

**Fresh Del Monte Produce N.V. v Eastbrook Caribe
A.V.V.**

2005 NY Slip Op 30097(U)

January 6, 2005

Supreme Court, New York County

Docket Number: 0600860/2003

Judge: Charles E. Ramos

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

PRESENT: Charles Edward Ramos

PART 53

0600860/2003

FRESH DEL MONTE PRODUCE N.V.
vs
EASTBROOK CARIBE A.V.V.

SEQ 9

ORDER OF PROTECTION

EX NO. _____
TION DATE _____
TION SEQ. NO. _____
TION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with
accompanying memorandum decision and order.

FILED

JAN 11 2005

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/6/05

[Signature]

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION *J.S.C.*

Check if appropriate: DO NOT POST

HON. CHARLES E. RAMOS

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
FRESH DEL MONTE PRODUCE N.V.,
FRESH DEL MONTE PRODUCE INC.
and IAT GROUP INC.,

Plaintiffs,

Index No. 600860/03

-against-

EASTBROOK CARIBE A.V.V.,
EASTBROOK, INC., and
EASTBROOK LIMITED,

Defendants.

-----X

Charles Edward Ramos, J.S.C.:

Non-party witness William Van Diepen moves for a protective order, pursuant to CPLR 3103 (b), quashing, or staying enforcement of a subpoena duces tecum dated May 10, 2004, served upon him by plaintiffs, during the pendency of competing, potentially dispositive motions for summary judgment by both parties.

At the outset, this court notes that, by decision and order dated December 1, 2004, this court granted plaintiffs' prior motion for summary judgment on the first cause of action of the complaint, and denied defendants' cross motion for summary judgment dismissing the first and third causes of action. Thus, Van Diepen's motion to quash the subpoena based upon pending summary judgment motions is rendered moot.

Van Diepen also seeks an order quashing the subpoena on the grounds that it is overbroad, burdensome and/or seeks information irrelevant to this action. Plaintiffs argue that Van Diepen

waived his objections, because during the conversations between counsel to schedule the Van Diepen deposition, Van Diepen's counsel failed to reserve the right to question the validity of the notice, or the propriety of any item contained therein.

The subpoena was served on Van Diepen on May 15, 2004, with the deposition scheduled for June 8, 2004. On June 2, 2004, Van Diepen's counsel contacted plaintiffs' counsel and requested an adjournment of the deposition date to June 16, 2004. Due to scheduling difficulties, plaintiffs' counsel proposed that the deposition be scheduled during the week of July 12, 2004. It is undisputed that Van Diepen's counsel never mentioned any opposition to the subpoena, nor did he reserve his right to challenge the subpoena.

Although, it has been held that the failure to reserve the right to move to vacate a notice for examination before trial constitutes a waiver to so move (Brand v Colgate-Palmolive Co., 21 AD2d 670 [1st Dept 1964]; Mossew v To Market, Inc., 3 AD2d 189 [1st Dept 1957]), the court has the discretion to permit discovery to go forward, notwithstanding that there was no reservation of rights during adjournment discussions (see e.g. Haas v Rothenberg, 6 AD2d 797, 798 [2d Dept 1958]). Based upon the circumstances here, this court will address Van Diepen's arguments to quash the subpoena.

Plaintiffs commenced this action to recover damages under a 1996 Settlement Agreement and Release executed by the defendants Eastbrook Caribe, A.V.V., Eastbrook, Inc., and Eastbrook Limited

(collectively referred to as Eastbrook) to settle prior litigation. Plaintiffs allege in the first and third causes of action, respectively, that defendants breached the Release and Settlement Agreement, and triggered an obligation to indemnify Fresh Del Monte for any damages they have suffered, by asserting meritless claims against plaintiffs, which claims fall within the released claims prohibited by the Release.

As related in a decision and order of this court dated January 13, 2004, in November 2002, Eastbrook filed a Summons with Notice in this court, entitled Eastbrook Caribe, A.V.V. v Fresh Del Monte Produce, Inc., et al., Index No. 124404/02 (the New York Action), seeking damages and equitable relief arising from the purchase by plaintiffs in December 1996 of 100% of FDMP N.V.'s stock. Eastbrook sought, inter alia, rescission of the Settlement Agreement and Release. That action was dismissed as meritless.

In December 2002, Eastbrook's alleged co-conspirators filed a lawsuit in Florida state court (the Florida Action) against IAT Group Inc. and Fresh Del Monte Produce Inc., among others, seeking to set aside the sale of shares in Fresh Del Monte Produce N.V. The third cause of action of the complaint in the instant action relates to the Florida Action. Plaintiffs argue that the Florida plaintiffs are asserting released claims, and that Eastbrook is liable for the Florida plaintiffs' commencement of the Florida Action under the Settlement Agreement and the Release.

As previously noted, this court granted summary judgment in the instant case as to liability on plaintiffs' first cause of action for breach of the Settlement Agreement and Release in connection with the New York Action.

CPLR 3101 (a) (4) provides that there "shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" by a non-party. The first request in the subpoena seeks documents concerning the New York Action, and the second request seeks documents concerning the Florida Action. Plaintiffs claim that documents received from non-party Heather Jones¹ indicate that, not only was Van Diepen involved with the Florida plaintiffs, but that he also financed the Florida Action. Plaintiffs claim that he can testify to the true identity of the persons behind the Florida Action, i.e., whether the Florida plaintiffs are "Cabal Associated Parties", which can go to the issue of Eastbrook's liability on the third cause of action. The first and second document requests are clearly relevant to the issue of damages on the first cause of action, and whether Eastbrook is liable for breach of the Release and Settlement Agreement on the third cause of action. Accordingly, the motion to quash the first and second document requests of the subpoena duces tecum is denied.

¹By decision and order dated January 13, 2004, this court directed that commissions be issued to take depositions of three out-of-state witnesses, including Heather Jones, concerning information regarding the New York Action and the Florida Action, "which may be relevant to the breach of Release and Settlement Agreement causes of action".

Request No. 3 of the Subpoena requests all documents concerning Van Diepen's relations with, or communications with, more than 24 different persons or entities, in addition to, inter alia, the employees, agents, representatives, successors, predecessors or assigns of various persons and entities. This request is overbroad and lacks reasonable particularity (Fernald v Vinci, 5 AD3d 596 [2d Dept 2004]; Chu v Green Point Savings Bank, 228 AD2d 635 [2d Dept 1996]; CPLR 3120 [2]). Accordingly, the motion to quest the Third Request is granted.

Accordingly, it is

ORDERED that non-party William Van Diepen's motion for a protective order quashing the subpoena duces tecum served upon him by plaintiffs is granted as to the Third Request and denied as to the First and Second Requests.

Dated: January 6, 2005



J.S.C.

HON. CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

FILED

JAN 11 2005

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COUNTY CLERK'S OFFICE