SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

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ROBERT MACDONALD and HOLLY CLINTON,

Plaintiff(s),

-against-

ANGELA PANTONY, TANTLEFF & KREINCES, LLP and MATTHEW R. KREINCES,

Defendant(s).

_____ X

TRIAL/IAS, PART 18
NASSAU COUNTY

Index No. 612715/17

Motion Seq. No.: 007

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Defendants, Angela Pantony (Pantony), Tantleff & Kreinces, LLP and Matthew R. Kreinces, move this court for an order, directing Plaintiffs, Robert MacDonald (MacDonald) and Holly Clinton (Clinton) to appear for further depositions based upon

answers given at the previous depositions, and based upon responses to post-deposition demands. Plaintiffs oppose the motion.

Plaintiffs signed a contract to purchase a house from Pantony, and put down a deposit of $100,000.00. When Plaintiffs were unable to secure financing to purchase the property, they sought the return of their deposit. Defendants refused, citing the contract.

Before a motion relating to discovery or bill of particulars can be brought, the movant is required to submit an affirmation of good faith indicating "that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." 22 NYCRR 202.7(a). The affirmation of good faith is supposed to indicate that the parties consulted over the discovery issues and the "time, place and nature of the consultation and the issues discussed...", or that such conferral would be futile. 22 NYCRR 202.7(c). The parties are to make a diligent effort to resolve the discovery dispute. (*Deutsch v. Grunwald*, 110 A.D.3d 949 [2nd Dept. 2013]; *Murphy v. County of Suffolk*, 115 A.D.3d 820 [2nd Dept. 2014]; *Chichilnisky v. Trustees of Columbia University in City of New York*, 45 A.D.3d 393 [1st Dept. 2007]). While the affirmation of good faith contains none of the required information, this court accepts that any further conferral would have been futile.

By demand dated February 6, 2018, Defendants sought, *inter alia:*

> 4. Copies of correspondence between the plaintiffs and defendants by any means whatsoever, including but not limited to regular mail and/or electronic means...
> 8. Any and all loan applications, 1003s, etc. (written and/or printed)...
> 9. Documentation submitted to any and all lending institutions regarding plaintiffs and

> plaintiffs family.
> 10. All credit and other information submitted to all lending institutions.,

By response dated March 1, 2018, Plaintiffs stated "No responsive documents" to number "4" and issued a blanket objection to "8", "9", and "10". On September 18, 2019, MacDonald was deposed. During his depositions, he referenced a file he had kept regarding this matter. Defendants then served a demand of that same date seeking the contents of the referenced file, including documentation sent to the lender, loan applications, and tax-related information. By response dated January 21, 2020, Plaintiffs claimed "No responsive documents." Defendants then served a demand on December 17, 2019. In response to that demand, Plaintiffs supplied hundreds of pages of documents, including the communication information to which they had previously claimed "No responsive documents" and the information sent to the lender which they had also claimed "No responsive documents". Defendants now seek to further depose Plaintiffs based upon these late submissions.

CPLR § 3124 provides that the court has the discretion to compel discovery or to strike a pleading for failure to abide with discovery and disclosure orders. At the discretion of the court, a party's failure to comply with such requests may result in sanctions, pursuant to CPLR § 3126. "Although actions should be resolved on the merits where possible, a court may strike [a pleading] for failure to comply with court-ordered discovery where there is a clear showing that the noncompliance is willful and contumacious" (*Rawlings v. Gillert*, 78 AD3d 806 [2d Dept 2010]; *see also* CPLR

3126[3]; *Moray v. City of Yonkers*, 76 AD3d 618 [2d Dept 2010]; *Palomba v. Schindler El. Corp*., 74 AD3d 1037 [2d Dept 2010]; *Rini v. Blanck*, 74 AD3d 941 [2d Dept 2010]).

Parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR § 3101[a]). This provision has been liberally construed to require disclosure "of any facts bearing on the controversy which will assist the parties' preparation for trial by sharpening the issues and reducing delay *(Allen v. Crowell–Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material ... in the prosecution or defense" (*Id.* at 407, quoting CPLR § 3101). Nonetheless, litigants do not have carte blanche to demand production of any documents or other tangible items that they speculate might contain useful information (*see Geffner v. Mercy Med. Ctr*., 83 AD3d 998 [2d Dept 2011]; *Foster v. Herbert Slepoy Corp*., 74 AD3d 1139 [2d Dept 2010]; *Gilman & Ciocia, Inc. v. Walsh*, 45 AD3d 531 [2d Dept 2007]; *Vyas v. Campbell*, 4 AD3d 417 [2d Dept 2004]). A party will not be compelled to comply with disclosure demands that are unduly burdensome, lack specificity, seek privileged material or irrelevant information, or are otherwise improper (*see e.g. Geffner v. Mercy Med. Ctr.*, 83 AD3d 998 [2d Dept 2011]; *Gilman & Ciocia, Inc. v. Walsh*, 45 AD3d 531 [2d Dept 2007]; *Astudillo v. St. Francis–Beacon Extended Care Facility, Inc.*, 12 AD3d 469 [2d Dept 2004]; *Crazytown Furniture v. Brooklyn Union Gas Co.*, 150 A.D.2d 420 [2d Dept 1989]).

In opposition, Plaintiffs argue the problem was in the alleged in-artful drafting of

the September, 2019 demand. Further, they argue that MacDonald never claimed to have a file, but that Defendants' counsel, in questioning MacDonald, assumed there was a file. These two arguments are patently false. This court read the demands and found nothing in-artful, confusing or unclear about them. As for the file, while it is true that counsel asks if information is contained in a file somewhere, MacDonald clearly says yes:

> Q. Do you have any of that information somewhere in a file somewhere?
> A. Yes.
> Q. Where is that file?
> A. At home.

Afterward, there are numerous references to the file, and Macdonald never denies such a file exists:

> Q. What is contained within this file that you have at home?
> A. Mr. Gonzalez's address.
> Q. Is that it?
> A. Specifically what are you looking for?
> Q. I don't know what is in the file, so I am asking you?
> A. Anything pertaining to the sale of that property.
> Q. Sale of which property?
> A. 125 Mineola Avenue.
> Q. Does this file contain all of the documents you submitted to the lender?
> A. Yes, I believe so, uh-huh.
> Q. What documents are contained in that file?
> A. Tax returns, financial papers, anything that was requested by the lender.

Later, when asked if he still has the file, MacDonald says he believes he does.

> Q. This file that you have at home with everything that you delivered to Mr. Gonzalez is it one file or two files or a draw?
> A. Folder.

Q. Did you review anything in that folder before coming here today?
A. No.
Q. Do you still have that file in its complete state at home?
A. We just moved, so I believe so

There are further references to this file in the deposition. At no time does MacDonald deny the existence of the file, nor does he change any aspect of that testimony using an errata sheet. To claim that MacDonald never acknowledged the existence of a file that contained relevant information to this matter is an intentional mis-reading and mis-interpretation of his testimony.

It is ironic that Plaintiffs claim Defendants are intentionally delaying this matter when it took Plaintiffs two years to turn over something as simple as email communication, after first claiming they did not exist in March, 2018. There is no explanation from Plaintiffs why they claimed these documents did not exist, but then were able to turn them over at a later date.

In light of the foregoing, Plaintiffs will be produced for a further deposition within 30 days of the date this order is uploaded onto the e-file site. The depositions shall be limited to the materials turned over by Plaintiffs in their February 12, 2020 discovery response. The depositions shall take place via Skype, Zoom or other electronic means, unless *all* parties and counsel agree to face-to-face depositions with the appropriate social distancing. This schedule may not be changed by any of the parties without the prior approval of this court. Should Plaintiffs fail to comply with this schedule, they will be precluded from testifying at a trial in this matter. Should Defendants fail to comply with

this schedule, the depositions will be waived.

Accordingly, it is hereby

ORDERED, that Defendants' motion to compel further depositions of Plaintiffs is GRANTED, consistent with the terms of this order; and it is further

ORDERED, that this matter will certify ready for trial on July 30, 2020.

This constitutes the decision and order of the court.

Dated: May 28, 2020
Mineola, New York

Hon. James P. McCormack, J. S. C.