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

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GORDON REES SCULLY MANSUKHANI, LLP

Plaintiff,

Index No.
151659/2015

DECISION and ORDER

- against -

Mot. Seq. #003

ALEXANDER E. RODRIGUEZ,

Defendant.

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

Plaintiff, Gordon Rees Scully Mansukhani, LLP ("Plaintiff" or "GRSM"), brings this action to recover attorney's fees for legal services allegedly rendered to defendant, Alexander E. Rodriguez ("Defendant" or "Rodriguez"), during the period between May 2013 and February 2014.

Defendant now moves for an Order, pursuant to CPLR § 3103(a), granting a protective order requiring Plaintiff to maintain the confidentiality of all information exchanged during the course of discovery; pursuant to 22 NYCRR 130-1, awarding sanctions against Plaintiff; and, pursuant to CPLR § 3103, granting Defendant priority of depositions.

Plaintiff opposes. Plaintiff cross-moves for an Order, pursuant to 22 NYCRR 130-1, awarding sanctions against Defendant's counsel; pursuant to CPLR § 3124, compelling the deposition of Defendant; pursuant to CPLR § 3123, deeming as admitted in lieu of a response GRSM's Notices to Admit, dated April 13, 2015; or, alternatively, pursuant to CPLR § 3124, compelling Defendant to respond to written discovery; and, pursuant to CPLR § 3106, allowing Plaintiff to retain priority of depositions.

Defendant opposes Plaintiff's cross-motion.

Turning first to Plaintiff's motion for a protective order, 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]). "When the disclosure process is used to harass or unduly burden a party, a protective order eliminating that abuse is necessary and proper." (*Jones v. Maples*, 257 A.D.2d 53, 57 [1st Dep't 1999]).

Defendant seeks a protective order requiring Plaintiff to maintain the confidentiality of all information exchanged through discovery. Defendant argues that such an order is necessary to prevent Plaintiff from leaking discovery material to the press. Defendant claims that Plaintiff previously leaked discovery material to the press in an effort to "harass," "vilify," and "besmirch" Defendant, (Siachos Aff., ¶ 27). More specifically, Defendant claims that Plaintiff provided the press with information regarding: the commencement of the instant action; service of a deposition notice noticing the deposition of Defendant; and, Plaintiff's notice to admit. Defendant contends that a protective order is warranted to prevent any further use of the discovery process to harass Defendant.

Here, Defendant fails meet his burden of demonstrating that the discovery process has been used to abuse or unduly burden Defendant. Defendant does not argue that any information subject to discovery is confidential in nature, and New York law expressly permits disclosure and publication to the media of "[t]he scheduling or result of any step in litigation." (DR-7-107[c][4]). Additionally, Plaintiff contends that there is no danger of the media attending Defendant's deposition, because, "as a practical matter, no one may be present, without being invited, in private offices of attorneys where so many of the examinations [before trial] are held." (*Westchester Rockland Newspapers, Inc. v. Marbach*, 66 A.D.2d

335, 338 [2d Dep't 1979]). Accordingly, Defendant fails to demonstrate that a protective order requiring Plaintiff to maintain the confidentiality of all information exchanged through discovery is warranted at this time.

As to the issue of priority of depositions, CPLR § 3106 provides, in relevant part:

> Normal Priority. After an action is commenced, any party may take the testimony of any person by deposition upon oral or written questions. Leave of the court, granted on motion, shall be obtained if notice of the taking of the deposition of a party is served by the plaintiff before that party's time for serving a responsive pleading has expired.

(CPLR § 3106[a]). Thus, "[a]s a general rule, in the absence of 'special circumstances', priority of examination belongs to the defendant if a notice therefor is served within the time to answer; otherwise, priority belongs to the party who first serves a notice of examination." (*Bucci v. Lydon*, 116 A.D.2d 520, 521 [1st Dep't 1986]).

Although it is well established that priority belongs to the party who first serves a notice of examination, "the court may use sound discretion to regulate and prevent abuse of the discovery process by protective orders." (*Church & Dwight Co. v. UDDO & Assoc., Inc.*, 159 A.D.2d 275, 275-76 [1st Dep't 1990] [internal citations omitted]). Additionally, priority may be "deemed abandoned . . . where a party fails diligently to pursue disclosure and is dilatory, thereby impeding the progress of the litigation." (*Bucci v. Lydon*, 116 A.D.2d 520, 521 [1st Dep't 1986]).

Here, it is undisputed that Plaintiff first served Defendant with a notice of deposition. Although Defendant argues that equity entitles Defendant to retain priority in this case, Defendant's conclusory statement that, "it is evident that Plaintiff did so [notice Defendant's deposition] in order to create yet another news story regarding Defendant", (Def's. MOL p. 9), is insufficient, without more, to demonstrate special circumstances warranting a departure from the general rule whereby priority belongs to the party who first serves a notice of examination. Accordingly, Defendant's application for a protective order granting Defendant priority of depositions fails.

Turning now to Plaintiff's cross-motion, CPLR § 3123 permits the service of a request for admission "of the genuineness of any papers or documents . . . or the

truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry." (CPLR § 3123[a]). The purpose of a Notice to Admit is "to eliminate from the litigation factual matters which will not be in dispute at trial, not to obtain information in lieu of other disclosure devices." (*Taylor v. Blair*, 116 A.D.2d 204, 205-06 [1st Dep't 1986]).

Where a party fails to respond to a Notice to Admit "within twenty days after service thereof or within such further time as the court may allow," the matters therein are deemed admitted for the purpose of the litigation. (CPLR 3123[a]). However, if the recipient of Notice to Admit pursuant to CPLR 3123 deems the notice unreasonable, the prompt and proper application for a protective order pursuant to CPLR § 3103 stays the time to respond, at least until the adjudication of the motion for protective order. (*See Nader v. General Motors Corp.*, 53 Misc.2d 515 [N.Y. Cnty. 1966] *aff'd* 29 A.D.2d 632, 286 N.Y.S.2d 209 [1st Dep't 1967]).

Accordingly, in light of Defendant's motion for a protective order, Plaintiff's motion to deem admitted Plaintiff's Notice to Admit is denied.

As far as Plaintiff's cross-motion to compel document discovery and the deposition of Defendant are concerned, 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]).

Wherefore, it is hereby

ORDERED that Defendant's motion is denied; and it is further

ORDERED that Plaintiff's cross-motion is granted only to the extent that Plaintiff is permitted to retain priority of depositions; and it is further

ORDERED that Defendant is directed to respond to Plaintiff's Notice to Admit within twenty days of service of a copy of this Order with Notice of Entry; and it is further

ORDERED that Defendant is directed to respond to Plaintiff's Request for Production of Documents within 45 days of service of a copy of this Order with Notice of Entry.

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

DATED: August 28 2015

EILEEN A. RAKOWER, J.S.C.