

Matter of Gutterman v Caliguiri
2010 NY Slip Op 31551(U)
June 17, 2010
Sup Ct, NY County
Docket Number: 106987/10
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 20

ALLEN GUTTERMAN
- v -
EDWARD CALIGUVA

INDEX NO. 106987/10
MOTION DATE 6/15/10
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 12 were read on this motion to/for disclosure in aid of arbitration

Notice of Motion/ Order to Show Cause — Affidavits -- Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1-8, petition: 9-12

Cross-Motion: Yes No

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 6/17/10 _____
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
NEW YORK COUNTY: IAS PART 6**

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In the Matter of ALLEN GUTTERMAN, RESPONSE
PERSONNEL, INC., R.P.I. SERVICES, INC., R.P.I.
PROFESSIONAL ALTERNATIVES, INC.,
RESPONSE MEDICAL STAFFING OF
CONNECTICUT, INC., and RESPONSE MEDICAL
STAFFING OF NEW JERSEY, INC.,

Index No. 106987/10

Decision, Order and Judgment

Petitioners,

- against -

EDWARD CALIGUIRI and BARRY COHEN,

Respondents.

-----X

JOAN B. LOBIS, J.S.C.:

Motion Sequence Numbers 001 and 002 on this special proceeding are hereby consolidated for disposition. In Sequence 001, petitioner Allen Gutterman and corporate petitioners Response Personnel, Inc., R.P.I. Services, Inc., R.P.I. Professional Alternatives, Inc., Response Medical Staffing of Connecticut, Inc., and Response Medical Staffing of New Jersey, Inc. (collectively "RPI") move, by order to show cause, for an order pursuant to C.P.L.R. § 3012(c), directing disclosure in aid of arbitration in the form of an examination before trial ("EBT") of nonparty Robert Peterson. In Sequence 002, petitioners move, by order to show cause, for an order pursuant to C.P.L.R. Articles 63 and 75, temporarily staying the arbitration pending Peterson's EBT, if ordered by the court. The orders to show cause were signed on May 27 and June 9, respectively. The arbitration is scheduled to begin on June 22. The parties appeared for oral argument on June 15, 2010; petitioners appeared by their counsel, respondent Edward Caliguiri appeared pro se and opposed the petition on the record, and counsel for Peterson appeared for the limited purpose of opposing the deposition of her client. The motions are determined as follows.

The pending arbitration involves a disputed buy-out agreement entered into in June 2007 (the "Agreement"). Gutterman, Caliguiri and Cohen were the shareholders of RPI, a job placement service. By the Agreement, Caliguiri and Cohen redeemed their shares in RPI and resigned as RPI's chief operating officer and director of training and recruitment, respectively, in exchange for certain payments. The Agreement contains certain noncompetition clauses by which Caliguiri and Cohen agree not to use or disclose RPI's confidential proprietary information; not to compete with or take clients away from RPI through December 1, 2007; and not to hire, attempt to hire, or induce to hire individuals employed by RPI through April 1, 2008. The Agreement also contains a clause that provides that if Caliguiri and Cohen breach the noncompetition clauses, RPI is entitled to withhold payments due to them under the Agreement pending resolution by arbitration.

Caliguiri and Cohen filed their demand for arbitration on or about September 1, 2009, alleging that RPI failed to make certain payments that they believe are due to them under the Agreement. On September 29, 2009, petitioners filed an answering statement asserting a general denial, failure to state a cause of action, fraud, larceny, and breach of contract. It is petitioners' position in the pending arbitration that Caliguiri and Cohen breached the Agreement by appropriating confidential information in order to compete unfairly with RPI and by employing Peterson while Peterson still worked for RPI and during the period when the Agreement prohibited Caliguiri and Cohen from employing Peterson. Peterson was RPI's chief information officer from July 2004 until January 3, 2009, and he, along with other principals in the business, had access to RPI's proprietary information. In Gutterman's affidavit in support of the order to show cause, he states that as early as October 2008, he suspected that Peterson had been working with Caliguiri and Cohen to

improperly obtain proprietary information from RPI. Gutterman apparently confronted Peterson over the telephone on December 31, 2008, and after that, Peterson never returned to work at RPI. Petitioners believe that, while working for RPI, Peterson was also working for Caliguiri and Cohen's new company, Rockwood Associates, Inc. ("Rockwood"), and helping Caliguiri and Cohen obtain proprietary information from RPI. They suspect that Peterson began working for Rockwood prior to April 1, 2008, in violation of the Agreement.

Petitioners argue that their application for an order allowing them to depose Peterson prior to the arbitration should be granted because the information that they seek is necessary for them to present a proper case to the arbitrators, and that Peterson's testimony is the key to their defense in the pending arbitration. They want to know when Caliguiri and Cohen first employed or attempted to employ Peterson, what services Peterson provided to Rockwood, and "when and how Peterson transmitted [RPI's] valuable trade secrets and confidential and proprietary information to Rockwood."

While C.P.L.R. § 3102(c) "expressly empowers the court to direct disclosure in aid of arbitration" (Int'l Components Corp. v. Klaiber, 54 A.D.2d 550, 551 [1st Dep't 1976]), the court should not direct disclosure in arbitration proceedings "except under extraordinary circumstances." De Sapio v. Kohlmeier, 35 N.Y.2d 402, 406 (1974), quoting In re Katz, 3 A.D.2d 238, 238-39 (1st Dep't 1957); see also Int'l Components Corp., 54 A.D.2d at 551. "Court-ordered disclosure is not justified except where it is absolutely necessary for the protection of the rights of a party." Id. Necessity, and not convenience, is the determining factor for court-ordered disclosure in aid of

arbitration. In re Travelers Indem. Co. v. United Diagnostic Imaging, P.C., 73 A.D.3d 791 (2d Dep't 2010). Failure to "show that the disclosure of information from a nonparty located out of State was necessary for [the petitioner] to present a viable case to the arbitrator" is a reason to deny court-ordered disclosure in aid of arbitration. In re Flood, 157 A.D.2d 780, 781 (2d Dep't 1990).

In this case, Peterson is not a party to the Agreement, the alleged breach of which is the subject of the pending arbitration. See Flood, 157 A.D.2d at 781. Petitioners indicated at oral argument that they are already aware of other independent causes of action against Peterson, so the information is not necessary to identify him as a potential defendant. But cf. In re VTrader Pro. LLC v. Pires, 24 Misc. 3d 828, 830 (Sup. Ct. N.Y. Co. 2009) (trial court ordered disclosure in aid of arbitration in order to allow petitioner to "obtain limited information as to the identity of potential defendants . . . against whom an action . . . may exist."). Petitioners have known about their potential claims against Peterson since as early as October 2008 and they could have taken any number of steps to depose him in the past nineteen months but have chosen not to. Moreover, the depositions of the parties named in the pending arbitration have apparently already taken place. Petitioners have not demonstrated that they do not already have sufficient evidence to present their defense to the arbitrator, nor have they demonstrated that the information sought is necessary to protect their rights in the pending arbitration. The court's discretion is limited to ordering disclosure in aid of arbitration only under circumstances in which the petitioner has made a showing of necessity, and petitioner has not made that showing here. Accordingly, it is hereby

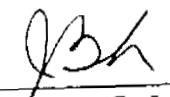
ORDERED that the petition is denied in Motion Sequence Number 001; and it is further

ADJUDGED that the motion to stay the subject arbitration in Motion Sequence Number 002 is denied in all respects, and the petition is dismissed in its entirety; and it is further

ADJUDGED that the parties shall proceed to arbitration forthwith.

This constitutes the decision, order, and judgment of the court.

Dated: June 17, 2010



JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).