Paycation Travel Inc. v Global Merchant Cash, Inc.
2018 NY Slip Op 34146(U)
August 15, 2018
Supreme Court, Westchester County
Docket Number: Index No. 52579/2017
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER : COMPLIANCE PART

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PAYCATION TRAVEL INC.,

Plaintiff,

- against -

GLOBAL MERCHANT CASH, INC.,

Defendant.

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DECISION AND ORDER

Index No. 52579/2017

Motion Date: June 18, 2018
Seq. Nos. 3,4

LEFKOWITZ, J.

The following documents were read on motion, seq. no. 3 by Joshua E. Abraham, Esq., attorney for defendant, Globe Merchant Cash, Inc. (hereinafter "defendant") for an order pursuant to CPLR 3123 and 3124 compelling Paycation Travel Inc. (hereinafter "plaintiff") to serve answers and admissions to defendant's second set of interrogatories and second request to admit and on motion seq. no. 4 by Becker & Poliakoff, LLP, attorneys for plaintiff, for an order pursuant to CPLR 3123 and 3124 compelling defendant to produce documents and witnesses as specified in plaintiff's post-deposition requests and pursuant to CPLR 3126, quashing the third-party deposition by written questions issued by defendant to Jeremy Monte, or in the alternative, directing defendant to proceed by oral deposition:

Motion Seq. No. 3:
Order to Show Cause; Affirmation in Support of Order to Show Cause dated May 18, 2018; Exhibits A-C;
Affirmation in Opposition; Exhibit 1.

Motion Seq. No. 4:
Order to Show Cause; Affirmation in Support of Order to Show Cause dated May 21, 2018; Exhibits A-G;
Affirmation in Opposition; Exhibits 1-10.

This action sounding in declaratory relief arises out of the allegedly fraudulent conduct of Jeremy T. Monte and Allison Monte (hereinafter "the Montes") and a loan amounting to $365,000 or more that they obtained from defendant Global Merchant Cash. Plaintiff alleges that the Montes secured a loan from defendant by executing a fraudulent confession of judgment purportedly on plaintiff's behalf without its knowledge or consent and using the proceeds from such loan for their own personal benefit. Thereafter, when the terms of the loan were not met, it ultimately resulted in the entry of a judgement against plaintiff in the amount of $256,046.25 on July 28, 2016 in the Supreme Court of Westchester County. Subsequently defendant issued and served a restraining notice upon plaintiff's bank based upon such judgment.

Upon learning of the judgment, plaintiff asserts it immediately informed defendant of the fraud underlying the judgment. It is undisputed that defendant did not withdraw the restraining notice, but instead, removed the amount of $256,046.25 from plaintiff's bank account. Based on the foregoing, plaintiff seeks a declaratory judgment pursuant to CPLR 3001[1], declaring the July 28, 2016 judgment void; an order vacating the judgment pursuant to CPLR 5240[2] and money damages as a direct and proximate result of defendant's unjust enrichment.

Plaintiff commenced this action by the filing of its summons and complaint on February 24, 2017[3], and defendant filed its answer with affirmative defenses and counter-claim for attorneys' fees on July 24, 2017.[4] Plaintiff filed its reply to such counter-claim on September 7, 2017.[5]

By preliminary conference stipulation, the parties agreed that plaintiff would appear for its deposition on December 29, 2017, and defendant would appear for its examination before trial on January 16, 2018. Examinations of all parties and non-parties were to be completed on or before January 31, 2018. On or before September 29, 2017, all parties were directed to exchange names and addresses of all witnesses, statements of opposing parties and photographs, or if none, so state in writing. Demands for discovery and inspection were ordered to be served on or before September 29, 2017, and responses to such demands were directed to be served no later than October 21, 2017. All interrogatories were directed to be served on or before September 29, 2017. Finally, a compliance conference was scheduled for January 24, 2018, and all disclosure was to be completed on or before April 5, 2018.[6]

By compliance conference referee report and order dated November 9, 2017 (Lefkowitz, J.),

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[1]CPLR 3001 states in relevant part that "The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not relief is or could be claimed".

[2]CPLR 5240 provides that "The court may at any time, or on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure."

[3]NYSCEF Doc. Nos. 1,2.

[4]NYSCEF Doc. No. 23.

[5]NYSCEF Doc. No. 24.

[6]NYSCEF Doc No. 25.

depositions of all parties were scheduled to be completed on or before January 24, 2018.[7] By compliance conference referee report and order (Lefkowitz, J.), depositions of all parties were to be completed by February 16, 2018 and of non-parties by March 16, 2018. Defendant's affidavit detailing its search for the 24 documents plaintiff demanded but defendant claimed it could not locate, was ordered to be submitted by January 15, 2018.[8] By compliance conference referee report and order (Lefkowitz, J.), defendant was directed to respond to plaintiff's demand for discovery and inspection. Additionally, defendant's deposition was to be completed by March 15, 2018, and plaintiff's examination was to be completed by April 27, 2018. By compliance conference referee report and order dated March 29, 2018 (Lefkowitz, J.), post-examination before trial discovery and inspection demands of defendant were directed to be served on or before April 6, 2018 and responses thereto were ordered to be served on or before April 26, 2018. Depositions of defendant were ordered to be completed on April 12, 2018 and examinations before trial of non-parties were to be done by May 17, 2018. Plaintiff's post-examination before trial demands were directed to be served by April 27, 2018 and defendant's responses were to be served on plaintiff by May 17, 2018.[9]

Motion Seq. No. 3:

Thereafter, by order to show cause returnable on June 18, 2018, defendant now seeks an order pursuant to CPLR 3123 and 3124 compelling plaintiff to serve answers and admissions to defendant's second request to admit and second set of interrogatories following party depositions. Defendant asserts plaintiff refused to respond on the grounds that such discovery demands were untimely and contends that since a note of issue has not yet been filed, the discovery period has not yet expired.

Plaintiff counters that pursuant to this Court's compliance conference referee report and order, defendant was required to serve any demands for discovery and inspection on or before April 6, 2018, and instead, served its second set of interrogatories and second request to admit following party depositions on May 9, 2018 without any explanation therefor. Plaintiff additionally argues that defendant's discovery demands are irrelevant, dilatory and seek information unnecessary to determine its liability to plaintiff. It complains that these latest discovery demands do not concern the transactions that form the crux of this matter which relate to defendant's actions or inactions concerning a loan or loans it made to non-parties allegedly authorized to act on plaintiff's behalf.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not

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[7]NYSCEF Doc. No. 27.

[8]NYSCEF Doc. No. 29.

[9]NYSCEF Doc. No. 31.

have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]).

CPLR 3123(a) provides in relevant part that "At any time after service of the answer or after the expiration of twenty days from service of the summons, whichever is sooner, and not later than twenty days before the trial, a party may serve upon any other party a written request for admission by the latter of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs, described in and served with the request, or of 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. Copies of the papers, documents or photographs shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless within twenty days after service thereof or within such further time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters. If the matters of which an admission is requested cannot be fairly admitted without some material qualification or explanation, or if the matters constitute a trade secret or such party would be privileged or disqualified from testifying as a witness concerning them, such party may, in lieu of a denial or statement, serve a sworn statement setting forth in detail his claim and, if the claim is that the matters cannot be fairly admitted without some material qualification or explanation, admitting the matters with such qualification or explanation." A notice to admit is designed to remove from the case those uncontested matters which are easily provable and would present a time-consuming burden at trial, but cannot be used to seek admissions of material issues, ultimate or conclusory facts, or an interpretation of law (*Priceless Custom Homes v O'Neill*, 104 AD3d 664 [2d Dept 2013]; *Nacherlilla v Prospect Park Alliance*, 88 AD3d 770 [2d Dept 2011]; *Rosenfeld v Vorsanger*, 5 AD3d 462 [2d Dept 2004]; *Villa v NYC Housing Auth.*, 107 AD2d 619 [1st Dept 1985]; *Berg v Flower Fifth Ave. Hosp.*, 102 AD2d 760 [1st Dept 1984]). Issues which go to the heart of the matter are not the proper subjects for a notice to admit and should be stricken (*Nacherlilla v Prospect Park Alliance*, 88 AD3d at 772; *DeSilva v Rosenberg*, 236 AD2d 508, 509 [2d Dept 1997]; *Burnside v Foglia*, 208 AD2d 1085 [3d Dept 1994]). A notice to admit may not be used as a substitute for other discovery devices, such as taking depositions before trial (*Singh v G & A Mounting & Die Cutting*, 292 AD2d 516 [2d Dept 2002]; *DeSilva v Rosenberg*, 236 AD2d at 508-509; *Berg v Flower Fifth Ave. Hosp.*, 102 AD2d at 760-761).

This Court's compliance conference referee report and order of March 28, 2018 required defendant to serve its discovery and inspection demands on or before April 6, 2018. Instead, defendant served a second request for admissions and a second set of interrogatories which was not authorized by this Court over a month later on May 9, 2018 in flagrant violation of this Court's order.

Defendant's motion is denied for its failure to serve its demands in compliance with this Court's

order. Additionally, as defense counsel conceded at oral argument with regard to that branch of its motion which sought an order compelling plaintiff to serve answers and admissions to its' second request to admit, the statutory penalty provision of CPLR 3123(a) is self-executing; other statutory penalties for refusal to disclose do not apply (*see 32nd Ave. LLC v Angelo Holding Corp.,* 134 AD3d 696 [2d Dept 2015]; *Hernandez v City of New York,* 95 AD3d 793 [1st Dept 2012]; *Matter of Cohn,* 46 AD3d 680 [2d Dept 2007]).

Defendant also seeks an order compelling plaintiff to answer its second set of interrogatories.

Pursuant to CPLR 3131, interrogatories may relate to any matters embraced in disclosure and may require copies of such documents as are relevant to the answers required, unless an opportunity for examination and copying is afforded. They are generally useful to make a later deposition more meaningful (CPLR 3130). A motion to compel responses to interrogatories is properly denied where the interrogatories seek information which is irrelevant, overly broad, or burdensome (*Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283 [2d Dept 2011]; *Merkos L'Inyonei Chinuch, Inc.,* 59 AD3d 408).

In addition to the lateness of such demand which forms the basis for this Court's denial of defendant's motion, the untimely interrogatories served by defendant are directed to David Manning, an alleged principal of plaintiff, who was previously deposed on March 27, 2018. Defendant requests Mr. Manning to identify emails, documents and communications which may have been exchanged between Mr. Manning and the non-party Jeremy Monte, information regarding a non-party, Peter Hirsch, and the home addresses, email addresses of all plaintiff's members, diamond members, international diamond members and executive diamond members who were present at a meeting held in Florida in 2016. Other than the possibility that Mr. Manning may have deleted some emails between himself and the non-party (who was deposed by defendant on May 30, 2018), defendant failed to meet its burden to demonstrate how any of the information it requests is relevant.

Motion Seq. No. 4.

Plaintiff seeks, in its motion pursuant to CPLR 3123 and CPLR 3124, an order compelling defendant to produce documents and witnesses as specified in its post-deposition discovery requests and additionally, an order, pursuant to CPLR 3126, quashing the subpoena previously issued to non-party Jeremy Monte to take his deposition by written questions issued by defendant, or in the alternative, direct defendant to proceed by oral deposition.

Plaintiff contends that disclosure is essential to demonstrate the lack of due diligence by defendant in determining whether the non-parties Montes were authorized representatives of plaintiff; however, defendant has failed to adequately respond to their discovery demands and has further failed to produce employees with knowledge of all the relevant facts regarding the subject transaction.

Defendant first counters that it has already produced all documents demanded. It next argues that plaintiff has not served notices of deposition for any additional witnesses, and therefore, it is not in a

procedural posture to seek any further depositions. Moreover, it has already produced the Chief Executive Officer of defendant for depositions, and he testified extensively concerning matters relevant to this action. In light of the foregoing, defendant contends plaintiff has not met its burden of demonstrating what additional information it still required and why such information is relevant.

As to plaintiff's application to quash the previously issued subpoena of defendant that sought the deposition of the non-party who resides out-of-state, defendant argues that plaintiff offers no basis why this Court should quash the previously issued subpoena to non-party Jeremy Monte to take his deposition by written questions. Defendant asserts that not only is this the preferred method for deposing an out-of-state witness, but plaintiff was provided notice of a prior deposition of Mr. Monte, and plaintiff, did in fact, participate by submitting its own set of written questions, and moreover, had the opportunity to physically appear and ask oral questions at such deposition which was held on May 30, 2018 in Austin, Texas.

This Court has reviewed plaintiff's document discovery demands and has determined that such demands seek documentation that may be relevant and material to the instant matter (CPLR 3101). If defendant is not in possession of such material, a representative with sufficient knowledge shall so state by affidavit and file such affidavit with this Court.

Turning to plaintiff's request for further depositions of other representatives of defendant corporation, a review of the deposition of defendant's representative Jay Keller previously taken reveals that Mr. Keller had limited knowledge of the subject transaction.[10] In light of the foregoing, plaintiff shall be permitted to depose defendant's employee, Jack Douek, who, as previously testified to by Mr. Keller, had knowledge of the transactions that occurred between defendant and the non-parties Montes. At this juncture however, although plaintiff seeks the depositions of additional individuals, this Court declines plaintiff's request (*see Walker v City of New York*, 140 AD3d 739 [2d Dept, 2016]; *Spohn-Konen v Town of Brookhaven*, 74 AD3d 1049 [2d Dept, 2010]; *see also Espinoza v City of New York,* 113 AD3d 590 [2d Dept, 2014]; *Bentze v Island Trees Union Free School Dist.,* 92 AD3d 709 [2d Dept, 2012]).

Addressing plaintiff's request for an order quashing the previously issued subpoena to non-party, Jeremy Monte, by defendant to take his deposition upon written questions, defendant concedes it has already conducted an examination of such non-party on May 30, 2018 in Austin, Texas, by written questions and plaintiff, in turn, submitted its written questions. Plaintiff opposes and asks this Court to issue an order quashing such subpoena pursuant to CPLR 3126 and require defendant to take the non-party's deposition upon oral examination.

Typically, one deposition of a witness or party is all that is necessary. In this instance, plaintiff

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[10]Transcript, p. 71, Lines 21-22; p. 72, Line 3-7, 10; p. 74, Line 9; p. 119, Line 24; p. 120, Line 2, Lines 4-12, 15, 17-19, 22-25; p. 121, Lines 2-4, 7, 9-14, 16-18, 23-24; p. 122, Lines 6, 8-9, 12-13, 16-17. Note: deponent was not even sure who plaintiff's underwriter was, when asked by plaintiff's attorney, Mr. Keller stated "...we can look into it and I can provide it if I can find out.", p. 122, Lines 20-23; p. 126, Lines 20-21, 24-25; p. 127, Lines 3-6, 9, 13, 16, 19, 21; p. 164, Lines 16-17, 20-22 (where Mr. Keller conceded he did not know the surname of defendant's CFO).

provides no basis for a further deposition of the non-party which was already held on May 30, 2018 (*see Yoshida v Huseh-Chih Chin*, 111 AD3d 704 [2d Dept 2013], where non-party's counsel directed the non-party on numerous occasions not to answer questions which may have elicited information relevant and necessary, and the directions not to answer them were not otherwise authorized by 22 NYCRR 221.2; *Polgar v Kuo,* 2017 NY Slip Op 32523(U) 2017 [Sup Ct, NY Co], where to order non-party to appear for further deposition of judicial and non-judicial resources at this juncture; *Moorman v Huntington Hosp.,* 8 Misc 3d 1012(A) [Suffolk Co., 2005], where the Court determined that to the extent that a party wished to take a further deposition of the non-party, such party must "indicate to the Court precisely what questions were not answered, that the witness' refusal to answer was improper, and that formal deposition is the appropriate remedy citing *American Reliance Insurance Company v National General Insurance Company,* 174 AD2d 591). Moreover, a deposition may be taken on written questions when the testimony is to be taken without the state (CPLR 3108). Plaintiff has not established a basis for quashing a previously issued subpoena for a deposition upon written questions issued to a non-party that resides without the State of New York, that has already been held and that plaintiff has already fully participated in.

Based on the foregoing, it is

ORDERED *that,* defendant's motion, seq. no. 3, is denied in its entirety; and it is further

ORDERED *that,* the branch of plaintiff's motion, seq. 4, seeking defendant's responses to its demands for documentation dated April 19, 2018, items numbered 1-13, is granted. Defendant shall serve its' responses to plaintiff's demands upon plaintiff via NYSCEF on or before August 30, 2018. To the extent that defendant claims it is not in possession of any of the documents plaintiff seeks, defendant shall provide an affidavit by a representative of defendant with knowledge of the subject transaction on or before July 6, 2018 to plaintiff via NYSCEF; and it is further

ORDERED *that,* the branch of plaintiff's motion, seq. 4, seeking a deposition of defendant's employee, Jack Douek, is granted, and such deposition shall be properly noticed for September 21, 2018 at 10:00 a.m. at a location in Westchester County, New York; and it is further

ORDERED *that,* the branch of plaintiff's motion, seq. 4, seeking to quash the subpoena dated May 9, 2018,is denied; and it is further

ORDERED *that,* counsel for the parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on September 24, 2018, at 9:30 a.m.; and it is further

ORDERED that, defendant shall serve a copy of this order with notice of entry upon plaintiff within seven (7) days of entry and shall file proof of service on the NYSCEF website within five (5) days of service.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
August 15, 2018

HON. JOAN B. LEFKOWITZ, J.S.C.

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