

KBL Group Intl., Ltd. v SH Brand Holdings, Inc.

2023 NY Slip Op 32604(U)

July 27, 2023

Supreme Court, New York County

Docket Number: Index No. 652361/2017

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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KBL GROUP INTERNATIONAL, LTD.,

Plaintiff,

- v -

SH BRAND HOLDINGS, INC., HARRY ADJMI, MORRIS
TBEILE,

Defendants.

INDEX NO. 652361/2017

MOTION DATE 06/13/2023

MOTION SEQ. NO. 010

**DECISION + ORDER ON
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190

were read on this motion to COMPEL DISCOVERY.

Plaintiff KBL Group International, Ltd.’s (“Plaintiff” or “KBL”) motion to compel the in-person depositions of Morris Tbeile (“Tbeile”) and Harry Adjmi (“Adjmi”); to compel the production of Mr. Tbeile’s text messages sent during his deposition; for the imposition of sanctions and for costs as well as fees against Defendant SH Brand Holdings, Inc. (“Defendant” or “SH Brand”) is **granted in part**. Messrs. Tbeile and Adjmi shall be produced as deponents and Mr. Tbeile’s text messages sent to counsel during his truncated deposition shall be produced subject to the terms of the stipulated confidentiality order. KBL shall also receive reimbursement for the court reporting costs for Mr. Tbeile’s May 30, 2023 deposition. No other costs, fees or sanctions are awarded.

A. Background

a. Discovery Has Been Extended Multiple Time for Multiple Years

This case is more than six years old. The Preliminary Conference Order (Bransten, J.) provides that fact discovery initially was to close on December 3, 2018 (NSYCEF 41). The deadline was extended to November 14, 2019 to facilitate mediation (NYSCEF 82). Fact discovery was extended a second time to February 17, 2020 (NYSCEF 90).

Despite the COVID-19 pandemic, the parties were scheduled to mediate on October 15, 2020 (NYSCEF 142). Mediation was unsuccessful and, on January 14, 2021, fact discovery was extended, for a third time, to May 1, 2021 (NYSCEF 150). Note of issue was to be filed by May 23, 2021 with motions for summary judgment due thirty days thereafter (NYSCEF 150).

The docket was silent for more than a year-and-a-half until KBL moved for partial summary judgment dismissing SH Brand's Counterclaims 2-7 on July 12, 2022 (NYSCEF 151). SH Brand opposed and argued that it had been attempting to secure deposition dates from counsel for KBL since December 7, 2021, and was continually rebuffed (NYSCEF 167).

On July 12, 2022 – the day the KBL filed its summary judgment motion – KBL took the position that discovery was stayed pursuant to CPLR 3124 (NYSCEF 167), even though the Commercial Division Rules do not provide for an automatic stay (Commercial Division Rule 11[g] [formerly 11[d]]). KBL thereafter moved to stay discovery but withdrew the motion (NYSCEF 174) after SH Brand cross-moved for sanctions (NYSCEF 161).

On April 26, 2023, the Court denied KBL's summary judgment motion, directed that depositions be completed by May 31, 2023, and directed the parties to submit a proposed scheduling order by April 28, 2023 (NYSCEF 176 [despite the Court's directive, the oral argument transcript has not been filed]). On April 28, 2023, the Court "So Ordered" the parties

discovery stipulation providing for fact discovery to close on May 31, 2023, for the Note of Issue to be filed on September 30, 2023, and for summary judgment motions to be filed on or before October 31, 2023 (NYSCEF 179).

b. Mr. Tbeile's Deposition is Terminated After 26 Minutes

On May 30, 2023, Mr. Tbeile was deposed as a representative of SH Brand (NYSCEF 182 [Transcript]). The deposition commenced at 11:20 a.m. and was held virtually via Zoom. Counsel for KBL requested that Mr. Tbeile keep his cellphone ringer off (Tr. 9:22-24).

Following a standard examination of Mr. Tbeile's background, a question was asked about the boards that he sits on (Tr. 12:24-25). Mr. Tbeile, who holds a law degree, initially refused to answer on the grounds that the question was "irrelevant" and prompted SH Brand's attorney to object (Tr. 13:1-25).

The deposition devolved quickly from there. Mr. Tbeile continued to assert relevance objections and refused to answer questions without instruction from counsel (Tr. 15:1 – 22:22). At 11:42 – twenty-two (22) minutes into the deposition – counsel for SH Brand claimed he was receiving a "personal call" and a six (6) minute recess was held (Tr. 22:23 – 23:5). The recess was held after Mr. Tbeile had answered a question (Tr. 22:21-22).

Immediately after the deposition resumed, counsel for KBL asked Mr. Tbeile if he communicated with counsel before the break (Tr. 23:10-14). Mr. Tbeile answered that he had texted SH Brand's counsel and, after some discussion on the record, counsel for KBL terminated the deposition (Tr. 23:11-25:18). The deposition lasted for a total of twenty-six (26) minutes.

Shortly after the deposition was terminated, counsel for the parties met and conferred (NYSCEF 183). Counsel for SH Brand agreed to pay the cost of the court reporting services for the deposition that was terminated and to produce Mr. Tbeile for an in-person deposition.

Counsel for SH Brand could not commit at the time of the meet-and-confer to produce Mr. Adjmi in person.

c. KBL Files This Motion After Mr. Adjmi Offers To Appear Live

On June 8, 2023, a different attorney from counsel for SH Brand's office offered again to produce Mr. Tbeile for an in-person deposition and Mr. Adjmi for a deposition via Zoom (NYSCEF 184). On June 13, 2023, counsel for SH Brand offered to produce Mr. Adjmi in person on June 14, 2023 (NYSCEF 188). Counsel for KBL declined and indicated that a motion to compel had already been prepared (NYSCEF 188). The parties resolved to seek a conference with the Court (NYSCEF 188).

A short time later on June 13, 2023, counsel for SH Brand emailed the Court (copying counsel for KBL) to request a conference (NYSCEF 189). Less than thirty minutes later, the Court's staff offered to schedule a conference (NYSCEF 189). However, before a conference could be set, later on June 13, 2023, counsel for KBL filed this motion (NYSCEF 180).

In opposing this motion, counsel for SH Brand submits an affirmation claiming that no question was pending when he broke to speak with Mr. Tbeile; that he was unaware that Mr. Tbeile had sent text messages during the depositions; that he immediately provided the substance of the text messaged to counsel for KBL; that he immediately agreed to produce Mr. Tbeile for an in-person deposition; that Defendants would pay the court reporting fees for the first deposition; and that counsel for KBL rushed to file this motion on the eve of Mr. Adjmi's deposition (NYSCEF 187). SH Brands argues that KBL's motion is moot as a result (NYSCEF 186).

B. Discussion

Depositions “shall proceed as permitted in the trial of actions in open court. . .” (CPLR 3113[c]). Generally, a deposition should proceed subject to any objections made (22 NYCRR 221.1). Objections at deposition are limited to those set forth in CPLR 3115(b) – (d) and include, among others, objection as to form (22 NYCRR 221.1[a]). Speaking objections are generally prohibited and should in no event “suggest an answer to the deponent” (22 NYCRR 221.1[b]).

A deponent may refuse to answer a question only to (a) preserve a privilege; (b) pursuant to a court order; or (3) where the question is “plainly improper” and answering would “cause significant prejudice” (22 NYCRR 221.2). With respect to communications with the deponent, 22 NYCRR 221.3 provides:

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

There is scant caselaw addressing Sections 221.1, 221.2 and 221.3, none of which permits what took place during Mr. Tbeile’s deposition. Mr. Tbeile and counsel for SH Brands violated Sections 221.1 and 221.3 (*Freidman v Fayenson*, 41 Misc 3d 1236(A) [Sup Ct New York County 2013], *affd sub nom.*, 138 AD3d 554 [1st Dept 2016] [collecting cases]). KBL’s termination of, and refusal to resume, the deposition was also improper (*Sciara v Surgical Assoc. of W. New York, P.C.*, 32 Misc 3d 904, 911 [Sup Ct Erie County 2011] [citations omitted]). Similarly, KBL violated Commercial Division Rule 14 by filing its motion while it knew a

request for a conference was pending (*Latin Markets Brazil, LLC v McArdle*, 76 Misc 3d 1208(A) [Sup Ct New York County 2022] [citations omitted]).

The Court has broad discretion to determine an appropriate remedy (*Friedman, supra*). Among other things, the Court can appoint a referee to supervise depositions and allocate reasonable expenses to the offending party (*K.S. v City of New York*, 56 AD3d 527, 528 [2d Dept 2008] *citing* CPLR 3104). However, drastic sanctions such as striking a pleading are not appropriate absent a pattern of misconduct or where mitigating factors exist (*id.*).

To be clear, both parties have violated the letter and spirit of Court orders and rules. Therefore, the Court declines to award sanctions against either Plaintiff or Defendant in this instance. Discovery shall proceed as set forth below, and no further extensions of the Note of Issue or summary judgment deadlines will be granted.

Failure to abide by the following directives will result in sanctions, potentially including case-dispositive sanctions.

* * * *

Accordingly, it is

ORDERED that depositions of Messrs. Tbeile and Adjmi shall proceed and be completed within thirty (30) days, and only permissible objections may be asserted (and only by counsel); it is further

ORDERED that Mr. Adjmi's deposition shall proceed in person, unless otherwise agreed promptly after the completion of Mr. Tbeile's deposition (any application to hold Mr. Adjmi's deposition remotely must be made by order to show cause and supported by affidavits of Mr. Adjmi and counsel); it is further

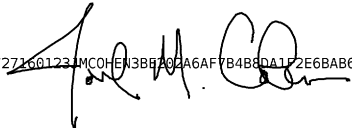
ORDERED that copies of the text messages exchanged by Mr. Tbeile and counsel during the May 30, 2023 deposition be produced to KBL’s counsel with a sworn certification by Mr. Tbeile that they are true and complete copies within five (5) days (the messages may be marked and maintained as “confidential” pursuant to the stipulated confidentiality order [NYSCEF 45] and the parties do not waive any objections as to the relevance or admissibility of the messages); it is further

ORDERED that the parties may adjust the expert discovery schedule without leave of Court, so long as it does not impact the Note of Issue and summary judgment deadlines specified in the May 1, 2023 order (NYSCEF 179), which are final and shall not be extended; it is further

ORDERED that counsel promptly file the April 21, 2023 oral argument transcript (NYSCEF 176); it is further

ORDERED that should any further discovery motions be made in this case, the non-prevailing party shall pay the costs, including reasonable attorney’s fees, of the prevailing party.

This constitutes the decision and order of the Court.

<p><u>7/27/2023</u> DATE</p>			<p>20230727160123JMC0HEN3BB702A6AF7B4B8DA1F2E66B8B66B748A  JOEL M. COHEN, J.S.C.</p>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> DENIED		