

McQuillan v Leake

2009 NY Slip Op 32964(U)

December 8, 2009

Supreme Court, Nassau County

Docket Number: 1109/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

RICHARD McQUILLAN and LINKS REALTY
OF NASSAU COUNTY CORP., T&R HOLDING
CO., LLC and McQUILLAN REALTY,

Plaintiff,

-against-

TIMOTHY J. LEAKE, VILLAGE AUTO
CENTER, INC. and T&R HOLDING CO., LLC,

Defendants.

TRIAL/IAS, PART 3
NASSAU COUNTY

INDEX No. 1109/09

MOTION DATE: Oct. 22, 2009
Motion Sequence # 005

In the Matter of the Application of
TIMOTHY J. LEAKE, holder of 50% of all
outstanding shares of LINKS REALTY OF
NASSAU COUNTY CORP. for the judicial
dissolution of LINKS REALTY OF NASSAU
COUNTY CORP., and holder of 50% of the
membership interests in T&R HOLDING CO.,
LLC for the judicial dissolution of T&R
HOLDING CO., LLC,

Petitioner,

-against-

RICHARD B. McQUILLAN,

Respondent.

INDEX No. 4230/09

MOTION DATE: Oct. 22, 2009
Motion Sequence # 002

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The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X
Reply Affirmation X

This motion, by defendant/petitioner Leake (herein “movant”), for an order pursuant to CPLR 3104(d) disaffirming and/or vacating Special Referee Frank Schellace’s ruling regarding discovery dated September 3, 2009, together with such other and further relief as this Court may deem just, equitable and proper, is determined as hereinafter set forth.

This Court, by an order dated May 18, 2009, referred the parties to Special Referee Frank Schellace for the purpose of supervising discovery herein. The instant motion arises out of a letter application to Mr. Schellace relative to the movant’s Fourth Demand for Production of Documents. His ruling is as follows:

“I have reviewed both submissions and I make the following findings, that by order of Justice Bucaria dated June 16th of 2009, that order confirmed a consented dissolution of Links Realty of Nassau County Corp. as of April 30th of 2009.

Two, accordingly, in accordance with said order, the valuation date of that corporation is April 30th of 2009.

I have reviewed - - three, I have reviewed the order of Special Referee Thomas Dana dated March 9th of 2009 whereupon Mr. Dana makes a finding that Mr. Leake is a 50 percent owner of the aforementioned dissolved corporation.

What was submitted to me was I believe a copy of the transcript - - the transcript of Special Referee Dana's order. It should be noted and a particular interest is that the order makes no mention of what the assets of said corporation, dissolved corporation are.

Four, the fourth document demand that has been submitted and served by the plaintiff seeks documents concerning unrelated entities post April 30th as well as information concerning the activities of the defendant as a real estate broker post April 30th of 2009, and accordingly I find that said document demand is outside the scope of the issues in this action".

The movant, through counsel, argues that his client "has little or no idea as to what assets these entities had or have. . . [and] McQuillan has improperly usurped corporate assets and opportunities to his own benefit" (Gionis affirmation ¶ 2). He further argues that his client is entitled to the disclosure which Mr. Schellace ruled upon, denying same. He contends that his adversary has made "baseless objections . . . to each legitimate demand"; and that his adversary has submitted some documentation to Mr. Schellace on an in camera basis with no apparent resolution thereon. He cites to case law and statutory authority for the disclosure herein; and notes that Mr. McQuillan has complete control over the books and records of the parties' books and records, which include corporate formation and financial information relative to the later Links entities formed by McQuillan, an inventory of Links assets, commission checks and arrangements between McQuillan and Links entities, without which the movant cannot calculate his money damages and is unable to formulate a settlement. He further contends that Mr. McQuillan formed the successor entity prior to the dissolution date and the movant requires such disclosure so as to determine his damages. He avers that, by virtue of the establishment of his client's judicial determination of 50% ownership of the subject entities, he is entitled to a 50% share of the profits; that a confidentiality order (which is not a part of this record) provides for protection and such

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should be produced. He further avers that the documentation from the successor entities are, at the least, discoverable relative to the issue of what constitutes the assets of the dissolved entities vis-a-vis the successor entities set up by Mr. McQuillan in light of Mr. McQuillan's admission of the wrongful use of the corporate parties' listings in his new Links entities.

In opposition, counsel for McQuillan avers that all documents sought in the three prior discovery demands have been supplied; and that documents from three entities, Links Realty of Rockville Centre Corp., Links Title Agency, Ltd. and Links Property Management Group, Ltd., submitted **in camera**, show that they "have never operated and have never done business". She asserts that those documents demonstrate that Links Real Estate Group, Ltd. did not operate until after the April 30, 2009 dissolution date and its capitalization did not originate from the dissolved entities; and that the movant does, in fact, possess the books and records of the dissolved entity, as such was previously provided to the movant. Counsel contends that the movant has not explained the materiality and necessity of this disclosure. Relative to the corporate dissolution, she asserts that until the accounting is completed, disclosure is unnecessary as to non-parties; and that the movant's constant motion practice is abusive and should be denied.

In reply, movant's counsel argues that the opposition is not viable, and that the movant, as a 50% shareholder, does not know the assets of the dissolved entities; and that Referee Schellace's order denying that disclosure is in error. He questions the opposition's argument based on documentation not disclosed to the movant and only to Referee Schellace. He avers that, since this motion was made, this Court, in deciding the contempt application, stated (**inter alia**) that all profits, whether corporate or McQuillan's (as a licensed broker) ". . . shall be accounted for. . .", thus all such disclosure, whether or not admissible, is permitted because such is necessary to a calculation of the movant's damages, or is likely to lead to relevant discovery.

DECISION

Chronologically, the Court must consider the procedural history herein as it relates to the application before Special Referee Schellace, i.e., that this Court stated, in the order of September 28, 2009, **inter alia**,

"It is fundamental that a corporation

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acts only through its agents and employees (*Ford v. Grand Union Co.*, 268 N.Y. 243, 252, 1935). Thus the Corporation necessarily acted by McQuillan, and, if McQuillan did not act on behalf of the Corporation in contracting for listings, he would be subject to a charge of violation of fiduciary duty for diverting corporate opportunities.

In any event, if the corporate assets have value, including listings for which commissions have already been earned, that value shall be determined and shared between the shareholders through an accounting, and not via a contempt motion”.

Clearly, then, while the extent of the corporate assets and profits are in question, and the entitlement is also in question, this is discovery, during which a party is entitled to be divulged such information.

“Pursuant to CPLR 3101(a), “full disclosure or all matter material and necessary in the prosecution or defense of an action” is required. The phrase “material and necessary” should 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 Pub. Co.,
21 NY2d 403, 406; see Andon v 302-
304 Mott St. Assoc., 94 NY2d 740,
746. While the disclosure provisions
of the CPLR are ordinarily to be
construed liberally, “the scope of
permissible discovery is not entirely
unlimited and the trial court is
invested with broad discretion to
supervise discovery and to determine
what is ‘material and necessary’ as
that phrase is used in CPLR 3101(a)”
NBT Bancorp v Fleet/Norstar Fin.
Group, 192 AD2d 1032, 1033”).

(Auerbach v Klein, 30 AD3d 451, 816 NYS2d 376, 2nd Dept., 2006).

The movant herein is not seeking privileged information, nor is he seeking voluminous materials that is abusive to the discovery process. In essence, the movant seeks, as an equal owner of the dissolved entities, the knowledge of precisely what the assets were, and where those assets are at this point in time; and the opposition does not articulate a sufficient rationale to disregard this State’s policy of “open and far-reaching pretrial discovery” (Kavanagh v Ogden Allied Maintenance Corp., 92 NY2d 952, 954, 683 NYS2d 156, 1998).

Accordingly, Special Referee Schellace’s determination, upon review, is vacated, and in its place, this Court directs that the movant’s motion is granted to the extent that his Fourth Document Demand be responded to in full, and such documentation, without exception, be delivered to movant’s counsel within 10 days after service of a copy of this order upon Mr. McQuillan’s attorney.

The Special Referee’s continued supervision of disclosure shall continue at his earliest possible convenience.

Dated DEC 08 2009

ENTERED
DEC 11 2009
NASSAU COUNTY
COUNTY CLERK’S OFFICE

Stephen Bucaria
J.S.C.