

1stDibs.com v Forcione

2007 NY Slip Op 30799(U)

April 12, 2007

Supreme Court, New York County

Docket Number: 0100935/2005

Judge: Emily Jane Goodman

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

PRESENT: Hon. Emily Jane Goodman
Justice

PART 17

1st Dibs. com

INDEX NO. 100935/05

- v -

Foreclosure

MOTION DATE _____

MOTION SEQ. NO. 009

MOTION CAL. NO. _____

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided for

at Default

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

DATED: _____

Dated: 4/12/07

FILED
APR 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

EMILY JANE GOODMAN
NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 17

-----X
1STDIBS.COM,

Plaintiff,

Index No. 100935/05

-against-

LAURENCE FORCIONE and MICHAEL J. BRUNO II,

Defendants.

-----X
MICHAEL J. BRUNO II,

Third-Party Plaintiff,

Third Party Index No.
590323/05

-against-

WILLIAM J. HOLLOWAY, JANE ALEXANDER and
1STDIBS.COM, INC.

Third-Party Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

FILED
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Upon for foregoing papers, it is ordered that this motion to compel the continuing deposition of Scott Rubman, Esq. and to compel him to produce documents responsive to a subpoena duces tecum, dated August 11, 2006, is decided as follows:

Scott Rubman will continue his deposition on a mutually agreeable date for which he will be available the entire day (Rubman consents to his further deposition). The Court finds that the subpoena is overbroad to the extent described herein and shall be responded to, as modified by this Decision. Rubman's responses to Document Requests No. 8, 9 and 10 shall be limited to documents concerning issues arising in this litigation.

Contrary to Rubman's allegation, production of all books and records of 1stDibs.com is not over broad; however, to the extent movants seeks the original books and records, Rubman shall only be required to produce copies.¹

Rubman has not established that the requested documents are protected by the attorney client privilege or the attorney work product doctrine. Here, Michael Bruno, a former director of the corporation, seeks to compel Rubman to turn over documents to him. The Court has not found many relevant cases, other than the cases cited in Bruno's papers. It is well settled in New York that corporations are entitled to the benefits of the attorney client privilege (see Rossi v. Blue Cross and Blue Shield of Greater New York, 73 NY2d 588 [1989]). However, the Court agrees with the reasoning of Kirby v. Kirby (1987 Del. Ch. Ct. Lexis 463 [Delaware Court of Chancery 1987]). In that case, the court held that various family members could not invoke the attorney client privilege to bar other family members access to documents prepared when the latter members were admittedly directors of the corporation. The court reasoned that because all the family members were directors, they all constituted the "client" when the legal advice was rendered.

Although it is not clear whether Rubman was hired to advise the company, or

¹Movants request to direct Rubman's attorney regarding Court rules on speaking objections is unnecessary as all counsel must adhere to all Court rules. To the extent that any party fails to adhere to Court rules at any deposition, counsel are free to contact the Court for a ruling.

rather, was hired to pursue Holloway's individual interests, the fact remains that Holloway paid Rubman with corporate funds, and, Rubman consistently represented to the Court, both orally and in writing, that he represented the company. Accordingly, the attorney client and work product privileges can not be asserted against Bruno for the period of time he was undisputed director of the corporation, and therefore, also the client at the time the advice was rendered.

After this motion was fully submitted, the Court attempted to resolve the dispute. During one of the telephone conferences, Rubman's attorney, belatedly, raised the issue of Rubman's charging lien. Apparently, that issue was also raised in an email, dated December 13, 2006, prior to the telephone conference. Accordingly, Rubman is only directed to produce responsive documents on the condition that the disbursements incurred by him/his firm in this action are paid, and upon the posting of an adequate undertaking (see Goldman v Rafel Estates, Inc., 269 AD 647 [1st Dept 1945]). Due to the Court's familiarity with this litigation and the amount of time it has taken for Rubman to achieve little progress, a hearing is unnecessary in order for the Court to determine the reasonable amount of the undertaking, which the Court finds to be \$100,000. The amount of the undertaking is without prejudice to any claim that the reasonable legal fees incurred by Rubman are actually higher or lower than the amount set for the undertaking.

It is hereby

ORDERED that Rubman appear for his deposition on a mutually agreeable date

for which he will be available the entire day; and it is further

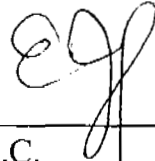
ORDERED that Rubman shall, within five business days of a request by any party, provide to that party a statement of the disbursements incurred by Rubman/his firm in this action; and it is further

ORDERED that Rubman is directed to turn over all documents responsive to the subpoena within thirty (30) days of receipt of receipt of payment of such disbursements, proof that an undertaking was filed in the amount of \$100,000, and receipt of a copy of this Decision and Order, with Notice of Entry.

This constitutes the Decision and Order of the Court.

Dated: April 12, 2007

ENTER:



J.S.C.

EMILY JANE GOODMAN

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