

**Phoenix Life Ins. Co. v Irwin Levinson Ins.
Trust II**

2009 NY Slip Op 31191(U)

May 29, 2009

Supreme Court, New York County

Docket Number: 600985/2008

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Index Number : 600985/2008

PHOENIX LIFE INSURANCE

vs

IRWIN LEVINSON INS. TRUST II

Sequence Number : 002

QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. _____

MOTION DATE 5/28/09

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 _____

FILED
PAPERS NUMBERED
JUN 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion Sequences 002 and 004 are consolidated for joint disposition and resolved herein, in accordance with the transcript (William Kutsch, official court reporter).

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motions of non-party witnesses Steven Lockwood, Lockwood Pension Services, Inc., Tall Tree Advisors, and Life Product Clearing LLC for an order, pursuant to CPLR §2304, to quash and/or modify, and for a protective order, pursuant to CPLR §3103, regarding deposition subpoenas and subpoenas duces tecum served by plaintiff Phoenix Life Insurance Company is granted, with the exception of the documents regarding Phoenix's policy with "Kramer" that are relevant to plaintiff's defense of defendants' GBL§349 counterclaim; and it is further

ORDERED that the movants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 5/29/09

HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 35

-----X
PHOENIX LIFE INSURANCE COMPANY,

Plaintiff,

-against-

THE IRWIN LEVINSON INSURANCE TRUST II, and
JONATHAN S. BERCK, AS SUCCESSOR TRUSTEE,

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION¹

Non-party witnesses Steven Lockwood (“Lockwood”), Lockwood Pension Services, Inc. and Tall Tree Advisors (collectively, the “Lockwood witnesses”) move to quash and/or modify (CPLR §2304) and for a protective order (CPLR §3103) regarding deposition subpoenas and subpoenas *duces tecum* served by plaintiff Phoenix Life Insurance Company (“Phoenix”) on the grounds that they are irrelevant, overbroad and unduly burdensome (Motion sequence 002).

By separate motion, Life Product Clearing LLC (“Life Product Clearing”) (Motion sequence 004) likewise moves to quash and/or modify and for a protective order with respect to deposition subpoenas and subpoenas *duces tecum* served by Phoenix, on the same grounds as the Lockwood witnesses.

Factual Background

Phoenix seeks to rescind a certain life insurance policy issued on the life of Irwin Levinson (“Mr. Levinson”) (the “Levinson Policy” or “Policy”) for the benefit of his life

¹ Motion sequences 002 and 004 are consolidated for joint disposition and resolved herein, in accordance with the transcript (William Kutsch, official court reporter).

Index No. 600985-2008

DECISION/ORDER

FILED
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NEW YORK

insurance trust, The Irwin Levinson Insurance Trust II (“The Levinson Trust”), on the grounds that (1) Mr. Levinson made a medical misrepresentation in his application by failing to disclose a May 2005 recurrence of bladder cancer and (2) that the Levinson Policy was procured by Mr. Levinson and the Levinson Trust for the benefit of a “stranger investor” under a STOLI (stranger originated life insurance) arrangement, and thus void for lack of an insurable interest pursuant to Insurance Law §3205. Lockwood was Mr. Levinson’s insurance broker, and acted as insurance broker on numerous other life insurance policies that Lockwood was authorized to represent. According to Lockwood, Phoenix contacted him in 2005 to act as an independent insurance broker to sell Phoenix Life Insurance products, and the parties entered into an Independent Producer Contract (“IPC”).

The Complaint alleges that Lockwood (1) confirmed that he accurately recorded the information supplied by Mr. Levinson on his application, (2) induced Mr. Levinson to procure the Policy in order to sell the rights to the death benefits to an outside investor, and (3) Lockwood induced Mr. Levinson to procure the Policy to benefit a person with no insurable interest on his life.

There is an action pending in federal court, brought by Alice Kramer as a personal representative of the Estate of Arthur Kramer, in which Phoenix is a defendant. Kramer is contesting the assignment of certain death benefits of insurance policies issued on the life of Arthur Kramer, alleging that the policies were procured without any insurable interest and as part of a STOLI arrangement. Phoenix filed third party claims against the Lockwood witnesses claiming that they defrauded Phoenix into issuing policies to recipients, including Mr. Levinson, by failing to make full disclosure about the beneficiaries of the life insurance trusts to which the

death benefits had been assigned, and the intent of those holding the beneficial interests in the insurance trust. Dispositive motions are pending decisions, and discovery has yet to take place in the federal action.

As relevant herein, the subpoena *duces tecum* seeks “all documents” concerning Arthur Kramer and Leon Lobel (Items 6 and 7); “all documents” concerning the Lockwood witnesses’ lease agreement at Rockefeller Plaza and other lease agreements to which they and other non-parties were parties (Item 9); information regarding the business relationships among the Lockwood witnesses, and their business relationships with Phoenix’s general agent and Life Product Clearing (Item 13); “all documents” concerning the Lockwood witnesses’ knowledge of and participation in transactions involving the issuance of so-called STOLI policies other than the Levinson Policy (Items 15, 16 and 17); “all documents” concerning strategy and marketing to procure, sell or transfer life insurance policies, life insurance trusts or the beneficial interests therein (Item 18); “all documents” pertaining to: (1) the distribution, sale or exchange of something of value in connection with a life insurance policy, life trust or beneficial interest in a life insurance policy or life trust; (2) the decision to purchase, acquire, sell or transfer the beneficial interests in such policies or trusts; and (3) marketing for the financing, profits, revenues or costs associated with such life insurance policies or trusts (Items 18, 19, and 20); information regarding investigations of any claim of any life insurance policy in which Lockwood acted as a broker or producer (Items 21 and 22); and “all documents” relating to any investigation of Lockwood’s professional conduct as a broker or producer by any entity, as well as any documents relating to the termination of Lockwood as a producer or broker by any insurance company (Items 24 and 25).

Motion

In support, the Lockwood witnesses and Life Product Clearing argue that certain portions of the subpoena *duces tecum* are irrelevant and overburdensome, are unsupported by any “special circumstances,” and that Phoenix is improperly attempting to obtain discovery for use in the unrelated federal action. Items 19 and 20, which have no relevance to the allegations of the accuracy of the representations on Mr. Levinson’s application or whether a basis exists to rescind the Levinson Policy, will place an enormous burden and expense on the Lockwood Witnesses to locate and assemble irrelevant materials, and will not in any way further the resolution of the issues in dispute. Items 6, 7, 9, 13, 15, 16, and 17 are specifically designed to obtain discovery relating to the separate and distinct insurance policies that are the subject of the federal action, and will have no bearing on the resolution of the particular issue raised herein. Items 21 and 22 seek highly confidential and sensitive information covering insurance applications to and policies issued by other life insurance companies, which have absolutely no relevance or bearing on Phoenix’s issuance of the Levinson Policy. Further, Items 24 and 25, which seek the production of all documents relating to any investigation Lockwood’s professional conduct as a broker or producer, concern his actions pertaining to other insurance applications, and bear no relevance to what is before this Court.

Opposition

In opposition, Phoenix argues that the purpose of the subpoenas is to obtain evidence that will establish that Levinson, together with the STOLI Participants, intended to procure the Policy solely as a “speculative investment” for the ultimate benefit of third parties who had no insurable interest in Levinson’s life, in violation of applicable law. The procurement of the

Policy was part of a common scheme to procure hundreds of millions of dollars of life insurance for the benefit of outside investors. Discovery will establish that the Policy was not supported by an insurable interest. Documents concerning transactions that are virtually identical to, and occurred around the same time as, the transactions alleged in this case are relevant to establishing such an intent and/or common scheme. Such documents are also relevant to Phoenix's defense to defendants' counterclaim that Phoenix is not engaged in a deceptive practice aimed at consumers under General Business Law ("GBL") §349.

The complaint that production will cover hundreds of insurance files is no basis for refusing to produce documents relevant to this action.

There is no requirement under First Department caselaw that Phoenix demonstrate "special circumstances" to obtain non-party discovery. In any event, as the architects and operators of the alleged STOLI schemes and as the parties who stand to profit from any payment of death benefits on the Policy, the STOLI Participants are the real parties-in-interest in this litigation and possess the key documents that Phoenix seeks. Phoenix cannot obtain such documents from its own files or from the defendants, who are after all, Phoenix alleges, merely the strawmen through which the STOLI Participants effected their scheme.

Further, the ultimate disposition of the federal action does not determine whether Phoenix is obligated to pay the proceeds of the Levinson Policy, and has no bearing on the scope of discovery in this rescission action.

The movants failed to demonstrate that the documents sought are utterly irrelevant to this lawsuit.

Reply

A third-party subpoena cannot be used for the purpose of discovery or to ascertain the existence of evidence. Its purpose is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding.

Phoenix acknowledges that the issue to be determined focuses on “the understanding and intent of the insured” who procured the policy. Tens of thousands of pages of documents relating to hundreds of other insurance policies on which Lockwood acted as broker that were issued to unrelated parties and insurance trusts created by those unrelated parties to own the policies are irrelevant. Plaintiff has not asserted any claims in this action against any of the Lockwood witnesses. Plaintiff has not asserted any conspiracy claims in its Complaint. Plaintiff has asserted a limited and directed claim in which the intent, intentions and actions of Levinson are the sole determinative factors to be considered. The intent of the Lockwood Witnesses, and their conduct with respect to numerous other insureds, simply has no relevance to the determination of Levinson’s conduct or to a finding as to whether the Levinson Policy was validly issued. In the federal action, Phoenix has asserted a variety of claims against the Lockwood witnesses, including multiple civil RICO causes of action, by which it has placed the conduct of the Lockwood Witnesses in issue and has alleged that the Lockwood Witnesses participated in a scheme to defraud Phoenix. Phoenix’s efforts in the federal action to obtain discovery from the Lockwood Witnesses while there is a pending motion to dismiss have been thwarted, and Phoenix now seeks to use this action to obtain discovery for the federal action.

Thus, the general discovery requests found in Items 6, 7, 15-17, 19, 20, 24, and 25 are impermissible in a third-party subpoena. Further, the supposed “similar act” evidence that

Phoenix claims it will find in the mass of subpoenaed material relates to, if anyone, one or all of the Lockwood Witnesses and not to Levinson. Even assuming, *arguendo*, that evidence of fraudulent intent could be found in such materials, such evidence would relate to the fraudulent intent of the Lockwood Witnesses, and not to Levinson's intent.

Analysis

"CPLR 3103 provides for a protective order that can be used to limit, condition or regulate the disclosure device used, while CPLR 2304 provides for a motion to quash, fix conditions or modify a subpoena" (*Velez v Hunts Point Multi-Service Center, Inc.*, 29 AD3D 104 [1st Dept 2006]).

CPLR §3103 states that "[t]he 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."

It is well settled that the purpose of a subpoena *duces tecum* is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding (*Velez v Hunts Point Multi-Service Center, Inc.*, *supra*, citing *Matter of Terry D.*, 81 NY2D 1042, 1044 [1993]). It is equally well settled that a motion to quash a subpoena *duces tecum* should be granted only where the materials sought are utterly irrelevant to any proper inquiry (*Velez v Hunts Point Multi-Service Center, Inc.*, *supra*, citing *New Hampshire Ins. Co. v Varda, Inc.*, 261 AD2D 135 [1999]). "However, this broadly stated standard, while consistent with a policy favoring the production of information, should not serve as an excuse for a court to

abdicate its responsibility to determine whether the materials sought are in fact relevant to a legitimate subject of inquiry or to permit the subpoena power to be used as a tool of harassment or for the proverbial “fishing expedition” to ascertain the existence of evidence” (*Reuters Ltd. v Dow Jones Telerate, Inc.*, 231 AD2D 337, 341 [1st Dept 1997], quoting *General Elec. Co. v Rabin*, 184 AD2D 391, 392 [1st Dept 1992]). The burden of establishing that the requested documents are utterly irrelevant is on the person being subpoenaed (*Velez v Hunts Point Multi-Service Center, Inc.*, citing *Gertz v Richards*, 233 AD2D 366, 366 [2d Dept 1996]).

The documents at issue herein seek the following information: (a) similarly structured transactions in which the STOLI Participants have participated (including the Lobel and Kramer transactions), (b) the relationship among the STOLI Participants, (c) the STOLI Participants’ understanding, marketing, and mutual correspondence with respect to STOLI policies and insurable interest requirements, (d) financing, revenues, and costs with respect to STOLI transactions, (e) investigations and terminations that involved some insurable interest or STOLI concern, and (f) the ownership, management, structure, creation, and general business purpose of Life Product.

The alleged close relationship among the STOLI Participants, together with a pattern of procuring policies pursuant to similar arrangements, may indicate that the transfer at issue in this case was part of a STOLI scheme committed by the Lockwood witnesses pertaining to other policies, but would have no bearing on whether Mr. Levinson intended to participate in such a scheme. There is no indication that the documents at issue herein, as they pertain to other policies not at issue herein, may, in any manner, disclose the intent of Mr. Levinson to obtain the Policy as a participant in a STOLI scheme. As there are no fraud or conspiracy claims alleged

against the Lockwood Witnesses or defendants, the documents sought are irrelevant to plaintiff's claim herein.

However, since the documents regarding Phoenix's policy with "Kramer" are relevant to defend the defendants' GBL §349 counterclaim, such records are discoverable.

Conclusion


Based on the foregoing, it is hereby

ORDERED that the motions of non-party witnesses Steven Lockwood, Lockwood Pension Services, Inc., Tall Tree Advisors, and Life Product Clearing LLC for an order, pursuant to CPLR §2304, to quash and/or modify, and for a protective order, pursuant to CPLR §3103, regarding deposition subpoenas and subpoenas *duces tecum* served by plaintiff Phoenix Life Insurance Company is granted, with the exception of the documents regarding Phoenix's policy with "Kramer" that are relevant to plaintiff's defense of defendants' GBL §349 counterclaim; and it is further

ORDERED that the movants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 29, 2009



Hon. Carol Robinson Edmead, J.S.C.

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