SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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JOHN M. ROAZZI

Index No.: 152129/2016

Plaintiff,

-vs.-

UA BUILDERS CORP., UNITED ALLIANCE ENTERPRISES LLC, GRANIT GJONBALAJ and ALBERT GJONBALAJ,

Defendants.

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AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE

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William Cafaro, being an attorney duly licensed to practice law before the Courts of the State of New York, does affirm as follows pursuant to Rule 2106 of the Civil Practice Law and Rules under the penalties of perjury as follows:

1. I am the attorney of record for the Plaintiff in this action brought pursuant to the New York City Human Rights Law ("NYCHRL"), specifically, discrimination based upon age, and as such I am fully familiar with the facts and circumstances of this matter.

2. Plaintiff, a 64 year old project manager with over 30 years of experience in the construction industry, was terminated without cause and was replaced by a woman in her 20's who had little or no construction experience prior to working for the Defendants, and certainly had no previous experience as a project manager.

3. The Complaint, which was filed on March 10, 2016, and the Answer, which was filed on May 3, 2016, are respectively appended as Exs. "1" and "2".

4. The Plaintiff brings this Order to Show Cause for a protective order with respect to the following specific Document Requests contained in Defendants' Notice for Discovery and Inspection dated July 11, 2016, (Ex. "3") which were served upon the undersigned by e-mail on July 11, 2016.

> Item 12. Duly executed and correctly addressed authorizations for employment records from all of Your employers for the period from ten (10) years prior to Your purported employment with Defendants through to the commencement date of Your purported employment with Defendants.
>
> Item 15. All documents and communications concerning Your efforts to find employment since Your termination seeking subsequent job searches.

5. This issue was raised at the preliminary conference before Judge Wright on June 9, 2016, (filed June 10, 2016), Ex. "4"). As indicated in ¶ 6(b) of the order, this issue was to be disputed. The Court attorney directed defense counsel to serve a demand, and directed me to bring this application on by Order to Show Cause so it could be adjudicated without impeding the progress of the case. This application is made within 30 days of the service of the demand and is clearly timely.

6. Plaintiff seeks a protective order striking Item 12 of the Defendants' Notice for Discovery in its entirety pursuant to CPLR § 3103 (a), which provides as follows:

> Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

N.Y. C.P.L.R. § 3103 (a). Plaintiff submits that the annoyance, embarrassment, disadvantage and other prejudice to the Plaintiff far outweighs any speculative claims of relevance the defense can offer for the requested disclosure.

7. Plaintiff will comply with item 15, but requests an order prohibiting the defendants from serving any subpoenas on any third party whose identity is ascertained from any documents responsive to this item unless thirty days prior notice is given to Plaintiff's counsel in order to allow time to move for an appropriate protective order, if such action is deemed necessary and advisable.

8. The stock defense argument for seeking the discovery of plaintiff's previous employment files is that they fired the plaintiff for incompetence, and this argument might be supported by information they could get from a prior employer. Even if this were true, it would not render such evidence admissible, so it is not reasonably calculated to the discovery of admissible evidence.

9. These demands are primarily brought for the purpose of harassment. This might be a big town, but the universe of people who hire construction project managers in New York City is finite, and the more attention that is called to the fact that Plaintiff has brought a discrimination lawsuit, the harder it will make it for Plaintiff to get another job and mitigate his damages. It is obviously in the best interests of all parties that Plaintiff's damages be mitigated to the greatest possible extent. Additionally, to the extent Plaintiff utilizes his prior employers as references for future employment prospects, there is additional harm in that the stigma of bringing a discrimination suit against an employer may make someone in the same industry reluctant to make this recommendation, and well might prompt them to disclose this fact in response to the inquiry. It is obvious that this will prejudice plaintiff's future employment prospects as well. It is true that the case has been e-filed, I googled his name and this case did not come up.

10. While prior employment authorizations are routinely given in personal injury cases, having brought a personal injury case does not carry the perceived stigma that a discrimination case will have to a present or prospective employer. Receipt of authorizations or subpoenas by a prior employer makes it likely that the discrimination lawsuit will be communicated to others in the industry, including prospective employers. This fact is clearly recognized in many of the authorities cited below.

11. On the other hand, if Defendants want to rely upon any alleged incompetence as their reason for firing the Plaintiff, they are required to do it based upon what they knew from the Plaintiff's performance in their employ, rather than trying to glean it from the records of any other employer, which would clearly be inadmissible in any case.

12. The First Department refused to enforce a defendant's demands for records of previous employers in a sexual harassment action as follows:

> However, defendants' demands for authorizations to obtain... complete employment files are overbroad.... Defendants' demands for plaintiffs' employment histories should be granted to the limited extent of providing plaintiffs' past wage histories and names of positions held, since plaintiffs have only placed their work histories at issue in the context of their financial worth as employees.

Pecile v Titan Capital Group, LLC, 113 A.D.3d 526, 526-527, (1st Dep't 2014) (internal citations omitted).

13. The First Department has further held that while discovery should be liberal, the information sought must be "material and necessary", and meet a test of "usefulness and reason."

Manley v. New York City Hous. Auth., 190 A.D. 2d 600 (1st Dep't 1993) (*citing Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 (1st Dep't 1993).

14. Moreover, the First Department has held that Federal law should be followed in assessing the discoverability of various documents in the discrimination context, the rationale being that discovery standards apply equally to discrimination actions brought under state law.

> As we noted in *Svaigsen v City of New York* (203 AD2d 32, 33), "[w]hen a State court entertains a Federally created cause of action, the ' "federal right cannot be defeated by the forms of local practice" ' ... [t]his [being] especially true of section 1983, which was enacted particularly to vindicate Federal rights 'against deprivation by state action' ". Thus, we held it appropriate to follow Federal law when assessing the discoverability of documents sought therein.

Morrison v. New York City Police Dep't, 225 A.D.2d 463, (1st Dep't 1996).

15. Federal Law could not be any clearer on this issue; discovery of prior employment records, in an employment discrimination case is highly disfavored. With respect to prior employers, the Court is respectfully referred to *Henry v. Morgan's Hotel Grp., Inc.*, 2016 U.S. Dist. LEXIS 8406, *9-11, 2016 WL 303114 (S.D.N.Y. Jan. 25, 2016). *Morgan's Hotel Grp., Inc.* is most illustrative on the issue of the discoverability of prior employment records in a discrimination case, and quashed subpoenas served on the plaintiff's prior employers in no uncertain terms:

> Here, Defendant contends that the records from Henry's three prior employers for whom he worked in the one- year period immediately prior to his employment with Defendant are relevant because 'Plaintiff held himself out as being an exceptional waiter, and relied upon his employment at these prior employers as evidence of his employable qualities. If Plaintiff's representations were false, which Defendant strongly suspects, the records from these prior employers are extremely relevant both in connection with Plaintiff's credibility and the doctrine of after-acquired evidence.' The Court finds this explanation to be an insufficient basis to warrant the subpoenas served on the prior employers. Defendant predicates these subpoenas on wholesale speculation that Henry was untruthful about some of the events of his

> prior employment. Even if Henry was not an "exceptional" waiter at his prior jobs (whatever that may mean), it is not remotely apparent what difference that would make regarding the allegations of discrimination and retaliation he has made in this case. The issue presented here is whether Defendant's actions directed toward Henry were based on valid considerations or violated the discrimination laws. Henry's prior employment has little if any bearing on that issue. In addition, as Henry notes, Defendant has not offered sufficient (indeed any) evidence that he made misrepresentations to Defendant regarding his prior employment to justify production of any of the records that Defendant seeks, or satisfied the Court that its production is proportional to the needs of the case. Finally, even if Defendant's speculation were justified in some way, the evidence to be adduced from the non-party employers would likely be inadmissible propensity evidence under Rule 404(a). *See, e.g., Lewin*, 2010 U.S. Dist. LEXIS 123738, 2010 WL 4607402, at *2 (attack on plaintiff's credibility by introducing evidence of his character in another employment setting likely inadmissible propensity evidence under Rule 404(a)); *Chamberlain v. Farmington Sav. Bank*, No. 06-CV-01437, 2007 U.S. Dist. LEXIS 70376, 2007 WL 2786421, at *3 (D. Conn. Sept. 25, 2007) (quashing subpoena served on plaintiff's former employer when defendant sought "to discover evidence of the plaintiff's performance history in order to show that he has a propensity for certain performance deficiencies").

Henry v. Morgan's Hotel Grp., Inc., 2016 U.S. Dist. LEXIS 8406, *9-11, 2016 WL 303114 (S.D.N.Y. Jan. 25, 2016).

16. The federal courts routinely hold that evidence of character from prior employment files would clearly be inadmissible, but that is a question of federal evidence. Turing to New York evidentiary principles, the rule and the exceptions are essentially parallel: Evidence of character is generally not admissible in a civil case *Wolff v Mahrer*, 273 AD2d 812, 709 N.Y.S.2d 310 (4th Dep't 2000). However, evidence of character is admissible: 1) to impeach a witness, or 2) where it is an issue of substantive law in a case. *Kravitz v Long Island Jewish Hillside Medical Ctr.*, 113 AD2d 577 (2d Dep't 1985) (holding that it was reversible error to allow character evidence of untruthfulness).

17. Generally, evidence of a person's character is not admissible to prove that on a particular occasion he acted in accordance with that trait (McCormick on Evidence, § 186 [2013]).

There are some exceptions. Where it is alleged that a party engaged in fraud, proof of similar prior acts of fraud are admissible to establish intent. *1515 Summer St. Corp. v Parikh*, 13 AD3d 305, 788 N.Y.S.2d 322 (lst Dep't 2004); *Matter of Mallin*, 2014 N.Y. Misc. LEXIS 5240, *2-4, 2014 NY Slip Op 33066(U), 2-3 (N.Y. Sur. Ct. June 30, 2014).

18. Under Federal law, subsequent employment records, which are concededly relevant for the purposes of mitigation of damages, and therefore much more relevant and probative than prior employment records, are still highly disfavored, and discovery of them should only be permitted as a last resort, and must obtain the information from less intrusive means where possible. The United States District Court for the Eastern District of New York held:

> Even if the discovery sought by Defendant was found to be relevant, this Court must still weigh Defendant's right to obtain that discovery against the burden imposed on Plaintiff. *Mirkin v. Winston Res., LLC*, No. 07 Civ. 02734, 2008 U.S. Dist. LEXIS 91492, 2008 WL 4861840, at *1 (S.D.N.Y. Nov. 10, 2008) (*citing During*, 2006 U.S. Dist. LEXIS 53684, 2006 WL 2192843, at *4 (*citing* Fed. R. Civ. P. 26(b)(2), 26(c))) "Because '[t]he trial court is in the best position to weight fairly the competing needs and interest of parties affected by discovery,' Rule 26 confers broad discretion to weigh discovery matters." *During*, 2006 U.S. Dist. LEXIS 53684, 2006 WL 2192843, at *4 (*quoting Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984)). Moreover, the court may issue an order "to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense . . . ." Fed. R. Civ. P. 26(c).

Warnke v. CVS Corp., 265 F.R.D. 64, 2010 U.S. Dist. LEXIS 16399 (E.D.N.Y. 2010); *see also Gambale v. Deutsche Bank AG*, 02 Civ. 4791 (HB)(DFE), 2003 U.S. Dist LEXIS 27412 (quashing defense subpoenas on executive search firms plaintiff went to seeking employment. Plaintiff claimed that the search firms would be less inclined to work with her if they were dragged into the litigation. The District Court found that the defendants' attempts to distinguish the search firms from current or prospective employers were futile, and the Court could not dismiss Plaintiff's

worry that involvement in the litigation might cause a search firm with a good "lead" to offer it someone other than her).

19. No prior application has been made for this or any similar relief before this or any other Court.

WHEREFORE, Plaintiff respectfully requests that this Court make an order pursuant to CPLR § 3103(a) striking Item 12 of Defendants' Notice for Discovery and Inspection dated July 11, 2016 in its entirety, and prohibiting the Defendants from contacting or serving any subpoenas on any entities or individuals identified by documents produced in response to Item 15 of the same demand unless Plaintiff's counsel is given 30 days advance notice to allow time to move for a protective order as appropriate.

Affirmed this 21st day of
July, 2016 at New York, New York

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