

Liberty Petroleum Realty, LLC v Gulf Oil, L.P.

2017 NY Slip Op 33556(U)

July 6, 2017

Supreme Court, Bronx County

Docket Number: Index No. 22163/2015

Judge: Laura G. Douglas

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

Index No. 22163/2015

LIBERTY PETROLEUM REALTY, LLC and
EAST RIVER PETROLEUM REALTY, LLC,

Plaintiffs,

DECISION/ORDER

-against-

Present:
Hon. Laura G. Douglas
J.S.C.

GULF OIL, L.P., CUMBERLAND FARMS, INC.,
and ANJON OF GREENLAWN, INC.,

Defendants.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to strike answer, compel compliance with a subpoena, striking certain discovery demands, and extending the deadline to file a note of issue and cross-motion for a protective order:

<u>Papers</u>	<u>Numbered</u>
Plaintiffs' Notice of Motion, Good Faith Affirmation of Neil Torczyner, Esq. Dated December 27, 2016, Affirmation of Neil Torczyner, Esq. dated December 27, 2016 in Support of Motion, and Exhibits ("A" through "N").....	1
Affirmation of Jeffrey H. Weinberger, Esq. dated January 26, 2017 in Opposition to Motion.....	2
Affidavit of Brian E. Glennon, II dated June 22, 2016 in Opposition to Motion.....	3
Defendants' Notice of Cross-Motion, Affirmation of Steven Cohn, Esq. dated January 26, 2017 in Support of Cross-Motion, and Exhibits ("A" through "G").....	4
Affirmation of Neil Torczyner, Esq. dated February 22, 2017 in Opposition to Cross-Motion and Exhibits ("1" and "2").....	5
Reply Affirmation of Neil Torczyner, Esq. dated February 23, 2017 and Exhibits ("1" and "2").....	6
Reply Affirmation of Jeffrey H. Weinberger, Esq. dated February 28, 2017....	7

This motion and cross-motion are consolidated for purposes of Decision/Order and upon the foregoing papers and after due deliberation, the Decision/Order on these motions is as follows:

The plaintiffs seek an order striking the defendants' answer for their purported failure to respond completely to the plaintiffs' discovery demands, compelling defendants' counsel to appear for a deposition and produce certain documents pursuant to plaintiffs' subpoena, striking the defendants' discovery and interrogatory demands dated December 20, 2016 as untimely, and extending the deadline to file a note of issue. The defendants cross-move for a protective order quashing the plaintiffs' subpoena upon defendants' counsel and barring further discovery demands directed at defendants' counsel. The motion and cross-motion are granted solely as ordered below and are denied in all other respects.

The plaintiffs seek monetary damages on a claim of tortious interference by the defendants with the plaintiffs' contract to supply motor fuel to certain retail service stations.

The parties' stipulation dated April 7, 2016 required the defendants to provide the plaintiffs with "full and complete" responses to certain written discovery demands. It appears that the defendants partially complied, after the deadline for doing so. These circumstances do not support the striking of the defendants' answer. The defendants did provide certain invoices and other items responsive to the demands. The Court should apply a penalty commensurate with the nature and extent of the disobedience, and go no further (*see Christian v. City of New York*, 269 AD2d 135 [1st Dept 2000]). It is well-settled that "[t]he nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion" (*Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 738 [2d Dept 2012]). Since striking a party's pleading for failure to provide discovery is an extreme sanction, it is reserved for those instances where the failure to disclose is willful and contumacious (*Bako v V.T. Trucking Co.*, 143 AD2d 561, 561 1st Dept 1999]). The Court will excuse the belated exchange on account of the complications arising from unrelated business transaction(s) detailed by the defendants and their substantial compliance in furnishing many pages of relevant documents. However, the defendants' "General Objection 1" to the plaintiffs' demands is stricken and the defendants are to furnish the remaining discovery as set forth in the letter by plaintiffs' counsel dated September 7, 2016. In addition, the defendants shall itemize each discovery response to denote which specific demand it is responsive to and which defendant(s) is providing the material.

The plaintiffs served a subpoena dated October 28, 2016 upon Law Offices of Steven Cohn, PC, counsel for the defendants in this action, seeking his deposition and production of certain documents. The

plaintiffs allege that Mr. Cohn communicated with defendants Gulf Oil, L.P. and Cumberland Farms, Inc. in connection with their inducement of the alleged breach of contract. The requested documents include the law firm's retainer agreements in this action and in a companion action, agreements under which defendant Anjon of Greenlawn, Inc. sublet or rented office space from the law firm, and communications between the law firm and their client(s) concerning the supply of wholesale gasoline to certain gas stations and indemnifying Gulf and/or Cumberland in the companion lawsuit.

The subpoena is quashed in its entirety as palpably improper. Seeking discovery from a party's attorney is a disfavored practice (*see Giannicos v. Bellevue Hospital Medical Center*, 7 Misc.3d 403 [S Ct New York Cty 2005]). Here, the material sought can be the subject of appropriate discovery demands upon the defendants themselves, rather than to their counsel. As the defendants note, communications between Mr. Cohn and Cumberland or Gulf "would be readily obtainable from them, and would not be privileged since I did not represent them" (Cohn Affirmation, paragraph "18"). Since the information is available through other means and counsel's testimony has not been shown to be crucial to the prosecution of the plaintiffs' claims, obtaining discovery through counsel is barred under the standard enunciated in *Shelton v. American Motors Corp.*, 805 F.2d 1323 [8th Cir 1986] and adopted by New York courts (*see Dufrense-Simmons v. Wingate, Russotti & Shapiro, LLP*, 53 Misc.3d 598 [S Ct Bronx Cty 2016], *Stevens v. Cahill*, 50 Misc.2d 918 [S Ct New York Cty 2015], and *Q.C. v. L.C.* 47 Misc.3d 600 [S Ct Westchester Cty 2015]).

The plaintiffs seek to strike the defendants' demand for production of documents dated December 20, 2016, since it was not raised at the Compliance Conference Order on June 21, 2016. The defendants' belated demands are not overburdening and the Court will permit them to stand. The plaintiffs have not demonstrated that they will incur any undue prejudice by responding to these demands at this stage of the litigation. In fact, the plaintiffs sought their own additional discovery through service of the subpoena after the Compliance Conference.

Finally, the branch of the motion seeking an extension of the deadline to file a note of issue is granted without opposition. The note of issue shall be filed by September 30, 2017.

Accordingly, it is hereby

ORDERED, that the defendants' "General Objection 1" to the plaintiffs' demands is stricken; and it is further

ORDERED, that the defendants are to furnish the remaining discovery as set forth in the letter by plaintiffs' counsel dated September 7, 2016 no later than 30 days following service of a copy of this Order

with notice of entry, itemizing each discovery response to denote which specific demand it is responsive to and which defendant(s) is providing the material; and it is further

ORDERED, that the subpoena dated October 28, 2016 served upon Law Offices of Steven Cohn, PC is quashed in its entirety; and it is further

ORDERED, that the plaintiffs shall respond to the defendants' demand for production of documents dated December 20, 2016 no later than 30 days following service of a copy of this Order with notice of entry; and it is further

ORDERED, that the deadline to file a note of issue is extended to September 30, 2017.

The foregoing constitutes the Decision and Order of this Court.

DATED:

7-6-17

Bronx, New York

LGD

HON. LAURA G. DOUGLAS

J.S.C.