

AYA CAB Corp. v Woodside Mgt. Inc.

2016 NY Slip Op 30487(U)

February 24, 2016

Supreme Court, Kings County

Docket Number: 502132/13

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of February, 2016

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P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
AYA CAB CORP.,

Plaintiff,

- against -

Index No. 502132/13

WOODSIDE MANAGEMENT INC.,

Defendant.

-----X

The following papers numbered 1 to 5 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2, 3-4
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	5
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, plaintiff Aya Cab Corp. (Aya) moves for an order 1) striking the answer, defenses and counterclaim of defendant Woodside Management Inc. (Woodside), 2) compelling Woodside to respond to the Judicial Subpoena Duces Tecum served upon it and to Aya's notice for discovery and inspection and first set of interrogatories and 3) awarding costs and attorney's fees to Aya. By separate motion, Aya moves for an

order, 1) pursuant to CPLR 5224 (a) (3) (iv) and 2308 (b), compelling Woodside to comply with an Information Subpoena, 2) pursuant to CPLR 5224 (a) (3) (iv) and 2308 (b), compelling Flex Funding LLC's (Flex) compliance with the Third-Party Information Subpoena, 3) granting costs to Aya in the amount of \$50.00, together with a penalty in the amount of \$50.00 plus actual damages and 4) pursuant to CPLR 2308, issuing a warrant directing a sheriff to bring Woodside before Aya to be deposed.

Aya commenced this action to recover damages for breach of contract, unjust enrichment, breach of covenant of good faith and fair dealing, breach of fiduciary duty, conversion and unlawful business conduct by Woodside in its management of two New York City taxi medallions owned by Aya. According to the complaint, on or about May 30, 2012, Aya entered into an agreement with Woodside whereby Woodside agreed to provide management services for the medallions, including the responsibility to provide certain insurance coverage and to pay TLC Parking Violation Bureau summonses for violations, renewal fees, tax stamps, registration and inspection fees and costs. Aya alleges that defendant failed to perform numerous obligations under the management agreement including, but not limited to, failure to timely make required third party payments, causing Aya to terminate the agreement.

In the course of discovery, Aya served upon Woodside a notice for discovery and inspection (D&I) a set of interrogatories and a Judicial Subpoena Duces Tecum. By order dated November 13, 2014, following a compliance conference, the court (Hon. David I.

Schmidt, J.) directed that Woodside respond to the D&I and interrogatory requests by December 31, 2014. The order noted that Aya reserved the right to compel Woodside's compliance with the Judicial Subpoena Duces Tecum.

On December 19, 2014, Aya moved for an order granting summary judgment on its breach of contract and breach of fiduciary duty causes of action, directing an inquest on damages, compelling Woodside to respond to Aya's Judicial Subpoena Duces Tecum, entering a conditional order and dismissing Woodside's counterclaim. By order dated May 15, 2015, this court granted Aya summary judgment on the issue of unpaid trip taxes in the amount of \$23,850.55. This court denied Aya summary judgment on the issue of punitive damages and disgorgement of profits on the ground that there were issues of fact as to Aya's entitlement to punitive damages and disgorgement of profits and the amount thereof. The court further granted that part of Aya's motion with respect to the Judicial Subpoena Duces Tecum and directed that Woodside provide all responsive documents to Aya's counsel by June 30, 2015. A judgment in the amount of \$23,850.55 was entered on June 19, 2015.

In the instant motion to strike pleadings and other relief, Aya maintains that Woodside has failed to comply with any discovery demands. On September 11, 2015, Aya and Woodside entered into a stipulation adjourning the motion to October 23, 2015 and Woodside agreed to waive opposition to Aya's motion to strike if not received by October 9, 2015. When the parties appeared before this court on October 23, 2015, Woodside raised the issue of the potential impact of providing the requested discovery in light of a criminal

investigation pending against Woodside's principal for failure to pay trip taxes. This court issued an order directing that Woodside provide a letter advising the court of any such impact by November 6, 2015.

By letter dated November 6, 2015, Woodside's counsel asserted that the provision of discovery in this case "without some type of non-disclosure agreement and an agreement that the discovery provided in [this case] will not be used in any criminal proceedings could have an adverse effect on the criminal investigation and any potential criminal liabilities that may arise from that investigation." Defendant's counsel argues that defendant has a right under the Fifth Amendment to the United States Constitution to refrain from providing evidence against itself that could result in criminal prosecution. Aya responded by letter dated November 19, 2015, arguing that the trip tax issue which is the subject of the criminal investigation is resolved in this matter, that the discovery sought herein does not relate to the trip tax issue but rather to disgorgement of profits and the enforcement of the judgment entered in this matter and that defendant, a corporation, cannot avail itself of the Fifth Amendment privilege. Aya acknowledged that it is willing to enter into a non-disclosure agreement regarding the documents and information that are the subject of its motion.

"The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court" (*Lazar, Sanders, Thaler & Assoc., LLP v Lazar*, 131 AD3d 1133, 1133 [2d Dept 2015]; see *Crystal Clear Dev., LLC v Devon Architects of N.Y., P.C.*, 127 AD3d 911, 913 [2d Dept 2015]; *McArthur v New York City*

Hous. Auth., 48 AD3d 431, 431 [2d Dept 2008]). While actions should be resolved on the merits when possible, a court may strike an answer upon a clear showing that the defendant's failure to comply with discovery demands or court-ordered discovery was the result of willful and contumacious conduct (see *Brandenburg v County of Rockland Sewer Dist. # 1, State of N.Y.*, 127 AD3d 680, 681 [2d Dept 2015]; *Almonte v Pichardo*, 105 AD3d 687, 688 [2d Dept 2013]; *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 210 [2d Dept 2012]). "The willful and contumacious character of a party's conduct can be inferred from the party's repeated failure to comply with discovery demands or orders without a reasonable excuse" (*Commisso v Orshan*, 85 AD3d 845, 845 [2d Dept 2011]; see *Espinal v New York City Health & Hosps. Corp.*, 115 AD3d 641, 641 [2d Dept 2014]). Here, Woodside's willful and contumacious conduct can be inferred from its undisputed repeated failure to provide responses to Aya's discovery demands despite two court orders so directing.

The court finds the arguments set forth in Woodside's November 6, 2015 letter unavailing. "It is basic that the privilege against self incrimination is a personal right which cannot be invoked by, or on behalf of, a corporation. Similarly, an agent or officer of the corporation cannot invoke the privilege and decline to produce records and documents of the corporation over which he has custody in a representative capacity, even if the contents of the documents would personally incriminate him" (*State of New York v Carey Resources*, 97 AD2d 508, 508-509 [2d Dept 1983] [citations omitted]; see *Matter of Grand Jury Subpoena Duces Tecum Dated Dec. 14, 1984*, 69 NY2d 232, 242 [1987]). Woodside thus cannot claim

that its corporate records are protected by the Fifth Amendment. Aya's action is against Woodside only and Aya is seeking discovery related to profits realized by Woodside, which Aya seeks under its breach of fiduciary duty and unjust enrichment claims, as well as information relevant to the enforcement of Aya's judgment. Woodside has offered no other opposition to Aya's motion.

In light of the foregoing and taking into consideration the absence of formal opposition from Woodside, Aya's motion to strike Woodside's answer, defenses and counterclaim is granted. Woodside is to respond to Aya's demand for D&I, interrogatories and subpoena duces tecum within 45 days of the service of this order with notice of entry. That part of Aya's motion for costs and attorney's fees is denied.

Turning to Aya's motion to compel compliance with the Information Subpoenas served on Woodside and Flex, CPLR 5224 (a) (3) (iv) governs the failure to comply with an Information Subpoena and states that such a failure "shall be governed by subdivision (b) of section twenty-three hundred eight of this chapter..." CPLR 2308 (b) states that when a person fails to comply with an information subpoena:

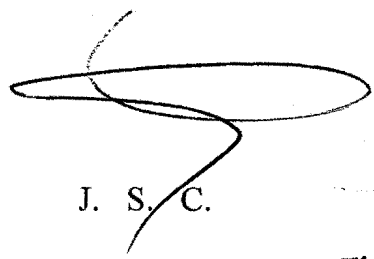
"the issuer or the person on whose behalf the subpoena was issued may move in the supreme court to compel compliance. If the court finds that the subpoena was authorized, it shall order compliance and may impose costs not exceeding fifty dollars. A subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding fifty dollars and damages sustained by reason of the failure to comply" (CPLR 2308 [b]).

Aya's motion to compel compliance with the Information Subpoenas is granted to the extent that Woodside and Flex shall respond to the subpoenas within seven (7) days of the service of this order with notice of entry. Failure to comply may give rise to contempt and further sanctions upon further motion of Aya, including an award of costs, penalties and damages pursuant to CPLR 2308 (b).

Plaintiff's time to file a note of issue is extended to July 15, 2016 as per the attached Stipulation dated February 23, 2016.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. LAWRENCE KNIPEL
SUPREME COURT JUSTICE

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