

**American Theatre for the Performing Arts v
Consolidated Credit Corp.**

2006 NY Slip Op 30487(U)

April 4, 2006

Supreme Court, New York County

Docket Number: 603735/03

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ
Justice

PART 03

**AMERICAN THEATRE FOR THE PERFORMING
ARTS,**

Plaintiff,

Index Number 603725/03

-against-

Motion Date: _____

**CONSOLIDATED CREDIT CORPORATION, THE
MOINIAN GROUP, JOSEPH MOINIAN and THE
JACK PARKER CORPORATION,**

Motion Seq. No. 002

Motion Cal. No. _____

Defendants. _____ X

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED
APR 13 2006
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes X No

Upon the foregoing papers, It is

ORDERED that this motion is decided in accordance with accompanying decision and order.

Dated: April 4, 2006



KARLA MOSKOWITZ, J.S.C.

Check one: FINAL DISPOSITION _____ NON -FINAL DISPOSITION X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----X
AMERICAN THEATRE FOR THE PERFORMING ARTS,

Plaintiff,

Index No. 603735/03

-against-

Decision and Order

CONSOLIDATED CREDIT CORPORATION, THE MOINIAN
GROUP, JOSEPH MOINIAN and THE JACK PARKER
CORPORATION,

Defendants.

FILED
APR 13 2006
CLERK'S OFFICE
NEW YORK

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KARLA MOSKOWITZ, J.:

Plaintiff American Theatre for the Performing Arts ("ATP") has sued defendants Consolidated Credit Corporation ("CCC"), The Moinian Group ("Moinian Group"), its principal, Joseph Moinian ("Moinian") and The Jack Parker Corporation ("Jack Parker") for breach of an agreement that provided ATP with an exclusive period to negotiate a commercial lease with an option to buy the Biltmore Theatre (the "Theatre"). By Order to Show Cause, plaintiff has moved: (1) for leave to serve a proposed amended complaint, (2) to compel non-party Manhattan Theatre Club ("MTC") to comply with a subpoena for documents related to MTC's use and occupancy of the Theatre, (3) to extend the Note of Issue date and (4) for attorneys' fees. Defendant Jack Parker has submitted an affidavit in opposition to plaintiff's motion and non-party MTC has cross-moved for an order quashing the subpoena, sanctions and attorneys' fees pursuant to 22 NYCRR 130-1.1.

At oral argument on January 12, 2006, the court extended the Note of Issue date to January 31, 2006. (See Transcript of Hearing, pp. 7-8). The court now addresses the balance of

the Order to Show Cause and MTC's cross-motion.

FACTS

The following facts are from the complaint and other documents that the parties submitted.

On March 11, 1997, defendant Moinian entered into a contract for the sale of the Theatre, located at 261 West 47th Street in Manhattan, with the Theatre's owner, Spike-Lane Theatre Company, that is not a party to this action. (Order to Show Cause, Exh. A). The contract also provided for Moinian's purchase of other real estate in New York from various other sellers (the "Sellers"), also not parties to this action. On May 11, 1999, Moinian commenced a lawsuit against the Sellers to compel the closing of title and completion of the sale of the Theatre. (Order to Show Cause, Exh. B).

On the same day that Moinian entered into the contract for the sale of the Theatre, plaintiff ATP claims it entered into an agreement with defendants Moinian, Moinian Group and CCC for the exclusive right to negotiate and enter into a lease for the Theatre (the "Agreement"). Plaintiff alleges that Moinian controlled both CCC and Moinian Group and that he operated the entities "interchangeably." (Complaint, ¶ 27). The Agreement itself however is between CCC and ATP only and Moinian executed the Agreement in his capacity as principal of CCC. (See Order to Show Cause, Exh. C).

The Agreement gave ATP the exclusive right to negotiate for a period of six months with the opportunity to enter into a ninety-year lease. The parties also agreed to extend the Agreement for two consecutive three-month periods. As a result of the extensions, the Agreement granted plaintiff the exclusive right to negotiate for a twelve-month period, from May 11, 1999 through

May 16, 2000. The Agreement also stated that if CCC received an unsolicited offer to lease, sell or otherwise transfer the Theatre, CCC would give plaintiff the right to match that offer. (Order to Show Cause, Exh. D).

Moinian lost its litigation with the Sellers and never closed on the sale or took title to the Theatre. On March 17, 2000, after Moinian lost the law suit, Spike-Lane Theatre Company sold the Theatre to Biltmore 47 Associates, LLC ("Biltmore 47"). (See Affidavit of Kurt Lenz, dated January 6, 2006, Exh. G). In September 2000, Biltmore 47 then leased the Theatre to MTC. Because Moinian never owned the Theatre and owner Biltmore 47 leased the Theatre to MTC, plaintiff ATP never exercised its alleged option to lease the Theatre.

In its complaint, ATP asserts a cause of action for breach of contract against defendants. Plaintiff alleges that defendants breached the Agreement when they entered into negotiations for the lease of the Theatre with MTC and allowed MTC access to the Theatre. Plaintiff did not name MTC or Biltmore 47 as defendants in its original complaint, but now alleges that defendants transferred their interests in the Theatre to Biltmore 47 in order to circumvent their obligations under the Agreement.

DISCUSSION

I. Proposed Amended Complaint

Plaintiff moves for leave to serve an amended complaint naming Biltmore 47, Biltmore Theatre LLC, OHR LLC, Parker Theatre Associates LLC, Jack Parker Second LLC and MTC as additional defendants. The role that Biltmore Theatre LLC, OHR LLC, Parker Theatre Associates and Jack Parker Second played in the sale of the Theatre or its related negotiations is unclear, but the proposed amended complaint alleges that these entities "caused defendant [CCC]

to enter into [the Agreement] with plaintiff.” (Proposed Amended Complaint, ¶ 14). The proposed amended complaint also alleges that CCC and the Moinian defendants entered into a series of business relationships with these additional defendants and that CCC and the Moinian defendants conveyed their interest in the Theatre to them.

Plaintiff also moves to assert additional causes of action for fraud, civil conspiracy and declaratory judgment. Plaintiff contends that amendment is necessary because the depositions have revealed additional facts and amendment would not prejudice defendants. Non-party MTC and defendant Jack Parker argue that the court should deny leave to serve the proposed amended complaint because there are no facts to support the proposed amendments and the amended complaint fails to state a cause of action. MTC also contends that the court should deny leave to serve the amended complaint because it is “unverified and supported only by an attorney’s affirmation” that does not “show any evidentiary basis for allowing the amendment.” (Affidavit of Jeffrey Bledsoe, dated January 6, 2006, ¶ 12).

“Although leave to amend should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit.” (*Curran v Auto Lab Serv. Center, Inc.*, 280 AD2d 636, 637 [2d Dept 2001]; *see also Joyce v McKenna Assoc. Inc.*, 2 AD3d 592 [2d Dept 2003]). An attorney’s affirmation may serve as a vehicle to introduce documentary evidence in support of amendment (*see Lewis v Safety Disposal Sys. of Pa., Inc.*, 12 AD3d 324 [1st Dept 2004] [summary judgment motion]), or a party with actual knowledge of the facts surrounding the proposed amendment may make the evidentiary showing. (*Morgan v Prospect Park Assocs. Holdings, L.P.*, 251 AD2d 306 [2d Dept 1998]). If a party does not submit an affidavit of a person with personal knowledge of the facts or if the attorney affirmation does not

annex sufficient documentary evidence to warrant amendment, the court must deny leave to serve an amended complaint. (*See Mohan v Hollander*, 303 AD2d 473, 474 [2d Dept 2003]). A party may use a verified amended complaint in lieu of an affidavit of merit if the party itself makes the verification. (*Pampalone v Giant Bldg Maintenance, Inc.*, 17 AD3d 556 [2d Dept 2005]).

Here, contrary to plaintiff's assertion, the proposed amended complaint is not verified. Therefore, the proposed amended complaint is not a sworn statement that establishes the proposed amendment's merits. (*See Black Car and Livery Ins., Inc. v H&W Brokerage, Inc.*, 2006 NY Slip Op 50078[U] [Supreme Court, New York County, January 23, 2006]). While plaintiff submits an attorney affirmation, its attorney lacks personal knowledge of any factual basis for the proposed amendment and his affirmation cannot substitute for a valid affidavit of merit. All that plaintiff's attorney states is that "as a direct result of the depositions taken of Defendants, there now exist sufficient facts to warrant an amendment of the original complaint." (Affirmation of Leslie H. Ben-Zvi, dated December 6, 2005, ¶ 33). However, plaintiff's attorney does not annex any deposition testimony or transcript to the affirmation to support this contention. Nor do any of the annexed documents support additional fraud, civil conspiracy or declaratory judgment causes of action. Thus, plaintiff has failed to make an evidentiary showing that the proposed amendment is meritorious. (*See Mohan*, 303 AD2d at 474; *Morgan*, 251 AD2d at 306; *Black Car and Livery*, 2006 NY Slip Op 50078[U] at *8). On this basis alone, a court may deny leave to serve an amended complaint. (*Black Car and Livery*, 2006 NY Slip Op 50078[U] at *8). Accordingly, the court denies plaintiff's motion for leave to serve the proposed amended complaint.

II. The Subpoena

Plaintiff also moves for an order compelling non-party MTC to produce the following documents and information:

For the period of May 11, 1999 through and including May 16, 2000, all correspondence, agreements, drafts, term sheets, documents, memoranda, notes, minutes, plans, drawings, blueprints, financial documents, leases, licenses, options, proposals, business plans regarding Manhattan Theatre Club's use, occupancy, rental and/or acquisition of the Biltmore Theatre, New York, NY.

(Ben-Zvi Affirm., Exh H). Plaintiff seeks these documents from non-party MTC to show that defendants CCC, Moinian and Moinian Group engaged in negotiations with MTC during ATP's alleged period of exclusivity. Plaintiff contends that it is unable to obtain these documents from defendants. Plaintiff argues that this subpoena is narrower in scope than its previous subpoena in its first motion and is therefore reasonable. Further, plaintiff offers to "reimburse Manhattan Theatre Club for its reasonable expenses incurred" in the production of these documents. (Ben-Zvi Affirm., ¶ 27). MTC cross-moves to quash the subpoena arguing that it is vague, overly broad and unduly burdensome. MTC also contends that ATP served the subpoena in defiance of the court's order at the hearing on October 11, 2005 and that ATP has delayed unreasonably in bringing this motion.

A subpoena served on a non-party must seek discovery that is material and necessary to the prosecution of the action. (*See* § CPLR 3101[a]; *Velez v Hunts Point Multi-Service Center, Inc.*, 2006 Slip Op 01105, *3 [1st Dept, Feb. 9, 2006]). To warrant disclosure from a non-party, the inquiry is whether "the information sought bears on the controversy and will assist in the preparation for trial; the ultimate test is one of 'usefulness and reason'." (*Hall v 130-10 Food*

Corp., 254 AD2d 22 [1st Dept 1998]; *In re New York County DES Litigation*, 171 AD2d 119 [1st Dept 1991]). A subpoena may not be used as a tool in a “fishing expedition” to ascertain the existence of evidence. (*Bolton v Weil, Gotshal & Manges LLP*, 4 Misc3d 1029[A] [Supreme Court, New York County, 2004]; *Reuters Ltd. v Dow Jones Telerate, Inc.*, 231 AD2d 337 [1st Dept 1997]). Finally, a court may modify a subpoena or impose reasonable conditions upon the granting or denial of a motion to quash so as to regulate discovery and prevent abuse. (*See CPLR* § 2304; *People v Weiss*, 176 Misc2d 496 [Supreme Court, New York County 1998]; *Samide v Roman Catholic Diocese of Brooklyn*, 16 AD3d 482 [2d Dept 2005]).

Here, the subpoena is narrower in scope than the first subpoena because it states a certain time period for which it seeks the documentation. Thus, the subpoena is not in defiance of the court’s previous order. However, it is nonetheless overly broad in that it seeks any and all documentation related to MTC’s relationship with the Theatre. Plaintiff seeks these documents to show that defendants negotiated with a party other than ATP during the alleged period of exclusivity. But, only “correspondence” with any of the defendants and attachments relating to MTC’s “use, occupancy, rental and/or acquisition” of the Theatre is relevant to plaintiff’s inquiry. Any correspondence between non-party MTC and defendants and attachments to the correspondence might reveal whether defendants negotiated with MTC during ATP’s alleged period of exclusivity. Accordingly, the court modifies the subpoena as follows:

For the period of May 11, 1999 through and including May 16, 2000, all correspondence and attachments thereto between Manhattan Theatre Club and any of the defendants regarding Manhattan Theatre Club’s use, occupancy, rental and/or acquisition of the Biltmore Theatre, New York, NY.

Further, plaintiff’s original request for any and all documentation is unduly burdensome

because it seeks a “wholesale fishing expedition” of non-party MTC’s business records and correspondence. (*See White Plains Coat & Apron Co., Inc. v K.M. Lehmann*, 87 AD2d 629 [2d Dept 1982]) . Jeffrey Bledsoe, MTC’s Director of Finance explains in his affidavit how costly and disruptive it would be for MTC to search for, copy and produce the documents that ATP seeks. (Bledsoe Aff., ¶ 7). Further, MTC is a not-for-profit organization with a limited budget and only five administrative staff members. (*Id.* at 8-9). Diverting staff from their current duties to conduct these searches would be extremely disruptive to MTC’s operations. However, MTC’s production of “all correspondence” only would not be so voluminous that it would cause undue burden. (*See Velez v Hunts Point*, 2006 Slip Op 01105 at *5). In addition, to alleviate MTC’s burden, the court orders plaintiff ATP to pay for all costs associated with MTC’s production, including personnel costs.

III. Sanctions and Attorneys’ Fees

Sanctions are appropriate only when a party or attorney has abused the judicial process or has caused the unnecessary expense of the court’s resources to respond to a “wholly frivolous” motion. (*See Drummond v Drummond*, 305 AD2d 450 [2d Dept 2003]; *Bell v State*, 96 NY2d 811 [2001]). The motion must be completely without merit in law and not supported by any reasonable argument. (*See Drummond*, 305 AD2d 450, 451-452). Here, there is no abuse of the judicial process nor is plaintiff’s motion without merit. Accordingly, the court denies that part of MTC’s cross-motion for sanctions.

As to attorneys’ fees, they are generally not recoverable as an item of damages in the absence of contractual or statutory liability. (*Tucker v Toia*, 64 AD2d 826 [1st Dept 1978]). Here, non-party MTC fails to submit any contractual or statutory basis for the court to award it

attorneys' fees. Accordingly, the court denies that part of MTC's cross-motion for attorneys' fees. For the same reasons, the court also denies plaintiff ATP's request for attorneys' fees.

Accordingly it is

ORDERED that that part of the motion of plaintiff American Theatre for the Performing Arts, Inc. for leave to serve the proposed amended complaint is denied; and it is further

ORDERED that that part of the motion of plaintiff American Theatre for the Performing Arts, Inc. to compel non-party Manhattan Theatre Club to comply with the subpoena is granted insofar as the court modifies the subpoena to read as follows: "For the period of May 11, 1999 through and including May 16, 2000, all correspondence and attachments thereto between Manhattan Theatre Club and any of the defendants regarding Manhattan Theatre Club's use, occupancy, rental and/or acquisition of the Biltmore Theatre, New York, NY."; and it is further

ORDERED that that part of non-party Manhattan Theatre club's cross-motion to quash the subpoena is granted insofar as the subpoena seeks all "agreements, drafts, term sheets, documents, memoranda, notes, minutes, plans, drawings, blueprints, financial documents, leases, licenses, options, proposals [and] business plans"; and it is further

ORDERED that plaintiff American Theatre for the Performing Arts, Inc. is directed to pay non-party Manhattan Theatre Club all costs of production, including personnel costs on presentation of a detailed invoice along with copies of subpoenaed documents; and it is further

ORDERED that that part of non-party Manhattan Theatre Club's cross-motion for sanctions and attorneys' fees is denied; and it is further

ORDERED that that part of plaintiff American Theatre for the Performing Arts, Inc.'s motion for attorneys' fees is denied; and it is further

ORDERED that the Note of Issue date is extended until May 31, 2006; and it is further
ORDERED that parties are to appear for a compliance conference on April 25, 2006 at
11am in courtroom 248 at 60 Centre Street, New York, N.Y.

Dated: April 4, 2006

ENTER:



J.S.C.

FILED
APR 13 2006
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