

63 Wall, Inc. v Brown Bros. Harriman & Co.

2007 NY Slip Op 33400(U)

October 15, 2007

Supreme Court, New York County

Docket Number: 0603530/2002

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 603530/2002

63 WALL

vs
BROWN BROTHERS HARRIMAN

Sequence Number : 012

OTHER RELIEFS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is 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

per attached

FILED
OCT 22 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/15/07

[Signature]
EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
63 WALL, INC.,

Plaintiff,

-against-

BROWN BROTHERS HARRIMAN & CO.,

Defendant.

Index No. 603530/02

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

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

Defendant Brown Brothers Harriman & Co. moves to compel the deposition of an Ireland resident, John. P McNabola, who is the principal of Millennium Recovery Fund (Millennium), a Cayman Islands company. Alternatively, Defendant seeks issuance of letters rogatory. It is undisputed that, pursuant to a Stock Purchase Agreement By and Between Millennium Recovery Fund and Fortepian Investment Ltd., dated as of May 21, 2004, Millennium acquired 100 percent of the stock of Plaintiff. Because Plaintiff had sold the building at issue on July 11, 2003, at the time of the stock purchase, Plaintiff's only assets consisted of cash, receivables and this litigation. Defendant suggests that Plaintiff, through its principal Yaron Bruckner, "engineered a complex transaction, the net effect of which was to sell this lawsuit, through a large number of intermediaries from four different countries, to a Cayman Islands entity allegedly controlled by an Irish accountant specializing in tax shelters

and asset protection."

Defendant claims such discovery may be ordered pursuant to CPLR §3101 (a) because McNabola and Millennium are "functioning as the Plaintiff." Plaintiff further argues that even if McNabola and Millennium are non-party witnesses, discovery may be ordered pursuant to CPLR 3101 (a)(4), whereby Plaintiff can be compelled to produce McNabola for a deposition in New York because of the relationship between Millennium and Plaintiff, citing Grande Prairie Energy LLC. v Alstom Power, 5 Misc3d 1002 [NY Sup Ct 2004] [party ordered to produce a foreign non-party resident for deposition because of the non-party's involvement with party]). Alternatively, Defendant maintains that the Court should grant its request for issuance of letters rogatory, pursuant to CPLR §3108, because the deposition is material and necessary to this action.¹

Specifically, Defendant maintains that the deposition of McNabola is material and necessary to this action because when Millennium purchased the stock of Plaintiff, it most likely performed due diligence and evaluated the strengths and weaknesses of this litigation. In that regard, Plaintiff points to the deposition testimony of Harold Levine, attorney for Millennium, indicating that the portion of the stock purchase

¹Ireland is not a signatory to the Hague Convention, which would have enabled Defendant to utilize a more streamlined process.

price allocated to this lawsuit included only a "small amount" upfront, although counsel did not know the specific amount (Levine Tr at 82-86, attached as Ex 9 to Pegno Aff). Defendant argues that payment of a "small amount" upfront for purchase of this lawsuit contradicts Plaintiff's position that this lawsuit is worth tens of millions of dollars. Defendant also maintains that the discovery sought is relevant to damages because "Plaintiff and Mr. Bruckner have now made tens of millions of dollars in cash on sales of various interests in the Building ... If the Millennium transaction is, as it appears to be, yet another method by which Plaintiff and Mr. Bruckner (through Plaintiff and his various other off-shore shells) have made money from the Building, and if they shielded that profit from tax liability, Brown Brothers is entitled to know." Defendant further argues that it is entitled to know the ownership and control of Millennium, as well as "the scope and structure of the Millennium transaction and the reasons for it" to determine if there are other relevant witnesses or information.

Plaintiff and Millennium's attorney oppose the motion, maintaining that it is just an attempt to delay the trial of this action and further claim that Defendant has not shown the deposition will lead to any relevant information. Plaintiff also maintains that Defendant knew about the Stock Purchase Agreement on September 29, 2005, when it was provided to Defendant's

counsel, who delayed in making this motion. However, Plaintiff neglects to point out that the reason why this motion was delayed was because, at the Court's suggestion, the parties were actively trying to resolve the issue without the necessity of court intervention.

Contrary to Defendant's argument, discovery may not be ordered pursuant to CPLR §3101 (a) because McNabola and Millennium are not a party, nor an officer, director, member, agent or employee of a party. CPLR §3101 (a) does not include discovery of individuals or entities that are "functioning as the Plaintiff." However, the Court agrees with Defendant that a deposition of McNabola, as a non-party, is warranted in Ireland.² The crux of this litigation is Plaintiff's claim that Defendant, who had a long term net lease at 63 Wall Street, did not properly maintain or repair the building. Within a year of Defendant's surrender of the building, Millennium purchased the stock of Plaintiff, including the asset of this litigation. It is reasonable to assume that in connection with the purchase, Millennium would have investigated the value of the lawsuit at issue. It is also reasonable to assume, in the course of such an investigation, Millennium would have come in possession of documents or information related to the physical condition of the

²Under the circumstances of this case, the Court declines to order the deposition of McNabola in New York, in accordance with Grande Prairie Energy LLC. v Alstom Power, supra.

building, and Plaintiff's claim that Defendant failed to maintain or repair the building.

Contrary to Defendant's position, however, Defendant has not shown the relevancy of discovery concerning the scope and structure of the Millennium transaction and the reasons for it, whether tax related or otherwise. Nor has Defendant shown the relevancy of the profit that Plaintiff made or will make from the sale of the building (as opposed to discovery of that amount of the stock purchase price allocated to the lawsuit). Defendant argues that the profit Plaintiff has made or will make from the Millennium transaction (and whether the profits are shielded from tax liability), as well as the profit from the sale of interests the building are relevant to an offset of damages, because otherwise, Plaintiff would receive a windfall. However, Defendant cites no cases, nor lease provision, to support its position that the profit Plaintiff made or makes can be used to offset damages, if any, owed by Defendant for failure to maintain or repair the building. Defendant has not explained why it would be legally entitled to an offset, if, for instance, Plaintiff sold the building for an amount greater than the amount it paid for the building, or, if Plaintiff benefitted from tax savings mechanisms.

Although Plaintiff complains that the deposition of McNabola will delay the trial, any delay is the product of

Plaintiff's decision to sell all of its stock to Millennium,
while retaining the right to litigate this action.

Accordingly, it is hereby

ORDERED that the motion is granted to the extent that
Defendant should submit, on notice, proposed letters rogatory for
the deposition of McNabola in Ireland.

This Constitutes the Decision and Order of the Court.

Dated: October 15, 2007

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
OCT 22 2007
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