

**Ben-Yosef v Hillel**

2009 NY Slip Op 33085(U)

November 23, 2009

Supreme Court, New York County

Docket Number: 602681/07

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN  
J.S.C. Justice

PART 1

Eyal Ben-Yosef

INDEX NO. 602681/07

- v -  
Yoram Hillel

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 3

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
<del>Notice of Motion</del> / Order to Show Cause — Affidavits — Exhibits <u>A-Q</u>	<u>1, 2</u>
Answering Affidavits — Exhibits <u>1-2</u>	<u>3</u>
Replying Affidavits <u>- Exhibits A-D</u>	<u>4, 5</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

**FILED**  
DEC 01 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: NOV 23 2009

Martin Shulman  
MARTIN SHULMAN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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 1

-----X  
EYAL BEN-YOSEF and YORAM MOUSSAIEFF,

Plaintiffs,

Index No: 602681/07

-against-

**Decision and Order**

YORAM HILLEL, OREN HILLEL, ITAMAR HILLEL,  
ET AL.,

Defendants.

**FILED**  
DEC 01 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**Hon. Martin Shulman, JSC:**

In or about 2003-2004, plaintiffs, Eyal Ben-Yosef and Yoram Moussaieff ("Plaintiffs") began a business relationship with defendant, Yoram Hillel ("Y. Hillel") to provide capital towards the purchase of parcels of real estate upon which the latter would either rehabilitate existing homes or construct new one to four-family homes. Y. Hillel formed various corporations (all named as defendants in this action) to purchase these parcels. The parties' arrangement was truly an uncomplicated business deal. After land(s) was purchased and the particular property(s) fully developed and sold to a third party, Y. Hillel was contractually obligated to use the net proceeds of the sale to reimburse Plaintiffs' capital investment and divide the profit equally between the parties. To monitor the progress of the purchases and sales of these varied real properties and related housing construction projects, a holding company, Defendant Y & Y Realty Land Corporation ("Y&Y") was formed.

In their verified complaint, Plaintiffs accuse Y. Hillel, his two sons, Oren and Itamar Hillel ("Hillel Sons") individually and through various defendant corporations (e.g., Yoe Develop Corp., Realty Eight Holding Corp., Realty Four Holding Corp., etc.)

(collectively, "Defendants") *inter alia* of fraud, breach of fiduciary duty, misappropriation of funds, failure to account, unjust enrichment and fraudulent conveyance. In addition to seeking more than \$3 million in damages, Plaintiffs seek the imposition of a constructive trust. In March 2009, Defendants (except for Qty Realty Land Corp. who has not appeared) moved by order to show cause ("OSC") to quash certain subpoenas and/or to strike the complaint because Plaintiffs wilfully failed to comply with certain stipulated discovery demands. During a number of court conferences and with the parties' consent, disposition of the OSC was held in abeyance for about a year to enable the attorneys for the parties to work out their respective discovery needs (i.e., confidentiality, pre-screening of documents, copying costs, etc.), and the ensuing resolution of certain discovery issues was either confirmed by letter or stipulation(s) so ordered. Notwithstanding these best efforts, these and other discovery issues simply could not be resolved and the court is now requested to consider the OSC Y. Hillel filed on behalf of Defendants.

In their OSC to strike Plaintiffs' complaint pursuant to CPLR §3126, Defendants essentially claim Bennett David Krasner, Esq., Plaintiffs' counsel ("Krasner"), misuses broadly worded subpoenas to obtain all of Defendants' banking information. Defendants further claim Plaintiffs and Krasner, without asserting any privilege or confidentiality, have repeatedly ignored their discovery demands for documentation (i.e., subpoenas, interrogatories, etc.) which could demonstrate the source of Plaintiffs' more than \$9 million investment in the parties' joint venture (ostensibly to avoid revealing a purported money laundering scheme which would vitiate any right to recover any profits from this joint venture).

In a follow-up affirmation in further support of the OSC ("Def. Supp. Aff."), Defendants' counsel apprises the court of Plaintiffs' purported ongoing discovery defaults: Plaintiffs' answers to the First Demand for Interrogatories (Exhibit A to Def. Supp. Aff.) were unsworn and unresponsive (see Exhibit B to Def. Supp. Aff.); their general objections to the interrogatories are improper; Plaintiffs fail to explain and document the sources of their \$10 million investment with Y. Hillel; they fail to explain and document where the \$13 million (\$10 million return on their investment and an additional profit of \$3 million) Y. Hillel paid them went; Plaintiffs fail to produce requested documents (e.g., capital payments Plaintiffs made to Y. Hillel, financial statements, accounting records and tax returns for Plaintiffs and their related entities for the period 2005-2007); and with the documents Plaintiffs did turn over (Exhibit D to Def. Supp. Aff.), they failed to "organize and label them to correspond to the categories in the request[s]." (see CPLR 3122[c]).

In opposition, Plaintiffs generally assert that Defendants' bogus charge of money laundering is a red herring to deflect the court's attention from allegations that Y. Hillel and the Hillel Sons misused Plaintiffs' investment funds and misappropriated profits from the sale of the developed parcels without giving a proper accounting of the expenditures, disbursements and profits (Krasner Opp. Aff. at ¶ 5). Plaintiffs further assert that Y. Hillel not only never questioned the legitimacy of the sources of Plaintiffs' investment capital when he took the \$10 million to fund his housing construction venture but also that this information is also totally irrelevant to address the merits of this action. Plaintiffs concede they inadvertently neglected to submit a signed verification with their answers to the interrogatories, but that has been corrected. And

without prejudicing Defendants in any way, Plaintiffs then claim their subpoenas of Defendants' bank records is appropriate discovery whereas Plaintiffs' subpoenas for documentation regarding the sources of Plaintiffs' investment capital is not. They also charge Defendants' counsel with obstructionist tactics in failing to produce all documentation referable to Y. Hillel's and Defendants' purchase and sale of the developed parcels (inexplicably, Defendants' transactional attorney apparently is unable to produce complete records of the transactions in issue). Krasner did highlight that Plaintiffs' willingness to turn over documents Defendants subpoenaed hinged on the parties executing a temporary confidentiality agreement, and that at no time did Plaintiffs ever refuse to turn over requested relevant documents. Krasner further points to Defendants' interrogatories and Notice to Produce as being overly broad, burdensome and a waste of time, and claims Defendants would be better served exploring the subject matter of these discovery requests at Plaintiffs' depositions.

### **Discussion**

The crux of Plaintiffs' action raises two central questions: What did Y. Hillel and the Hillel Sons do with the former's \$10 million investment capital?; and What did Y. Hillel and the Hillel Sons do with all the profits from the sales of the developed parcels?

As the Appellate Division, First Department noted in *Rios v. Donovan*, 21 AD2d 409 (1<sup>st</sup> Dept. 1964), "[t]he purpose of disclosure . . . is to advance the function of a trial, to ascertain truth and to accelerate the disposition of suits." CPLR § 3101 (a) mandates that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof by . . . (4)

any other person [non-party], upon notice stating the circumstance or reasons such disclosure is sought or required.” “This provision has been liberally construed to give effect to the strong public policy favoring full disclosure to adequately appear for trial.” *New York State Elec. & Gas Corp. v. Lexington Ins. Co.*, 160 AD2d 261 (1<sup>st</sup> Dept. 1990).

Plaintiffs have adequately shown they can appropriately utilize subpoenas (Exhibits C through F to OSC), served on JP Morgan Chase Bank, Rosenthal & Rosenthal Factors, Inc., M&T Bank and Astoria Savings Bank to seek the production of Defendants’ transactional and financial documentation highly relevant to the resolution of these questions that are in the custody of these non-parties.

True, as noted in Defendants’ counsel’s March 13, 2009 letter (Exhibit G to OSC) to Krasner, the subject matter of these subpoenas is perceived as overly broad presumably because they lack a precise time frame (e.g., a request for copies of Defendants’ checks issued *at or about the start-up date* of the parties’ joint venture, etc.), notwithstanding that a time period is implicit from the subpoenas’ references to Y&Y and Defendant-corporations indisputably set up during the period 2003-2007. Plaintiffs’ subpoenas also contain a technical deficiency concerning the proper addresses for these non-party entities. Nonetheless, these deficiencies are not fatal to justify a protective order (see CPLR §3103[a]<sup>1</sup>) quashing the subpoenas as they are

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<sup>1</sup> CPLR §3103 (a) states: “The 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.”

easily resolvable. Plaintiffs must simply re-serve these subpoenas properly addressed to these non-party entities which must contain a time frame for the production of documents created when Defendants were either banking and/or doing transactional work with these non-party entities during the course of this joint venture.

Defendants' OSC further seeks an order striking Plaintiffs' complaint for discovery defaults. Regarding the penalties for refusal to comply with orders to disclose, CPLR § 3126 states, in pertinent part:

If any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses . . . ; or
3. an order striking out pleadings or parts thereof, . . . or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Where a party disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the party's pleadings is within the broad discretion of the trial court. *Zletz v. Wetanson*, 67 NY2d 711 (1986); *Berman v. Szpilzinger*, 180 AD2d 612 (1<sup>st</sup> Dept. 1992)(even though afforded ample opportunity to comply with discovery, plaintiff's repeated failure in this regard warranted dismissal of the complaint).

While the penalty of striking a pleading for failure to comply with disclosure is extreme, the courts nonetheless have held that dismissing the pleading is the

appropriate remedy where the failure to comply has been "clearly deliberate or contumacious." *Henry Rosenfeld, Inc. v. Bower & Gardner*, 161 AD2d 374 (1<sup>st</sup> Dept. 1990); *Kutner v. Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 (1<sup>st</sup> Dept.), *lv. to app. den.*, 88 NY2d 802 (1996).

Against this backdrop, it is important to note that this court so-ordered a discovery stipulation the parties executed on October 6, 2008 ("October 6<sup>th</sup> Stipulation") (Exhibit L to OSC) which resolved an earlier round of discovery motion practice involving some of the mutual discovery requests that are still outstanding. Plaintiffs *inter alia* sought material from David Azoulay, Esq., Defendants' former transactional attorney ("Azoulay") who represented Defendants in the purchase of land parcels and their eventual sale as developed lots. On the other hand, Defendants had issued their own subpoenas to obtain documentation from non-party entities related to Plaintiffs, *viz.*, UBS Financial Services, Inc., Brandon D. Gioffre, Rosenthal and Rosenthal, Federal Jeans, Inc., Plaintiffs' counsel and Citigroup Global Markets, Inc. (see Exhibits I-J to OSC).

The October 6<sup>th</sup> Stipulation required the subpoenaed non-parties to turn over copies of their respective records to Plaintiffs' counsel who would then review same to ostensibly weed out any privileged or confidential material. Plaintiffs' counsel would then have 15 days to notify Defendants' counsel and the court that a court conference is required to address these concerns. And if plaintiff's counsel never objected within the 15 day period, then any objection to the production of subpoenaed records to Defendants would be deemed waived requiring certain non-parties purported linked

with Plaintiffs to respond accordingly. On this record, Krasner has not shown that he made a formal (written) objection to the production of certain confidential material within this prescribed period.

Notwithstanding the foregoing, it seems readily apparent that Defendants' use of subpoenas and interrogatories to discover Plaintiffs' funding sources for its investment capital to shed light on a speculated money laundering scheme is a fishing expedition. As Krasner's opposition to the OSC noted (Krasner Opp. Aff at ¶ 8), Defendants expressed no concern about any money being illegally laundered when Y. Hillel and the Hillel Sons willingly accepted Plaintiffs' \$10 million, utilized this investment capital to develop over 50 properties and enjoyed profits from their eventual sales, personally profiting from their joint venture with Plaintiffs as equal partners. In this context, Defendants have not even filed a counterclaim to recapture the claimed \$3 million in profit to which they allege Plaintiffs would not be entitled because of the latter's alleged illegal scheme (see Unverified Answer to Verified Complaint as Exhibit B to OSC).

On the other hand, Krasner's unrefuted May 13, and 18, 2009 letters to the court filed during discovery settlement discussions prior to the OSC becoming *sub judice* strongly suggest that Defendants, while seeking the drastic remedy of striking a pleading, do not come to the court "free of sin." Illustratively, and as noted earlier, Plaintiffs' counsel *inter alia* refers to an outstanding subpoena to Azoulay requesting all the relevant transactional paper work for the purchases and sales of approximately 50 properties that were/are the development projects of the parties' joint venture, a

subpoena improperly vetted by Defendants' counsel resulting in the production of incomplete and inaccurate transaction records.

Moreover, much of the documentary information Defendants request in their interrogatories and Notice to Produce (see Exhibits A and C to Def. Supp. Aff.) are clearly within Defendant's custody and control (e.g., Interrogatory 28 implicitly references the four properties purchased, mortgaged and sold by co-defendant 1804 Summerfield Realty Corp., an entity Y. Hillel controlled, for a total of \$3,685,000.00<sup>2</sup> and Interrogatory 31 references Defendants' wire payments to Plaintiffs of approximately \$13 million, etc.).

Certain "non-issues" which Defendants' OSC raises have been resolved. Plaintiffs do concede that a verification to Plaintiffs' Response to Defendants' Demand for Interrogatories (Exhibit B to Def. Supp. Aff.) was inadvertently omitted and will be provided to comply with CPLR 3133 (b) (Krasner Opp. Aff. at ¶ 6), and that the documentation Plaintiffs produced (not properly labeled and organized in accordance with CPLR 3122 [c])<sup>3</sup> will be remedied as well. To be fair the OSC is not utterly without merit, however, Defendants' dissatisfaction with . . . [Plaintiffs'] document production

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<sup>2</sup> The factual details and underlying documentation as to the purchase, development and sale of any of 1804 Summerfield Corp.'s properties is peculiarly within Y. Hillel's knowledge and control. Contrarily, it is Plaintiffs who should be entitled to discovery concerning Y. Hillel's alleged self-dealing regarding the sale of the properties and ultimate disposition of the profits from such sales.

<sup>3</sup> This rule states: "R 3122. *Objection to disclosure, inspection or examination; compliance* [c] Whenever a person is required pursuant to such notice or order to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request."

[and responses to certain interrogatories] is an insufficient basis for finding that . . . [Plaintiffs] [were] willful and contumacious . . .” *Commerce & Indus. Ins. Co. v. Lib-Com, Ltd.*, 266 AD2d 142, 146 (1<sup>st</sup> Dept. 1999).

Nonetheless, a number of Plaintiffs’ responses were clearly deficient. Thus, in the interest of permitting this case to be decided on the merits, Defendants’ OSC is granted to the following extent:

- Interrogatory No. 4 must be responded to with greater specificity, namely, Plaintiffs must set forth the factual basis for naming a particular corporate entity as a defendant, however Plaintiffs are not required to specify “any and all communications known to Plaintiffs for each defendant respectively.” This portion of this interrogatory is overly broad and burdensome;
- Interrogatories Nos. 5 and 6 refer to an actual agreement allegedly formalizing the parties’ joint venture that is the subject matter of this lawsuit which Plaintiffs claim was produced. No copy of such agreement is contained among the documents produced (Exhibit D to Def. Supp. Aff.). Plaintiffs are directed to produce any and all written memoranda, correspondence or other writings, if any, which set forth the basic terms of this joint venture as alleged in the Verified Complaint at ¶¶ 3 and 5 (see Exhibit A to OSC);
- Interrogatory No. 21 was not properly responded to. In ¶ 26 of the Complaint, Plaintiffs allege that Defendants were induced to invest \$10 million and the latter, “fraudulently represented that they would reimburse Plaintiffs’ money and pay to Plaintiffs one-half of all profits on the sale of the Property.” Defendants have the right to know what specific fraudulent representations Plaintiffs relied upon to make their substantial investment;<sup>4</sup>
- Interrogatory No. 24 should be responded to by Plaintiffs identifying the date, the amount and the manner in which its funds were provided to Y&Y and Y. Hillel to enable 1804 Summerfield Corp. to purchase property for development and sale.

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<sup>4</sup> CPLR 3016 (b) states: “Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.”

However, the sources of such investment funds are irrelevant and accounting entries, if any, as to Defendants' receipt of such funds are particularly within the knowledge of Y. Hillel and Y&Y (*see* fn. 2, *supra*); and

- Interrogatory 33 should be responded to by Plaintiffs specifying what portion of the \$13 million it received from Y. Hillel and Y&Y was allocated on their books and records as a return on their capital investment in the joint venture and what portion was allocated as profit.

Accordingly, it is hereby

ORDERED that Defendants' OSC is granted to the extent that Plaintiffs shall provide the foregoing responses and produce the requested documents in accordance with CPLR 3122[c]; and it is further

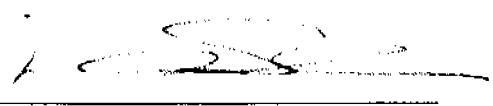
ORDERED that should Plaintiffs fail to fully comply with this order within 45 days of its issuance, Defendants shall move on notice with an accompanying affirmation detailing the default which may result in an order striking the Verified Complaint in its entirety.

Counsel for the parties are directed to appear for a status conference on January 19, 2010 at 9:30 a.m. at I.A.S. Part 1, Room 1127B, 111 Centre Street, New York, New York.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York  
November 23, 2009

**FILED**  
DEC 01 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

  
HON. MARTIN SHULMAN, J.S.C.