Williamsport Capital Ltd. v Gaspar Roberto Lopez Costa
2010 NY Slip Op 33956(U)
September 28, 2010
Sup Ct, New York County
Docket Number: 101984/06E
Judge: Paul G. Feinman

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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WILLIAMSPORT CAPITAL LTD, and MARIA del CARMEN ONRUBIA de BEECK,
Plaintiffs,

- against -

GASPAR ROBERTO LOPEZ COSTA,
Defendant.

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Index No. 101984/06 E
Mot. Seq. No. 005 & 006

DECISION and ORDER

Appearances:

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Papers considered in review of these motions:

Motion sequence number 005:

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PAUL G. FEINMAN, J.:

Motions bearing sequence numbers 005 and 006 are consolidated for the purposes of this

decision and order.

Defendant moves (sequence number 005) for partial summary judgment dismissing the first cause of action for a declaratory judgment pertaining to the title of certain funds (*see* CPLR 3212 [e]). Plaintiff moves separately (sequence number 006) to compel the production of certain documents (*see* CPLR 3124). For the reasons discussed below, defendant's motion for summary judgment on the first cause of action (sequence number 005) is denied, and plaintiff's motion to compel (sequence number 006) is granted.

Background

Over twenty years ago, Maria del Carmen de Beeck ("plaintiff") and her family attended counseling sessions with defendant, a psychologist, in Peru (Doc. 9-2 ¶ 8).[1] Plaintiff alleges that he convinced her and her family to relocate to Argentina, which they did. She claims that over the course of many years, defendant convinced her to give him "control over her wealth and to make and manage economic investments on her behalf in Argentina" (Doc. 2 ¶ 13). She claims that she provided him with substantial sums of money for various investment purposes. In 2001, defendant apparently established Williamsport Capital, Ltd., which was incorporated in the British Virgin Island; defendant was appointed president and secretary and issued five bearer share certificates (Doc. 2 ¶¶ 31-34). Sometime in 2004, plaintiff acquired possession and/or custody of those shares for Williamsport to which she now claims title (Doc. 2 ¶ 24). The manner in which she acquired possession and/or custody is now in dispute. Defendant claims that he only gave those shares to her "to hold in trust for him" (Doc. 9-2 ¶ 20). This action ensued.

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[1] Unless otherwise indicated, all references are to the E-filing document numbers.

Analysis

I. Motion Sequence Number 005

Plaintiffs' first cause of action seeks "a declaration establishing their rights to the funds on deposit at [Israel Discount Bank of New York] in account 08-3174-4" (Doc. 3 ¶¶ 39-41). A declaratory judgment is a *sui generis* discretionary remedy by which this court may determine "the rights and other legal relations of the parties to a justiciable controversy" (CPLR 3001; *see Bower & Gardner v Evans*, 60 NY2d 781, 782 [1983]; *Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983], *cert denied* 464 US 993 [1983]).

As the movant on this motion for partial summary judgment, defendant bears the burden of demonstrating that there are no material issues of fact regarding his entitlement to the funds at issue (*see Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 311 [1st Dept 2008]; *Armstrong v Archives L.L.C.*, 46 AD3d 465, 466 [1st Dept 2007]). He has not met this burden. Defendant has failed to demonstrate entitlement to judgment as a matter of law because he has not adequately addressed the issue of which jurisdiction's law governs the alleged tort. As defendant conceded during oral argument (Doc. 56, at 8), the most analogous or "next-nearest action" for this declaratory judgment action is conversion (*Solnick v Whalen*, 49 NY2d 224, 230 [1980]; *see* Siegel, NY Prac § 438, at 743 [4th ed]), which has been held to fall within the ambit of the traditional rule of *lex loci delicti* (*see Salimoff & Co. v Standard Oil Co.*, 262 NY 220, 226 [1933]; *Riley v Pierce Oil Corp.*, 245 NY 152, 153 [1927 per curiam]) a vestige of the vested rights doctrine (*see Cooney v Osgood Mach.*, 81 NY2d 66, 72 [1993]). Given New York's trend toward applying interest-based analyses for determining substantive rights (*see Babcock v Jackson*, 12 NY2d 473, 477 [1963]; *see also Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521

[1994]), it may very well be "appropriate to look to the place of the tort" and apply that jurisdiction's law (*Hacohen v Bolliger Ltd.*, 108 AD2d 357, 360-361 [1st Dept 1985] [quotations omitted]). When determining which jurisdiction "has the most significant relationship to the occurrence and the parties," this court considers the following factors: the location of the conduct; location of the injury; the parties' domicile, residence, and nationality; and location where the parties' relationship is centered (Restatement [Second] of Conflict of Laws, § 145; *see Pescatore v Pan Am. World Airways, Inc.*, 97 F3d 1, 14 [2d Cir 1996]).

Here, there is evidence tending to support each of these factors in conflicting manners. For example, plaintiff Maria Del Carmen de Beeck is a Peruvian citizen and apparently resides in both Lima, Peru and Buenos Aires, Argentina (Doc. 3 ¶ 3). Allegedly, defendant, an Argentinian citizen (Doc. 3 ¶ 4), convinced her and her family to relocate to Argentina (Doc. 3. ¶ 3; Doc. 20-3, at 9-13, 15, 19). There are indications that the alleged tortious activity and injuries occurred in Argentina and involved international transfers of funds involving Williamsport Capital Ltd., which apparently was incorporated in the island of Tortola, British Virgin Islands via the Israel Discount Bank, which is a New York corporation along with funds maintained "at the Uruguayan subsidiary of [Israel Discount Bank]" and in Miami, Florida (Doc. 3. ¶¶ 2-5, 13, 18, 20; Doc. 20-3, at 92-93; Doc. 28-4) (*see McCarthy v Coldway Food Express Co.*, 90 AD2d 459, 460 [1st Dept 1982]).

Despite this, defendant devotes a mere two sentences, in a footnote, discussing this matter's governing law. "Because plaintiffs voluntarily commenced this action in New York, defendant's motion is made pursuant to New York law. Nevertheless, regardless of whether the law of Argentina or the British Virgin Islands is applied, a thief cannot take legal title to stolen

property" (Doc. 22, at 6 n 2). Defendant's motion is entirely premised upon this cursory and conclusory treatment of conflict of laws principles. Considering this, and that the "first step in choice of law analysis is determining whether an actual conflict exists between the jurisdictions involved," this court cannot grant judgment as a matter of law to defendant when he has not sufficiently addressed the issue of the law pursuant to which he claims to be entitled to such judgment (*K.T. v Dash*, 37 AD3d 107, 111 [1st Dept 2006]).

II. Motion Sequence Number 006

Plaintiff moves to compel the production of defendant's tax returns from 1992-2005. "Because of the strong public policy in this state . . . in favor of resolving disputes on the merits" (*Corsini v U-Haul Intl.*, 212 AD2d 288, 291 [1st Dept 1995], *lv dismissed and denied* 87 NY2d 964 [1996]), the CPLR mandates "full disclosure of all matter material and necessary" (CPLR 3101 [a]). Matter is deemed material and necessary if it is relevant (*see Zegarelli v Hughes*, 3 NY3d 64, 66 [2004]; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 407 [1968]) or "reasonably calculated to lead to relevant evidence" (Siegel, NY Prac § 344, at 525 [4th ed]; *see Galleon Syndicate Corp. v Pan Atl. Group*, 223 AD2d 510, 510 [1st Dept 1996]). This court has broad discretionary powers over disclosure and is accorded significant discretion in making such determinations (*see Devore v Pfizer Inc.*, 58 AD3d 138, [1st Dept 2008], *lv denied* 12 NY3d 703 [2009]; *Gradaille v City of New York*, 52 AD3d 279, 283 [1st Dept 2008]). A party seeking disclosure may move to compel compliance under CPLR 3124.

In March 2006, plaintiff served a demand for defendant's tax returns from 1992 - 2005 (Doc. 37-8). Defendant objected on the grounds that the demand was overly broad, unduly burdensome, not reasonably calculated to lead to relevant matter, and "seeks information

protected from disclosure by applicable privileges, doctrines, or immunities, including the attorney-client privilege and the attorney work-product immunity privilege" (Doc. 38-9). Generally, tax returns are afforded a great deal of protection and the court will not require them to be disclosed absent a showing of necessity (*see Kodsi v Gee*, 54 AD3d 613, 614 [1st Dept 2008]), especially if the information sought is available from other sources (*see Williams v New York City Hous. Auth.*, 22 AD3d 315, 316 [1st Dept 2005]).

Here, however, defendants' tax returns are quintessentially relevant to nearly every cause of action and affirmative defense. Specifically, they will tend to prove or disprove whether, as he claims, he is entitled to the funds at issue in the Williamsport account. Defendant opposes the production claiming that "the source of those funds is not an issue in this litigation" apparently because ownership of the bearer bonds is distinct (Doc. 49 ¶ 18). He offers no authority to support this thinly veiled attempt to frame the issue in a more favorable light. Defendant's own deposition testimony reveals the necessity for his tax returns. For example, his position is that he is the sole owner of Williamsport but has no "recollection of where [a] $220,000 [deposit] came from" (Doc. 37-7, at 282, 290). His deposition testimony is riddled with instances of his allegedly poor recollection regarding the sources of various deposits into the Williamsport account and various other transactions (Doc 37-7, at 180-181, 282, 283, 284). In fact, in no uncertain terms, defendant repeatedly testified that he has personally destroyed his financial records "for safety reasons" since "2000 or 1999, from 2000 onwards" (Doc. 37-7, at 282, 287-288). The court is cognizant of defendant's privacy interest and has fully considered the protections New York affords to tax returns (*see Matter of New York State Dept. of Taxation & Fin. v New York State Dept. of Law, Statewide Organized Crime Task Force*, 44 NY2d 575, 579

[1978]), but plainly, defendant's objections on the grounds of relevance lack merit and plaintiff has established "there was at least an inference of possible fraud" demonstrating the necessity for his tax returns from 1999 to 2005 (*see Sachs v Adeli*, 26 AD3d 52, 56 [1st Dept 2005] ["this Court fails to see what evidence could be more essential"]). Defendant's concessions that he destroyed his financial records over the course of several years supports the unavailability of the information sought from other sources (*see Gordon v Grossman*, 183 AD2d 669, 6870 [1st Dept 1992]).

Defendant's remaining contentions are equally unpersuasive. The party invoking a privilege bears the burden demonstrating its applicability (*see Matter of Priest v Hennessy*, 51 NY2d 62, 68 [1980]; *Big Apple Concrete Corp. v Abrams*, 103 AD2d 609, 613 [1st Dept 1984]). Defendant has not. In fact, his invocation of the attorney-client privilege for tax returns borders on the frivolous. Accordingly, it is

ORDERED that defendant's motion, bearing sequence number 005, is denied; and it is further

ORDERED that plaintiff's motion, bearing sequence number 006, is granted and defendant shall furnish plaintiffs with copies *or* authorizations for the relevant taxing authorities for his tax returns from 1992 until 2005 within 20 days of notice of entry of this order; and it is further

ORDERED that if defendant has not already done so, he shall comply with the order of Justice Michael Stallman (the previously assigned Justice) dated May 13, 2010 within 10 days of entry of this order; and it is further

ORDERED that if defendant fails to comply with the foregoing, plaintiff may submit an

order on ten days' notice precluding defendant from denying at trial that the source of any contributions to Williamsport Capital Ltd. fund by defendant was the individual plaintiff and her family.

ORDERED that the parties and their counsel shall appear at the previously scheduled mediation in Mediation-I on October 14, 2010. Failure to appear may result in entry of an appropriate order pursuant to 22 NYCRR 202.27.

This constitutes the decision and order of the court.

Dated: September 28, 2010
New York, New York

J.S.C.

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