

Petra Fund Reit Corp. v Belfonti

2009 NY Slip Op 30559(U)

March 9, 2009

Supreme Court, New York County

Docket Number: 602487/2007

Judge: Richard B. Lowe

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

PRESENT: Lowe
Justice

PART 56m

Petra Ford Rest Corp

INDEX NO. 602487/07

- v -

MOTION DATE _____

MOTION SEQ. NO. 009

Michael Belfonte et al

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


Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

NOTICE: MOTION FILED IN SUPREME COURT OF NEW YORK COUNTY OF NEW YORK
FILED
 MAR 16 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: 3/9/09


 RICHARD B. LOWE III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X
PETRA FUND REIT CORP.,

Plaintiff,

Index No: 602487/2007

-against-

DECISION AND ORDER

MICHAEL BELFONTI, RICHARD BELFONTI,
BELFONTI CAPITAL PARTNERS, LLC, BCP
FLORIN, LLC and DIAMOND GAMING
CORPORATION, N.V.,

Defendants.

-----X
RICHARD B. LOWE III, J:

Plaintiff brings this motion pursuant to CPLR §§ 3104(d) and 3103.

The factual background of this matter is extensively discussed in this court's decision dated March 12, 2008, reference to which is made herein.

Defendants' seek to contact plaintiff's passive investors to take informal discovery. In an order dated January 17, 2009, this court's Special Master found that plaintiff's objections would impose a drastic remedy akin to a "preliminary injunction affecting speech and contact", and thus required a demonstration by the plaintiff of irreparable harm. The Special Master went on to find that the defendants could not be barred from contacting the passive investors for any reason. Plaintiff now moves this Court to reverse the Special Master's January 17, 2009 Order and Decision permitting defendants to contact plaintiff's passive investors and denying plaintiff's cross-application to enjoin defendants from contacting plaintiff's passive investors.

While related to the present application, the standards governing free speech or injunctive

relief do not necessarily control; rather this discovery application requires consideration of CPLR § 3101. On a motion to compel document production pursuant to CPLR §3101, the burden is on the defendants to establish the relevancy of the information they seek and not solely on the plaintiff to establish the standards of injunctive relief (*Fresh Del Monte Produce N.V. v Eastbrook Caribe A.V.V.*, 799 NYS2d 160 [NY Sup Ct 2004]).

Defendants argue that information gathered through informal discovery of the passive investors will be relevant to rebut plaintiff's claims of fraud and damages resulting from the alleged fraud. Regarding the fraud, defendants expect that investors will testify that plaintiff never mentioned the casino despite having multiple, detailed communications regarding the underlying loan. This evidence, according to the defendants, goes to illustrating that plaintiff was not focused on the casino during the relevant period. Regarding damages, defendants argue that plaintiff likely told its investors that it has not been harmed at all by reasons of the defendants' alleged fraud and defendants argue that such party admissions will be admissible at trial to demonstrate that plaintiff has suffered no damages.

Plaintiff argues that there is significant potential for abuse and harassment in permitting defendants to contact its' passive investors. Additionally, plaintiff argues that the information concerning communication with passive investors is irrelevant to the ultimate decisions concerning the materiality of the casino to the lease and the damages sustained from the defendants' alleged fraud. According to the plaintiff, both are "objectively provable" through factual allegations which cannot be "enhanced nor diminished by comments, silences, thoughts or feeling by [plaintiff's] principals" (Plaintiff's Reply Affirmation at ¶ 10). According to the plaintiff, the materiality of the casino to the lease is established by the transaction documents,

* 4]

which define it as a "Major Lease" and "Material Agreement." Plaintiffs also argue that other facts related to the transaction establish materiality, including the fact that the casino served as collateral for the mezzanine loan. Regarding defendants' argument concerning damages, plaintiff argues that damages from the alleged fraud will be proven using actual values. Therefore, plaintiff argues that what it may or may not have said is irrelevant to arguments concerning materiality and damages.

The Court, having considered the parties' arguments, finds that defendants' proffered reasons for contacting plaintiff's passive investors do not establish that the information they seek will be material and necessary to this action. Defendants concede that the dispute concerns what the contract says (Tr 2/23/09 at 20:1-6), but fails to explain how passive investors' recollection of communications from plaintiff will assist in resolving the contract dispute. Furthermore, the passive investors' recollection of communication from plaintiff will have no bearing on the issue of damages, which will be determined through actual values and potentially through expert testimony. Therefore, defendants have not established that passive investors' recollection of communications from plaintiff will be relevant to the defense of plaintiff's claims for damages or materiality (*Crazytown Furniture, Inc. v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989] ["unsubstantiated bare allegations of relevancy are insufficient to establish the factual predicate regarding relevancy"]). The potential for abuse and damage to plaintiff's business, if defendants are allowed to contact the passive investors as part of this litigation, is significant. Therefore, defendants are prohibited from pursuing informal discovery from plaintiff's passive investors for the purposes proffered by the defendants on this motion. Additionally, whereby plaintiff has acknowledged that what it said to its' investors is "utterly irrelevant" (Plaintiff's

5]
Reply Affirmation at ¶ 14), plaintiff is also prohibited from using evidence of passive investors' recollection of communications for the purposes of establishing materiality or damages.

Accordingly, plaintiff's motion brought pursuant to CPLR § 3104(d) is granted to the extent that this Court finds information from plaintiff's passive investors is not material and necessary to the defense of materiality or damages.

The Court denies that part of plaintiff's motion brought pursuant to CPLR § 3103(a) as unnecessary because, as the Special Master noted, the concern about interference and harassment is speculative at this time. However, it should be noted that the defendants have failed to proffer any reason why contacting the passive investors as part of the discovery process is material and necessary to this action.

At oral argument on February 23, 2009, the parties mentioned that the note of issue had not been filed (Tr 2/23/09 at 21:1-14). After reviewing the record, this issue was settled on the record of February 2, 2009, when the Court ordered that the parties file the note of issue on time, that the date for filing not be extended, and the Court ordered the parties to set up a post note of issue schedule for the taking of plaintiff's depositions (Tr 2/02/09 at 19:17-19). Inexplicably, the parties have failed to file the note of issue as directed by the Court. Plaintiff is hereby directed to file the note of issue no later than March 16, 2009. Parties are furthermore directed to submit to the Special Master the post note of issue deposition schedule for review and approval.

CONCLUSION

Therefore, based on the foregoing, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR 3104(d) is granted to the extent that this Court finds that defendants' proffered reasons for contacting plaintiff's passive investors do not establish that the information they seek will be material and necessary to this action; and it is further

ORDERED that plaintiff's motion pursuant to CPLR 3103 enjoining defendants from contacting any of the passive investors is denied; and it is further

ORDERED that the date for filing the note of issue is extended to March 16, 2009.

Dated: March 9, 2008

ENTER:



J.S.C.

FILED
MAR 16 2009
COUNTY CLERK'S OFFICE
NEW YORK