

Mikhailov v Liberty Publ. House Inc.

2009 NY Slip Op 30312(U)

February 9, 2009

Supreme Court, New York County

Docket Number: 118794/06

Judge: Edward H. Lehner

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

PRESENT: Edward H. Lehner
Justice

PART 19

Mikhailov

INDEX NO. 118794/06

- v -

MOTION DATE _____

Liberty Publishing

MOTION SEQ. NO. 06

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM

FILED

FEB 13 2009

COUNTY CLERK'S OFFICE
NEW YORK

FEB 09 2009

Dated: _____

J.S.C.

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: PART 19

-----X

ZINAIDA MIKHAILOV,

Plaintiff,

Index No.: 118794/06

-against-

LIBERTY PUBLISHING HOUSE INC. and
ILYA LEVKOV,

Defendants.

-----X

EDWARD H. LEHNER, J.:

Defendants Ilya Levkov (Levkov) and Liberty Publishing House, Inc. (Liberty Publishing), move, pursuant to CPLR 3103, for a protective order with respect to interrogatories and a demand for documents propounded by plaintiff Zinaida Mikhailov. Defendants argue that several of the interrogatories and document requests are overbroad, irrelevant to the facts of this case, or are beyond the scope of discovery.

Plaintiff contends that both the interrogatories and document demand are relevant to this litigation, and that defendants fail to meet their burden in proving the need for a protective order.

FACTUAL ALLEGATIONS

Plaintiff is the author of a three-volume literary work entitled "From Terek To Hudson." Plaintiff alleges that defendant Levkov is the director, officer and shareholder of co-defendant Liberty Publishing. Plaintiff maintains that on or before February of 2006, she tendered to defendants \$34,000 in cash in exchange for defendants' reading, editing, layout, design and printing of 3,000 three-volume sets. Defendants maintain that despite attempts made to memorialize the agreement in writing, plaintiff refused to sign a contract.

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NEW YORK

Plaintiff contends that upon reviewing some of the completed volumes, she concluded that defendants were negligent in their work and acted without her consultation or approval. Furthermore, plaintiff alleges that, although defendants delivered twenty samples of the volumes, they refused to deliver the balance of the volumes despite plaintiff's verbal and written demands.

On December 19, 2006, plaintiff filed a complaint against Liberty Publishing and Levkov alleging eight causes of action. Plaintiff maintains that defendants have been unjustly enriched, demands judgment against defendants for specific performance, an accounting and money damages for defendants' negligent work and actions. Plaintiff also demands judgment against defendants declaring all intellectual property rights associated with the literary work as plaintiff's sole property and alleges that defendants have committed extortion, fraud and blackmail by withholding the paid volumes.

Plaintiff also seeks to pierce the corporate veil of Liberty Publishing. She alleges that Liberty Publishing was undercapitalized with the intent of avoiding obligations which arose as a result of its operations, that Levkov drained income out of Liberty Publishing, and that he insisted on and received cash payments for his work. Plaintiff maintains that Liberty Publishing failed to adhere to the formalities of corporate existence in that it did not keep adequate records relating to governance of its corporate affairs and accounting of its finances, and failed to retain earnings from its operations in an amount sufficient to meet its financial obligations. She further alleges that as Levkov primarily conducted the business of Liberty Publishing for himself and in disregard of corporate formalities, Levkov should be held personally responsible and personally liable for Liberty Publishing's breaches, liabilities, and indebtedness.

Defendant Levkov answered pro se on behalf of himself and Liberty Publishing on

February 20, 2007. On August 20, 2007, plaintiff served her first demand for interrogatories and first demand for the production of documents.

On October 5, 2007, defendants made a motion for a protective order striking plaintiff's demands (motion seq. no. 003) and on November 16, 2007, the court granted defendants' motion on default, striking plaintiff's demands. On July 29, 2008, this court granted plaintiff's motion to vacate the default (motion seq. no. 005) with respect to the motion for a protective order and restored the motion to this court's calendar.

DISCUSSION

CPLR 3101 (a) provides for the full disclosure of all information that is material and necessary to the defense or prosecution of an action. "The 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 Publ. Co.*, 21 NY2d 403, 406 (1968).

Defendants contend that plaintiff's demand for interrogatories 1, 2, 7, and 16 are overbroad, that interrogatories 9, 10, 11, 12, and 13 are irrelevant to the facts of this case, and that interrogatories 16, 17, 18, 19, 20, and 21 are beyond the scope of discovery.

The first interrogatory requests the identity of every person with knowledge or information concerning the facts and circumstances upon which defendants base their allegations contained in the answer, while the second interrogatory requests that all documents be identified upon which defendants base their allegations. These standard questions are clearly relevant to the proceedings since they seek information which supports the responding party's answers.

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The seventh interrogatory requests that defendants identify the services which it provided for plaintiff including a description of the items which it read, edited, performed layout and design, printed, sold and marketed. Information regarding the actual work which Liberty Publishing and Levkov performed is clearly relevant to this litigation as plaintiff alleges the work was completed in a negligent manner. Therefore, this interrogatory must be answered.

Interrogatory 9 asks for the identification of certificates, authorizations, or other governmental agency authority under which defendants conduct their business. Interrogatory 10 asks for the identification of bonds, insurance policies, or licenses held by defendants for the operation of the business. The eleventh interrogatory requests that the shareholders of Liberty Publishing be identified, delineating the amount and percentage of shares held, while the twelfth interrogatory requests the identity of each officer of Liberty Publishing and the position held.

Due to plaintiff's allegations that Liberty Publishing was undercapitalized with the intent of avoiding obligations; that Levkov drained income out of Liberty Publishing; that Liberty Publishing failed to adhere to the formalities of corporate existence and failed to retain earnings to meet its financial obligations; that Liberty Publishing acted as the alter ego of Levkov, and that Levkov has closed the offices and moved his publishing business to his residential address, such requested discovery may be relevant to this litigation and should be disclosed.

This information is particularly relevant since Levkov purports to appear pro se on behalf of Liberty Publishing. In his affidavit dated March 22, 2007, Levkov avers that Liberty Publishing is a general partnership, of which he is the sole member. However, in a later affidavit submitted in support of defendants' motion for a protective order, he contends that "Liberty Publishing House is a limited partnership organized under New York law" (Levkov 10/16/07

Aff., ¶ 8). According to the records of the New York State Department of State, submitted by plaintiff in connection with motion seq. no. 004, no certificate of limited partnership has been filed for an entity with that name, rather “Liberty Publishing House, Inc.” is listed as an inactive domestic business corporation. *See* Shiryak 11/26/07 Affirm., Exhs. K and M thereto.

The thirteenth interrogatory requests the identity of each printer involved in the printing of plaintiff’s works. The interrogatory also requests the contact information of the printer as well as the quantity of work printed, dates of printing requested, dates of delivery to defendants, and the cost to defendants for said printing. Since a dispute exists concerning the quantity of the volumes which was published, such information is relevant and must be disclosed.

Interrogatories 16 and 17 ask defendants to identify whether they intend to rely upon admissions made by plaintiff and to specify the identity of other people present at the time the admission was made, and the words alleged to constitute the admission. Because any admissions made by plaintiff regarding allegations in the complaint or answer would be relevant, such information should be disclosed.

Interrogatory 18 seeks the identity of expert witnesses which defendants may call at trial. Plaintiff also seeks the expert’s qualifications, the publications which he/she has authored, employment history, compensation to be paid, a listing of all cases he/she has been an expert at trial within the preceding four years, and the documents made available to the expert.

CPLR 3101 (d) (1) (i) provides that “[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and

a summary of the grounds for each expert's opinion.” Therefore, pursuant to CPLR 3101 (d) (1) (i), the interrogatory is not beyond the scope of disclosure and the information should be identified.

In interrogatory 19, plaintiff asks for the identity of each individual that participated in the preparation of the answers to the interrogatories and their relationship to defendants, another standard boilerplate question. Because such individual(s) may have knowledge concerning the facts of this case, his/her identity is relevant to this litigation and should be revealed.

Interrogatory 20 asks defendants to identify whether they have obtained a statement from any non-party to this action concerning any of the matters alleged in the complaint, while interrogatory 21 requests that for any such admission, the non-party who made the statement be specifically identified, as well as the words spoken, the name and address of their employer, and documents be identified concerning the statement. Since non-party statements utilized by defendants regarding the allegations in the complaint would be relevant to this action, such information should be disclosed.

Defendants' responses to interrogatories 3, 4, 5, 6, 14 and 15, contained in Levkov's October 16, 2007 moving affidavit, are incomplete or do not provide the requested information. For example, interrogatory 6 requests the identity of each payment made by plaintiff to defendants, delineating the amount, form, date, recipient, and what bank accounts or other repository such payment was deposited into. Levkov's response fails to identify how the December 2006 payment was made, and fails to identify in what bank accounts the payment was deposited into. Defendants are ordered to provide detailed responses to these interrogatories.

Defendants also object to several of plaintiff's supplementary demands for documents.

Defendants contend that document demands 1, 4, 5, and 9 are overbroad while document demands 6, 7, and 8 are beyond the scope of discovery or are irrelevant to this matter. There is no question that demands 1, 4 and 5 are relevant to this case and must be responded to.

The sixth demand requests state and federal tax returns filed by defendants relating to defendants' business. The First Department has held that in order for the disclosure of tax returns to take place, plaintiff must demonstrate "the 'strong showing of overriding necessity' to overcome the confidentiality of such information." *Editel, New York v Liberty Studios, Inc.*, 162 AD2d 345, 346 (1st Dept 1990), quoting *Matthews Industrial Piping Co. v Mobil Oil Corp.*, 114 AD2d 772 (1st Dept 1985); see also *A. Colish, Inc. v Abramson*, 150 AD2d 210, 211 (1st Dept 1989). While the disclosure of tax returns is disfavored due to their confidential and private nature, due to Levkov's inconsistent representations to the court regarding in what form Liberty Publishing conducts or conducted its business, plaintiff has demonstrated the need for the production of these documents, redacted to exclude any individual social security numbers. *See Four Aces Jewelry Corp. v Smith*, 256 AD2d 42, 43 (1st Dept 1998) (variance in plaintiff's valuations for stolen jewelry raises inference of fraud and creates a proper basis for compelling production of tax returns).

In the seventh demand, plaintiff requests bank statements for accounts from 2005 to the present which were used for defendants' business. Due to the dispute as to how much money has been transferred between the parties, how Liberty Publishing conducted its business and whether defendants have been unjustly enriched, such statements should be provided.

In the eighth demand, plaintiff seeks a copy of Liberty Publishing's certificate of incorporation. Due to the allegations of defendants' failure to adhere to the formalities of

*9]
corporate existence, such information should be provided, including any certificate of limited partnership or formal partnership agreement.

Finally, the ninth demand requests all photographs or drawings depicting, concerning or otherwise related to the publishing of plaintiff's work. Because the sufficiency of defendants' work is at the center of this litigation, such information must be disclosed.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that defendants must respond to interrogatories 1, 2, 7, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, and 21 within 30 days of this order; and it is further

ORDERED that defendants must supply the documents requested in demand 4, 5, 6, 7, 8, and 9 within 30 days of this order; and it is further

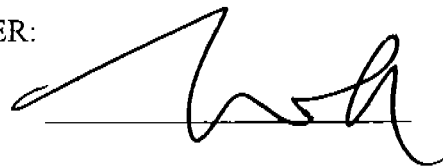
ORDERED that defendants provide supplementary responses to interrogatories 3, 4, 5, 6, 14 and 15 within 30 days of this order; and it is further

ORDERED that a compliance conference will be held on MARCH 25, 2009 at 9:30 a.m. in room 252, 60 Centre Street, New York, New York, at which time the parties will update the court on the exchange of discovery; and it is further

ORDERED that the note of issue must be filed on or before JUNE 30, 2009.

Dated: February 9, 2009

ENTER:



J.S.C.

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