Matter of Crescente

2009 NY Slip Op 30076(U)

January 6, 2009

Supreme Court, New York County

Docket Number: 100797/08

Judge: Doris Ling-Cohan

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SCANNED ON 1/16/2009

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

PRESENT: JUSTICE DORIS LING-COHAN PART 36
Justice

In the matter of Crescent, et al
- v -
BLACK LEON

INDEX NO. 100797/08
MOTION DATE 001
MOTION SEQ. NO. ~~100797/08~~
MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to/for Quash Subpoena

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3, 4
Answering Affidavits — Exhibits	5
Replying Affidavits (memo	6

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the attached memorandum decision.

(Consolidated for disposition with motion Seq No 002, 003 & 004)

FILED
JAN 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/16/09

J.S.C.
JUSTICE DORIS LING-COHAN

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: I.A.S. PART 36

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In the Matter of the Application of Plaintiffs Mary Crescente et al. for an Order, pursuant to CPLR 3102 (e), Directing Service of a Subpoena Upon LEON BLACK, DAVID I. FOLEY, HENRY KRAVIS, MARC. S. LIPSCHULTZ, MICHAEL G. MACDOUGALL, STEPHEN A. SCHWARZMAN and AARON J. STONE for Oral and Videotaped Depositions as ordered by Letters Rogatory and Commissions issued by the Court Appointed Special Master in the Harris County District Court, Texas action styled *Mary Crescente v. Kinder Morgan, Inc., et al.*, Cause No. 2006-33011.

Index No.: 100797/08

Motion Seq. No.: 001, 002 003 & 004

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LING-COHAN, J.:

Motions sequence numbers 001, 002, 003 and 004 have been consolidated for disposition. In this case, plaintiffs, via subpoenas issued in accordance with CPLR 3102 (e), seek to take the depositions of non-parties Leon Black, Aaron J. Stone, Stephen A. Schwarzman, David I. Foley, Henry Kravis, Marc S. Lipschultz, and Michael G. MacDougall in connection with litigation pending in Texas and Kansas. The litigation in Texas and Kansas challenges the fairness of a management-led buyout of Kinder Morgan, Inc. Oral and videotaped depositions were ordered by letters rogatory and commissions issued by a court-appointed special master in the Texas action captioned *Crescente v Kinder Morgan, Inc. et al.*, Cause No. 2006-33011 (164th Judicial District Court, Harris Co., Texas) and in a Kansas action captioned *In re Kinder Morgan Inc. Shareholders Litig.*, Case No. 06 C 801 (Shawnee Co., Kansas, Division 12). On February 6, 2008, an order was filed pursuant to CPLR 3102 (e) in New York County Supreme Court, by the Honorable John E. Stackhouse, directing that the depositions of the non-parties take place in March of 2008.

The non-parties Leon Black, Aaron J. Stone, Stephen A. Schwarzman, David I. Foley,

Henry Kravis, Marc S. Lipschultz, and Michael MacDougall move pursuant to CPLR 2304 and 3103 (a), for an order quashing the subpoenas for depositions. Stephen A. Schwarzman, David I. Foley, Henry Kravis, Marc S. Lipschultz, and Michael MacDougall also move for protective orders directing that the depositions do not take place.

FACTUAL ALLEGATIONS

Kinder Morgan, Inc. (KMI) is an energy pipeline transporter and terminal operator. On May 29, 2006, KMI announced that it had received a management-led offer to acquire all of KMI's outstanding stock for $100 per share. The management-led investment group included Goldman Sachs Capital Partners (Goldman Sachs); American International Group, Inc.; The Carlyle Group; Riverstone Holdings, LLC; Richard Kinder, chief executive officer of KMI; and KMI directors and members of senior management including Park Sharper and David Kinder. As a result of the offer, KMI formed an independent committee to evaluate the fairness of the transaction and to solicit other offers of interest. After soliciting competing bids from potential bidders and conducting negotiations with the investors, KMI announced on August 28, 2006, that its board of directors had approved an agreement and plan of merger under which the investment group would acquire KMI for an increased price of $107.50 per share.

Just prior to KMI's announcement that it had received the offer, meetings were held in New York City in May of 2006, in which representatives of Goldman Sachs, Richard Kinder, Park Sharper and David Kinder met with representatives of potential financial sponsors regarding the acquisition of KMI via a management-led buyout.

In August of 2006, shareholders of KMI filed lawsuits in state court in both Texas and Kansas. In these actions, plaintiffs allege that KMI's directors as well as its officers breached

their fiduciary duties by approving the management-led buyout of KMI at a low price which was unfair to KMI's shareholders, and that the private equity investors that participated in the buyout aided and abetted a breach of fiduciary duty.

Plaintiffs filed a motion for a preliminary injunction enjoining the buyout which was denied on December 18, 2006. Prior to the denial of this motion, plaintiffs took depositions of numerous party witnesses, including at least four individuals who attended May 23, 2006 meetings in New York City between representatives of KMI and private equity firms which were considering participating in the buyout of KMI. Those witnesses were Richard Kinder, Park Sharper, David Kinder, and a representative of Goldman Sachs. Plaintiffs now seek the depositions of seven non-parties to obtain testimony concerning these meetings.

I. SEQUENCE 001

In sequence 001, Leon Black (Black) and Aaron J. Stone (Stone), move jointly to quash plaintiffs' subpoena for their depositions. Black is the chairman, chief executive officer and director of Apollo Global Management, LLC (Apollo), an alternative asset management firm. Stone is a partner of Apollo.

On May 23, 2006, Stone attended a meeting with KMI representatives in New York City regarding a potential acquisition of KMI. Stone maintains that also in attendance at the meeting were representatives from KMI, Goldman Sachs, American International Group, Inc., Texas Pacific Group, Kholberg Kravis Roberts & Co., and The Blackstone Group. (Stone Aff., ¶ 5). Although Black did not attend that meeting, he attended a later meeting at Goldman Sachs which also took place on May 23, 2006. Shortly after the meetings took place, Apollo declined to participate in the transaction.

After commencing litigation regarding the buyout, on September 26, 2007, plaintiffs subpoenaed documents from Apollo concerning information it received from the investor group and Apollo's analysis of the potential buyout. In response, Apollo maintains that it produced more than 3,000 pages of documents concerning its six-day consideration of a transaction with KMI.

On February 11, 2008, plaintiffs served subpoenas on Black and Stone seeking testimony with respect to the meetings which they attended on May 23, 2006. Black and Stone contend that plaintiffs cannot show that their involvement was significant enough to justify the burden of taking two depositions; that plaintiffs fail to specify the reasons such disclosure is sought; that plaintiffs have not pointed to evidence to suggest that Black and Stone could offer relevant testimony which would add or differ from the party testimony; and that testimony of Black should not be allowed due to his high level position as chief executive officer and head of Apollo.

II. SEQUENCE 002

In sequence 002, Stephen A. Schwarzman (Schwarzman), the chairman and chief executive officer of The Blackstone Group L.P. (Blackstone), a global alternative asset manager, and David Foley (Foley), senior managing director of Blackstone, move jointly to quash the subpoenas seeking their depositions and for protective orders. Plaintiffs served a document subpoena on Blackstone as well as a request for depositions regarding the KMI buyout and their attendance at the May 23, 2006 meetings.

Schwarzman and Foley contend that the deposition subpoenas should be quashed, as four witnesses have already provided deposition testimony, that the requested depositions are not material or necessary, since plaintiffs made no mention of the May 23, 2006 meetings in their

complaint, nor is there a connection between those meetings or the private equity firms that attended and the breach of fiduciary duty claims. Schwarzman and Foley argue that the depositions are burdensome as Blackstone did not participate in the transaction and that plaintiffs have not demonstrated that Schwarzman has unique knowledge which cannot be obtained through other sources.

Schwarzman and Foley further maintain that on December 28, 2007, plaintiffs' counsel filed a class action antitrust lawsuit in federal court in Massachusetts against private equity firms, including Blackstone, alleging a conspiracy to fix prices and allocate participation in several leveraged buyouts, including the KMI buyout. Schwarzman and Foley argue that the plaintiffs should not be permitted to take discovery of non-parties where its real purpose is for possible use in another case in which the non-parties employer is defendant.

III. SEQUENCE 003

In sequence 003, non-parties Henry R. Kravis (Kravis) and Marc S. Lipschultz (Lipschultz) move jointly to quash the deposition subpoenas issued by plaintiffs and for protective orders. Kravis is the co-founder of Kholberg, Kravis & Roberts & Co. LP (KKR), a private equity firm, and Lipschultz, is a senior executive and member.

On May 23, 2006, Lipschultz attended a meeting concerning the buyout of KMI which lasted about three hours at Goldman Sachs's offices and a second "break-out meeting" which lasted for one and a half hours which Kravis also attended. Subsequently, KKR decided not to participate in the KMI transaction, as it deemed the purchase price to be too high. On February 7, 2008, plaintiffs served subpoenas on Kravis and Lipschultz. Kravis and Lipschultz contend that the depositions are burdensome, that they are duplicative and unnecessary, that the subpoenas

provide no notice or explanation as to the circumstances or necessity of such depositions, and that Kravis and Lipschultz are both high level corporate officials who should not be subject to the depositions.

IV. SEQUENCE 004

In sequence 004, non-party Michael G. MacDougall (MacDougall), a partner of TGP Capital, LP (TGP), moves to quash the subpoena served on him and for a protective order directing that the deposition not take place. On May 23, 2006, MacDougall attended a meeting at Goldman Sachs regarding a buyout of KMI. Following the May 23, 2006 meeting, TGP declined to participate in the buyout because it believed the proposed purchase price was too high. MacDougall was subsequently served with a subpoena on February 7, 2008. Plaintiffs have also commenced an action in California state court to compel the testimony of James G. Coulter, another TGP executive.

MacDougall contends that plaintiffs have not met their burden of justifying the deposition and that even if plaintiffs could articulate some information to which they are entitled, party discovery must first be completed. MacDougall argues that he has no material or necessary testimony to provide; that the information which plaintiffs seek has already been provided by numerous party defendants; that the subpoena is facially defective as it fails to state the circumstances or reasons why disclosure is sought; and that any information plaintiffs could obtain from MacDougall would be cumulative and duplicative of what is available in party discovery. MacDougall also states that TGP is not mentioned in any allegations in the KMI complaints.

DISCUSSION

The scope as to disclosure of a non-party is governed by CPLR 3101 which provides full disclosure of all evidence "material and necessary." *See* CPLR 3101. The Court of Appeals has held that "[t]he words, 'material and necessary', are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 (1968).

Here, plaintiffs seek the depositions of the non-parties pursuant to CPLR 3102 (e) in connection with the litigation pending in Texas state court. CPLR 3102 (e) states:

> [w]hen under any mandate, writ or commission issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement, it is required to take the testimony of a witness in the state, he may be compelled to appear and testify in the same manner and by the same process as may be employed for the purpose of taking testimony in actions pending in the state. The supreme court or a county court shall make any appropriate order in aid of taking such a deposition.

The First Department examined what factors it should consider regarding objections to the decisions of out of state commissions in *Matter of Ayliffe & Cos.*, (166 AD2d 223 [1st Dept 1990]). There, the court held:

> [t]he court's inquiry with respect to objections raised by persons required to testify pursuant to CPLR 3102 (e) is limited to determining (1) whether the witnesses' fundamental rights are preserved; (2) whether the scope of inquiry falls within the issues of the pending out-of-State action; and (3) whether the examination is fair. The courts will not prejudge the materiality or the competency of the evidence in a cause pending in another jurisdiction and will afford the widest possible latitude in the conduct of such examinations.

Id. at 224 (citations and internal quotations omitted).

Here, Justice Walsh, a special master who was provided with the power to resolve any

discovery disputes by the Texas state court, authorized all seven non-party subpoenas and stated that the testimony from each individual was "discoverable" and "potentially relevant." Although the non-parties contend that plaintiffs have not satisfied the requirements for obtaining non-party discovery under New York law, as they provide no notice or explanation as to the circumstances or reasons why plaintiffs need the depositions, both the subpoenas and Judge Stackhouse's order pursuant to CPLR 3102 (e) explain that the subpoenas concern the meetings of May 21-23, 2008. Judge Stackhouse's order which was to be served with the subpoenas states:

> [t]hese depositions are authorized by the court appointed Special Master in the Harris County District Court, Texas action styled *Mary Crescente v Kinder Morgan, Inc., et al.*, Cause No. 2006-33011, and are with regards to the meetings held in New York City on May 21, 2006 through May 23, 2006, where representatives of Goldman Sachs Capital Partners, Richard Kinder, Park Shaper and David Kinder met with representatives of potential financial sponsors regarding a potential acquisition.

(Polovoy Affirm., ex. C). Therefore, as the non-parties had notice of the scope of the depositions, their argument that they did not know the circumstances or reasons as to why disclosure is sought is without merit.

As there is no dispute that the non-parties were in attendance at the meetings which discussed the buyout of KMI, and as the information which is sought is relevant as it relates to the information communicated to the companies regarding the transaction, the depositions should be permitted to proceed. Although the non-parties maintain that the depositions of the defendants have taken place, plaintiffs should be entitled to discovery from individuals that were present at the meeting that do not have an interest in the litigation. "A showing that a nonparty witness has information or knowledge of facts needed by a party to prepare fully for a trial is an adequate ground to require disclosure from the nonparty witness." *Desai v Blue Shield of Northeastern*

New York, Inc., 128 AD2d 1021, 1022 (3d Dept 1987); see also *Desideri v Brown*, 184 AD2d 247 (1st Dept 1992) (holding that a nonparty witness with knowledge of facts should be subjected to a deposition). Here, the non-party depositions could offer insight as to what occurred and what information was presented at the May 23, 2006 meetings beyond what has been already presented by the defendants. Therefore, such information should be made available to the plaintiffs.

Although the non-parties contend that having two individuals from each company testify could result in the disclosure of duplicative information, such argument should be made to the court which made the initial determination as the First Department has held that:

> "[t]he courts will not prejudge the materiality or the competency of the evidence in a cause pending in another jurisdiction and will afford the widest possible latitude in the conduct of such examinations . . . [a]ccordingly, appellant's arguments respecting the necessity for or duplicity of such testimony would be more appropriately addressed to the . . . court which made such determination."

Matter of Ayliffe, 166 AD2d at 224. Furthermore, in *Matter of Raquel Welch,* (183 Misc 2d 890 [Sup Ct, New York County, 2000]), the Supreme Court of New York County followed the holding of *Ayliffe* and held "[i]t is appropriate for the sister State court which has the underlying case, and is therefore in a better position to determine the appropriate scope of disclosure, to make the threshold determination as whether to permit discovery. The New York court's role is necessarily more limited." *Id.* at 891.

The non-parties also contend that they did not have an opportunity to appear before Justice Walsh prior to the subpoenas being issued and that this court has no basis to find that Justice Walsh was apprised of the relevant facts regarding the non-parties prior to issuing the subpoenas. Although the court notes these arguments, the non-parties have not moved to vacate the

commissions of Justice Walsh in the Texas or Kansas courts where the litigation is pending.

The non-parties also argue that as Black, Schwarzman, Kravis, and Lipschultz are high-level corporate officials, plaintiffs are prohibited from taking the depositions, as the information is obtainable from other sources. The First Department has held that where information is available from other witnesses, heads of a corporation do not have to be deposed. *See Nauka v Plenum Publ. Corp.*, 266 AD2d 157 (1st Dept 1999) (holding that the court was proper when it vacated the notices to take depositions of a president and three directors as the information sought was obtainable from other deponents). Here, however, the information sought cannot be obtained from other individuals as the information is specific to those individuals that attended the May 23, 2006 meeting. Therefore, the non-parties' argument that they are not obligated to testify due to their high level positions, would be inapplicable to the present situation, as the information cannot be obtained from other employees. Further, such argument should properly be made before the initial determining court.

Plaintiffs maintain that the depositions will not be burdensome to the non-parties, that the location of the depositions will be conveniently located for all of the non-parties and that each deposition will last no more than two hours. Furthermore, the topic of the depositions is narrow as it will solely involve the meeting each individual attended. Therefore, plaintiffs claim that any burden on the non-parties will be minimal.

The First Department has held that "[a] subpoena will be quashed . . . where the material requested is utterly irrelevant to any proper inquiry." *General Electric Co. v Rabin*, 184 AD2d 391, 392 (1st Dept 1992). Here, as the testimony which plaintiffs seek to obtain from the non-parties is relevant to the underlying action as it will potentially discuss the non-parties

observations from the May 23, 2006 KMI buyout meetings, and as the testimony can only be provided by those individuals that attended the meetings, the non-parties' motions to quash the subpoenas and for protective orders, must be denied.

Finally, although Schwarzman and Foley speculate that their depositions are being utilized to gather information for a class action antitrust lawsuit which is taking place in federal court in Massachusetts, neither Schwarzman, nor Foley point to any specific information which proves that this is the reason for the subject depositions.

CONCLUSION AND ORDER

Accordingly, it is

ORDERED that the motion to quash the subpoenas of Leon Black and Aaron J. Stone (motion sequence 001) is denied; and it is further

ORDERED that the motion to quash the subpoenas of Stephen A. Schwarzman and David Foley and for a protective order (motion sequence 002) is denied; and it is further

ORDERED that the motion to quash the subpoenas of Henry Kravis and Marc S. Lipschultz and for a protective order (motion sequence 003) is denied; and it is further

ORDERED that the motion to quash the subpoena of Michael G. MacDougall and for a protective order (motion sequence 004) is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy upon all parties and movants, with notice of entry.

Dated: January 6, 2009

Hon. Doris Ling-Cohan, J.S.C.

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