SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

In the Matter of the Application of
RITA CUSIMANO,

Petitioner,

For the Judicial Dissolution of The Strianese Family Limited Partnership pursuant to Section 802 of the Revised Limited Partnership Act,

INDEX NO.: 008522/2010
MOTION DATE: 09/15/2010
MOTION SEQUENCE: 005

-against-

THE STRIANESE FAMILY LIMITED PARTNERSHIP and BERNADETTE STRIANESE,

Respondents,

-and-

BERNARD STRIANESE and CARMELA STRIANESE,

Petitioners-Interveners,

-against-

RITA CUSIMANO and BERNADETTE STRIANESE,

Respondents.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibit Annexed	1
Memorandum of Law in Support of Petitioner's Motion to Depose Bernard and Carmela Strianese in Aid of Arbitration	2
Affirmation of Peter J. Terracciano in Reponse to Petitioner's Motion	3

Affidavit of Alan A. Heller in Opposition & Exhibits Annexed 4
Interveners' Memorandum in Opposition to Petitioner's Motion for an Order Authorizing Depositions 5
Affirmation of Edward J. Boyle in Further Support of the Motion to Compel the Deposition in Aid of Arbitration of Bernard and Carmela Strianese 6

Petitioner has moved pursuant to CPLR 3102(c) for an order directing the depositions of Bernard and Carmela Strianese in aid of arbitration. CPLR 3102(c) authorizes the Court to order disclosure in a matter that has been referred to arbitration.

This Court had previously granted an application of Bernard and Carmela Strianese (the parents) to intervene in this dissolution proceeding. The Court then granted the application of the interveners to arbitrate the entire matter, including whether the interveners had any ownership in the Strianese Family Limited Partnership.

Petitioner argues, and has argued, that the interveners have no ownership rights in the Limited Family Partnership. Part of her argument is based upon a 2001 tax return (filed in 2002) in which Bernard Strianese allegedly acknowledged that the Limited Partnership was owned by his two daughters (the petitioner, Rita Cusimano, and respondent, Bernadette Strianese, in our caption).

This determination is made, not from a statement by Mr. Strianese, but from the interpretation of the K-1 forms filed with the 2001, Form 1065, tax returns. These reflect that at the end of 2001 Rita Cusimano and Bernadette Strianese each held 49% of the Limited Partnership at the end of the year, and in the beginning each held 4.5269%. They also reflect that at the beginning of the year Bernard and Carmela each owned 1%, and at the end of the year they had no interest (apparently now transferred to the daughters). Additional K-1s reflect that at the beginning of the year Bernard and Carmela each held 44.54731% of the partnership, and at the end of the year they held nothing.

In an affidavit submitted as part of a motion to reargue the Court's decision to compel arbitration, Andrew Schnurr, the accountant who signed this 2001 return, stated he was the accountant who completed the return based on information provided by Bernadette Strianese, the respondent in our case and the daughter of the interveners, and, interestingly enough, the mother of the attorney who represented the interveners.

The petitioner argues that she needs to depose the interveners, or at lease Bernard Strianese, in that eight years after the filing of the 2001 Form 1065, he now claims he and his wife each hold 50% of the Limited Partnership. This is a claim he made when he moved to intervene. Petitioner also argues that other documentation is inconsistent with the claim of the parents that they each hold 50% of the Limited Partnership.

A notice to depose the parents was served as part of the accounting action, but it was stayed by the order to arbitrate, thus, petitioner has now initiated this motion to compel the depositions.

Respondent, Bernadette Strianese, does not join in her sister's application based on the recommendation of her parents' medical providers that a deposition might pose a possible health risk to the parents.

Counsel for the parents objects to the depositions. He argues that a deposition would be very stressful to his clients and that Mr. Strianese specifically included an arbitration clause in the Limited Partnership Agreement due to prior litigation of which he had been a part.

An affidavit of Mr. Strianese filed in support of the motion to intervene and arbitrate reflects his belief that he and his wife are owners of the Limited Partnership and how he had gifted his daughters money up through the year 2000 (1998, 1999, 2000), but then stopped because they were gifting them in other ways. He further notes that he and his wife received distributions through 2006, but stopped when his daughter, Bernadette, the respondent, told him they had to set up a reserve fund for the Limited Partnership. He never addresses the tax reporting changes as reflected in the K-1 forms.

The power of the Court to order disclosure, which would be in aid of arbitration, is as noted by the commentators, used sparingly (7 Weinstein, Korn & Miller, New York Civil Practice, ¶ 3102.16), and "is held to be inconsistent with the expeditious aims of arbitration to allow the time consuming processes of litigation's pre-trial discovery devices." Siegel, New York Practice, § 352. Intervener cites to *DeSapio v. Kohlmeyer* , 35 N.Y.2d 402 (1974) where, while finding the defendant waived arbitration by

affirmative use of the judicial process, the Court of Appeals wrote, "[t]he courtroom may not be used a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration."

In *DeSapio*, the defendant chose to depose the plaintiff, and then chose to invoke the arbitration agreement. The Court of Appeals clearly did not look kindly on that scenario. Those are not our facts.

In a more recent case, *Matter of State Farm v. Wernick*, 90 A.D.2d 519 (2d Dept. 1982), the Court wrote, citing to *DeSapio*, supra, that the Court may only order discovery in the aid of arbitration in the presence of "extraordinary circumstances." In *Matter of State Farm*, the Court found the physical exam of a party fit the definition of "extraordinary circumstances." It determined that the request for the physical exam was not a "dilatory ploy" nor would the party to be examined suffer prejudice by said exam.

Interveners-parents cite to other appellate cases which have denied or reversed requests for discovery in aid of arbitration. Clearly, each case must be examined on its facts.

In a most recent case, from May of 2010, *Matter of Travelers Indemnity Company, Respondent, v. United Diagnostic Imaging, P.C., Appellant*, 73 A.D.3d 791 (2d Dept. 2010) the Court held "[t]he test for ordering disclosure to aid in arbitration is necessity as opposed to convenience." Thus, Court ordered disclosure to aid in arbitration is justified only where that relief is "absolutely necessary for the protection of the rights of a party to the arbitration." (Internal citation omitted).

If a petitioner already has evidence to support its position in arbitration, which is what the interveners' counsel argues, based upon the petitioner's claims re the 2001 income tax return, then no disclosure would be appropriate and the motion should be denied.

At one time arbitration was considered an expeditious process as an alternative to a lengthy litigation. From this Court's own experience with the cases before me, and the fact that there has yet to be an arbitration date set in this matter, that is clearly not the case (decision granting arbitration, from the bench, July 22, 2010).

This case does have extraordinary circumstances. The Court further finds that

there is a necessity for such depositions considering the extraordinary conflicting facts of this case. We have interveners who claim to be owners of an entity which documentary evidence indicates they may have given up such ownership to their daughters nearly a decade ago. That Mr. Strianese's affidavit, that covers a great deal of history, fails to mention the 2001 tax return K-1s. That these individuals are over 90 years old and that the Court ordered the case to go to arbitration which has not yet started.

Considering the age of the interveners, the lack of progress of the arbitration process, and the extreme importance of any statements to be made by the Strianeses (the interveners and parents of petitioner and respondent), it is highly appropriate to grant petitioner's application to depose Bernard Strianese. The test — whether the petitioner had adequate knowledge to frame a claim or defense (*Timeplex, Inc., Respondent v. Racal-Milgo Limited, Appellant*, 87 A.D.2d 753) is met. This follows the procedure under 3102(c) and is not precluded by the Appellate Division decision in *Travelers Indemnity*, supra.

However, considering the age of the interveners and their apparent dislike of this judicial courtroom process, any deposition shall take place at a site of their designation in Nassau County, including their home and that said deposition shall pause every half hour for a ten (10) minute break.

That this order, directing the deposition, is stayed for thirty (30) days from the date of this decision to allow for the arbitration to begin. If arbitration does begin within this period of time, the decision to allow for the deposition of the parents or their testimony will be left to the arbitrator. If arbitration does not begin within this period, then the depositions shall be held within ten (10) days of the end of the thirty (30) day period.

It is **SO ORDERED**.

Dated: October 5, 2010

J.S.C.