

County of Suffolk v Love'm Sheltering, Inc.
2012 NY Slip Op 30942(U)
April 10, 2012
Sup Ct, Suffolk County
Docket Number: 1399-10
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3/30/12

ADJ. DATES _____

Mot. Seq. # 008 - Mot D

Conf. Adj. to 7/17/12

-----X
COUNTY OF SUFFOLK,

Plaintiff,

-against-

LOVE'M SHELTERING, INC., and its officers and
directors, LOVE'M, INC., and its officers and
directors, RICHARD MORRISON, in his individual
capacity, MARY MORRISON, in her individual
capacity

Defendants
-----X

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Upon the following papers numbered 1 to 10 read on this joint motion _____ by the defendants for leave to
reargue plaintiff's prior motion for a protective order and the joint cross motion by defendants for an order compelling
disclosure _____ Notice of Motion/Order to Show Cause and supporting papers 1-4; Notice of Cross Motion
and supporting papers _____; Answering Affidavits and supporting papers 5-6; Reply papers 7-8;
9-10; Other _____; (and after hearing counsel in support of and in opposition to the motion) it is,

ORDERED that this motion (#008) by the defendants, Love'M, Inc., Richard Morrison and
Mary Morrison, for leave to reargue motion (#006) by the plaintiff for a protective order and
defendants' prior cross motion (#007) to compel disclosure is considered under CPLR 2221 and is
granted and the order of this court dated February 22, 2012, which partially granted the plaintiff's
motion and denied the defendants' cross motion, is hereby recalled and vacated; and it is further

ORDERED that upon reargument the plaintiff's motion (#006) for a protective order is denied
while the defendants' cross motion to compel document production and for an order directing the
continuation of an examination before trial of the Suffolk County Comptroller is granted to the extent
set forth herein; and it is further

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ORDERED that the conference presently scheduled for *May 22, 2012* is hereby adjourned until **July 17, 2012**, at 9:30 a.m. in Part 33 at the courthouse located at 1 Court Street - Annex, Riverhead, New York.

This action was brought to enforce a judgment in the amount of \$809,417.91 against defendants Morrison and Love'm Inc. which the plaintiff secured against defendant, Love'M Sheltering, Inc. (hereinafter "Sheltering") in January of 2008. This judgment was awarded upon the plaintiff's successful prosecution of its claim to recover overpayments made to Sheltering under a 1999 contract by which Sheltering agreed to provide emergency housing and other services to indigent residents of Suffolk County. This claim was interposed as a counterclaim in a hybrid Article 78/declaratory judgment action commenced by Sheltering against the plaintiff in 2004 and was predicated upon the terms of the 1999 contract between the parties and a June 8, 2004 audit of Sheltering's fiscal operations from January 1, 2000 through December 31, 2000 by the Suffolk County Comptroller. Sheltering's challenges to the validity of the audit and the amount of overpayments to which the plaintiff claimed an entitlement were rejected by the trial court in an order dated April 7, 2005 (*see* Index # 14978/2004). The order of the trial court was affirmed by the Appellate Division, Second Department on October 24, 2006 (*see Love'M Sheltering, Inc. v County of Suffolk*, 33 AD3d 923, 824 NYS2d 98 [2d Dept 2006]).

To succeed on its complaint in this action, the plaintiff must successfully pierce the corporate veil of defendant Sheltering. The parties have engaged in certain pre-trial discovery proceedings including the deposition of the Suffolk County Comptroller, which was in its second day, when the parties broke due to time constraints but without completion of such deposition by defendants Morrison and Love'M Inc. (hereinafter the Morrison defendants). After counsel were unable to agree upon a date for the continuation of said deposition and the re-opening of same by defendant Sheltering and issues pertaining to the production of documents referred to in said deposition, motion practice ensued.

By order dated February 22, 2012, this court granted in part the plaintiff's motion (denominated as a cross motion #006) for a protective order against supplemental document demands issued by the defendants subsequent to the two day deposition of the Comptroller and his production for any further deposition. In that same order, the court denied the defendants' motion to strike, conditionally, the plaintiff's complaint for failure to furnish the documents demanded in their supplemental document discovery request.

By the instant motion, the defendants seek to reargue both of these prior motions. The court grants the defendants leave to reargue, in as much as it overlooked the fact that the deposition of the plaintiff's Comptroller by the Morrison defendants was incomplete and that the right of defendant Sheltering to resume its inquiry of the Comptroller was duly reserved by its counsel, pending receipt of documents that were referred to in the two days of deposition testimony already recorded (*see* CPLR 2221[D]; *Hirsh v Stern*, 83 AD2d 783, 920 NYS2d 783 [2d Dept 2011]). Accordingly, the order of February 22, 2012 is hereby recalled and vacated and the applications that were the subject of that order are hereby determined as set forth herein (*see Cinquemani v Old Slip Assoc., LP.*, 77 AD3d 603, 912 NYS2d 224 [2d Dept 2010]).

That the Morrison defendants are entitled to complete their deposition of the Comptroller is now clear from the record, since such deposition was halted prior to its completion due to the

constraints of time. Those portions of the plaintiff's motion wherein it seeks a protective order against the Morrison's continuation of the Comptroller's deposition is denied. Likewise denied are the plaintiff's demands for an order denying the defendant's request for a resumption of the deposition of the Comptroller by defendant Sheltering, as such resumption was specifically reserved by its counsel on the record. Those portions of the plaintiff's motion for a protective order relieving it of any obligation to further produce the Comptroller for deposition are thus denied.

The remaining portions of the plaintiff's motion wherein it seeks a protective order against the supplementary document demands served by the defendants following the two days of deposition testimony by the Comptroller is denied, as the defendants' cross motion to compel the production of such documents by way of a conditional order of dismissal is granted but only in so far as contemplated by CLR 3124.

At issue on these applications are four groups or categories of documents set forth in the defendants supplemental demand, as the defendants "have accepted" the representation of plaintiff's counsel that "the other documents sought by the defendants do not exist (*see* p. 3, ¶ 7 of the Affirmation of attorney Bensl in support of cross motion and the reply affirmation of attorney Shirmer at ¶ 7). The documents at issue are as follows:

- a) Any records from any Suffolk County Department or entity that made reference to any finding determination or review that the rents that were being paid by Love'M Sheltering Inc. to Love'M Inc. were either below market value, at fair market value or in excess of fair market value;
- b) Copies of any requests for rulings, or interpretations or new procedures on the Reimbursable Cost Manual from the Department of Social Services pertaining to related companies for purpose of real property and for the purchase of electronic goods for the period January 1, 2000 through December 31, 2005 submitted to the Suffolk County Comptroller's office;
- c) Copies of any responses from the Suffolk County Comptroller's office in response to the requests set forth ...[above]...
- d) A true copy of the Settlement Agreement with Penates.

Pursuant to CPLR 3101(a), "full disclosure of all matter, material and necessary in the prosecution or defense of an action" is required. The phrase "material and necessary" should be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Auerbach v Klein*, 30 AD3d 451, 816 NYS2d 376 [2d Dept 2006], quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). While the disclosure provisions of the CPLR should be liberally construed, the scope of permissible discovery is not unlimited and the principle of "full disclosure" does not give a party the right to uncontrolled

and unfettered disclosure (*see Friel v Papa*, 87 AD3d 1108, 930 NYS2d 39 [2d Dept 2011; *JFK Family Ltd. Partnership v Millbrae Natural Gas*, 83 AD3d 899, 920 NYS2d 708 [2d Dept. 2011]). The Supreme Court is thus vested with broad discretion to oversee the discovery process and to determine what is 'material and necessary' as that phrase is used in CPLR 3101(a) (*see Auerbach v Klein*, 30 AD3d 451, *supra*; *see also Orgel v Stewart Title Ins. Co.*, 91 AD3d 922, --- NYS2d ---- [2d Dept 2012]; *Giano v Ioannou*, 78 AD3d 768, 911 NYS2d 398 [2d Dept 2010]). The terms material and relevant have been read to include evidence required for trial preparation as well as inadmissible matter that may lead to the disclosure of admissible proof (*see Montalvo v CVS Pharmacy, Inc.*, 81 AD3d 611, 915 NYS2d 865 [2d Dept 2011]).

It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*see Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, *supra*). Unsubstantiated, bare allegations of relevancy are insufficient to establish the factual predicate regarding relevancy (*see Beckles v Kingsbrook Jewish Med. Ctr.*, 36 AD3d 733, 830 NY.2d 203 [2d Dept 2007]). Instead, a showing that the method of discovery sought will result in the disclosure of relevant evidence or matter that is reasonably calculated to lead to the discovery of admissible proof bearing on the claims is required (*see Vyas v Campbell*, 4 AD3d 417, 771 NYS2d 375 [2d Dept 2004]). Where issues are limited by undisputed facts or defenses in bar, discovery may be correspondingly limited (*see Markel Ins. Co. v Bottini Fuel.*, 89 AD3d 1212, 932 NYS2d 570 [3d Dept 2011]; *Davis v Cornerstone Tel. Co., LLC*, 78 AD3d 1263, 910 NYS2d 254 [3d Dept 2010]).

When a particular discovery demand is inappropriate, the court may "make a protective order" with respect to that demand (CPLR 3103[a]). "Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person" (*id*; *see D'Adamo v Saint Dominic's Home*, 87 AD3d 966, 929 NYS2d 301 [2d Dept 2011]).

In support of its motion for a protective order, the plaintiff claims that the documents in dispute are neither material nor relevant to the issues joined by the pleadings, including issues germane to the plaintiff's claim for a judicial piercing of the corporate veil of the judgment debtor, Love'M Sheltering, Inc. The court finds, however, that the defendants failed to show the relevance or materiality of the Penates settlement documents, the production of which, are demanded in subparagraph d) of the supplemental demand as quoted above. The defendants failed to show that the details of the County's settlement with the Penates, a provider of shelter services who was, like defendant Sheltering, the target of claims by the County for recoupment of overpayments bear, upon any claim asserted or defense possessed by the parties to this action.

In contrast, the defendants have demonstrated that the requested documents may contain information that is relevant, necessary and material to the assertion of defenses possessed by the Morrison defendants and defendant Sheltering. The record sufficiently establishes that without the disclosure of the documents listed in ¶¶ a); b) and c) of the demand as quoted above, both groups of defendants will be stymied in the preparation of their defenses to the plaintiff's claims in this action. Those claims are singularly premised upon the 2000 audit of Sheltering that is attached to the complaint in this action, which audit was used to support the plaintiff's claims in the underlying action in which the plaintiff secured its judgment against defendant Sheltering.

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Although defendant Sheltering may be bound by principles of res judicata and collateral estoppel from challenging the accuracy of the 2000 audit at the trial of this action, or any motion equivalent thereof, the Morrison defendants would not be so bound. Defendant Sheltering would thus be entitled to the discovery of the documents merely due its status as a party co-defendant of the Morrison defendants. In any event, the plaintiff failed to demonstrate that its claim of res judicata/collateral estoppel with respect to the audit eradicates any of the defendants' entitlement to discovery of the documents used in the compilation of the 2000 audit which the plaintiff admits is the sole basis for its corporate veil piercing claims against Sheltering (*see* ¶ 10 of the Affirmation in Opposition by plaintiff's counsel).

Nevertheless, the court finds that the remaining relevant demands are overly broad and burdensome. For example, the defendants' first demand that calls for the production of *any records* from *any Suffolk County Department or entity* that made reference to *any* finding, determination or review that the rents that were being paid by Love'M Sheltering Inc. to Love'M Inc. were either below market value, at fair market value or in excess of fair market value is improper. Demands employing terms such as "any and all" and those without limitation as to time have long been viewed as improper due to over breadth (*see Tornheim v Blue & White Food Prod. Corp.*, 73 AD3d 745, 899 NYS2d 650 [2d Dept 2010]). The defendant's second and third demands are also overly broad due to the failure to identify the term "related companies".

In view of the foregoing, the defendants are hereby granted thirty days leave to remedy the defects outlined above by service of new tailored demands with respect to the documents listed in ¶¶ a); b); and c) of the demand as quoted above. The plaintiff shall fully respond thereto within thirty days of receipt of the demands. Within 30 days of their receipt of the plaintiff's response, the defendants shall re-notice the continuing deposition of the Suffolk County Comptroller in writing on not less than 10 days notice to plaintiff's counsel. The scheduling of the deposition of the plaintiff's other witness, Stephen McMaster which was stayed order of this court dated March 6, 2012, shall be the subject of a further order.

The defendants are reminded that they must separately move for affirmative relief in their favor, as joint motions for such relief are not contemplated by Article 22 of the CPLR.

DATED: 4/10/12


THOMAS F. WHELAN, J.S.C.