alternatively, precluding Plaintiffs from submitting evidence of damages in support of the Fifth Cause of Action.

On August 3, 2011, Defendants served document requests and interrogatories on Plaintiff. On September 28, 2012, the Court granted Defendants' motion to compel production of various categories of documents and information and directed production within thirty days of receipt of the Order. On November 30, 2012, the Court issued another Order directing Plaintiffs to produce "by January 7, 2013" all documents "previously scheduled to be produced by November 2, 2012." On February 5, 2013, the Court held a compliance conference, and issued another Order directing Plaintiffs to complete the production of documents pursuant to the Court's previous two orders prior to Fletcher's deposition. The Court held another compliance conference on March 5, 2013, and the Court issued another order directing Plaintiffs to comply with the outstanding discovery.

This Court's Orders of February 22, 2013 and March 5, 2013 specified that Plaintiffs would produce by March 19, 2013 documents regarding "identities of investors, current as of 9/14/2010 and prospective investors in Fletcher Funds alleged to have been affected by reputational harm in plaintiff's defamation cause of action." The February 22, 2013 Order provided that "Failure to comply will be deemed willful and contumacious." Pursuant to the Court's March 5, 2013 Order, "Plaintiffs' document production including ordered produced [sic] by Order dated February 22, 2013 will be completed on or before March 19, 2013, with any documents not produced by that date to be precluded."

Defendants allege that Plaintiffs have refused to produce documents and withheld testimony concerning the identities of "current and prospective investors" that the Second Amended Complaint alleges learned of, were affected by, the allegedly defamatory statements of The Dakota and Nitze. Defendants state that this information is necessary to substantiate any concrete harm suffered by Plaintiffs.

In the supporting affirmation of Christine H. Chung, Chung states that Plaintiffs have refused to produce a list of investors, and states that their latest document production, dated March 19, 2013, redacts investors names and contains no identification of current or potential investors.

In the opposing affirmation of Nathaniel P.T. Read, Read states that on April 22, 2013, Plaintiffs produced "unredacted versions of documents regarding the then-current investors impacted by Defendants' alleged defamatory statements, additional documents regarding prospective investors, and a small number of documents identified during Plaintiffs' final privilege log to review."

In her reply affirmation, Christine H. Chung states that at his deposition on April 25, 2013, Fletcher testified that he was not involved in the creation of the list, and that it included only some, not all, of the investors that he believes were impacted by Defendants' defamation and other wrongful acts. Furthermore, Chung states that the list does not identify any prospective investors impacted by the statements. Plaintiff states that in their April 22 letter, Plaintiffs listed business and governmental entities that Plaintiffs claim were prospective investors, but did not identify them as investors who were impacted by the alleged defamatory statements.

Pursuant to CPLR §3126, a court may impose a wide range of penalties upon

any party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, pursuant to this article, [and] the court may make such orders with regard to the failure or refusal as are just . . ." *See also Sage Realty Corp. v. Proskauer Rose, LLP*, 275 A.D. 2d 11, 17 [1st Dept 2000] (sanctions warranted "when a party intentionally, contumaciously or in bad faith fails to comply with a discovery order . . ."). The sanction imposed "should be commensurate with the nature and extent of the disobedience." *Christian v. City of New York*, 269 A.D. 2d 135, 137 [1st Dept 2000].

"In order to invoke the drastic remedy of a preclusion order . . .the court must determine that the party's failure to comply . . . was the result of willful, deliberate, and contumacious conduct or the equivalent." *Vatel v. City of New York*, 208 A.D. 2d 524, 525 [2d Dept 1994]). Sustained noncompliance over a period of time raises the inference that the noncomplying party's conduct was willful. *See e.g., Goldstein v. CIBC World Mkts Corp.*, 30 A.D. 3d 217, 217 [1st Dept 2009].

Plaintiffs' failures in this action to comply with their discovery obligations and to frustrate Defendants' ability to obtain meaningful discovery has been previously documented in the Court in prior orders. This Court's March 5, 2012 Order specifically stated, "Plaintiffs' document production including ordered produced [sic] by Order dated February 22, 2013 will be completed on or before March 19, 2013, with any documents not produced by that date to be precluded." Here, as Plaintiffs acknowledge, despite the last Order, they produced an unredacted list of "then current investors impacted by Defendants' alleged defamatory statements" on April 22, 2013, after the deadline. Furthermore, the list provided, as acknowledged by Fletcher, is not complete. Based on Defendants' repeated failure to comply with this Court's Orders and to provide complete, responsive information within the deadlines imposed, preclusion is therefore warranted at this juncture.

Wherefore it is hereby

ORDERED that defendants' motion is granted solely to the extent that plaintiffs shall be precluded from offering evidence demanded, but not disclosed by March 19, 2013 regarding their alleged damages from defendants' alleged defamation, namely the current and prospective investors influenced by the statements made.

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

DATED: 5/24/13

EILEEN A. RAKOWER, J.S.C.