

**Wisell v Indo-Med Commodities, Inc.**

2009 NY Slip Op 32175(U)

September 11, 2009

Supreme Court, New York County

Docket Number: 003015-00

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**JOHN T. WISELL, SR.,**

**TRIAL/LAS PART: 25  
NASSAU COUNTY**

**Plaintiff,**

**-against-**

**Index No: 003015-00**

**INDO-MED COMMODITIES, INC., PHILMANEX  
INC. and SHABBIR ABIDALI, individually and in  
his capacity as sole director of  
INDO-MED COMMODITIES, INC.,**

**Motion Seq. Nos: 12 & 13  
Submission Date: 7/7/09**

**Defendants and  
Counterclaimants,**

**-against-**

**SCALA WISELL CO. INC and INDO-MED NORTH  
AMERICA, INC.,**

**Counterclaim Defendants.**

-----x

**The following papers having been read on these motions:**

- Notice of Motion, Affidavit and Exhibits.....x**
- Affirmation in Opposition and Exhibits.....x**
- Defendants'/Counterclaimants' Memorandum of Law in Opposition...x**
- Notice of Motion, Affirmation and Exhibits.....x**
- Defendants'/Counterclaimants' Memorandum of Law in Support.....x**
- Affidavit in Opposition and Exhibits.....x**
- Plaintiff's Reply Affidavit and Exhibits.....x**
- Defendants'/Counterclaimants' Reply Affirmation and Exhibit.....x**
- Defendants'/Counterclaimants' Reply Memorandum of Law.....x**

This matter is before the Court for decision on 1) the motion filed by Plaintiff John T. Wisell, Sr. (“Wisell”) on April 29, 2009, and 2) the motion filed by Defendants/Counterclaimants Indo-Med Commodities, Inc. (“Indo-Med”), Philmanex Inc. (“Philmanex”) and Shabbir Abidali (“Abidali”) (collectively “Defendants”) on June 2, 2009, which were submitted on July 7, 2009. For the reasons set forth below, the Court 1) denies Plaintiff’s motion to quash two Subpoenas to Aid in the Enforcement of Judgment and directs John T. Wisell, Sr. and Carol Wisell to comply with those Subpoenas within forty five (45) days of this Decision; 2) denies Defendants’ motion to dismiss, in light of a relevant decision of the Appellate Division, Second Department, and the parties’ stipulation that the jury trial on Plaintiff’s claims would proceed after the bench trial on Defendants’ counterclaims was completed; and 3) directs Defendants to refrain from taking any steps to execute on their judgment against Plaintiff, pending the jury trial on Plaintiff’s claims, and further Order of the Court.

### BACKGROUND

#### A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR §§ 2304, 3103 and 5240, 1) quashing or otherwise modifying the subpoena dated April 2, 2009 issued to Wisell; and 2) quashing or otherwise modifying the subpoena issued to Carol Wisell (“C. Wisell”). Defendants oppose Plaintiff’s motion.

Defendants move for an Order, pursuant to CPLR § 3211(a)(5), dismissing the Verified Complaint (“Complaint”) on the grounds that Plaintiff’s claims are barred by the doctrines of *res judicata* and collateral estoppel. Plaintiff opposes Defendants’ motion.

#### B. The Parties’ History

On March 19, 2009, a judgment was entered in favor of Indo-Med, as judgment creditor, against Wisell, as judgment debtor, in the sum of \$2,927,697.01 (“Judgment”). Defendants subsequently served both Wisell and C. Wisell with Subpoenae *Duces Tecum* and *Ad Testificandum* to Aid in Enforcement of Judgment (“Subpoenas”), dated April 2, 2009, which sought documentation relevant to Indo-Med’s satisfaction of the Judgment.

Plaintiff submits that the Subpoenas improperly seek information regarding C. Wisell’s

assets, who is not the judgment debtor. Plaintiff also argues that the nineteen year time frame in the Subpoenas is overbroad and unduly burdensome on the Wisells. Plaintiff submits, further, that the Subpoena is overbroad as it relates to Wisell's business records, in light of the facts that Wisell is allegedly 69 years old, not currently employed and collects Social Security payments. Moreover, Plaintiff affirms that Indo-Med already received relevant financial information during the trial of this action. Finally, Plaintiff argues that Indo-Med's request number eight (8) in the Subpoena, which seeks records regarding the Wisells' employment and business earnings, is duplicative because the tax returns that Indo-Med also requested in the Subpoenas would contain that information.

Defendants oppose Plaintiff's motion, submitting that the Decision After Trial issued by the Hon. Leonard B. Austin ("Trial Decision"), and Defendants' own investigation regarding the Wisells' finances, demonstrate the appropriateness of the Subpoenas. Defendants provide a copy of that Trial Decision.

In the Preliminary Statement of the Trial Decision, the Court outlined the following procedural history of this matter: By Order dated May 2, 2002, the Court (Mahon, J.) struck Plaintiff's jury demand. By Order dated March 31, 2003 ("Appellate Decision"), the Appellate Division, Second Department reversed and remitted the matter for a joint trial in which a jury would decide the legal issues and the Court would decide the equitable issues. The Second Department also directed that the trial court may ask the jury to reach an advisory verdict with respect to equitable issues to minimize the danger of conflicting verdicts.

In light of the fact that the trial had already begun at the time of the Appellate Decision, the parties entered into a Stipulation on April 8, 2003 ("Stipulation"), that the Court so-ordered on April 9, 2003. Pursuant to the Stipulation, the parties agreed that 1) a court-appointed neutral expert would conduct an accounting; and 2) Plaintiff's claims and the legal counterclaims would be heard before a jury after the Court's determination on the trial of the counterclaims and determination of the accounting. The Stipulation was apparently reached to obviate the need to restart the trial before a jury.

The parties' dispute involves a oral joint venture agreement ("Agreement") among Wisell, Counterclaim Defendant Scala Wisell Co., Inc. ("Scala Wisell") and Indo-Med that, as per the Trial Decision, was entered into in August 1995 and commenced on January 1, 1996.

Indo-Med was a company dealing with commodities such as hazelnuts and dried fruits, and the Agreement involved food distribution. Moreover, according to the Trial Decision, Scala Wisell is owned by Wisell and C. Wisell. Prior to the joint venture agreement, Scala Wisell was a broker for Indo-Med, in which capacity it sold product on a commission basis but did not take title to it.

In the Trial Decision, the Court concluded that Wisell owed a fiduciary duty to Indo-Med that he breached in many ways, including but not limited to: 1) incorporating a competing business called Indo-Med North America (“IMNA”) in 1998; 2) doing business as IMNA without the knowledge or consent of Indo-Med; 3) misusing certain accounts; 4) transferring the inventory and assets of Indo-Med to IMNA; and 5) hiring his wife and relatives and giving them unauthorized salaries and benefits.

The Court also concluded that Defendants established their counterclaims for 1) breach of contract, 2) a Lanham Act violation based on IMNA’s improper use of Indo-Med’s registered mark, 3) a violation of General Business Law § 133 based on IMNA’s deceptive use of Indo-Med’s registered mark, 4) injunctive relief based on IMNA’s violation of Business Corporation Law § 360-1 by improperly using Indo-Med’s registered mark and 5) punitive damages based on the Court’s conclusion that Plaintiff demonstrated a wilful or wanton disregard for the rights of others.

On June 19, 2006, all parties entered into a stipulation concerning matters that needed to be corrected in the Decision. The Court (Austin, J.) so-ordered this stipulation on June 22, 2006. By decision dated November 27, 2006, the Court (Austin, J.) denied the motion by Wisell and IMNA to set aside, or correct certain findings in, the Trial Decision. By decision dated December 16, 2008, the Court (Austin, J.) denied Wisell and IMNA’s motion to stay enforcement of any judgment rendered or to be rendered pending appeal, and pending the trial of the remaining issues in the case.

In light of the Trial Decision, and its denial of Wisell and IMNA’s post-trial motions, the Court (Austin, J.) signed a judgment (“Judgment”) dated March 16, 2009 awarding Indo-Med the sum of \$2,927,697.01 against Wisell and IMNA, comprised of 1) principal of \$1,455,673.20, representing compensatory damages, 2) interest of \$568,190.53 for the time period December 31, 2001 through May 2, 2006, 3) punitive damages of \$150,000, 4) \$115,787.76 for forensic

accounting fees, 5) interest of \$637,095.52 computed from May 3, 2006 and 6) \$950 in costs and disbursements. The Court also enjoined Wisell and IMNA from using the name “Indo-Med,” or any derivative thereof, or any logotype used by Indo-Med, or any derivative thereof.

On or about April 7, 2009, Plaintiff filed a Note of Issue, demanding a jury trial on its Complaint against Defendants. Defendants now move to dismiss the Complaint, submitting that Plaintiff cannot prevail on any of its four causes of action because necessary elements of each cause of action were tried and decided adversely to Plaintiff, as reflected by the Trial Decision, and Plaintiff is therefore collaterally estopped from litigating these issues further. Defendants’ specific arguments are as follows:

With respect to the first cause of action, Wisell alleges that he provided facilities and services to Indo-Med without compensation from August 1995 through March 1998. Justice Austin concluded that, with respect to the Agreement, Wisell agreed to receive “no compensation of any kind except his share of the profits,” and Justice Austin credited Wisell with his share of the profits. In light of these findings, Defendants submit that Plaintiff may not relitigate his claim to compensation.

In the second cause of action, Wisell alleges that he was not compensated for funds that he advanced and for services that he provided. In the Trial Decision, the Court analyzed this issue in detail and determined that Wisell was entitled to compensation for certain items, and was not entitled to compensation for others. Accordingly, Defendants submit, Wisell may not relitigate this issue.

In the third cause of action, Wisell seeks damages for Indo-Med’s alleged diversion of profits by misstating the price it paid on documents filed with the United States Customs Service. Justice Austin rejected this argument, as demonstrated by his conclusion in the Trial Decision that “[t]he inaccurate information regarding the cost of the desiccated coconut contained on the U.S. Customs forms proffered by Wisell is irrelevant to this litigation...His claimed profit was not affected by these erroneous filings.” (Tr. at 29)

Wisell’s fourth cause of action alleges unjust enrichment. After a lengthy trial, that included an extensive analysis of the financial issues involved, the Court awarded damages to Indo-Med. Thus, Wisell asserts that the Court necessarily concluded that Wisell had not been unjustly enriched.

Plaintiff opposes Defendants' motion to dismiss on the following grounds:

First, Plaintiff affirms that, after the trial before Justice Austin had ended, an action was commenced in the High Court of Justice, Chancery Division in London, England, in which the Bank of Tokyo-Mitsubishi UFJ, Ltd. and KBC Bank N.V. ("Banks") are the Plaintiffs and Defendant Abidali is one of twelve defendants. Plaintiff provides a letter dated February 12, 2007 from counsel for the Banks to Plaintiff's counsel, advising him that the Banks obtained a "Freezing Order" against Abidali in the British Court, the effect of which is that Abidali may not dispose of any of his assets outside England and Wales unless the total unencumbered value of all his assets remain above 20 million Euros. Counsel for the Banks expresses his concern that Abidali's enforcement of the Judgment may "unwittingly" assist Abidali in breaching the terms of the Freezing Order, and asks that any monies paid towards the Judgment be paid to Abidali's attorney, rather than to Abidali personally. Counsel for the Banks subsequently wrote a letter to Plaintiff's counsel dated May 7, 2009 in which he advises him that the Freezing Order remains in effect. Second, Plaintiff claims that the Stipulation expressly provides for the Plaintiff's right to seek a jury trial, and that Plaintiff has not had a full and fair opportunity to litigate his claims.

### C. The Parties' Positions

Plaintiff moves to quash the Subpoenas, submitting that they are overbroad, unduly burdensome and duplicative. Defendants oppose Plaintiff motion, submitting that, in light of the Trial Decision, the Subpoenas seek information relevant to Defendants' satisfaction of the Judgment.

Defendants move for dismissal of the Complaint on the ground that, in light of the Trial Decision, Plaintiff is precluded from litigating its claims based on the doctrines of *res judicata* and collateral estoppel. Plaintiff opposes Defendants' motion, submitting that, in light of the Appellate Decision and the Stipulation, Plaintiff has the right to proceed with its claims.

## RULING OF THE COURT

### A. The Appellate Decision and Stipulation Preclude Dismissal of Plaintiff's Claims

CPLR § 3211(a)(5) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the bases, *inter alia*, that the cause of action may not be maintained because of collateral estoppel or *res judicata*. The doctrine of *res judicata* operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as

claims for different relief which arise out of the same factual grouping or transaction and which should have or could have been resolved in the prior proceeding. *Luscher v. Arrua*, 21 A.D.3d 1005, 1006-07 (2d Dept.), quoting *Koether v. Generalow*, 213 A.D.2d 379, 380 (2d Dept. 1995). Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue which has been previously decided against him in a prior proceeding where had a full and fair opportunity to litigate such issue. *Luscher*, 21 A.D.3d at 1007.

A stipulation of settlement entered into in open court, with the parties and counsel present, and stenographically recorded, is enforceable as a contract binding on all the parties thereto, and is governed by general contract principles for its interpretation and effect. *Linsalato v. Giuttari*, 59 A.D.3d 682, 683 (2d Dept. 2009). Where the stipulation's terms are unambiguous, the parties' intent must be gleaned from the plain meaning of the words used by the parties. *Id.*

Here, the Appellate Decision and the Stipulation expressly provide that Plaintiff is entitled to a jury trial on its claims, notwithstanding the Trial Decision. Indeed, the Appellate Decision specifically mentioned the possibility of conflicting verdicts, and the parties nonetheless decided to enter into the Stipulation that provided for the completion of the bench trial and a subsequent jury trial on Plaintiff's claims. Accordingly, the Court denies Defendants' motion to dismiss Plaintiff's claims and directs that the jury trial on Plaintiff's claims will proceed.

In so doing, the Court recognizes the unusual posture of this case. The Court concludes that, given the "realities of litigation" that this Court must recognize, *see Staatsburg Water Company v. Staatsburg Fire District*, 72 N.Y.2d 147, 153 (1988), it would be most improvident for the Court to apply rigidly the doctrines of *res judicata* and collateral estoppel and thereby both deprive Plaintiff of the benefits of the bargained-for Stipulation and ignore the mandate of the Appellate Decision.

**B. The Court Denies the Motion to Quash because the Subpoenas are Appropriate in light of the Trial Decision**

CPLR § 5223 provides as follows:

At any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the

action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon, and shall state that false swearing or failure to comply with the subpoena is punishable as a contempt of court.

CPLR § 5240 provides, in pertinent part, as follows:

The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure.

The Court should grant an application to quash a subpoena only where the futility of the process to uncover anything legitimate is inevitable or obvious. *Myrie v. Shelley*, 237 A.D.2d 337, 338 (2d Dept. 1997), quoting *Matter of Edge Ho Holding Corp.*, 256 N.Y. 374, 382 (1931) and *Matter of La Belle Creole Intl. v. Attorney-General of State of N.Y.*, 10 N.Y.2d 192, 196 (1961). See also *Technology Multi Sources v. Stack Global Holdings*, 44 A.D.3d 931 (2d Dept. 2007) (trial court properly denied non-party's motion to quash subpoena to enforce judgment where non-party shared same address, telephone number, ownership and management with judgment debtor company). In the Trial Decision, the Court concluded that Wisell breached his fiduciary duty to Indo-Med by 1) incorporating a competing business called Indo-Med North America ("IMNA") in 1998; 2) doing business as IMNA without the knowledge or consent of Indo-Med; 3) misusing certain accounts; 4) transferring the inventory and assets of Indo-Med to IMNA; and 5) hiring his wife and relatives and giving them unauthorized salaries and benefits. In light of these findings, the Court concludes that the Subpoenas are appropriate and directs Wisell and C. Wisell to comply with the Subpoenas within forty five (45) days of this decision.

In light of the Court's denial of Defendants' motion to dismiss, however, the Court directs Defendants to refrain from taking any steps to execute on the Judgment, pending the jury trial on Plaintiff's claims, and further Order of the Court. The Court makes this direction because of the possibility that the jury may find in favor of Plaintiff and award damages that may offset Defendants' right to the sums in the Judgment.

All matters not decided herein are hereby denied.

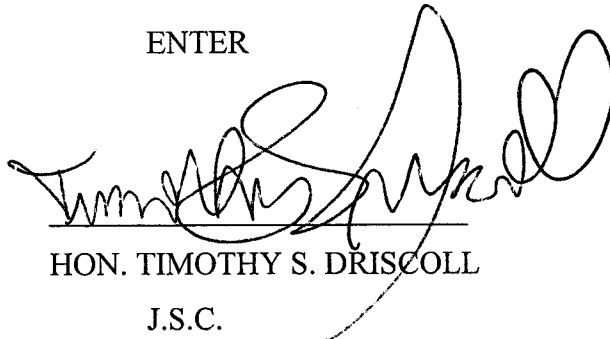
This constitutes the decision and order of the Court.

The Court directs counsel to appear at a pre-trial conference before the Court on  
October 7, 2009 at 9:30 a.m.

DATED: Mineola, NY

September 11, 2009

ENTER



HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**  
SEP 16 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE