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SHORT FORM ORDER mg,md,mg

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

BARNETT GUTHARTZ,

Plaintiff(s),

-against-

FIRST WALL STREET SECURITIES OF NEW YORK, INC.,

Defendant(s).

MOTION DATE: 12/20/07
INDEX No.:14567/07
MOTION SEQUENCE NO:1,2,3

CAL. NO.:

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-5
Notice of Motion.....	12-15
Notice of Cross Motion.....	16-19
Answering Affidavits.....	6-9,
Replying Affidavits.....	10,11,20,21 22-25

Upon the foregoing papers, it is ordered that this motion by plaintiff for an order pursuant to CPLR 2304 quashing the non-party subpoenas duces tecum is granted. Motion by plaintiff for an order pursuant to CPLR 3215 directing the entry of a default judgment is denied. Cross-motion by defendant for an order pursuant to CPLR 2004 and 3012(d) extending its time to answer is granted.

This action to recover a sum of money had and received is part of a larger family dispute arising from the administration of an estate. Plaintiff is the surviving spouse of Frieda Guthartz, who died intestate in Florida on November 14, 1998. At the time of Frieda's death, she was the owner of a home located at 16 Lake Road in Lake Success. Plaintiff's son Alan Guthartz and his wife Ona, who is ill, have been living in the Lake Success home for a number of years. According to Alan, plaintiff promised to convey the house to him after his mother's death. However, plaintiff has demanded that Alan and Ona vacate the premises. Because of extreme acrimony between Alan and his father, and questions as to their fitness to serve as fiduciaries, letters of temporary administration were issued to the Public Administrator with respect to the property(*In re Frieda Guthartz*, Surrogate's Court, Nassau County, No. 343312 [Sept 20, 2007]).

Alan is a director and the sole shareholder of defendant First Wall Street Securities of New York, Inc. In February 2004, plaintiff paid $16,455.07 to First Wall Street, allegedly for the purpose

of satisfying an outstanding tax lien on the Lake Success property. Plaintiff alleges that instead of paying off the tax lien, First Wall Street purchased the lien in its own name. Plaintiff claims that in August 2006 he was required to pay $23,037.10 to the Nassau County Treasurer to satisfy the lien, and that he has been damaged in the amount of the additional funds expended.

In August and September of 2004, plaintiff transferred $34,000 to First Wall Street. Plaintiff alleges that the funds were to be used for the purpose of installing a "vertical lift" in the house in Lake Success and that any excess funds were to be returned to plaintiff. Although the lift was installed, First Wall Street did not pay any money to the contractor who performed the work.

Finally, plaintiff alleges that over a period of several years, he advanced $10,000 to First Wall Street for the purpose of establishing an investment account for his benefit. Plaintiff alleges that First Wall Street has refused to account to him for the funds which were to be invested.

This action for money had and received was commenced by plaintiff on August 17, 2007. On August 29, 2007, service was effected upon defendant by delivering two copies of the summons and complaint to the Secretary of State. Pursuant to BCL § 306(b), service of process was complete when the Secretary of State was served. Thus, defendant's answer was required to be served within thirty days, or by September 28, 2007. On October 15, 2007, pursuant to CPLR § 3215(g)(4), counsel for plaintiff served an additional copy of the summons upon defendant by first class mail to the corporation's last known address. With the summons, counsel included a notice that service had been made pursuant to BCL § 306(b) (See CPLR § 3215(g)(4)[ii]).

On or about November 15, 2007, defendant served its answer along with certain discovery requests. Around the time that defendant served its answer, it mailed subpoenas duces tecum to the Internal Revenue Service, Bank of America, Wachovia Bank, Merrill Lynch, Metrobank, and Erskine & Fleisher, a law firm. The financial institutions and the law firm are all located in Florida. The subpoena served on the IRS was returnable before the court. The other subpoenas were returnable at the office of counsel for defendant. The subpoena addressed to the IRS sought tax returns and other documents pertaining to plaintiff; Frieda Guthartz; Janet Barry, who is plaintiff's daughter; and three Florida corporations, 4685 Haverhill, Inc., Park Centre West Corp., and Shining Star Ranch, Inc. Since counsel for plaintiff purports to represent the Florida corporations, they are presumably under plaintiff's control. However, Alan also appears to be a shareholder. The subpoenas served on the financial institutions sought financial records concerning plaintiff, Janet Barry, and the three corporations. The subpoenas served on the law firm sought documents relating to two law suits involving Park Centre West Corp. On November 19, 2007, plaintiff rejected defendant's answer and requests for discovery and demanded that the subpoenas be withdrawn.

On November 28, 2007, plaintiff moved pursuant to CPLR § 3215 for leave to enter a default judgment. On November 30, 2007, plaintiff moved by order to show cause pursuant to CPLR § 2304 to quash the subpoenas duces tecum. Plaintiff argues defendant was not authorized to serve subpoenas on entities located outside New York State. Plaintiff argues that the tax returns and other

documents sought from the IRS are confidential, the documents sought from the law firm are privileged, and the records of the financial institutions are irrelevant to the present action. Defendant cross-moves pursuant to CPLR § 3012(d) to extend its time to answer. CPLR § 3012(d) provides that upon application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default. Pursuant to this provision, the court has discretion to extend defendant's time to answer even though defendant is in default because the time to answer has already expired. The factors informing the court's discretion are the extent of the delay, the reasonableness of the excuse for the delay, evidence of meritorious defenses, evidence of willful default or intent to abandon any defenses, and public policy which favors the resolution of cases on the merits (*City Line Auto Mall, Inc. v. Citicorp Leasing Inc.*, 45 AD2d 716).

Defendant's answer was served six weeks late. However, defendant's attorney affirms that he was "engaged" to answer the complaint on November 15, 2007, the very day that the answer was served. Thus, there does not seem to have been a law office failure.

Defendant claims alternatively that the monies advanced by plaintiff were gifts to Alan and his wife, loans, or payments pursuant to contracts entered into by Frieda and guaranteed by plaintiff. As evidence to support the defenses of loan or guarantee payments, defendant submits a one page handwritten agreement in which Frieda promised to lend him $250,000 worth of bearer bonds by February 15, 1992. Although the agreement purports to be "guaranteed" by plaintiff, it is unclear whether he was standing as surety for the lender or the borrower in the transaction. Defendant submits another handwritten agreement in which Frieda promises to establish a $7 million line of credit in favor U.S. Funding Corp., presumably another company controlled by Alan. The agreement, which is undated, is also "guaranteed" by plaintiff. Finally, defendant submits a third handwritten agreement in which Frieda agrees to purchase 50,000 shares of U.S. Funding Corp. at a price of $9.25 per share. Payment for the stock was to be made over a 12 month period, commencing February 25, 1992. The stock purchase agreement was similarly "guaranteed" by the plaintiff. Defendant submits no evidence to support the defense of gift other than Alan's filial relation.

Where a parent and an adult child negotiate a contract at arm's length, it is legally enforceable(See *Chernow v. Chernow*, 39 AD3d 684). However, the contract may be voidable if the parent was subject to undue influence by the child(*Pacchiana v. Pacchiana*, 94 AD2d 721). The court notes that the contracts upon which defendant relies are remote in time to the advances upon which plaintiff sues. Nevertheless, a guarantee of future debts may exist for an unspecified duration, subject to unilateral revocation by the guarantor(*Delaware Funds, Inc. Zuckerman-Honickman, Inc.*, 43 AD2d 889). However, the court also notes that if the transfers by plaintiff represented loans, as opposed to payments pursuant to his guarantee, Alan would be under an obligation of repayment.

The court concludes that there is no evidence of willful default and a sufficient showing of merit has been made to entitle defendant to submit its answer. Accordingly, plaintiff's motion for

leave to enter a default judgment is denied. Defendant's motion to extend its time to answer is granted, and plaintiff is directed to accept defendant's answer as timely served as of November 15, 2007.

CPLR § 2304 provides that a motion to quash, fix conditions, or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it, and a motion to quash, fix conditions, or modify may thereafter be made in the Supreme Court(CPLR § 2304). Reasonable conditions may be imposed upon the granting or denial of a motion to quash or modify. The court deems counsel's letter of November 19, 2007 as a request to withdraw all of the subpoenas.

Supreme Court has the authority to enforce a subpoena duces tecum against a federal agency, such as the IRS(*Morgan v. Dell Publishing Co.*, 185 AD2d 876). However, a subpoena duces tecum to be served upon a governmental agency must be issued by the Supreme Court rather than an attorney for a party(CPLR § 2307). Thus, counsel for defendant did not have authority to issue a subpoena to the IRS. Accordingly, plaintiff's motion to quash the subpoena duces tecum directed to the IRS is granted.

With respect to the other non-party subpoenas, the court notes that CPLR 3120 no longer requires a motion in order to obtain document discovery from a non-party(Practice Commentary C3120:1). Thus, there is no longer any impropriety in making a subpoena duces tecum returnable at a law office rather than the court(See *Matthews v. McDonald*, 241 AD2d 808). However, a New York subpoena may not be served outside the state(Judiciary Law § 2-b; Practice Commentary C3120:12). Thus, counsel for defendant was not authorized to mail the subpoenas to the financial institutions or the law firm located in Florida. Accordingly, plaintiff's motion to quash is granted as to the subpoenas duces tecum issued to Bank of America, Wachovia Bank, Merrill Lynch, Metrobank, and Erskine & Fleisher.

Nevertheless, many of the documents requested from the IRS and the financial institutions may be within plaintiff's control by virtue of his ownership interest in the three Florida corporations. The quashing of the subpoenas is without prejudice to defendant's right to seek discovery of relevant documents pursuant to CPLR 3120. However, because of the acrimony between the parties noted by the Surrogate, this court will on its own initiative issue the following protective order regulating document discovery(CPLR § 3103[a]).

Given their confidential nature, tax returns are generally not discoverable in the absence of a strong showing that the information is indispensable to the claim and cannot be obtained from other sources(*Saratoga Harness Racing, Inc. v. Roemer*, 274 AD2d 887, 889). Nevertheless, because defendant has raised the defense of gift, it may seek discovery of gift tax returns filed by plaintiff, pertaining to gifts given to Alan Guthartz, for tax years 1997 to 2007. The profitability of the three Florida corporations is some evidence of plaintiff's ability to make gifts to Alan, albeit

many other factors will also be relevant to the issue of donative intent. Accordingly, defendant may seek discovery of the financial statements of the Florida corporations for fiscal years 1997 to date. The burden of proving that the attorney-client privilege applies rests with the party asserting the privilege(*Manufacturers and Traders Trust Co. v. Servotronics, Inc.*, 132 AD2d 392, 399). Nevertheless, because the law firm is located outside New York, and there is a danger of inadvertent violation of the privilege, defendant may not seek discovery from the Florida law firm, absent a stipulation of the parties or a further order from this court. This protective order is not intended to limit the parties' rights to discovery in any other forum.

While the non-party subpoenas were overbroad, they do not appear to have been issued for delay or to harass plaintiff. Because defendant has not engaged in frivolous conduct, plaintiff's motion for attorney's fees and expenses is denied(22 NYCRR § 130-1.1).

Dated: FEB 04 2008

J.S.C.