

**Matter of Romic Env'tl. Tech. Corp.
v Laurus Capital Mgt. LLC**

2009 NY Slip Op 30107(U)

January 15, 2009

Supreme Court, New York County

Docket Number: 113289/08

Judge: Eileen A. Rakower

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

PRESENT: EILEEN A. RAKOWER
Eileen A. Rakower
J.S.C.
Justice

PART 5

Atomic Environmental
- v -
TECHNOLOGIES

INDEX NO. 113289/08
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1
2, 3, 4, 5

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JAN 21 2009

COUNTY CLERK'S OFFICE
NEW YORK

RECORDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 1/15/09
[Signature]
EILEEN A. RAKOWER

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
IN THE MATTER OF ROMIC ENVIRONMENTAL
TECHNOLOGIES CORP.:

Petitioner

For an order for the taking of the deposition
and the production of documents by
Laurus Capital Management LLC
pursuant to CPLR 3102(e),

Index No.
113289/08

Respondent,

-against-

FILED
JAN 21 2009

Mot. Seq. 001
Mot. Seq. 002
Decision/Order

for use in an action pending in the Superior
Court of the State of California, County of
Los Angeles entitled Romic Environmental
Technologies Corp. v. General Environmental
Management Corp. et. al.

COUNTY CLERK'S OFFICE
NEW YORK

-----X
HON. EILEEN A. RAKOWER:

Petitioner, Romic Environmental Technologies Corp. ("Romic") brings this petition by Order to Show Cause, seeking an order, pursuant to CPLR §3102(e), compelling respondent, Laurus Capital Management, LLC ("Laurus"), an out-of-State-non-party witness, to produce documents requested in the subpoena served upon it and to produce a representative to be deposed. Romic seeks this discovery for use in an action pending in the Superior Court of California, County of Los Angeles (the "California action"). Laurus opposes the motion and moves for a protective order pursuant to CPLR §3103.

Romic, in support of its motion, submits: (1) two affirmations in support of the motion to compel; (2) a copy of the complaint; (3) documents in the underlying case (4) a copy of the California order granting plaintiff's motion to compel; (5) copies of orders granting extensions in the underlying case; (6) the September 26, 2008

California commission authorizing Romic to seek discovery from Laurus (7) Romic's notice of deposition to Laurus (with exhibits attached, including the October 1, 2008 New York State Supreme Court order, directing Laurus to produce the documents and a witness for deposition); (8) a copy of GEM's SEC filing disclosing details of the underlying California action; (9) an October 21, 2008 letter from Laurus' counsel to Romic's; (10) a copy of Laurus' notice of motion for protective order (with attachments); (11) a copy of Laurus October 23, 2008 memorandum of law in support of its motion for a protective order; and (12) correspondence between Romic's and Laurus' counsel concerning this discovery dispute.

Laurus, in support of its motion for a protective order, submits: (1) two affirmations of counsel; (2) documents from the underlying California action including: (a) the complaint; (b) a record from the post-mediation status conference in the California action, (c) GEM's motion to extend the trial date (and memorandum in support thereof); (d) a July 24, 2008 stipulation between Romic and defendants extending the trial date; (e) a September 16, 2008 order granting continuance of the trial; (f) Romic's attorney affirmation in support of its *ex parte* application (for judicial subpoena ad testificandum and *duces tecum* pursuant to out of state commissions); (g) the California court's September 26, 2008 order granting the subpoena request (along with a copy of Judge Bransten's October 1, 2008 order).

Laurus argues that Romic's document requests are impermissibly overbroad and burdensome in two ways. First, Laurus asserts that the document requests encompass material unrelated to the underlying case. Second, Laurus challenges Romic's two and a half year time frame, claiming that the only relevant documents Laurus could provide would be from April 2007 through June of 2007. In the alternative, Laurus argues that the court should limit the discovery to either (1) documents from April 2007 to June 2007 relating to GEM's potential acquisition of Romic; or (2) Laurus Capital's internal documents regarding GEM's acquisition of Romic that may not be available through discovery from a party to the underlying litigation.

The relevant facts and circumstances of the underlying case are as follows. Romic provided waste management and recycling services to commercial clients throughout California and the Western United States. On June 7, 2007, defendant General Environmental Management Corp. ("GEM") submitted a bid to purchase Romic's assets. GEM then withdrew its purchase offer on June 15, 2007 (after Romic received and accepted a purchase offer from another company, Clean Harbors). Romic alleges that GEM then attempted to undermine Romic's sale to Clean Harbors

through illegal tactics. Specifically, Romic contends that GEM used the access it had obtained to Romic's data to examine confidential information regarding Romic's employment agreements with key personnel, and that it then induced four of Romic's five senior managers, individual defendants Namki Yi, Gary Bowling, Betty McKee, Mindy Rath and Chris Walker, to breach their agreements by leaving Romic and joining GEM.¹ Romic also claims that, the individual defendants "...provided GEM with a detailed business plan explaining how they would capitalize upon their established business relationships (including Romic's customers) after they joined GEM..." and that this business plan included *pro forma* financials setting forth the revenue GEM could expect after the individual defendants joined GEM.

Romic sought discovery from GEM and the individual defendants in the California action but received no response to its initial discovery requests. On January 14, 2008, Romic brought a motion to compel, which the California court granted, ordering GEM to respond to the discovery requests and sanctioning GEM with a fine for its earlier failure to respond. GEM then produced over 300 pages of documents. In July of 2008, the parties reached a voluntary resolution of their remaining discovery disputes, but discovery issues again arose during depositions, which began in mid-September 2008. Defendants or their witnesses cancelled numerous depositions, and, based on the depositions taken, Romic determined that GEM had failed to search for certain evidence and that other evidence had been deleted. Romic alleges that GEM and the individual defendants may have destroyed evidence, and, as a supporting example, refers to an e-mail that its forensic expert identified as having been deleted from one of the individual defendant's computer.²

On September 26, 2008, Romic obtained a commission from the California trial court for a subpoena to obtain documents and testimony from Laurus, a financial services company involved in financing on behalf of GEM for the proposed

¹ On June 22, 2007 Yi, Bowling, McKee and Rath resigned their positions with Romic and accepted employment with GEM. One document at issue in the underlying case is a business plan allegedly completed on or about May 25, 2007, authored by Yi and circulated among all defendants. The document proposed, among other things, specific positions at GEM the individual defendants could be hired to fill.

² Romic's forensic expert obtained fragments of the email from that defendant's computer, but stated that neither GEM nor any of the recipient defendants produced copies of the deleted e-mail at or before depositions.

transaction between GEM and Romic³ Then, on October 1, 2008, Romic obtained a New York court order, in which Justice Bransten directed Laurus to produce discovery including deposition testimony and documents requested in Romic's subpoena. On October 3, 2008, pursuant to Justice Bransten's order, Romic served a subpoena on Laurus. In addition to deposition testimony, Romic requested eight categories of documents, many of which were identical to requests previously served on GEM. Before reaching the production and deposition deadlines set forth in Justice Bransten's order, Laurus moved for a protective order.

CPLR §3101(4) provides that disclosure may be sought from non-parties "...upon notice stating the circumstances or reasons such disclosure is sought or required. The scope of disclosure under CPLR 3101(a) is "...all evidence material and necessary in the prosecution or defense of an action." (*New York County DES Litigation v. Eli Lilly and Company* 575 N.Y.S.2d 19,22 [1st Dept. 1991].) "While materiality and necessity obviously place some limits on the scope of disclosure, disclosure should be permitted as long as the information sought bears on the controversy and will assist in the preparation for trial; the ultimate test is one of 'usefulness and reason.'" (*Id.* at 22). Noting that CPLR§3101(a) generally favors liberal disclosure to adequately prepare for trial, the First Department has held that the ability to obtain non-party discovery requires no special circumstances and that "the showing needed under CPLR 3101(a)(4) 'is truly a nominal one.'" (*BAll Banking Corporations v. Northville Industries Corp.*, 612 N.Y.S.2d 141, 142 [1st Dept 1994]; *See also Schroder v. Consolidated Edison*, 670 N.Y.S.2d 856 [1st Dept 1998].)

CPLR 3103(a) states in pertinent part:

...The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

³ Had the transaction between GEM and Romic occurred, Laurus would have provided the financing. Laurus contends that its contact with Romic was limited to accessing Romic's data room to review Romic's financials and that Romic mischaracterizes its relationship with GEM by claiming that Laurus is a major GEM shareholder when Laurus instead holds unconverted options to purchase GEM shares.

CPLR §3103 provides “for a protective order that can be used to limit, condition or regulate the disclosure device used.” (*Velez v. Hunts Point Multi-Service Center*, 811 N.Y.S.2d 5, 9 [1st Dept. 2006].) “The determination as to the terms and provisions of discovery as regulated to prevent abuse by protective orders under CPLR 3103...rests in the sound discretion of the court to which application is made, subject to review by the intermediate appellate court...,” and the Appellate Division “will not disturb the determinations made by that court in the absence of a demonstration that as a matter of law there has been an abuse of discretion.” (*U.S. Pioneer Electronics v. Nikko Electric Corp of America* 419 N.Y.S.2d 484, 485 [Court of Appeals 1979].)

CPLR §3102(e) provides:

Action pending in another jurisdiction. When under any mandate, writ or commission issued out of any court of record in any other state,...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.

Pursuant to CPLR 3102(e), “...a New York court can order the testimony of a witness or compel the production of documents in aid of an action pending outside the state.” (*Trump v. Sulzberger* 2008 WL 4126910, *2 [N.Y. Sup. Ct. 2008]). The First Department has held that “[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. (*Ayliffe v. Canadian Universal* 166 A.D.2d 223, 224 [First Dept. 1990] See also *Kirkland & Ellis v. Chadbourne & Parke*, 176 Misc.2d 73 at 76 [N.Y. Sup. Ct. 1998]; and *Matter of Raquel Welch* 183 Misc.2d 890, 892 [Sup. Ct. N.Y. Cty. 2000]). The court, in *Ayliffe* further notes 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’.” (*Id.* At 224, citing *Matter of Roberts* 214 A.D. 271, 275 [First Dept. 1925]). Additionally, the court in *Trump* instructs that it 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 to whether to permit the discovery. (*Trump* at *2; *See also, Welch* at 891).

Here, Romic’s discovery requests have already been reviewed by both the California court authorizing the commission and again by Justice Bransten, who ordered on or about October 1, 2008, the production of documents and directed Laurus to produce a person authorized to give testimony on October 27, 2008. The order states that, “...upon reading the [attorney’s affirmation] and exhibits attached thereto, together with the commissions...” that the taking of testimony and production of documents appeared “necessary and proper.”

Wherefore it is hereby

ORDERED that petitioner’s motion to compel is granted; and it is further

ORDERED that Laurus Capital Management LLC’s motion for a protective order is denied; and it is further

ORDERED that Laurus Capital Management LLC is directed to produce the documents previously ordered in Justice Bransten’s October 1, 2008 decision, or to provide an affidavit stating that they do not exist, within 45 DAYS of service of a copy of this order with notice of entry, and it is further

ORDERED that Laurus Capital Management LLC is directed to send a representative to appear for deposition, at the offices of Allegaert Berger & Vogel LLP, 111 Broadway, 20th Floor, New York, New York 10006 at a date to be agreed to by the parties but no later than March 30, 2009.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: January 15, 2009

FILED

EILEEN A. RAKOWER, J.S.C.

JAN 21 2009

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NEW YORK