

Tucker v Moltion

2019 NY Slip Op 34147(U)

January 28, 2019

Supreme Court, Onondaga County

Docket Number: 793/2018

Judge: Gregory R. Gilbert

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT
STATE OF NEW YORK COUNTY OF ONONDAGA

WILLIAM M. TUCKER, M.D.,

Plaintiff,

v.

JOHN M. MOLTION, BLOOD, SWEAT AND
GEARS, LLC, SOUNDHEALTH, LLC, MICHAEL
MILLER, JOHN DOE #1, JOHN DOE #2, JOHN
DOE #3, XYZ CORP. AND ABC LLC,

Defendants.

DECISION & ORDER
Index No.: 793/2018
RJI No.: 33-18-0537
HON. G. GILBERT, JSC

BACKGROUND

Defendant, John Moltion, (Moltion) purported to build what he called a “energy generating machine” and enlisted the financial backing of plaintiff, William M. Tucker, MD (Tucker). Defendant, Blood, Sweat and Gears, LLC, (BSG) is solely owned and operated by Moltion. Moltion also entered into an agency agreement with defendant, SoundHealth LLC of Florida, the agreement being executed by defendant, Michael Miller, as CEO of SoundHealth, neither of these defendants being involved on the present motion.

The financial relationship between Moltion and Tucker ended poorly with Tucker leveling accusations of fraud against Moltion concerning the development of the machine and misuse or misdirection of his financial backing. Tucker also claims to have been fraudulently induced to support Moltion in the refurbishing of a house and a taxi service. This action was commenced on January 22, 2018.

Presently before the Court is a disclosure motion brought by Tucker

seeking orders on outstanding items of discovery requested from Moltion. The Court is well aware of the issues that are raised.

A preliminary conference was conducted on June 5, 2018 at which Moltion appeared pro se and attempted to appear for BSG. Moltion was informed that BSG could only properly appear in the litigation represented by counsel. Pro se appearance for BSG was specifically prohibited by the resulting Order which gave BSG until July 12, 2018 to appear by counsel. No appearance was ever made on behalf of BSG and a motion for default judgment against BSG consequently was granted by an Order entered on September 4, 2018 when there was no appearance or opposition on the motion by Tucker.

There were immediate problems with Moltion's compliance with the Preliminary Conference Order and Tucker's discovery demands. On August 2, 2018 a disclosure conference was requested by Tucker as required by the Order. The same was set for August 9, 2018 and conducted by the Court's law clerk with Moltion present. A formal Order was entered August 27, 2018 by stipulation of Tucker and Moltion for conditional preclusion of any evidence demanded but not produced by Moltion by October 9, 2018 in response to Tucker's initial interrogatories and document request.

On October 5, 2018 Moltion requested an extension of the October 9, 2018 deadline to October 16, 2018 and this request was granted. A further extension was requested by Moltion on October 15, 2018 and this resulted in a final extension to October 30, 2018. Limited disclosure responses were made by Moltion on October 30, 2019 in the form of responses to interrogatories one through ten but neglecting to respond to interrogatories eleven through twenty three in any fashion. There was no response by Moltion to the document request made by Tucker. Further, Moltion failed to respond to a second set of interrogatories and document requests sent out by Tucker on August 23, 2018.

Tucker requested a further disclosure conference on December 2, 2018. The Court's law clerk contacted Moltion by telephone and Moltion advised that he believed that he had responded to all disclosure that had been demanded. As the matter was incapable of resolution, the present

motion was authorized and then filed on December 20, 2018 by Tucker.

The present motion seeks a conditional order to automatically and without further motion strike the Moltion answer unless Moltion fully responds to Tucker's first and second interrogatories and first and second document requests and permits an inspection of each version of the energy generating machine built by Moltion (under a notice issued September 17, 2018) by a date certain or such other relief that the Court deems just and proper. Moltion filed no papers in opposition to the motion which was returnable on submission for January 24, 2018 but made a last minute request to adjourn his appearance for the motion claiming that he was ill. It was again confirmed for Moltion that the motion was being taken on submission and his appearance was not needed.

As to the inspection of the energy generating machines, the notice served by Tucker required the inspection, testing and documentation by photograph or video of every version of the energy generating machine and the parts, products, supplies, improvements, alterations or modifications to the same. The energy generating machine is central to this litigation. Tucker has stated reason to doubt that such a machine exists or that it works or works as described by Moltion. The inspection was set for November 8, 2018. Moltion unilaterally cancelled the inspection by voicemail late on November 6, 2018. Counsel returned Moltion's call to attempt to have the matter rescheduled and left a message which has gone unanswered. Moltion has made no effort to reschedule the inspection.

The failure of Moltion to permit the inspection is completely inappropriate. On the basis of the record presented, Moltion's refusal of the inspection can only be seen as wilful and contumacious and intended to frustrate the disclosure process. It also violates and fully disregards the scheduling order. Moltion made no objection to the inspection, sought no conference with the Court's law clerk, sought no protective relief and states no basis on which the inspection should not have gone forward. The refusal to permit the inspection also contrasts with Moltion's assurance to the Court's law clerk that he had fully responded to all disclosure requests made by Tucker.

Accordingly, and based upon the foregoing, it is

ORDERED, that the motion by plaintiff, William M. Tucker, MD, to compel compliance with the notice of inspection is **GRANTED** and defendants, John M. Moltion and Blood, Sweat and Gears, LLC shall be obligated to fully comply therewith on or before April 1, 2019, or a conditional order of evidentiary preclusion will apply to defendants, John M. Moltion and Blood, Sweat and Gears, LLC, as to the existence of any energy generating machine and, further, it will, upon the failure of such timely inspection, be deemed to have been established in evidence at trial that there is not now nor has there ever been any such energy generating machine.

As to Tucker's first interrogatories and request to produce, a copy of Moltion's response to questions one through ten is provided and Moltion has made no further response. This is a violation of the Order and an evidentiary preclusion applies to any additional evidence that Moltion might present in the matter beyond the response and those documents provided with the interrogatory response. This preclusion will stand as Motion has failed to file any opposition to the motion or to make any final effort to address the failure of response to questions eleven through twenty three or first document request. A further Order in this respect is not necessary.

Tucker's second interrogatories and document request were actually addressed to and requested information from Moltion from BSG. BSG is still subject to an inquest as to damages. Moreover, the information being requested applies to the claimed diversion and use of funds derived through Tucker's financing of BSG and the identification of financial institutions that may then be subpoenaed for records to be used during the inquest. All of this impacts Moltion, individually. Again, no opposition has been filed as to the motion nor has any objection been registered to the second interrogatories and document requests.

The relief sought by Tucker to strike Moltion's answer is, however, inappropriate. Strictly speaking, the failure of response is by BSG and,

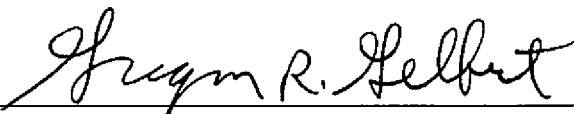
thus, the requested sanction to strike an answer for the failure of disclosure resides with BSG and not Moltion, individually. In any event, there was no answer or appearance by BSG as to whom a default has already.

Accordingly, and based upon the foregoing, it is

ORDERED, that the motion by plaintiff, William M. Tucker, MD, to compel compliance with the second interrogatories and second request to produce documents is **GRANTED** and defendants, John M. Moltion and Blood, Sweat and Gears, LLC shall be obligated to fully comply therewith by April 1, 2019, or a conditional order of evidentiary preclusion will apply to defendant, Blood, Sweat and Gears, LLC, which will not be permitted to offer any evidence that was subject to disclosure or may then have been subpoenaed for the inquest for damages against BSG and, further, it will, upon the failure of such timely response, be deemed to have been established in evidence at trial for defendant, John M. Moltion and at inquest for defendant, Blood, Sweat and Gears, LLC that any and all funds shown to have been supplied by Tucker, whether to John M. Moltion or to Blood, Sweat and Gears, LLC were used by John M. Moltion on an individual basis.

IT IS SO ORDERED.

Dated: January 28, 2019
Syracuse, New York



HON. GREGORY R. GILBERT
SUPREME COURT JUSTICE