

GS Plasticos Limitada v Bureau Veritas

2013 NY Slip Op 31904(U)

July 23, 2013

Sup Ct, NY County

Docket Number: 650242/09

Judge: Joan A. Madden

Republished from New York State Unified Court System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Jock A. M. ...
Justice

PART 11

GS PLASTICOS LIMITADA

INDEX NO.

650242/09

- v -

MOTION DATE

MOTION SEQ. NO.

24

MOTION CAL. NO.

Bureau Veritas, EAL

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision & order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 23, 2013

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

GS PLASTICOS LIMITADA,
Plaintiff,

INDEX NO.
650242/09

-against-

BUREAU VERITAS AND BUREAU VERITAS
CONSUMER PRODUCTS SERVICES,

Defendants

-----X

JOAN A. MADDEN, J.:

Plaintiff GS Plasticos Limitada ("GS") moves, by order to show cause, pursuant to CPLR 3124 for an order (i) compelling defendant Bureau Veritas Consumer Products Services ("BVCPS") to produce and/or permit GS's counsel to inspect, copy, test or photograph designated documents or things in BVCPS's custody and control, (ii) directing that if BVCPS's does not comply by a certain date, (a) it will be precluded from offering any evidence of the same at trial, (b) the issues to which the discovery is relevant shall be deemed to be decided in GS's favor and against BVCPS, (c) BVCPS's affirmative defendants will be dismissed (motion seq. no. 024). BVCPS opposes the motion.

GS separately moves, by order to show cause, for an pursuant to CPLR 3124 for an order (i) compelling BVCPS to answer separately fully and under oath certain interrogatories and where requested produce and/or permit GS's counsel to inspect, copy, test or photograph designated documents or things in BVCPS's custody and control, (ii) directing that if BVCPS's does not comply by a certain date that (a) it will be precluded from offering any evidence of the same at trial, (b) the issues to which the discovery is relevant shall be deemed to be decided in

GS's favor and against BVCPS, (c) BVCPS's affirmative defendants will be dismissed (motion seq. no. 025). BVCPS opposes the motion.¹

BACKGROUND

GS is a Brazilian manufacturer of toy "premiums" for the promotional market, which are small plastic toys like those found McDonald's Happy Meals. BVCPS is a provider of testing and inspection services for consumer products. This action arises out of allegations that, *inter alia*, between August 2006 and October 2006, BVCPS issued various reports to Kellogg Brazil, a subsidiary of the Kellogg Company ("Kellogg"), that incorrectly found that GS's stamps, which were to be used in promotional inserts in Kellogg's products, contained dangerously high levels of arsenic. It is alleged that as a result of these reports, which were subsequently determined to be false, Kellogg canceled its contract with GS to manufacture the stamps and lost future business opportunities with Kellogg.

The original complaint asserted causes of action for negligence, *res ipsa loquitor*, tortious interference with existing contractual relations, and tortious interference with prospective business relations. BVCPS moved to dismiss the complaint on various grounds. In its decision and order dated April 7, 2010, this court granted the motion to the extent of dismissing all of GS's claims except for the claim seeking to recover for tortious interference with existing contractual relations.

By decision and order dated October 13, 2011, the Appellate Division, First Department affirmed the court's April 7, 2010 decision and order. See *GS Plasticos Limitada v. Bureau Vertas*, 88 AD3d 510 (1st Dept 2011). Following certain discovery, GS moved to amend its complaint to assert claims for negligence, and violations of the Donnelly Act, and to add certain

¹Motion seq. nos. 024 and 025 are consolidated for disposition.

allegations in connection with its existing claim for tortious interference with contract. By decision and order dated November 8, 2012, the court denied GS's motion to amend except to the extent of permitting GS to include additional allegations in connection with its claim for tortious interference with contract with respect to damages to its reputation. Accordingly, the only claim remaining in this action is for tortious interference with contract.

CPLR 3101(a) provides that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action." The words "material and necessary" are "liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial." Roman Catholic Church of Good Shepherd v. Tempco Systems, 202 AD2d 257, 258 (1st Dept 1994). Disclosure is thus not limited to "evidence directly related to the issues in the pleadings." Allen v. Crowell-Collier Publishing Co., 21 NY2d 403, 408 (1968). However, the use of the words "any and all" in a document demand is contrary to the requirement of CPLR 3120(a) that such demands must be "specified with reasonable particularity" (Ehrlich v. Ehrlich, 74 AD2d 519 (1st Dept 1980)).

Likewise, interrogatories must "satisfy the standard of reasonable particularity in identifying the information to be produced." Lobatto v. Lobatto, 109 AD2d 697 (1st Dept 1985). However, when a discovery request is otherwise narrowly defined, the use of "all" is not so improper as to require judicial intervention. Ensign Bank, F.S.B. v. Gerald Modell, Inc., 163 AD2d 149 (1st Dept 1990). Considering GS's document requests and interrogatories in the context of this law, the court reaches the following conclusions.

Document Requests At Issue In Motion Seq. 024

Document request no. 1 of GS's third notice of discovery and inspection seeks:

Each and every document which in any way mentions, describes or otherwise refers to any option, equity, or employee incentive plan,

or share-based incentive plan, or stock offering allowing [BVCPS's] directors, officers, agents and/or employees to subscribe to purchase stock options, stock options on preferential terms, stock appreciation rights, warrants, equities, or allowing [BVCPS's] directors, officers, agents and/or employees to otherwise receive the means of grant, award or transfer stock options, stock options on preferential terms, stock appreciation rights, warrants, equities, or share based compensation.

BVCPS has already produced this information as to James Keast the one employee who had responsibility in 2006 for interacting with Kellogg with respect to premiums.² This demand is otherwise overly broad and burdensome. Furthermore, GS's position that most of the employees of GS who were deposed stated that they received stock options and therefore would have an incentive to be compensated for action/inaction in testing GS's product is purely speculative.

Document Request No. 15 of GS's third notice of discovery and inspection seeks "[a]ll documents evidencing, reflecting or relating to any copy of Kellogg manual used or referred to any quality assurance plan relating to triangular stamps." In addition to objecting on various standard grounds, BVCPS refers to its interrogatory response, in which it states that the Kellogg manual was not directly referred to or used in drafting the quality assurance plan for the testing of stamps. However, as there was testimony that the Kellogg manual was generally used as the basis for BVCPS's quality assurance plan used to test GS products, a statement that the manual was not "directly" referred to or used does not eliminate the possibility that it was nonetheless utilized in some way. Accordingly, BVCPS shall respond to the request by providing any pages of the Kellogg manual relevant to this request and/or provide an affidavit of a person with

²In 2006, Mr. Keast was responsible for premiums generally and specifically for Kellogg premiums.

knowledge stating that none of the documents sought in this request exist and that Kellogg manual was not used either directly or indirectly or in any other way, including as general guidance, in connection with the quality assurance plan for the stamps.

Document Request No. 20 of GS's third notice of discovery and inspection seeks "[a]ll documents evidencing or reflecting any travel record, expense account reimbursement, or any other payment or expense relating to any interaction of any director, officer, agent and/or employee of [BVCPS] and Kellogg during the year 2006." The document request is overly broad and burdensome and GS has adequately not explained how the travel expense records will lead to relevant evidence. In addition, as noted by BVCPS in its opposition, GS had an opportunity to question witnesses regarding various trips made in connection with the stamps and BVCPS points out that it has responded to this request insofar as it has produced emails regarding a trip to Hong Kong in October 2006, with Kellogg and STR (another testing agency) at which the stamps were discussed and attaches excerpts from Karen Gerwitz's deposition testimony in this regard. In fact, in reply, GS points to the testimony of Mr. Keast that he also traveled in connection with the Kellogg Back to School Promotion for the stamps, and while GS states that Mr. Keast did not have "more specific information," it provides no explanation as to how the travel expense documents would lead to such information or other relevant evidence.

Document Request No. 26 of GS's third notice of discovery and inspection seeks "[e]ach and every document or communication which in any way mentions, describes or otherwise refers to Kellogg's key performance indicators."

GS asserts that these documents are relevant as BVCPS employees testified that they were rewarded based on their ability to meet key performance indicators, and specific

information as to these indicators and rewards handed out based on such indicators is essential to linking BVCPS's intentional interference with financial incentives that motivated BVCPS's employees.

BVCPS maintains that it has produced all relevant documents related to the key performance indicators as they relate to the stamps, including all of the material in the personnel file of Mr. Keast that relates to or discusses Kellogg or the work done for Kellogg, and documents that reference the stamp purchase or the testing of stamp pads, including documents, if any, referencing these issues in the context of the key performance indicators. As GS has not explained how key performance indicators other than those relating to the stamp purchase are relevant, its motion to compel a further response to this request is denied.

Document Request No. 28 of GS's third notice of discovery and inspection seeks "[a]ll documents evidencing, reflecting or relating to any revenue figure and/or budget relating to the Kellogg account for any month during the year 2006 or the year 2007." GS asserts these documents are relevant as BVCPS employees testified that they were rewarded for their ability to meet revenue figures and/or budgets and their ability to increase BVCPS's share of the Kellogg's "wallet," and that documentation regarding such figures and budgets is essential to linking BVCPS's intentional interference with the financial incentives that motivated BVCPS. As BVCPS has already provided plaintiff with annual revenues for Kellogg both for BVCPS alone and for the aggregate of BVCPS and its affiliates for the years 2004 through 2007, it has adequately complied with this request.

Document Request No. 15 of GS's first notice of discovery and inspection seeks "[a]ll documents evidencing, reflecting or relating to written or oral contracts or agreements between

[BVCPS] and any third-party contractor and all such drafts of such contracts or agreements.” GS clarifies in its motion that by “third-party contractor” it means Kellogg, and asserts that the documents sought are relevant as they bear on the financial motives for BVCPS’s intentional interference with GS’s contracts. In opposition, BVCPS asserts that based on this clarification the relevant documents, i.e. the Testing Service Agreements and their attachments effective in September and November 2006 have been produced, and GS does not dispute this assertion in its reply papers.

Document Request No. 16 of GS’s first notice of discovery and inspection seeks “[a]ll monthly and annual financial statements of defendant, including balance sheets and income statements, for the years three years prior to BVSA’s direct or indirect acquisition of [BVCPS].” GS asserts that this request is relevant since for GS to show BVCPS’s financial motive for interfering with GS’s contracts it must be able to analyze BVCPS’s financial position both before 2006 and subsequent to 2006. BVCPS denies that the information is relevant, but states that it has provided BVCPS with its annual revenue and net income figures for 2004 to 2007, asserting that figures for a broader time period and/or for monthly statements are overly broad. While the information produced by BVCPS is sufficient, as GS notes in reply, the form of the response is improper insofar as the figures are contained in two letters from BVCPS’s attorney. Accordingly, BVCPS shall respond in a response in writing and under oath in accordance with CPLR 3133.

Interrogatories At Issue In Motion Seq. 024

Interrogatory 1 of GS’s fifth set of interrogatories requests that BVCPS state its “revenue and income separately for each year from 2001 to 2011.” As indicated in connection with

Document Request No. 16 of GS's first notice of discovery and inspection, BVCPS will have adequately responded to this interrogatories by providing a response for the years 2004 to 2007 in writing and under oath in accordance with CPLR 3133. In this connection, the court finds that GS has not shown that the relevance of seeking the revenue and income information for the period earlier and later periods.

Interrogatory no. 2 of GS's fifth set of interrogatories requests that BVCPS "[d]escribe, specify and list the top twenty (20) sources of income for BVCPS for the years 2001 to 2011, and give a precise statement as to : a) the amounts received accompanied by the name of the person the amounts were received from b) the amounts owed accompanied by the name of the person the amounts were received from c) for each person from whom BVCPS received revenue or income, the services or products provided by BVCPS for which payments were paid or are due to BVCPS."

GS asserts that this information is relevant to showing that BVCPS has a financial incentive to interfere with GS's contracts and thereby secure increase business from Crea³ or indirectly through McDonald's and/or other Crea clients. The court finds that the interrogatory is overly broad and burdensome and GS has not adequately explained how the information sought is relevant or will lead to relevant information . Notably, the interrogatory does not specifically mention Crea or other companies and as indicated below, BVCPS has provided

³ In the Second Amended Complaint it is alleged "upon information and belief that either at the behest of [GS's] competitor Crea or in an effort to generate substantial business and profits from Crea, BVCPS embarked on a course of conduct with the intent of inducing Kellogg to breach the triangular stamp contracts and/or damaging [GS's] reputation." According to BVCPS, Crea is one of McDonald's two marketing agencies for Happy Meal Premiums, and is not GS' competitor, and has been a GS client.

information regarding revenue and income earned from Creata and other specified companies in subsequent interrogatories.

Interrogatories 3, 4, and 5 request that BVCPS state the amount of revenue and income BVCPS earned annually from respectively, Creata, the Marketing Store, and McDonald's for the each year from 2001 to 2011. GS argues that this information will demonstrate that BVCPS had a financial incentive to interfere with the contracts at issue. The court finds that BVCPS has responded to these interrogatories by providing this information for two years prior and one year after the alleged interference with contract which occurred in 2006. However, to the extent that such information was provided in a letter from counsel, BVCPS shall be required to provide this information under oath in accordance with CPLR 3133.

Interrogatory 6 requests that BVCPS state the amount of revenue and income BVCPS earned annually from OnPack (which GS describes as a marketing agent that help GS secure the contracts with Kellogg) for each year from 2001 to 2011. Interrogatory 7 requests that BVCPS state the amount of revenue and income BVCPS earned from GS for each year from 2001 and 2011. GS argues that "by comparing revenues earned from Kellogg, McDonald's and Creta to revenues earned from GS or OnPack, GS can show that BVCPS had an incentive to inflict economic harm on GS to reduce financial and legal liability to Kellogg due to BVCPS's disruption of Kellogg's Back to School triangular stamp promotion and secure increased business directly from Creata or indirectly through McDonald's and/or other Creata clients." BVCPS argues that the information is irrelevant and in any event, GS is in possession of this information, including the information regarding OnPack which is its affiliate.

Even assuming *arguendo* that the information in these interrogatories were sufficiently

relevant to warrant its disclosure, as GS does not deny that it is in possession of, or has access to, this information, its request to compel BVCPS to respond to these interrogatories is denied (See Rios v. Donovan, 21 AD2d 409 [1st Dept 1964]; Briger v. Briger, 110 AD2d 526 [1st Dept 1985]; 44A NYJur2d § 182 [2013]).

Interrogatories 8, 9, 10, 11, 12, and 13, request that BVCPS state whether it provided any products or services in exchange for which it did not receive monetary compensation to respectively Creata, Marketing Store, and McDonald's and that BVCPS identify and produce any documents to support its responses. As BVCPS has stated that it did not provide any products or services without monetary compensation to these companies, these interrogatories have been adequately responded to.

Interrogatory 14 requests that BVCPS state whether it provided any products or services to OnPack, without monetary compensation, and Interrogatory 15 requests that BVCPS identify and produce any documents in support of this response. Interrogatory 16 requests that BVCPS state whether it provided any products or services to GS without receiving monetary compensation, and Interrogatory 17 requests that BVCPS identify and produce any documents in support of this response. GS states that the responses to these interrogatories will permit it to compare the products and services provided to Creata, Marketing Store, and McDonald's with those provided to OnPack and GS and will demonstrate BVCPS's incentive to inflict economic harm to GS. The court finds that GS has not shown the relevance of these interrogatories in light of BVCPS's response that it did not provide any products or services to Creata, Marketing Store, and McDonald's without receiving monetary compensation and, in any event, GS should have this information in its possession or have access to such information.

In view of the above, it is

ORDERED that GS's motion to compel BVCPS to produce various documents and for related relief (motion seq. no. 024), is granted only to the extent of directing that within 30 days of the date of this decision and order, BVCPS shall respond to document request no.15 of GS's third notice of discovery and inspection and document request no. 16 of GS's first notice of discovery and inspection in accordance with this decision and order; and it is further

ORDERED that GS's motion to compel BVCPS to respond to various interrogatories and for related relief (motion seq. no. 025), is granted only to the extent of directing that within 30 days of the date of this order, BVCPS shall respond to interrogatories 1, 3, 4 and 5 of GS's fifth set of interrogatories in accordance with this decision and order.

DATED: July 23, 2013



J.S.C.