

DiCarlo Distribs., Inc. v Synergy Rest. Corp.

2007 NY Slip Op 33960(U)

December 4, 2007

Supreme Court, Suffolk County

Docket Number: 0019544/2004

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 19544/2004

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 DICARLO DISTRIBUTORS, INC.,

Plaintiff,

-against-

 SYNERGY RESTAURANT CORP. d/b/a
 MANDOLINO RESTAURANT & PIZZA,

Defendant.

ORIG. RETURN DATE: SEPTEMBER 17, 2007
 FINAL SUBMISSION DATE: SEPTEMBER 20, 2007
 MTN. SEQ. #: 008
 MOTION: MD

ORIG. RETURN DATE: OCTOBER 12, 2007
 FINAL SUBMISSION DATE: OCTOBER 18, 2007
 MTN. SEQ. #: 009
 MOTION: MG

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Upon the following papers numbered 1 to 10 read on these motions _____
TO QUASH SUBPOENA AND TO COMPEL

Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Memorandum of Law 6; Notice of Motion and supporting papers 7-10 it is,

ORDERED that this motion for an Order quashing a subpoena duces tecum, dated June 25, 2007, served upon DAVID FENSTERSTOCK, ESQ. of GROVER & FENSTERSTOCK, P.C., counsel for defendant in this action, relative to the enforcement of a money judgement entered in favor of plaintiff and against defendant on March 9, 2007, is hereby **DENIED**; and it is further

ORDERED that this motion by plaintiff for an Order, pursuant to CPLR 2308(b), compelling AVRAHAM GOLDBERG, ESQ. of GROVER & FENSTERSTOCK, P.C. to comply with an information subpoena, dated April 19, 2007, seeking responses to certain questions relating to the satisfaction of plaintiff's judgment, is hereby **GRANTED**. The Court has not received opposition to this application.

The above-referenced applications have been consolidated herein solely for the purpose of rendering the within decision and Order.

On March 2, 2007, this Court granted plaintiff a money judgment in the sum of \$257,975.91 against the defendant corporation. Thereafter, plaintiff began its enforcement efforts against defendant. On June 22, 2007, a deposition of RICHARD COHEN, a principal of defendant, was conducted in which Mr. Cohen testified that the defendant corporation was sold in 2005, and that DAVID FENSTERSTOCK, ESQ. of GROVER & FENSTERSTOCK, represented defendant in connection with the sale. Mr. Cohen further testified that Mr. Fensterstock was in possession of the transaction documents. As such, plaintiff served a subpoena duces tecum upon Mr. Fensterstock, dated June 25, 2007 and returnable July 16, 2007, which required that Mr. Fensterstock produce copies of the following: (1) all documents relating to the sale of defendant in 2005; (2) all bank statements relating to any monies held in escrow by Grover & Fensterstock with respect to the sale; (3) all corporate documents relating to defendant; (4) all agreements relating to defendant; (5) all bank statements relating to any monies received and currently being held by Grover & Fensterstock; (6) all of Grover & Fensterstock's ledgers relating to monies received and disbursed on behalf of defendant from 2003 to the present; and (7) copies of all of defendant's tax returns. Plaintiff alleges that Mr. Fensterstock failed to comply with the subpoena; instead, by letter dated July 24, 2007, counsel for Mr. Fensterstock advised that they would be making the instant motion to quash the subpoena.

In support of the instant motion to quash, Mr. Fensterstock argues that the subpoena is unreasonable in scope and an annoyance to Mr. Fensterstock in that plaintiff already has in its possession, or currently has access to, many of the documents sought. Further, Mr. Fensterstock argues that the financial records sought are protected from production by the attorney-client privilege and as attorney's work product. Finally, Mr. Fensterstock alerts the

Court that on July 18, 2007, a severe storm hit Grover & Fensterstock's storage facility damaging many of its case files, including files relating to the instant litigation. As such, Mr. Fensterstock alleges that some of the demands are impossible to comply with as many of the documents have been severely damaged or destroyed.

In opposition, plaintiff alleges that Mr. Fensterstock's application is procedurally defective in that Mr. Fensterstock did not first request that the subpoena be withdrawn or modified prior to the instant motion to quash (see CPLR 2304); that it is untimely as it was not "promptly" made, i.e., prior to the return date of the subpoena (see CPLR 2304); and that it fails to set forth grounds sufficient to quash the subpoena. Plaintiff alleges that Mr. Fensterstock has failed to demonstrate that the documents sought are "utterly irrelevant to any proper inquiry," the applicable standard for a motion to quash. For the reasons set forth hereinafter, this Court agrees.

CPLR 5223 compels disclosure of "all matter relevant to the satisfaction of the judgment" (CPLR 5223). A judgment creditor is entitled to discovery from either the judgment debtor or a third party in order "to determine whether the judgment debtor concealed any assets or transferred any assets so as to defraud the judgment creditor or improperly prevented the collection of the underlying judgment" (*Tech. Multi Sources v Stack Global Holdings, Inc.*, 2007 NY Slip Op 8062 [2d Dept 2007], quoting *Young v Torelli*, 135 AD2d 813 [1987]). CPLR 5240 provides the court with broad discretionary power to control and regulate the enforcement of a money judgment under article 52 to prevent "unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice" (*Paz v Long Is. R.R.*, 241 AD2d 486 [1997]; *Matter of Sanders v Manufacturers Hanover Trust Co.*, 229 AD2d 544 [1996]). Nonetheless, an application to quash a subpoena should be granted only "where the futility of the process to uncover anything legitimate is inevitable or obvious" . . . "or where the information sought is utterly irrelevant to any proper inquiry" (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327 [1988] [citations omitted]; see *Tech. Multi Sources v Stack Global Holdings, Inc.*, 2007 NY Slip Op 8062, *supra*; *Myrie v Shelley*, 237 AD2d 337 [1997]; *Ayubo v Eastman Kodak, Co.*, 158 AD2d 641 [1990]).

Attorneys owe fiduciary duties of both confidentiality and loyalty to their clients (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123 [1996]; *Solow v Grace & Co.*, 83 NY2d 303 [1994]). The Code of Professional Responsibility thus

imposes a continuing obligation on attorneys to protect their clients' confidences and secrets. Even after representation has concluded, a lawyer may not reveal information confided by a former client, or use such information to the disadvantage of the former client or the advantage of a third party (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, *supra*; Code of Professional Responsibility DR 4-101 [B] [22 NYCRR 1200.19 (b)]; *see also* Code of Professional Responsibility DR 5-108[A][2] [22 NYCRR 1200.27(a)(2)]).

New York's attorney-client privilege provides that unless a client waives the privilege, an attorney shall not disclose, or be allowed to disclose, a confidential communication made from client to attorney or attorney to client, provided they are made for the purpose of facilitating the rendition of legal advice or services (CPLR 4503[a]; *Rossi v Blue Cross and Blue Shield of Greater New York*, 73 NY2d 588 [1989]). However, the privilege does not immunize the underlying factual information that the client may have communicated to the attorney (*Spectrum Systems Int'l Corp. v Chemical Bank*, 78 NY2d 371 [1991]; *Miranda v Miranda*, 184 AD2d 286 [1992]). An attorney's work product is not obtainable during the discovery process (CPLR 3101[c]), but this exemption is limited to those materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his or her legal research, analysis, conclusions, legal theory or strategy (*Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190 [2005]; *Durio v MacKechnie*, 202 AD2d 667 [1994]; *Hoffman v Ro-San Manor*, 73 AD2d 207 [1980]).

Here, the Court finds that the demands by plaintiff in its subpoena to Mr. Fensterstock seek information which is material and relevant to the enforcement of its judgment. In addition, Mr. Fensterstock failed to make a showing that the information being sought was protected by the attorney-client privilege or the attorney work-product doctrine, as outlined above. Accordingly, this motion for an Order quashing the subpoena duces tecum, dated June 25, 2007, served upon Mr. Fensterstock, is **DENIED**. However, the Court finds that the following demands contained in the subpoena are overbroad and unduly burdensome, as they do not limit the demand to a definite period of time: demand number four which seeks all agreements relating to defendant; demand number five which seeks all bank statements relating to defendant; and demand number seven which seeks copies of all tax returns of defendant. As such, the Court hereby limits the time period of demands number four, five, and seven to the year 2003 to the present.

Turning to plaintiff's motion for an Order, pursuant to CPLR 2308(b), compelling AVRAHAM GOLDBERG, ESQ. of GROVER & FENSTERSTOCK, P.C. to comply with an information subpoena dated April 19, 2007, the Court notes that the questionnaire contained therein was drafted to seek information possessed by Grover & Fensterstock relating to the assets of defendant. In support of its application, plaintiff has submitted a copy of the subpoena, proof of service of said subpoena pursuant to CPLR 5224(a)(3), a copy of the judgment dated March 2, 2007 granted by this Court, and an affirmation of plaintiff's counsel detailing Mr. Goldberg's non-compliance with the subpoena. Moreover, neither Mr. Goldberg nor defendant has moved for an Order quashing the subpoena, and neither has filed opposition to plaintiff's instant motion. As such, this application is **GRANTED**. Mr. Goldberg shall respond to the information subpoena and written questions within twenty (20) days of service of a copy of this Order with notice of entry.

The foregoing constitutes the decision and Order of the Court.

Dated: December 4, 2007



HON. JOSEPH FARNETI
Acting Justice Supreme Court