

<b>Bluebird Partners, L.P. v Bank of N.Y.</b>
2009 NY Slip Op 32013(U)
September 2, 2009
Supreme Court, New York County
Docket Number: 601016/1996
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Eileen Bransten  
Justice

PART 3

Bluebird Partners, L.P.

INDEX NO. 601016/1996

MOTION DATE 8/21/09

- v -  
The Bank of New York, et al.

MOTION SEQ. NO. 011

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 IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

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NEW YORK COUNTY - CIVIL

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NEW YORK

*Handwritten initials*

Dated: 9-2-09

Eileen Bransten  
J.S.C.

**MON. EILEEN BRANSTEN**

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 THREE

-----X  
BLUEBIRD PARTNERS, L.P.,

Plaintiff,

Index No.: 601016/96  
Motion Date: 8/21/09  
Motion Sequence No.: 011

-against-

THE BANK OF NEW YORK; FIRST FIDELITY BANK,  
N.A., NEW JERSEY; MIDATLANTIC NATIONAL  
BANK; UNITED JERSEY BANK; NATIONS BANK OF  
TENNESSEE, N.A.; CONSTELLATION BANK;  
CORESTATES NEW JERSEY NATIONAL BANK;  
RIKER DANZIG SCHERER HYLAND & PERRETTI;  
VECCHIONE, P.C.; WOLF & SAMSON, P.A.;  
KELLEY DRYE & WARREN; and WILENTZ,  
GOLDMAN & SPITZER, P.C.,

Defendants.

----- X  
PRESENT: EILEEN BRANSTEN, J.:

Pursuant to CPLR 3103, plaintiff Bluebird Partners, L.P. (“Bluebird”) moves for a protective order, shielding from disclosure materials it deems “confidential business information sought by defendant Bank of New York (“BNY”) that is totally irrelevant to the claims and defenses and would be unduly burdensome to retrieve and produce” (Memorandum of Law in Support of Plaintiff’s Motion for a Protective Order [“Supp Mem”], at 1). BNY opposes the motion.

**BACKGROUND**

BNY is the collateral trustee of a trust of which Bluebird is a beneficiary. Bluebird seeks damages against BNY for “refusing to distribute millions of dollars held in trust for the

benefit of bondholders in violation of the express terms of a contract” (Supp Mem, at 1). Bluebird maintains that BNY refused to make distributions, claiming it needed to hold \$30 million in cash in a litigation reserve (*id.*). According to Bluebird, it “was not until several years after BNY established its excessive ‘Reserve’ that BNY distributed the balance of the funds” (*id.*).

In this action, Bluebird alleges that BNY breached its fiduciary duty in setting a grossly excessive litigation reserve, depriving beneficiaries of money to which they were entitled. Specifically, Bluebird asserts that as “a result of the wrongful conduct of [defendants including BNY, it] has been deprived of its right to use and invest the funds being withheld by the collateral trustee and has been financially damaged” (Lundberg Aff, Ex. 3 at ¶ 119). It alleges entitlement to damages for “its share of the funds held in trust . . . plus treble that amount as punitive damages” (*id.*, at ¶ 125).

### DISCUSSION

On April 29, 2009, BNY served a document demand on Bluebird that contains five requests. Bluebird objects to producing materials responsive to the following three requests numbered two through four:

“Documents concerning investments or deposits, or both, that Bluebird made or maintained with the proceeds it received from the First Priority Secured Equipment Certificates due 1992 between January 1994 and the present.

“Documents concerning investments or deposits, or both, that Bluebird would have made or maintained with any proceeds it would have received from the First Priority Secured Equipment Certificates due 1992 if BNY or its predecessors had made greater or additional distributions than they actually made between January 1994 and the present.

“Documents concerning the rate of return Bluebird earned on investments or deposits, or both, that it made or maintained between January 1994 and the present” (Schub Aff., Ex. 3).

Bluebird contends that the materials sought are wholly irrelevant to the issues at hand. It maintains that what it hypothetically would have done with the money had it properly received the funds has absolutely no bearing on damages. Bluebird points out that to the extent it did not have the benefit of money to which it was allegedly entitled--that amount being its damages--statutory interest on the damages award will make it whole.

BNY counters that the information sought actually goes to Bluebird's damages, a necessary element of its breach of fiduciary duty claim. BNY urges:

“The Trust's funds are and always have been invested in interest-producing money market funds. Thus, for example, if those money-market funds produced a rate of return of 5%, and assuming, *arguendo*, the fundamental viability of Bluebird's theory, Bluebird will need to prove that had BNY distributed more of the Trust's funds sooner, Bluebird would have invested the portion it received and earned a rate of return higher than 5%” (Defendant The Bank of New York Mellon's Memorandum of Law in Opposition to Plaintiff's Motion for a Protective Order, at 16).

BNY's counsel argues, moreover, that “at the end of the day, if they got this money sooner, Mr. Merkin [‘a feeder of Mr. Madoff’] would have invested it. There are two

possibilities: invested it with Mr. Madoff he would have made 300 percent or whatever he made in those days. He could explain that to the jury; or he would have been a late Madoff investor [and] he would [have] lost all his money. In that case he should give us a big thank you for saving him at least this money at 5 percent” (Aug. 21 Tr., at 24).

Significantly, BNY does not explain how the information it seeks is at all relevant to damages analysis. It does not cite any legal authority supporting the proposition that what Bluebird may or may not have ultimately chosen to do with its own money affects the calculation of damages here.

Contrary to BNY’s argument, Bluebird is not obligated to prove how it would have used the money had it been timely and appropriately disbursed. Its damages, assuming it successfully proves all of the elements of its remaining causes of action, will be the amount wrongfully held. To the extent that Bluebird lost use of its money, regardless of what it would have done with its own funds, interest will be added to the damages to indemnify Bluebird for the nonpayment of what was owed (*see Manufacturer’s & Traders Trust Co. v Reliance Ins.*, 8 NY3d 583, 589 [2007]).

In the end, BNY has not demonstrated that the information it seeks--documents concerning Bluebird’s actual use of the money once it received it, the rate of return it received on that money or “documents concerning investments or deposits, or both, that

Bluebird *would* have made or maintained with any proceeds it *would* have received” earlier--  
are matters “material and necessary in the prosecution or defense” of this action.

Accordingly, it is ORDERED that Bluebird’s motion for a protective order is  
GRANTED and it need not produce documents responsive to requests 2-4 of the document  
demand dated April 29, 2009.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
September 2, 2009

ENTER



Hon. Eileen Bransten

**FILED**

SEP - 4 2009

COUNTY CLERK'S OFFICE  
NEW YORK