SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

LLOYD GOLDSTEIN,

Plaintiff,

INDEX No. 154/09

MOTION DATE: July 28, 2010
Motion Sequence # 002

-against-

LAURENCE LYNCH, NATIONAL ADMINISTRATORS, INC., GREATER METRO CORPORATION and FIRST NATIONAL ADMINISTRATORS, INC.,

Defendants,

and

FIRST NATIONAL ADMINISTRATORS OF NEW JERSEY,

Additional Defendant.

The following papers read on this motion:

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

Motion by defendants to quash plaintiffs' subpoenas is **granted** in part and **denied** in part.

GOLDSTEIN v LYNCH, et al **Index no. 154/09**

This is an action for breach of contract. Plaintiff Lloyd Goldstein was a 50% stockholder in defendants National Administrators, Inc, Greater Metro Corporation, and First National Administrators, Inc, which are insurance brokers. The other 50% of the stock of the corporations was owned by Howard Lynch, who is defendant Laurence Lynch's father. On January 1, 1999, Lloyd and Howard entered into an agreement to sell their stock in the corporations to Laurence. The base purchase price for the stock was $2.4 million, and the sellers were entitled to additional compensation if the purchaser resold any of the stock, or substantially all of the assets, of the companies. The stock purchase agreement describes the business of the corporations as acting as "general agents and brokers with respect to the sale of various health insurance plans."

On January 20, 1999, Lloyd entered into a "deferred compensation and consulting agreement" with National Administrators. The agreement provides that Lloyd was to be paid $17,000 per month for 60 consecutive months in addition to certain "variable fees" based on "the number of insureds being serviced by the company." The variable fee was to be $.50 for each insured, payable monthly until January 15, 2009 and $.25 for each insured until January 15, 2014. During the term of the agreement, Lloyd was not to engage in the "corporate business" of National Administrators within New York, New Jersey, or Connecticut. The agreement defines corporate business as "acting as a general agent and broker with respect to the sale of various health insurance plans." Lloyd entered into similar deferred compensation agreements with Greater Metro and First National Administrators. The agreements were personally guaranteed by Laurence. The corporations entered into similar deferred compensation and consulting agreements with Howard.

The present action was commenced in 2009. Plaintiff alleges that from February 1999 through 2001, National Administrators did not make the monthly payments required by the deferred compensation agreement but claimed the payments were included in the sum paid by Greater Metro. Plaintiff further alleges that during 2001 he agreed with National Administrators to amend the variable fee to $.375 per insured per month and that National Administrators made payments. However, plaintiff alleges that in August 2008, Greater Metro reduced its payments, claiming that the difference was based upon business not covered by the National Administrators deferred compensation agreement. Plaintiff alleges that National Administrators has failed to provide documentary evidence to justify the reduction in payments or allow plaintiff to verify the amount paid.

In the first cause of action, plaintiff seeks an accounting of amounts allegedly due from National Administrators, including not only the variable fees but also "5 % of the life

insurance override commissions." In the second cause of action, plaintiff asserts a claim against National Administrators for breach of the deferred compensation agreement and a claim against Laurence on his guaranty. In the third cause of action, plaintiff asserts claims against National Administrators and Laurence for conversion of compensation due to him under the agreement.

In the fourth cause of action, plaintiff seeks an accounting of amounts allegedly due from Greater Metro, including both the variable fees and the 5 % life insurance override. The fifth cause of action is asserted against Greater Metro for breach of contract and against Lynch on the guaranty. The sixth cause of action is asserted against Greater Metro and Lynch for conversion. In the seventh cause of action, plaintiff seeks an accounting of amounts due from First National, including the variable fees and the 5 % life insurance override. Plaintiff alleges that the life insurance commissions were generated from business which should have been placed with Greater Metro. In the eighth cause of action, plaintiff asserts a claim against First National for breach of contract and a claim against Lynch on his guaranty. In the ninth cause of action, plaintiff asserts claims against First National and Lynch for conversion.

The tenth cause of action is asserted against another defendant, First National Administrators of New Jersey, Inc. Plaintiff alleges that Laurence formed this corporation to avoid the other defendants' obligations under the deferred compensation agreements. In the eleventh cause of action, plaintiff alleges that at the closing of the stock purchase, the parties agreed that Greater Metro, which was licensed to sell life insurance, would pay plaintiff 5 % of net life insurance override commissions earned on new life insurance policies which it placed. This cause of action is for breach of the "life insurance agreement."

On May 24, 2010, plaintiff served a series of subpoenas duces tecum on United States Life, American International Life, and American General Life Insurance companies. The subpoenas seek documents identifying the "number of employee-insureds" serviced by National Administrators as a broker/third party administrator for health insurance, defined as including medical, dental, vision, disability, and long-term care between 1999 and the present. The subpoenas seek documents identifying the number of employee insureds serviced by National Administrators for life insurance for the same period. The subpoenas seek documents identifying the commissions paid to National Administrators for health and life insurance. The subpoenas seek similar documents identifying the number of employee insureds serviced by, and commissions paid to, Greater Metro, First National, and First National Administrators of New Jersey. The subpoenas were returnable June 14, 2010 at

plaintiff's counsel's office.

Defendants moved to quash the subpoenas pursuant to CPLR § 2304 on June 18, 2010. Defendants argue that the subpoenas are defective because they do not state the "circumstances or reasons such disclosure is sought or required" as provided by CPLR 3101(a)(4). Defendants argue that the subpoena served on American General Life Insurance Co. of Delaware is invalid because that company has no office in New York and was served in New Jersey. Defendants argue that the documents concerning commissions are not relevant because the agreements provide for payment based on the number of insureds serviced, which cannot be determined based upon the commissions received. Finally, defendants argue that the subpoenas are overbroad in terms of time period because, based upon the six year statute of limitations for breach of contract, plaintiff cannot recover payments accrued prior to 2003.

CPLR 3101(a)(4) provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by any person other than a party, "upon notice stating the circumstances or reasons such disclosure is sought or required." The purpose of this requirement is "presumably to afford a nonparty who has no idea of the parties' dispute or a party affected by such request an opportunity to decide how to respond" (***Kooper v Kooper***, 74 AD3d 6, 13 [2d Dept 2010]). Pursuant to this section, a subpoena duces served on a nonparty must contain the required notice stating why disclosure is sought (Id).

While relevance and materiality must be shown to obtain disclosure from a nonparty, a showing of mere relevance and materiality is not sufficient (Id at 17-18). A party's inability to obtain the requested disclosure from her adversary or from independent sources is a significant factor in determining the propriety of nonparty discovery (Id at 16). However, other circumstances may be relevant in the context of the particular case (Id at 17).

The subpoenas at bar contain a notice that "Plaintiff Lloyd Goldstein, a consultant for the above-captioned corporate defendants, has commenced an action...alleging that defendants have breached several consulting agreements under which payment to plaintiff is based upon the number of health insurance insureds serviced and life insurance commissions received by defendant corporations." Documents showing the number of insureds serviced by the brokers are clearly relevant to the amount of variable fees to which plaintiff is entitled. While the parties have a dispute as to whether plaintiff was entitled to receive a share of the life insurance commissions, documents showing the basis upon which

the broker was compensated by the carrier may be relevant to this issue. The parties' course of performance after the contracts were formed in 1999 is relevant to their intent, regardless of whether an action to recover payments due at that time is barred by the statute of limitations. Thus, the court concludes that plaintiff has satisfied the relevance and materiality requirement.

Before serving the subject subpoenas, plaintiff attempted to obtain the information from defendants by requesting electronic discovery. In response to defendants' argument that plaintiff might use the information to engage in competition, the court ordered defendants to provide a schedule showing the number of insureds serviced, under all insurance policies, broken down by year commencing with 1999. Defendants' failure to provide a schedule showing the number of insureds under the different types of policies and arranged by year led plaintiff to seek discovery from the insurance companies. Thus, plaintiff has made a sufficient showing of inability to obtain the requested information from his adversary. Plaintiff's notice on the face of the subpoena did not explain his previous efforts to obtain the information from defendants. However, in the circumstances of the present case it was sufficient to make this showing in opposition to defendants' motion.

CPLR § 2303 provides that a subpoena shall be served in the same manner as a summons. Nevertheless, while a summons may be served outside the state if a basis for personal jurisdiction exists, a subpoena may not be served without the territorial jurisdiction of the state (***Coutts Bank v Anatian***, 275 AD2d 609, 612 [1st Dept 2000]). The subpoena which was served on American General in New Jersey is unenforceable.

In response to defendants' motion to quash, plaintiff asserts that American General has "voluntary consented" to provide the documents. While the insurer may have agreed to produce documents without requiring plaintiff to move to compel compliance, it is not clear that such consent is voluntary. In any event, because the documents have not yet been produced, defendants' motion to quash is not moot. Accordingly, defendants' motion to quash the subpoena served on American General Life Insurance Co. of Delaware is **granted**. Defendants' motion to quash the subpoenas served on United States Life Insurance Company and American International Life Assurance Company of New York is **denied**.

So ordered.

ENTERED

Dated 22 September 2010 SEP 24 2010 Stephen A. Bucaria J.S.C.

NASSAU COUNTY
COUNTY CLERK'S OFFICE