

People's Capital & Leasing Corp. v Color-Web, Inc.

2014 NY Slip Op 32353(U)

September 2, 2014

Supreme Court, New York County

Docket Number: 652645/11

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

Facts

The court will summarize the facts that are relevant to this motion. For a more detailed statement of the facts, the court refers the parties to its Decision and Order dated December 4, 2012.

PCL agreed to finance Color Web's purchase of a Mitsubishi printing press (Press), for \$3,695,000, from Mitsubishi Lithographic Presses, Inc. (MLP). On July 24, 2008, Color-Web executed a demand promissory note in favor of PCL in the amount of \$200,000.00 (Note), with guarantees signed by the other defendants. Upon default (alleged) under the Note, Color-Web was obligated to pay, in addition to unpaid principal, interest, and unpaid late charges, plaintiff's expenditures in enforcing collection of the Note, including reasonable attorney's fees.

The proceeds of the Note were to be disbursed by PCL on Color-Web's behalf to MLP as a down payment for Color-Web's purchase of the Press. The Note provided that, upon delivery of the Press to Color Web, it was expected that the Note would convert to an 84-month term loan. MLP and PCL executed a July 28, 2008 letter agreement for the Press, in which they agreed, *inter alia*, that MLP would refund the money to PCL in the event of non-delivery of the Press to Color Web. PCL provided MLP with the \$200,000 down payment on October 27, 2008.

Color Web kept delaying its acceptance of delivery of the Press. By letter to MLP dated February 12, 2009, Color Web attempted to cancel the agreement due to economic difficulties. By letter dated March 6, 2009, MLP refused to accept the cancellation, and instead proposed an amendment to the sales agreement providing for, *inter alia*, a deferral period for delivery of the press to Color Web, MLP's right to sell the press to a third party during that period, and MLP's obligation to "refund the down payment to Color Web (or People's Capital)" in the event the

Press is sold for equal to or greater than the contract price. PCL claims that on October 29, 2010, Color-Web defaulted under the Note by failing to make the monthly payment, and did not cure that default or pay the balance due. There is no evidence that the Press was successfully delivered to Color Web, or sold by MLP, before the action was filed by PCL.

The Motion

Defendants claim that PCL intentionally withheld, from them and the court, information and documents showing that when PCL filed the Complaint on September 27, 2011, and moved for summary judgment alleging that defendants are liable under the Note, MLP had already returned the \$200,000 down payment to PCL eight months earlier, in January, 2011. Defendants argue that PCL is clandestinely suing on MLP's behalf to collect damages for breach of the sales agreement, and that by suing defendants indirectly through PCL, MLP can reach the Note guarantors, who are not parties to or guarantors of the sales agreement. Defendants only learned about the return of the money, and the arrangement between PCL and MLP, after subpoenaing documents directly from MLP. In response to discovery requests, PCL had intentionally withheld all documents revealing MLP's return of the money.

In a further effort to keep this information from defendants, PCL refused to stipulate to a commission for the deposition of MLP's past President Marke Baker in New Jersey. Baker had been the MLP representative communicating with PCL during the period in question. The court has now granted defendants' motion for issuance of a commission, without opposition. Defendants now move to compel PCL to make available computers and other electronic devices for inspection, to strike the Complaint, and for monetary sanctions.

PCL does not dispute its failure to inform defendants that MLP had returned the down payment, but it claims the information is irrelevant because defendants remain liable under the Note and the Guarantees. PCL also requests, in its opposition, that the court issue a confidentiality order because defendants will not stipulate to one. Defendants reply that PCL cannot seek affirmative relief in an opposition, only in a cross-motion.

Defendants submitted correspondence, e-mails and other exhibits to the motion, as well as formal and informal agreements between MLP and PCL requested by the court, providing, *inter alia*:

– In a July 28, 2008 letter agreement (Doran Affirm., Exh. B), PCL and MLP agreed that if the Press is not delivered to Color Web, then MLP will refund to PCL “the entire portion of the purchase price of the [Press] delivered to [MLP]”;

– As of October 2, 2008, MPL had signed a May 19, 2008 “Agreement” with PCL which provides a “First-Loss Guarantee” to PCL ensuring payment by MPL to PCL for any loss resulting from a foreclosure sale of the Press; and a “Recourse” Agreement that PCL had e-mailed earlier, but which appears to have remained unsigned. (10/2/08 e-mail chain within PCL);

– As of October 28, 2010: PCL demanded repayment of the \$200,000 by MLP; PCL stated to MLP that it would “assign the Demand Note/Security Agreement documentation in place on the \$200,000 to Mitsubishi ...[to] pursue Color web for the \$200,000”; MLP denied executing a recourse agreement with PCL, and took the position that PCL had assumed the risk. (10/28/10 e-mail from MLP to PCL);

– MLP wired the \$200,000 back to PCL on January 10, 2011 “under an indemnification agreement” (4/20/11 e-mail from PCL to MLP);

– PCL asked MLP to confirm that nobody at MLP had told Color Web about MLP’s return of the \$200,000 to PCL because “[l]egal counsel needs this confirmation so that PCLC can pursue Color Web for reimbursement” (*Id.*), and MLP confirmed that nobody at MLP had been in contact with Color Web “about this matter” (4/20/11 e-mail from MLP to PCL);

– In a January 11, 2011 letter to PCL, MLP stated:

This confirms that the \$200,000 wired to PCLC is cash collateral for the recourse obligation of MLP U.S.A., Inc. (“Vendor”) to People’s Capital and Leasing Corp. (“PCLC”) in connection with the advance of like amount by PCLC to Vendor as the deposit for a 2008 . . . printing press that Vendor intended to sell to Obligor with financing supplied by PCLC. If PCLC determines in its sole discretion that it cannot collect this amount from Obligor, then PCLC may apply the cash collateral wired by Vendor to Obligor’s debt to PCLC.[;]

– After MPL re-paid the \$200,000 to PCL, PCL put pressure on Color Web to re-pay the \$200,000 Demand Note, MLP agreed to payment terms proposed by PCL to Color Web, and PCL agreed to “bill and collect for MLP,” and to remit to MLP “all payments received” (8/10/11 e-mail chain between MLP and PCL).

Discussion

The court agrees with defendants that the documents and information withheld by PCL are relevant. CPLR 3101 entitles a party to disclosure of matter that is “material and necessary” to prosecuting or defending an action. *See* CPLR 3101. The trial court has discretion to determine what is “material and necessary” to the litigation. *See Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 746 (2000). In making this determination, the “test is one of usefulness and reason.” *Id.* The court has the discretion to deny discovery where the party seeking discovery

fails to demonstrate that the discovery is relevant. *Williams Real Estate Co. v Viking Penguin*, 216 AD2d 27 (1st Dept 1995).

The relevance of the withheld discovery is plain. PCL admitted as much through its own blatant efforts to hide MLP's re-payment from defendants and the court, as well as its failure to oppose the motion for a commission to depose MLP's past President, after refusing to consent. PCL was at pains to hide the re-payment because it arguably satisfied defendants' obligation under the Note (and Guarantees) to repay the \$200,000. The money was paid by PCL to MLP on behalf of Color Web, and on default the latter became obligated under the Note to immediately pay it all back. MLP's agreement with PCL to re-pay the money on Color Web's default, served as collateral to PCL for Color Web's obligation, and the actual re-payment by MPL satisfied that obligation.

PCL has not provided an explanation for its actions. The documents produced by MPL, which defendants submitted in support of the motion, suggest there was some kind of side deal between MPL and PCL beyond their initial agreement. A January 11, 2011 letter from MPL's Baker to PCL "confirms" that the wiring back of the \$200,000 is "cash collateral for the recourse obligation of MLP [to PCL]." (Doran Affirm., Exh. E, #MLP 0030.) But no executed recourse agreement has been submitted to the court, and the submitted e-mails support the reasonable inference that one was never provided by MLP to PCL. There was only an "indemnification" agreement to cover PCL's loss on a foreclosure sale of the Press, and the July 28, 2008 letter agreement in which MLP agrees that if the Press is not delivered to Color Web, then MLP will "refund" the \$200,000 to PCL. The re-payment was a refund that arguably satisfied Color Web's obligation.

Further, the fact that PCL was pursuing payment of the Note on behalf of MLP, when there was no executed agreement for it to do so, and MLP could have sued Color Web directly under the sales agreement, is highly relevant. PCL no longer has a basis on which to seek payment of the \$200,000 from defendants under the Note, and MLP has no standing to seek payment from defendants under the Note. It does not even have standing under the sales agreement to sue defendant-guarantors, who are not signatories. At a minimum, defendants have a right to the documents and information that concern these defenses. Next the court will determine the appropriate sanction.

Defendants have requested that the court strike plaintiff's complaint, the severest of penalties. In accordance with CPLR 3126:

[i]f any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: [3] an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

CPLR 3126(3). The nature and degree of the remedy are committed to the court's sound discretion. The penalty imposed will not be disturbed absent a clear abuse of that discretion. *See Myers v Community Gen. Hosp. of Sullivan County*, 51 AD3d 1359, 1360 (3d Dept 2008) (court properly dismissed case where failure to provide discovery was willful). 'A trial court has discretion to strike pleadings under CPLR 3126 when a party's repeated noncompliance is "dilatory, evasive, obstructive and ultimately contumacious.'" *CDR Creances S.A.S. v Cohen*, 214 N.Y. LEXIS 1042 (May 8, 2014), quoting *Arts4All, Ltd. v Hancock*, 54 AD3d 286, 863 (1st Dept 2008), *aff'd* 12 NY3d 846 (2009). "[W]illfulness can be inferred from a party's

repeated failure to respond to demands [. . .] coupled with inadequate excuses for its defaults.” *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41, 52 (2d Dept 1998); *see Kihl v Pfeffer*, 94 NY2d 118, 122-123 (1999) (affirming trial court’s striking of complaint under CPLR 3126 where plaintiff failed to respond to interrogatories within court-ordered time frames).

PCL does not dispute that it withheld the documents and information in question, and offers no explanation, only a claim that the discovery is irrelevant. The court finds that claim to be disingenuous, in light of the concerted effort by PCL and MPL to hide their arrangement, and the repayment of the money, from defendants and the court. There is no reasonable justification for PCL’s actions, which were willful and intended to facilitate a recovery from defendants to which PCL was, arguably, no longer entitled. In fact, the court can only conclude that PCL and its attorney were hoping to win the case through the use of material omissions in the complaint, affirmations, affidavits and other legal papers filed with the court. The omission of key facts was also used to influence a settlement with Color Web, as President David Moyal describes in his Affidavit. Moyal explains that after MPL had already returned the money to PCL, of which he was unaware at the time, MPL’s Baker offered to return the \$200,000 to PCL if defendants dropped their counterclaims against PCL. (Moyal Affd., ¶7.)

As the Court of Appeals recently stated in *CDR Creances S.A.S. v Cohen*,

Apart from CPLR 3126, a court has inherent power to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice. [. . .] Fraud on the court involves wilful conduct that is deceitful and obstructionist, which injects misrepresentations and false information into the judicial process “so serious that it undermines . . . the integrity of the proceeding” (*Baba-Ali v State*, 19 NY3d 627, 634, 975 NE2d 475, 951 NYS2d 94 [2012] [citation and quotations omitted]).

Id. Under these circumstances, it is the court's view that the harsh penalty of striking the complaint, and the additional remedies sought by defendants are warranted. Accordingly, it is

ORDERED defendants' motion to strike the complaint is GRANTED, and as stricken the complaint is dismissed with prejudice, with costs and disbursement to defendants; and it is further

ORDERED that the defendants' counterclaims are severed and continued; and it is further

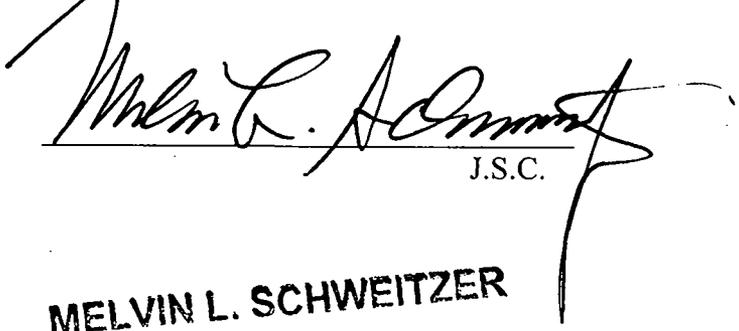
ORDERED that defendants' motion to compel plaintiff, at plaintiff's sole cost and expense, to make available its business computers, flash drives, external hard drives and e-mail accounts for examination by a mutually agreed upon third party for the purpose of conducting electronic discovery pursuant to specified search terms, is GRANTED; and it is further

ORDERED that defendants' motion for monetary sanctions against plaintiff, including attorney's fees, costs and disbursements incurred in preparing and pursuing this motion, is GRANTED; and it is further

ORDERED that determination of fees, costs and disbursements as granted here will await the disposition of the remaining counterclaims.

Dated: September 2, 2014

ENTER:


J.S.C.

MELVIN L. SCHWEITZER