

**Mizrahi v Keller**

2011 NY Slip Op 33781(U)

May 6, 2011

Supreme Court, New York County

Docket Number: 118321/09

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

YGAL MIZRAHI and CORNELIA COMMERCIAL HOLDING CORP.,  
Plaintiffs,

**FILED**

INDEX NO. 118321/09

- v -

MAY 12 2011

MOTION DATE 04-27-2011  
MOTION SEQ. NO. 002

DOUGLAS KELLER, KELLNER, HERLIHY GETTY & FRIEDMAN, LLP, KELLNER CHEHEBAR & DEVENEY,  
Defendants.

NEW YORK COUNTY CLERK'S OFFICE

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this petition to/for Art. 78

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

**PAPERS NUMBERED**

1-2

Answering Affidavits — Exhibits \_\_\_\_\_ cross motion \_\_\_\_\_

3,4

Replying Affidavits \_\_\_\_\_

5

Cross-Motion: Yes  No

Upon the foregoing papers, it is ordered that the Order to Show Cause to compel responses to the defendants First Notice for Discovery and Inspection, staying, or alternatively modifying the discovery schedule set by the Compliance Conference Order dated March 2, 2011, is granted.

Plaintiff, Cornelia Commercial Holding Corp. is the current owner of real estate located at 2 Cornelia Street. Prior to June of 2003, the property was owned by R & L Cornelia Street Company. The defendants are attorneys that represented the plaintiffs in various legal matters from 2003 through 2009. Plaintiff, Ygal Mizrahi contacted the defendants and retained them to provide legal services. The plaintiffs brought this action seeking damages for fraudulent inducement to enter into a refinance agreement for their mortgages in June of 2003, wrongful conversion of escrow funds, breach of fiduciary duty and malpractice.

On March 2, 2011, the parties appeared in Court for a Compliance Conference and stated that discovery had been exchanged, and they sought to have supplemental responses completed and served, to the extent needed, by March 16, 2011. Defendants claim that their First Notice for Discovery and Inspection (Defs. Exh. A) was not fully responded to, supplemental responses were sought, and have not been provided. Defendants seek an Order compelling the plaintiffs to provide responses alternatively, modifying the discovery schedule set by the Compliance Conference Order dated March 2, 2011 (Defs. Exh. H).

Pursuant to CPLR §3124, the Court may compel compliance upon failure of a party to provide discovery. It is within the Court's discretion to determine whether the materials sought are "material and necessary" as legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (Roman Catholic Church of the Good Shepard v. Tempco Systems, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [N.Y.A.D. 1<sup>st</sup> Dept. 1994]; 148 Magnolia, LLC v. Merrimack Mutual Fire Insurance Company, 62 A.D. 2d 486, 878 N.Y.S. 2d 727 [N.Y.A.D. 1<sup>st</sup> Dept., 2009]). The test concerning discovery is one of "usefulness and reason" and as such should lead to

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

disclosure of admissible proof. Parties to an action are entitled to reasonable discovery of any relevant facts to the action (Allen v. Crowell-Collier Publ.Co., 21 N.Y. 2d 403, 288 N.Y.S. 2d 449, 235 N.E. 2d 430 [1968]; Spectrum Systems International Corporation v. Chemical Bank, 78 N.Y. 3d 371, 581 N.E. 2d 1055, 675 N.Y.S. 2d 809 [1991]).

The defendants claim that the plaintiffs exchanged responses to the Defendants First Notice of Discovery and Inspection on November 10, 2010, but that the majority of the demands were either objected to or the responses were not complete (Defs. Exh. B). The defendants sent the plaintiffs a letter dated January 14, 2011 outlining the missing discovery and seeking to resolve compliance issues (Defs. Exh. C). On February 1, 2011, the plaintiffs replied to the defendant's January 14, 2011 letter, and stated that the supplemental responses sought were either irrelevant, vague and overbroad, or not provided because there were no other records in their possession (Defs. Exh. D). On March 4, 2011, the defendants sent a letter to plaintiffs' counsel amending some of the items sought in their First Notice of Discovery and Inspection, and seeking supplemental responses (Defs. Exh. E). On March 7, 2011, the plaintiffs sent a letter addressing the discovery sought in the defendants' January 14, 2011 and March 4, 2011 letters, agreeing to provide redacted bank records and related financial documents but objecting to a majority of the demands.

The plaintiffs claim that tax returns sought by the defendants are overbroad and irrelevant to this action, the demands for corporate records have either been responded to or are overbroad, and documents sought concerning Fisher v. Cornelia Commercial Holding Corp., Index Number 108639/08 have been provided. Plaintiffs also claim that the documentation sought concerning other litigation, involves cases that were commenced prior to retention of the defendants in 2003 and are not relevant to this action. The plaintiffs seek to limit the discovery sought for the period of January 1, 2003 to December 31, 2008, concerning bank statements and related financial records and statements for, "Ygal Mizrahi, Cornelia Commercial Holding Corp., R & L Cornelia Street Co., Ramit Management Corp. and Ramit International Corp." Plaintiff states that the bank statements and financial documents sought are excessive and involve at least three other entities that are not parties to this action.

The defendants claim they are seeking supplemental responses to all of the items sought in the Defendants First Notice of Discovery and Inspection (Defs. Exh. A). The defendant's have established that the documents sought in item 6, concerning Fisher v. Cornelia Commercial Holding Corp., Index number 108639/08 have not been provided to them. The documentation that was provided concerns another related action under Index number 102530/09. The defendants did not represent the plaintiff in the action bearing index number 108639/08 and those litigation documents are relevant to this action:

The defendants in Item 2 of their First Notice of Discovery and Inspection, are seeking corporate records for Cornelia Commercial Holding Corp., "in addition to the certificate of incorporation, bylaws and stock ledger, and amendments to such documents if any." The defendants have sought as part of the supplemental responses, "the binder" with corporate records which was returned to plaintiffs as of April 8, 2008. The defendants have also stated that they are seeking documentation that was previously in their possession. The defendants have sufficiently demonstrated that the corporate documents sought are not excessive or overbroad.

Tax returns are generally not discoverable without using a strong showing that the information contained in them is indispensable to the action and not obtainable from

any other source. A party seeking disclosure of tax returns must demonstrate the relevance of the information sought, why other sources supplying the same information are not available or unlikely to be productive and then limit examination of material to only that which is relevant by the use of redaction (*Samsung America, Inc. v. Yugoslav-Korean Consulting & Trading Co., Inc.*, 199 A.D. 2d 48, 604 N.Y.S. 2d 112 [N.Y.A.D. 1<sup>st</sup> Dept., 1993] and *Xamaka, Inc. v. 166 East 61<sup>st</sup> Street Associates*, 277 A.D. 2d 35, 715 N.Y.S. 2d 145 [N.Y.A.D. 1<sup>st</sup> Dept., 2000]). A party claiming potential loss of income is in a "unique" situation requiring the use of tax records (*Konrad v. East 64<sup>th</sup> Street Corp.*, 235 A.D. 2d 258, 652 N.Y.S. 2d 30 [N.Y.A.D. 1<sup>st</sup> Dept., 1997]).

The defendants in Items 2, 4, 11- 13 and 22 are seeking communication concerning any loan and mortgage since 1986, tax returns, financial documents and accounting records for the plaintiffs, individually and corporate, as well as for non-parties to this action, R & L Cornelia Street Company, Ramit Management Corp. and Ramit International Corp.. Item 9 seeks documentation concerning any legal fee paid to the defendants by plaintiff, "Yoel Mizrahi or any entity in which Ygal Mizrahi or Yoel Mizrahi has a direct or indirect ownership interest." The defendants have not established a basis for seeking documents concerning payment of fees from the nonparty entities or Yoel Mizrahi. The defendants seek in item 10 documentation concerning receipt of funds from any defendant by any plaintiff and, "Yoel Mizrahi or any entity in which Ygal Mizrahi or Yoel Mizrahi has a direct or indirect ownership interest." The defendants have not established a basis for seeking the tax records or financial documents and accounting records from any of the nonparty entities or Yoel Mizrahi.

The defendants have not included a copy of their answer to the motion or reply papers. Other than mentioning that R & L Cornelia Street Company owned the premises involved prior to 2003, there is no reference to these entities in plaintiffs' pleadings. The defendants have not sufficiently established that the plaintiff have in their possession or that there is a basis to compel them to provide tax returns, financial documents and accounting records for the non-party entities or Yoel Mizrahi.

The defendants are entitled to tax returns, financial documents including bank statements and accounting records for January 1, 2003 through December 31, 2008, for the plaintiffs, based on the allegations in the complaint of misappropriation and conversion of funds.

The defendants seek in Item 7, "any communication with Roger Fisher or Mwafak Peress also known as Mike Peress since 1986;" Roger Fisher and Mike Peress are named as individuals that received disbursed funds in the summons and complaint, however, the defendants have not established a basis for obtaining documentation of communications with these individuals prior to 2003. Documentation concerning "any communication" with the two non-parties will be limited from 2003 to 2008. Defendants seek in Item 8 to have copies of, "any contract or agreement with Roger Fisher or Mwafak Peress (also know as Mike Peress) from 1987;" these individuals are not parties to the action and this there is not a sufficient explanation provided for obtaining documentation prior to 2003. The defendants are entitled to copies of any contract or agreement between the plaintiffs and Roger Fisher or Mwafak Peress (also know as Mike Peress) from 2003 through 2008.

The defendants are entitled to supplemental responses concerning item 14, communication with the plaintiffs on the disbursement of funds obtained from settlement of a claim with Seneca Insurance Company. The plaintiffs shall provide

documentation in addition to the e-mails, copies of checks and a letter already provided, dated April 15, 2009, to the extent they exist.

The Defendants First Notice of Discovery and Inspection, items 15 through 20 seek, pleadings, demands or other documentation concerning litigation all commenced prior to their being retained 2003, most of the documentation sought is, "since" 1991, 1999 or 2000. The defendants have not sufficiently established a basis for the use of this documentation. Item 21 seeks documentation concerning, "each pleading, demand or other paper filed or served by any party in any other action in which plaintiff was a party," this demand is overbroad. The plaintiff has not sufficiently established a basis for the documentation sought from litigation commenced prior to 2003 or a response to item 21.

The Defendants First Notice of Discovery and Inspection, item 23 seeks, "any document that any plaintiff may use as an exhibit at any examination before trial or at the trial of this action." The defendants are entitled to this discovery to the extent that the plaintiffs are aware at this stage of the litigation of the documents that will be utilized. The Defendants First Notice of Discovery and Inspection, part (b) seeks all other documents in plaintiffs' possession or control that is relevant to the present action, it is overbroad and shall be stricken.

Accordingly, it is ORDERED that the defendants' motion to compel responses to the defendants First Notice for Discovery and Inspection pursuant to CPLR §3124, staying, or alternatively modifying the discovery schedule set by the Compliance Conference Order dated March 2, 2011, is granted; and it is further

ORDERED, that the plaintiffs shall provide supplemental responses to the Defendants First Notice of Discovery and Inspection within thirty days from service of a copy of this Order with Notice of Entry, as follows: The plaintiff's shall provide full supplemental responses to items 1,3,6 and 14. The plaintiffs shall provide supplemental responses to items 7 and 8 but only for the years, 2003 through 2008. The plaintiffs shall provide supplemental responses to items 9 through 13 and 22, but they will be limited only to those documents prepared, issued or filed by Cornelia Commercial Holding Corp. or Ygal Mizrahi for the years 2003 through 2008. The plaintiff shall provide supplemental responses to item 23 to the extent that it is available for exchange. The plaintiffs shall not provide responses to items 15 through 21, and part (b), those demands are stricken; and it is further

ORDERED, that the Compliance Conference Order dated March 2, 2011 is modified to the extent that the parties shall appear for deposition conducted on or before July 15, 2011, at a time and location convenient to the parties; and it is further

ORDERED, that counsel are directed to appear for a status conference in room 307, at 80 Centre Street, on July 27, 2011, at 9:30 a.m.

**FILED**

**MAY 12 2011**

This constitutes the decision and order of this court.

Dated: May 6, 2011

  
**MANUEL J. MENDEZ**  
J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

**MANUEL J. MENDEZ**  
J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST                       REFERENCE