

Barbaro v Spinelli

2012 NY Slip Op 30100(U)

January 13, 2012

Supreme Court, Richmond County

Docket Number: 100155/09

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:100155/09
Motion No.:005, 006,
007**

NICHOLAS BARBARO,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**THOMAS SPINELLI,
DONNA SPINELLI, a/k/a DONNA MAZZAFERRO,
ALLSTATE FUNDING SERVICES, INC.,
MATIZ MALDONADO,
BUSINESS CLUB NETWORK,
HOWARD TAPS, and
ILLUMILUNA, INC. d/b/a PLI,**

Defendants

The following items were considered in the review of the following: 1) motion to quash a subpoena; 2) cross motion to compel compliance with a subpoena; and 3) motion to amend the complaint.

<u>Papers</u>	<u>Numbered</u>	
Notice of Motion and Affidavits Annexed	1	
Notice of Cross-Motion and Affidavits Annexed	2	
Memorandum of Law in Support of Cross Motion and in Opposition to Motion	3	
Notice of Motion and Affidavits Annexed	4	
Memorandum of Law in Support of Motion	5	
Affirmation in Opposition	6	
Memorandum of Law in Reply	7	
Answering Affidavits		
Replying Affidavits		
Exhibits		Attached to Papers

Upon the foregoing cited papers, the Decision and Order on the Motions is as follows:

The non-parties, MHT Holdings, Inc. (“MHT”) , North American Manufacturing Enterprises, Inc. (“North American”) and Steven Mazzaferro’s motion to quash the plaintiff’s subpoena is granted. The plaintiff’s cross-motion to compel compliance with the subpoena and

motion to amend the complaint are denied.

Facts

This is an action arising out of a joint venture agreement entered into in early 2008. According to the terms of the joint venture agreement the parties were to incorporate Lifebulb International, Inc. (“Lifebulb”) to distribute high efficiency light bulbs. According to the defendants, Lifebulb made on only one transaction with the town of Villahermosa in Mexico.. The defendants’ maintain that upon the completion of that transaction Lifebulb ended as a going concern. The plaintiff maintains that the defendants “. . . excluded [him] from any and all transactions involving the Venture or the Venture’s current or future clients for the sole purpose of excluding plaintiff from any share of the profits derived therefrom.”¹

In a June 29, 2010 decision and order this court evaluated a restrictive covenant contained in the Lifebulb shareholders agreement that states:

Each of the shareholders, for and on behalf of himself and any person or entity which he controls, and each of BCN and PLI, for and on behalf of itself and each of its shareholders, partners, members, officers director, agents and employees, hereby covenants and agrees not to establish, open, be engaged in, nor in any manner whatsoever become interested, directly or indirectly, as employee, owner, partner, member, agent, stockholder, director or office, or otherwise, in any business, trade or occupation which competes with the business of LI for the period within the area hereinafter set forth.

The foregoing covenant not to compete shall remain in full for and effect for each party hereto for the following time periods: (a) during the entire time that such party is either record owner or beneficial owner of any shares in LI or otherwise a party to this Agreement, as amended from time to time; (b) for a period of two (2) years after the sale or disposition of all of such party’s shares in

¹ Complaint paragraph 13.

11 or after such party otherwise ceases to be a party to the Agreement.

The foregoing covenant not to compete shall be effective within the following geographical area: Mexico, Latin America and the United States.

In evaluating this clause this court originally held that the restrictive covenant may be unenforceable, but allowed the defendant to renew this argument upon the completion of discovery.

Here, MHT, a Florida corporation was dissolved pursuant to that state's laws in February 2010. The other non-party North American is comprised of Frank Scalice, a shareholder; Thomas Spinelli, a minority shareholder; and Steven Mazzaferro, a production manager. According to Scalice, North American is engaged in the production and sale of high efficiency light bulbs. The plaintiff served the non-party movants with subpoenas that failed to properly tender witness fees, and in the case of the subpoena served on Steven Mazzaferro the return date was set in 2005. In addition, the non-party subpoenas failed to contain or be accompanied with a notice setting for the reasons why the information is sought from those entities and individual. The attorneys for the moving non-parties argue that apart from the facial deficiencies the subpoenas they are not material or relevant to this action.

By a separate motion the plaintiff seeks to amend his complaint to name MHT and North American as defendants in this action.

Discussion

A subpoena duces tecum served upon a nonparty is facially defective and unenforceable, where it does not contain or is not accompanied with a notice setting forth the circumstances or

reasons such disclosure was sought or required pursuant to CPLR § 3101(a)(4).² Here, the subpoenas served on the moving non-party entities lacked the requisite statement as to why the discovery was necessary. This court previously held that the restrictive covenant in this action was not per se unenforceable and allowed discovery to move forward. Notwithstanding the additional discovery, restrictive covenants are disfavored by courts, and may only be enforced if it is reasonably limited in both duration and geographic scope, and to the extent said restrictions are necessary to protect the use of trade secrets or confidential customer information.³ Here the purported restrictive covenant cannot be enforced. The plaintiff seeks discovery from non-parties in a futile attempt to enforce a restrictive covenant that would prevent parties to a joint venture from participating in any similar business for two years, virtually anywhere in North America. The court must find that the time period and geographic scope of the restrictive covenant is unenforceable. Therefore, the material requested in the plaintiff's subpoenas are not relevant to this action.

Although leave to amend pleadings should be freely given absent prejudice or surprise, leave to amend should not be granted where a new or alternate theory is plainly lacking in merit.⁴ It is incumbent upon the movant to make some evidentiary showing that the claim can be supported. A court must examine the underlying merit of the proposed claims, since to do otherwise would be wasteful of judicial resources.⁵ Here, the plaintiff seeks to add MHT and North American in the third and seventh causes of action for tortious interference with contract rights and unjust enrichment, respectively. In addition, the plaintiff seeks to assert a new cause of action against MHT and North American for aiding and abetting the misconduct of the already named defendants. But, the proposed amendments are supported only by an affirmation of the plaintiff's attorney, a person that clearly lacks personal knowledge of the underlying facts in this

² *Knitwork Productions Corp. v. Helfat*, 234 AD2d 345, [2d Dept, 1996].

³ *Gilma & Ciocia, Inc. v. Randello*, 55 AD3d 871, [2d Dept 2008]

⁴ *Dos v. Scelsa & Villacara*, 200 AD2d 705, [2d Dept 1994].

⁵ *Morgan v. Prospect Park Associates Holdings, L.P.*, [2d Dept 1998].

action. Moreover, the annexed proposed verified amended verified complaint is unsigned by either the plaintiff's attorney, or the plaintiff. Therefore, the plaintiff's motion to amend his complaint must be denied.⁶

Conclusion

The motion to quash the plaintiff's subpoena made by the moving non-parties, MHT and North American is granted. The plaintiff's cross motion to compel a response from MHT and North American is denied as well as the other branches of plaintiff's cross-motion seeking the continued depositions of the defendants, a conditional order of dismissal against the defendants, conditional sanctions and a protective order preventing the disclosure of the documents requested in the defendants' Second Combined Notice and Demand for Discovery. The plaintiff's motion to amend his complaint is also denied.

Accordingly, it is hereby:

ORDERED, that the plaintiff's motion and cross motion are both denied; and it is further

ORDERED, that the motion to quash the plaintiff's subpoena made by the non-parties' MHT Holdings, Inc., North American Manufacturing Enterprises, Inc. and Steven Mazzaferro is granted; and it is further

ORDERED, the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, Monday, January 30, 2012 at 9:30 a.m. for a Certification Conference.

ENTER,

⁶ *Id.*, See also, *Mohan v. Hollander*, 303 AD2d 473, [2d Dept 2003].

DATED: January 13, 2012

Joseph J. Maltese
Justice of the Supreme Court