

Kim v Wachter

2011 NY Slip Op 33882(U)

April 21, 2011

Supreme Court, New York County

Docket Number: 603705/09

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE
HON. JUDITH J. GISCHE Justice
J.S.C.

PART 10

Daw Kim

INDEX NO.

603705/09

MOTION DATE

-v-

MOTION SEQ. NO.

002

Karl J Wachter

MOTION CAL. NO.

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

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Dated: APR 21 2011

HON. JUDITH J. GISCHE
J.S.C.

J.S.C.

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): 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

----- X
DOW KIM,

Plaintiff,

- against -

KARL J. WACHTER,

Defendant.
----- X

Decision and Order

Index No. 603705/09

Seq No. 001, 002

Present:

Hon. Judith J. Gische, JSC

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Motion Seq. No. 1	
Pltf's n/m (quash subpoena) w/ JMW affirm, exhs	1
JMW affirm good faith (sep back)	2
Wachter opp w/MRR affirm, exhs	3
Pltf's reply w/JMW affirm, exhs	4
Wachter's surreply w/DP affid, exhs	5
 Motion Seq. No. 2	
Wachter's n/m (compel), JDB affid good faith (sep backs)	1,2
MRR affid in support, exhs	3
Pltf's opp w/JMW affirm, exhs	4
Wachter's reply w/ MRR affid, exh	5

Upon the foregoing papers, the decision and order of the court is as follows:

Gische, J.

Motion sequences numbers 001 and 002 are hereby consolidated for disposition.

In motion sequence 001, plaintiff Dow Kim (Kim) moves for a protective order quashing a subpoena for documents issued by defendant Karl J. Wachter (Wachter) to Diamond Lake Investment Group LP, DLIG LLC and Diamond Lake GP LLC c/o Kim. In motion sequence 002, Wachter moves to compel responses to his document requests and interrogatories, which seeks much of the same information.

In May 2007, Kim left his employment at Merrill Lynch & Co. to establish his own hedge fund. Kim formed Diamond Lake Investment Group LP (the LP), Diamond Lake GP LLC (the LLC) and DLIG LLC. DLIG LLC was the general partner of the LP, and Kim is the managing member of DLIG LLC. Wachter agreed to work for the hedge fund as its managing director and general counsel. Wachter also became a limited partner in the LP and a non-managing member of the LLC. The terms of Wachter's business relationship with the hedge fund and his compensation was memorialized in a written "Term Sheet" providing that his compensation would be paid by "Diamond Lake." Kim signed the Term Sheet as the managing member of DLIG LLC. In August 2008, Kim abandoned plans to start the hedge fund, when he was unable to raise sufficient investment capital. Wachter was paid \$180,000 for his services from October 1, 2007 until his termination in August 2008; but claims he is owed more than \$2.3 million.

In December 2008, Wachter commenced a lawsuit against Kim in this court, entitled *Wachter v Kim*, Index No. 650532/08 (the *Wachter* action), seeking to recover unpaid compensation. Wachter asserted claims against Kim for breach of an oral contract, breach of a written contract (arguing that Kim is an affiliate of "Diamond Lake"), violation of New York's Labor Law and promissory estoppel. All claims were dismissed by Justice Charles Ramos by order dated September 10, 2009. Wachter appealed, and the complaint has been recently reinstated. *Wachter v Kim*, ___ AD3d ___, 2011 WL 1161037, 2011 NY Slip Op 02526 (1st Dept Mar. 31, 2011).

Kim commenced this action in December 2009, seeking indemnification from Wachter for the legal fees that Kim expended in defending against the *Wachter* action. Kim relies on section 2.10 of the LLP's Limited Partnership Agreement and section 2.10 of the LLC's Limited Liability Company Agreement. These sections provide that the rights of limited partners/non-managing

members are limited to receiving distributions and allocations to their capital account and any other rights granted by agreement between them and the company. Any partner/non-managing member who asserts a claim or takes actions that are inconsistent with the foregoing must indemnify, defend and hold harmless the partnership/company and the other partners/members from any, inter alia, costs or expenses resulting therefrom, including reasonable legal fees.

On or about September 30, 2010, Wachter served a subpoena on the three Diamond Lake entities c/o Kim seeking documents regarding the failed hedge fund. On the same date, Wachter served a supplemental request for the production of documents and interrogatories on Kim, seeking much of the same information. Wachter alleges that Kim has improperly refused to provide documents in response to 11 out of the 14 document requests, and has refused to answer certain interrogatories.

In essence, the subpoena and Wachter's disclosure requests seek information relating to:

- Diamond Lake's liabilities, expenses and debts and insolvency (*Subpoena*, ¶¶ 1, 15; *Supp. Document Request*, ¶¶ 1, 12);
- Kim's liabilities or expenses in connection with Diamond Lake, and payments made by Kim on its behalf (*Subpoena*, ¶¶ 2, 5; *Supp. Document Request*, ¶ 2);
- Diamond Lake's payment or nonpayment of compensation to Wachter (*Subpoena*, ¶ 3; *Supp. Document Request*, ¶ 3);
- the creation, operation, governance and dissolution of Diamond Lake, and the Term Sheet, the LLC agreement and the LP agreement (*Subpoena*, ¶¶ 4, 6, 7; *Supp. Document Request*, ¶ 4);
- the decision to "abandon plans for the Venture" and "cease operations" of Diamond Lake, referencing paragraph 9 of the complaint (*Interrogatories*, ¶¶ 9, 10; *Subpoena*, ¶¶ 8, 9);
- capital contributions to Diamond Lake (*Subpoena*, ¶ 10; *Supp. Document Request*, ¶ 7; *Supp. Interrogatory*, ¶10);

-- notice given to partners of the LP or members of the LLC regarding withdrawal (*Subpoena*, ¶ 11; *Supp. Document Request*, ¶ 8; *Supp. Interrogatory*, ¶11);

-- the distribution of Diamond Lake's assets (*Subpoena*, ¶ 12; *Supp. Document Request*, ¶ 9);

-- the establishment of a "management committee" or other governing board for Diamond Lake (*Subpoena*, ¶ 13; *Supp. Document Request*, ¶ 10; *Supp. Interrogatory*, ¶12);

-- D&O insurance for any directors or officers of Diamond Lake (*Subpoena*, ¶ 14; *Supp. Document Request*, ¶ 11; *Supp. Interrogatory*, ¶ 13); and

-- the payments of expenses and legal fees relating to the *Wachter* action or this lawsuit (*Subpoena*, ¶¶ 16, 17; *Supp. Document Request*, ¶¶ 13, 14; *Supp. Interrogatories*, ¶ 15, 16).

In support of his motion to quash the subpoena, Kim argues that the information sought via the subpoena is duplicative of the supplemental document request, and wholly irrelevant to this action, which simply seeks contractual indemnification of legal fees as a result of the *Wachter* action. In Kim's view, there are only two issues to be adjudicated: (1) whether the filing of the *Wachter* action was inconsistent with section 2.10 of the LP and LCC agreements; and, if so, (2) is Kim entitled to recoup his legal fees. Kim also objects to the subpoena on procedural grounds, arguing that it lacks any meaningful recitation of the circumstances or reasons disclosure from non-parties is being sought, citing CPLR 3101 (a) (4).

Wachter defends the subpoena and disclosure requests as relevant to proving his defenses. One defense is that neither the LP nor the LLC Agreements was ever effective, because these agreements were never executed by all of the required individuals. *Wachter* contends that Kim has been unable to produce signature pages for all of these individuals. *Wachter's* sixth affirmative defense is that, even if the agreements were effective at one time, they were no longer effective and *Wachter* was not a partner nor a member at the time he sued Kim in December 2008.

As a threshold matter, the court rejects Kim's argument that the subpoena should be quashed, because it lacks the notice required under CPLR 3101 (a) (4). Even if the statement that the information was "material to the defense of this action" was insufficient, a court may permit the omitted notice to be corrected in absence of any apparent prejudice to the non-party served. *See Velez v Hunts Point Multi-Serv. Ctr.*, 29 AD3d 104, 111 (1st Dept 2006). The purpose of the CPLR 3101 (a) (4) notice is 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." *Id.* at 110. Here, the Diamond Lake entities are no strangers to the dispute between Kim and Wachter, and this is not a situation where a non-party witness did not understand why documents are being sought, and would have no idea how to respond to a party's subpoena.

Both parties argue that each is judicially estopped from arguing their case by virtue of positions taken in the *Wachter* action and an Article 75 proceeding involving another former employee of the hedge fund. Such a ruling would not be appropriate on a motion addressed to the propriety of a disclosure device. In determining whether the materials sought of a non-party are "material and necessary," the proper inquiry is whether "the information sought bears on the controversy and will assist in the preparation for trial; the ultimate test is one of 'usefulness and reason.'" *Matter of New York County DES Litig.*, 171 AD2d 119, 123 (1st Dept 1991) (citations omitted). At the same time, however, it has been held that the subpoena, like other discovery devices, should not be "used as a tool of harassment or for the proverbial 'fishing expedition' to ascertain the existence of evidence." *Matter of Reuters Ltd. v Dow Jones Telerate*, 231 AD2d 337, 342 (1st Dept 1997) (citation omitted).

The information sought in paragraphs 1, 2, 5, 8, 9, 10, 12 and 15 of the subpoena,

paragraphs 1, 2, 7, 9, and 12 of the supplemental document request, paragraphs 9 and 10 of the interrogatories, and paragraphs 3, 4 and 10 of the supplemental interrogatories, relating to the funding and solvency of the hedge fund, and its expenses, debts, liabilities and capital contributions, are completely irrelevant to the issues in this lawsuit. Whether or not other individuals were required to, and either did or did not sign the LP and LLC agreements, is an issue that has no bearing on the history of Kim's funding of the hedge fund or decision to abandon the venture, nor does it justify a wholesale examination of the finances of the failed hedge fund attempt. Information regarding the payment or nonpayment of Wachter's compensation and documents relating to the Term Sheet might be relevant to the *Wachter* action, but not this lawsuit.

However, information regarding the creation, operation and governance of the Diamond Lake entities, and the creation of the LP and LCC agreements, and any notices regarding withdrawal, are relevant to Wachter's defense that the agreements never became effective. Information regarding the procurement of D&O insurance is also relevant, but only as to the issue of Kim's alleged damages. Thus, the court will not quash paragraphs 4, 6, 7, 11, and 13 of the subpoena; and Kim must respond to paragraphs 8, 10 and 11 of the supplemental document request, paragraphs 5 and 6 of Wachter's initial interrogatories dated December 30, 2009, and paragraphs 11, 12, and 13 of the supplemental interrogatories.

Information regarding the Diamond Lakes entities' funding of Kim's defense of the *Wachter* action and prosecution of this indemnification action must be produced. The information is relevant to Kim's ability to prove damages and Wachter's twelfth affirmative defense that Kim's damages are "nonexistent, speculative, not of the nature or to the extent alleged, and/or not permitted as a matter of law." Answer, at 7. Kim responded to Wachter's first document request

asking for all time records reflecting legal work performed in defense of the *Wachter* action by producing invoices addressed not to Kim, but to the LP and, in some instances, DLIG LLC, from his legal counsel, the Cole Schotz firm, from January 2009 through March 4, 2010. *See Rosen Aff., Ex. G.* Therefore, Kim must respond to paragraphs 13 and 14 of the supplemental document request and paragraphs 15 and 16 of the supplemental interrogatories. For the same reasons, paragraphs 16 and 17 of the subpoena will not be quashed.

All narrative description of the legal services provided by Cole Schotz were redacted from the invoices on the basis of the attorney-client privilege. *Wachter* contends that this is improper, and that Kim must provide a privilege log explaining his redactions. In his reply papers, *Wachter* argues for the first time that an “at issue” waiver of the attorney-client privilege with respect to the invoices occurred by Kim’s commencement of this lawsuit, citing *DH Holding Corp. v Marconi Corp. plc*, 10 Misc 3d 530 (Sup Ct, NY County 2005). This court will not consider *Wachter*’s waiver argument, raised for the first time in reply papers, particularly in light of the recent reinstatement of the complaint in the *Wachter* action. For the time being, the court rules only *Wachter* has no right to those portions of the invoices that would reveal client confidences as to services and legal strategy in an ongoing litigation (*Fochetta v Schlackman*, 257 AD2d 546 [1st Dept 1999]; *De La Roche v De La Roche*, 209 AD2d 157, 159 [1st Dept 1994]), and that, according to the First Department, “the redaction of all material contained in [the invoices] other than the number of hours worked and the dollar amount charged” is proper. *Teich v Teich*, 245 AD2d 41 (1st Dept 1997); *see also Fochetta v Schlackman, supra.*

For these reasons, it is hereby

ORDERED that the motion (seq. no. 001) of plaintiff Dow Kim for a protective order

quashing the subpoena duces tecum dated September 30, 2010 is granted with respect to information sought in paragraphs 1, 2, 3, 5, 8, 9, 10, 12, and 15 of the subpoena dated September 30, 2010, and the motion is denied in all other respects; and it is further

ORDERED that, upon service by mail of a copy of this order with notice of entry upon Diamond Lake Investment Group LP, DLIG LLC and Diamond Lake GP LLC c/o counsel for the plaintiff, they shall fully respond to paragraphs 4, 6, 7, 11, 13, 14, 16 and 17 of the subpoena dated September 30, 2010 within twenty (20) days; and it is further

ORDERED that the motion (seq. no. 002) of defendant to compel discovery is granted to the extent that plaintiff shall respond to:

--paragraphs 8, 10, 11, 13 and 14 of defendant's supplemental document request dated September 30, 2010,

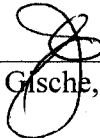
--paragraphs 5 and 6 of defendant's initial interrogatories dated December 30, 2009, and

-- paragraphs 11, 12, 13, 15 and 16 of defendant's supplemental interrogatories dated September 30, 2010;

and all such responses shall be served within twenty (20) days of service of a copy of this order with notice of entry, and the motion is otherwise denied.

Dated: April 21, 2011

So Ordered:



Hon. Judith J. Gische, J.S.C.