

Attori v Waller

2010 NY Slip Op 33386(U)

December 6, 2010

Supreme Court, New York County

Docket Number: 601681/09

Judge: Eileen A. Rakower

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

PRESENT: **HON. EILEEN A. RAKOWER**

PART 15

Index Number : 601681/2009

ATTORRI, GREGORY J.

vs

WALLER, JOHN

Sequence Number : 002

COMPEL DISCLOSURE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3

4

Cross-Motion: Yes No

FILED

Upon the foregoing papers, It is ordered that this motion

DEC 10 2010

NEW YORK COUNTY CLERK'S OFFICE

DECEDED BY ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 12/10/10



HON. EILEEN A. RAKOWER

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 15

-----X

GREGORY J. ATTORI,

Index No.
601681/09

Plaintiff,

**DECISION
and ORDER**

- against -

JOHN WALLER, WALLER CAPITAL CORP. and
WALLER CAPITAL PARTNERS,

Mot. Seq.

FILED⁰⁰²

Defendants.

DEC 10 2010

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HON. EILEEN A. RAKOWER

NEW YORK
COUNTY CLERK'S OFFICE

Gregory J. Attori ("Plaintiff") brings this action against Defendants for fraud, breach of contract, and breach of the covenant of good faith and fair dealing based upon alleged misrepresentations made by Defendant John Waller ("Mr. Waller") as to the financial condition of Waller Capital Corp. and Waller Capital Partners (collectively "Waller Capital"). Plaintiff alleges in his Complaint that, in the summer of 2005, he was approached by a recruitment firm retained by Waller Capital based upon his background in investment banking in the media and communications industry. It was represented to Plaintiff by the recruiter that Waller Capital was generating approximately \$15,000,000 in revenue in both 2005 and 2006 and had expenses of approximately \$3,000,000.

Based upon his initial discussions with the recruiter, Plaintiff was interested to learn more about the position at Waller Capital. He subsequently had several in-person meetings with Mr. Waller. In those meetings, Mr. Waller represented that that the revenues of Waller Capital in both 2005 and 2006 were \$15,000,000 or more, and that part of Plaintiff's compensation package would include a percentage of profits and share ownership in the company. Mr. Waller also represented that expenses were approximately \$2,000,000-\$3,000,000. Mr. Waller also provided, at Plaintiff's request, a spreadsheet detailing Waller Capital's expenses in 2005. The spreadsheet showed expenses in the amount of approximately \$2,400,000.

Based on Mr. Waller's representations as to the financial condition of Waller Capital, and the fact that he would be an immediate equity owner in a highly profitable firm and would manage Waller Capital's daily operations, Plaintiff entered into an employment contract with Waller Capital on January 19, 2006. In addition to a base salary, the contract provided for a bonus comprised of 15% of net profits and a 15% share interest in the company.

However, Plaintiff states that, upon joining Waller Capital, he began to discover that Mr. Waller's representations as to the firm's performance in 2005 and 2006 were false. In fact, once Plaintiff had organized the firm's "pipeline" reports, which tracked projects and revenues, he discovered that the firm's actual revenues were only a small fraction of the \$15,000,000 for both 2005 and 2006. After approaching Mr. Waller with these discrepancies, Mr. Waller agreed to increase Plaintiff's equity participation to 25%, and increase his bonus to 25% of net profits.

Plaintiff further alleges that, in 2007, he was able to review Waller Capital's true expenses, at which time he discovered that the firm's expenses were significantly higher than previously represented. At this point, Plaintiff states that he and Mr. Waller conflicted over the direction of the firm, with the former seeking to cut expenses and collect unpaid bills from clients.

In February 2009, Plaintiff states that he was terminated from Waller Capital without notice. Plaintiff claims that he has been damaged by Mr. Waller and Waller Capital's material representations as to the condition of the company. In addition, Plaintiff claims that Defendants have failed to compensate Plaintiff pursuant to the revenue and expense formula set forth in his contract, even under the firm's actual revenues and expenses. Further still, Plaintiff claims that, pursuant to his contract, he is entitled to payment of his 25% equity share of Waller Capital, which is to be valued as of the date of his termination.

Presently before the Court is Plaintiff's motion to compel the further production of documents in response to Plaintiff's First Notice of Discovery and Inspection ("D&I") dated July 21, 2009. While the record indicates that the parties have conferred on several occasions and have agreed to the production of numerous documents, Plaintiff takes the position that Defendants' production thus far has been insufficient. Defendants disagree. The sought-after discovery in this motion, and the parties' positions thereon, are as follows:

- Request Nos. 1-7:
 - Plaintiff seeks “financial statements, wire transfers, check deposits, emails, notes, internal memoranda, and other documents relating to Defendants’ financials,” and states that Defendants have only produced “scattered revenue/liability reports for 2005-2009.” Plaintiff claims that more detailed yearly and monthly financial statements exists for the years 2002-2010, and demands that Defendants produce same.
 - Defendants state that Plaintiff’s initial request was limited to the years 2005-2009, and that they have fully complied with that request. To the extent that Plaintiff seeks production of responsive documents for the years 2002-2004 and 2010, Defendants maintain that such documents are irrelevant, since Plaintiff claims that a) he was fraudulently induced into joining Waller Capital based upon Defendants’ misrepresentations concerning the company’s financial condition in 2005 and 2006; and b) he states that he is entitled to his 25% equity share, to be calculated based on the company’s worth at the time of his termination in February 2009.

- Request No. 13:
 - Plaintiff seeks all federal and state tax returns filed by Defendants, claiming that such records are discoverable due to discrepancies between financial records heretofore produced.
 - Defendants claim that Plaintiff has failed to make the requisite showing of necessity under the applicable case law, and states that the financial statements cited by Plaintiffs as inconsistent are only so to the extent that one statement reflects revenues for the entire 2007 calendar year, while the other reflects 2007 revenues up to November 30th of that year.

- Request No. 14:
 - Plaintiff seeks “all ‘pipeline’ reports and documents concerning all Defendants’ transactions, engagements, or potential engagements” created from January 2005 through the date this action was commenced. Plaintiff states that Defendants have produced some pipeline reports, which Plaintiff claims are outdated and incomplete.
 - Defendants state that, “[a]s previously explained to Plaintiff, only a few pipeline reports were available because the electronic file

containing the report is automatically saved over when it is updated. The latest (and only) electronic version and any old hardcopy pipeline reports in Defendants' possession locatable through reasonable efforts have been produced to Plaintiff."

- Request No. 18:

-Plaintiff seeks "all documents relating engagements in which Defendants had not been paid in full." Plaintiff states that Defendants have not produced any documents which are responsive to this request.

-Defendants claim that they have "produced all responsive documents in their possession locatable through reasonable efforts and have identified these documents by Bates number by Plaintiff." Defendants refer the Court to an e-mail from defense counsel to Plaintiff's counsel stating that responsive documents were produced by way of documents marked "WC 30650-704," and that "no further responsive documents exist."

- Request Nos. 21 and 22:

-Plaintiff seeks "documents related to Defendants' transactions or engagements with 'Time Warner' and 'Alameda.'" Plaintiff states that Defendants produced numerous documents responsive to these requests, but failed to produce an engagement letter for Time Warner.

-Defendants state that, as previously explained to Plaintiff, they were able to locate the Time Warner engagement letter after performing a diligent search.

- Request No. 32:

-Plaintiff seeks "any invoices or bills from Mr. Kenneth Rich or A.T. Kearney or successor organization regarding [Plaintiff's] hiring." Plaintiff states that Defendants have produced several responsive documents, but have failed to produce an engagement letter for Mr. Rich or A.T. Kearney, and have also failed to produce "a bill referencing the financials of Waller Capital as represented to Mr. Rich and upon which Mr. Rich's fee was calculated."

-Defendants state that, as previously represented to Plaintiff, they were unable to locate these documents after performing a diligent search.

- - Request No. 38-40:
 - Plaintiff seeks production of “any and all documents regarding Defendants[’] interactions or involvement with the National Association of Securities Dealers (‘NASD’), FINRA, or Securities [and] Exchange Commission (‘SEC’).” Defendants have not produced any such records.
 - Defendants state that, on April 23, 2010, Defendants agreed to produce their registration documents. However, they oppose turning over any responsive documents beyond their registration documents, claiming that “Defendants’ ‘interactions’ with government agencies have absolutely nothing to do with Plaintiff’s claims for fraud and breach of contract.”
- Request No. 56 and 57:
 - Plaintiff seeks “all documents reflecting any other employment-related actions to which Defendants are or have been a party,” and states that Defendants have failed to produce any such records. .
 - Defendants state that Plaintiff fails to show how any such documents are relevant to his claims, and further assert that Plaintiff’s request is overbroad and unduly burdensome.

CPLR §3101(a) generally provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” The Court of Appeals has held that the term “material and necessary” is to be given a liberal interpretation in favor of the disclosure of “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity,” and that “[t]he test is one of usefulness and reason” (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]). However, a party is not required to respond to discovery demands which are “palpably improper.” A demand is palpably improper if it seeks information which is irrelevant or confidential, or is overbroad and unduly burdensome (*Gilman & Ciocia, Inc. v. Walsh*, 2007 NY Slip Op 8410, *1 [2nd Dept. 2007]).

With respect to Requests 1-7, the Court finds that Plaintiff is entitled to responsive documents for the year 2004, in addition to the records already produced by Defendants. The Court finds that these documents are relevant and material because they speak to the issue of whether, as Plaintiff alleges, Mr. Waller willfully and fraudulently misrepresented Waller Capital’s financial condition.

Plaintiff's request for responsive records for the year 2010 is denied, however, as Plaintiff claims in his complaint that the value of his equity share is to be calculated at the time of his termination, which took place in February 2009.

As for Item 13 (Waller Capital's tax records), it is well settled that disclosure of tax returns is disfavored, and is not to be ordered by a court absent a showing of "overriding necessity" therefore (*see Four Aces Jewelry Corp. v. Smith*, 256 A.D.2d 42 [1st Dept. 1998]). Here, the Court finds that Plaintiff is entitled to Waller Capital's 2009 tax returns, as Plaintiff has demonstrated that Waller Capital's financial records for that year are inconsistent, thus making disclosure of the 2009 tax returns necessary in order to accurately ascertain the value of Waller Capital in 2009 (*see id.*).

With respect to Requests 14, 18, 21-22, and 32, Plaintiff's motion is granted to the extent that Defendants shall provide an affidavit stating that a search was performed and no further responsive records were located.

Plaintiff's Requests 38-40 (documents regarding Defendants' "interactions" with NASD, FINRA, and/or the SEC, "including but not limited to annual Broker/Dealer applications filed by Defendants") are denied as overly broad.

Finally, Requests 56 and 57 (documents pertaining to other employment-related actions involving Waller Capital) are denied as overly broad.

Wherefore it is hereby

ORDERED that Plaintiff's motion is granted to the extent that Defendants' shall produce Waller Capital's 2009 tax returns within 30 days of receipt of a copy of this Order with Notice of Entry thereof; and it is further

ORDERED that Defendants shall produce an affidavit as set forth above within 30 days of receipt of a copy of this Order with notice of entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: December 6, 2010

FILED 

EILEEN A. RAKOWER, J.S.C.

DEC 10 2010

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