SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

STUART M. STEINBERG and HEATH S. BERGER,

Plaintiffs,

INDEX No. 6667/07

MOTION DATE: April 17, 2008
Motion Sequence # 003

-against-

JOSEPH L. DISALVO, MARY ANN DISALVO, OLVASID REALTY, LLC, MARBEE REALTY, LLC, LEECOLE CORP., STEWART TITLE INSURANCE COMPANY, STEWART TITLE GUARANTY COMPANY, VINCENT MARCHESE, FRANK RACANO and JOHN DOE DEFENDANTS "1" THROUGH "10",

Defendants.

The following papers read on this motion:

Order to Show Cause..... X
Affirmation in Opposition XX
Reply Affirmation..... XX
Sur-Reply Affirmation..... XX

This motion, by plaintiffs, brought on by order to show cause, for an order:

(a) Pursuant to CPLR §5251 and Jud. Law §753(a)(5), punishing

the defendants-judgment debtors, Joseph L. DiSalvo, Mary Ann DiSalvo, Olvasid Realty, LLC, Marbee Realty, LLC and Leecole Corp., for contempt of, violation of and non-compliance with subpoenas, served pursuant to CPLR5224, in that they failed to appear at the stated place, dates and times set in such subpoenas, for the taking of depositions upon oral questions, with the documents requested in accordance with said subpoenas, by fine, having to pay the costs of this motion, or imprisonment or both;

(b) Pursuant to CPLR §5251 and Jud. Law §753(a)(5), punishing the defendant, Frank Racano, for contempt of, violation of and non-compliance with a subpoena, served pursuant to CPLR R.5224, in that he failed to appear a the stated place, date and time set in such subpoena, for the taking of a deposition upon oral questions, with the documents requested in accordance with said subpoena, by fine, having to pay the costs of this motion, or imprisonment or both; and

(c) Granting such other and further relief as this Court may deem just and proper,

is determined as hereinafter set forth.

Procedurally, the defendants Joseph L. DiSalvo, Mary Ann DiSalvo, Olvasid Realty, LLC, Marbee Realty LLC and Leecole Corp. (hereinafter "DiSalvo defendants") have had a judgment in this action entered against them. The defendant Racano had previously been employed, as an attorney, by the plaintiffs' law firm for several years; and the DiSalvo defendants were clients of the plaintiffs' law firm and the defendant Racano. The defendants were served with subpoenas, ad testificandum and duces tecum, for oral testimony and production of documents. Each subpoena consists of the subpoena and a rider with 118 demands. The claims against the defendants Racano, Stewart Title Insurance Co., Stewart Title Guaranty Co. and Vincent Marchese have not yet been adjudicated.

The plaintiffs aver that the attorneys for the DiSalvo defendants have stated that their clients would not appear for a deposition, but a contempt motion would be

responded to, and the plaintiffs assert that such action has caused the plaintiffs to incur additional costs and disbursements. With respect to Mr. Racano, he also has refused to appear. The plaintiffs argue that these actions have prejudiced the plaintiffs in their search for assets to satisfy the judgment against the DiSalvo defendants, and those materials are necessary to said search.

The attorney for the DiSalvo defendants concedes that the judgment against his clients is undisputed, but argues that the plaintiffs' subpoena and document demands are unlimited in scope and time, irrelevant and are designed to harass the defendants. He avers that the subpoenas are defective, in that they fail to reasonably specify the demand, and that the liberal use of the phrase "any and all" makes the demands unreasonable and patently defective. He argues that the plaintiffs' status as judgment creditors does not grant them the right to expect compliance with overburdensome and harassing document demands; and that a prompt objection was made to plaintiffs' attorney, which included a note that the subpoenas failed to provided a time frame within which the relevant documents were to be produced.

The defendant Racano explains that he was employed by the plaintiffs' law firm from August 2002 until January 2007, worked under the plaintiffs during that time, and the DiSalvo defendants were clients of the firm during that time. He avers that when he was dismissed from the firm, he was asked to vacate his office immediately, and left all files, books and records concerning the DiSalvo defendants in the control of the firm, specifically the plaintiff Berger. He further avers that upon receipt of the subpoena, he advised Mr. Fineo, a partner in the law firm that any and all of the demanded documents were in the firm's possession, and that he (Racano) would invoke client confidentiality and/or attorney-client privilege in response to any queries regarding his representation of the DiSalvo defendants when he was an associate in the firm.

In reply to the DiSalvo defendants' opposition, counsel relates a series of actions by these defendants, which, he avers, shows a continuing intent to delay and frustrate the plaintiffs' efforts in prosecuting this action. Counsel asserts that no active opposition was made by the DiSalvo defendants for either a protective order or to quash the subpoenas. Counsel argues that the material sought is relevant and that the DiSalvo defendants have not attempted to comply with any part of the subpoena and not moved to quash or for a protective order. Another attorney for the plaintiffs responds to the defendant Racano's opposition by disputing that Racano's objection to the deposition appearance was due to the attorney-client privilege. Rather, his reason was a personal one and that he was

seeking an opinion letter from the bar association. He argues that no questions have been asked and the objection is premature; that the privilege is not a blanket one; and that he has information that shows evidence of a conspiracy to hide assets of the DiSalvo defendants. He also argues that other transactions occurred, while the DiSalvo defendants were clients of the firm and Mr. Racano was an associate, that did not involve the firm. Therefore, the firm has no knowledge of those transactions. He contends that Mr. Racano erased data from his computer's hard drive to hide files and records from the plaintiffs, and that such information is necessary to the enforcement of the judgment against the DiSalvo defendants.

The defendant Racano responds to the issue raised in opposition, that another real estate deal was pending in which Mr. Racano was holding escrow moneys, in that said deal was cancelled and the moneys were released back to the purchaser's attorney.

The DiSalvo defendants' attorney points out the hearsay bases for the plaintiffs' assertions; that the plaintiffs seek to depose the defendant Racano on unrelated issues; and that this process is harassment, not legal procedure.

DECISION

> "It is well settled that "[t]he supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed" (**Mattocks v White Motor Corp.**, 258 AD2d 628,629; see **Kaplan v Herbstein**, 175 AD2d 200)".

(**Gilman and Ciocia, Inc. v Walsh**, 45 AD3d 531, 845 NYS2d 124, 2nd Dept., 2007).

A general rule regarding disclosure is that pruning discovery demands is not looked upon favorably by the courts (see, **Villa v New York City Housing Authority**,

107 AD2d 619, 484 NYS2d 4, 1st Dept., 1985). The rider to the subject subpoenas seeks 118 items of information, a large percentage of which are not limited to either time or scope. A failure to limit, by time, may be overly broad or burdensome (see, **Keller v Nieves**, 178 AD2d 509, 577 NYS2d 434, 2nd Dept., 1991).

> "While the disclosure provisions of the CPLR are ordinarily to be construed liberally, "the scope of permissible discovery is not entirely unlimited and the trial court is invested with broad discretion to supervise discovery and to determined what is 'material and necessary' as that phrase is used in CPLR 3101(a)" (**NBT Bancorp v Fleet/Norstr Fin. Group**, 192 AD2d 1032, 1033)".

(**Auerbach v Klein**, 30 AD3d 451, 816 NYS2d 376, 2nd Dept., 2006). Such extensive demands, without substantiation, are overly broad and burdensome. Accordingly, the request for an order holding the subpoenaed parties in contempt is **denied**.

With respect to the defendant Racano, the plaintiffs have not satisfied the three prong test promulgated by the Eighth Circuit Court of Appeals in **Shelton v American Motors Corp.** (805 F2d 1323, 1986). While Mr. Racano is not trial counsel, his status as the DiSalvo defendants' counsel is sufficient to categorize him as one who may possess privileged material or communications is sufficient. Accordingly, for this additional reason, the plaintiffs application is **denied**.

Dated JUN 16 2008

Stephen A. Bucaria J.S.C.