

Balestriere PLLC v Banxcorp
2013 NY Slip Op 31539(U)
June 27, 2013
Sup Ct, New York County
Docket Number: 650919/10
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADDEN
HON. JOAN A. MADDEN
Justice
J.S.C.

PART 4

BALESTRIANO PLLC
- v -
BANCORP

INDEX NO. 650919/10
MOTION DATE _____
MOTION SEQ. NO. 13
MOTION CAL. NO. _____

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

	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 is decided in accordance with the Memorandum Decision and order filed under motion seq. no. 008.

FOR THE FOLLOWING REASON(S):

Dated: July 3, 2013

[Signature]
HON. JOAN A. MADDEN J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

PRESENT: JOAN A. MADDEN
Justice

PART 11

Balestriere, PLLC
- v -
Banxcorp and Norbert Mehl

INDEX NO. 650919/10
MOTION DATE _____
MOTION SEQ. NO. 008

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

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Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + order

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

Dated: June 27, 2013

JOAN A. MADDEN J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. MOTION IS: GRANTED DENIED GRANTED IN PART OTHER (CHECK AS APPROPRIATE)
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

BALESTRIERE PLLC,

Plaintiff,

-against-

Index No. 650919/10

BANXCORP and NORBERT MEHL,

Defendants.

-----X

JOAN A. MADDEN, J.:

Plaintiff Balestriere PLLC (hereafter “the plaintiff” or “the Firm”) moves to compel defendants to comply with 19 document demands and 13 interrogatories in its First Set of Document Demands and First Set of Interrogatories sent to defendants on August 27, 2010 (motion seq. 008). Defendants oppose the motion and defendant Norbert Mehl (“Mehl”) cross moves for sanctions by way of order to show (motion seq. no . 013).¹

This action arises out of the alleged refusal of defendants BanxCorp and Norbert Mehl (“Mehl”) to pay for legal services rendered on their behalf by plaintiff in an antitrust action brought in New Jersey federal court.

Plaintiff alleges that the documents and interrogatories are relevant for the following four reasons:

- 1) Discovery allowing plaintiff to pierce the corporate veil in demonstrating that defendant Norbert Mehl (“Mehl”) is the alter ego of defendant BanxCorp.
- 2) Discovery which will demonstrate the hard work and substantial effort that plaintiff

¹Motion sequence nos. 008 and 013 are consolidated for disposition.

dedicated to BanxCorp's underlying case, which would further illustrate that the plaintiff was terminated without cause and therefore deserves the reasonable value of its services.

3) Discovery which will demonstrate how Mehl abused the risk-sharing contingency fee arrangement which will further illustrate the basis for plaintiff's quantum meruit claim.

4) Discovery which will demonstrate that plaintiff has suffered damages due to Mehl's termination without cause.

Plaintiff asserts that in response to its document demands, defendants produced only 66 documents all of which related to their now dismissed counterclaim for legal malpractice.

Defendants counters, *inter alia*, that the requests are overly broad, speculative, and constitute a fishing expedition.²

As to plaintiff's request to pierce the corporate veil, defendants argue that plaintiff has not established a sufficient legal and/or factual basis to support such request. This argument is unavailing. While the Appellate Division, First Department dismissed plaintiff's fraudulent inducement claim, the majority opinion found that the complaint was sufficient to sustain a cause of action for quantum meruit against all defendants, including Mehl. See Balestriere PLLC v. BabxCorp, 96 AD3d 497 (1st Dept 2012). Although the majority opinion did not directly address the issue of sufficiency of plaintiff's theory with respect to piercing the corporate veil, the majority did say that it disagreed with the dissent's conclusion that the quantum meruit claim should be

²To the extent that defendants objected based on a protective order issued in the action pending in New Jersey federal court, this argument was previously rejected in the court's interim decision and order dated December 19, 2011. As for any other objection based on privilege, the court required defendants to provide a privilege log indicating the legal and factual basis for the assertion of the privilege. As defendants have not provided a privilege log, there is no basis for their objections based on privilege.

dismissed against Mehl as legally insufficient on the grounds that plaintiff failed to allege that Mehl abused “the corporate form to perpetuate a wrong fraud against plaintiff.” Id., at 498-499. Under these circumstances, discovery should go forward in connection with plaintiff’s theory and the issue can be revisited after discovery.

Piercing the corporate veil is an equitable concept that allows a creditor to disregard a corporation and hold controlling shareholders liable for corporate debt. Stahl & Vaccaro v. Kane, 6 AD3d 72 (2d Dept 2004). Here, plaintiff’s theory is that Mehl is the alter ego of BanxCorp. Under New York law, plaintiff must establish that Mehl exercised complete domination over the corporation with respect to the transaction at issue and that such domination was used to commit a fraud or wrong that was the cause of injury to the party seeking to pierce the corporate veil. Morris v. New York State Dept of Taxation, 82 NY2d 135 (1993); Fisher v. Zaks, 48 AD3d 251 (1st dept 2008).

In order to recover in quantum meruit, a plaintiff must establish (1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation, and (4) the reasonable value of the services. Miranco Contr. Inc. v. Perel, 57 AD3d 956, 957 (2008).

CPLR 3101(a) provides that “[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action.” The words “material and necessary” are “liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial.” Roman Catholic Church of Good Shepherd v. Tempco Systems, 202 AD2d 257, 258 (1st Dept 1994). Disclosure is thus not limited to “evidence directly related to the issues in the pleadings.” Allen v. Crowell-Collier Publishing Co., 21 NY2d 403, 408

(1968). Moreover, the use of the words “any and all” in a document demand is contrary to the requirement of CPLR 3120(a) that such demands must be “specified with reasonable particularity” (Ehrlich v. Ehrlich, 74 AD2d 519 (1st Dept 1980)). Likewise, interrogatories must “satisfy the standard of reasonable particularity in identifying the information to be produced.” Lobatto v. Lobatto, 109 AD2d 697 (1st Dept 1985). However, when a discovery request is otherwise narrowly defined, the use of “all” is not so improper as to require judicial intervention. Ensign Bank, F.S.B. v. Gerald Modell, Inc., 163 AD2d 149 (1st Dept 1990). Considering plaintiff’s document requests and interrogatories in the context of this law, I reach the following conclusions.

Document Requests

Document request no. 1, which seeks “[a]ll documents, or records of documents, or communications of any kind whatsoever, relating to any interrogatories contained in plaintiff’s First Set of Interrogatories,” is overly broad and burdensome, and it is not for the court to speculate as to which documents might relate to the interrogatories. Document request no. 2, which seeks “[a]ll documents, records, or communications of any kind whatsoever relating to the engagement and representation by the [plaintiff] during the relevant period,” is limited to all communications between the parties and defendants.

Document request nos. 3 and 4 which, respectively, seek documents, records of documents and communications as to payment of fees and expenses to plaintiff, and termination of plaintiff are relevant to establishing plaintiff’s damages in quantum meruit and must be produced. Document request no. 5 regarding “all documents of any kind whatsoever, between Mehl and anyone employed by BanxCorp regarding the 2007 and 2010 [underlying anti-trust actions]” is sufficiently narrow and relevant to the issue of piercing the corporate veil to require defendants to produce the requested

documents.

In contrast, document request nos 6, 7, 8, 9, 10, 12 and 13 are unduly broad and burdensome. Although these document requests relate to the relationship between BanxCorp and Mehl and are potentially relevant, in their current form they are overly broad and unduly burdensome as they seek all documents and records of all communications relating to BanxCorp's operations, corporate structure and financial information from the time of its founding until the termination of defendants' relationship with the firm, approximately 26 years later. For example, request no. 6 seeks "all documents or records of all communications of any kind whatsoever, between Mehl and anyone employed or associated with BanxCorp regarding BanxCorp's finances." As for request no. 12, it seeks not only all documents related to the bank accounts and credit lines of BanxCorp during this 26-year period but also those of Mehl and his wife, Besheva Mehl.

As for request No. 11, which seeks "[a]ll documents or records of documents, or communications of any kind relating to the tax returns of BanxCorp, Mehl, or Besheva Mehl or both for the relevant time period," such request is overly broad and burdensome for same reasons as stated in connection with request nos. 6 through 10. In addition, the court notes that to require the production of tax returns, a party must demonstrate a "strong showing of overriding necessity" needed to overcome the confidentiality of tax returns. Rosenfeld v. Kaplan, 245 AD2d 176, 176 (1st Dept 1997)(internal citations and quotation omitted). Here, plaintiff has not made this showing. Thus, at this juncture, except to the extent defendants have agreed to produce tax returns for BanxCorp for the period of 2007-2010, upon the parties execution of a confidentiality agreement, the request for tax returns shall await the depositions of the parties in this action. Samsung America, Inc. v. Yugoslav-Korean Consulting and Trading Co., Inc., 199 AD2D 48, 48 (1st Dept

1993)(internal citation omitted)(despite assertions that individual defendant intermingled assets of several defendant corporations plaintiff had not demonstrated the need for discovery of tax returns and discovery demands are vacated with leave to renew in a limited extent following individual defendant's deposition).

Request no. 14, which seeks documents directly related to the Firm's representation of the defendants, is relevant and sufficiently narrow and must be answered. Request no. 15 regarding all communications as to the status of the 2007 and 2010 actions is limited to communications between the Firm and Mehl.³

Request nos. 16 and 17, which seek information regarding the value of BanxCorp during the relevant period and the value of claims in the 2007 and 2010 actions, are no longer relevant as these requests appear to relate to the fraudulent inducement claim which, as noted above, has been dismissed by the Appellate Division, and plaintiff has not articulated any other basis for obtaining this information.

Request no. 18, which requests "all documents, or records of documents; or any communications whatsoever, relating to the engagement of attorneys for any action prosecuted by or against both or either of defendants" is overly broad, burdensome and palpably improper.

As for request no. 19, it seeks "[a]ll timesheets, time-keeping records, and any documents or records of documents, or communications of any kind whatsoever, recording the time spent by Mehl during engagement (a) on the 2007 Action, (b) during engagement of the 2010 Action and (c)

³In this connection, the court notes that to the extent plaintiff sought these documents to show that Mehl fraudulently induced the Firm into a contingency fee arrangement, such documents are no longer relevant, since, as indicated above, the Appellate Division dismissed the fraudulent inducement claim.

after termination on the instant action.” These documents are relevant to the issues in this action, including whether the work performed by plaintiff was for Mehl, as opposed to BanxCorp. Moreover, while Mehl states he has no responsive documents to this request, he must provide an affidavit from a person with knowledge providing a “detailed statement” as to the nature and extent of the search conducted for such documents. Longo v. Armor Elevator, Co., Inc., 278 AD2d 127 (1st Dept 2000); Fugazy v. Time Inc., 24 AD2d 443 (1st Dept 1965)(requiring plaintiff to produce documents where objection that he did not have the requested documents was not supported by an affidavit from plaintiff or a person with knowledge).

Interrogatories⁴

Here, as set forth below, while a number of plaintiffs’ interrogatories are relevant and sufficiently narrow, others are overly broad and burdensome or irrelevant, and are properly stricken. See Albert v. Time Warner Cable, 225 AD2d 248 (1st Dept 1998).

Interrogatory no. 2, which requests that defendants “[i]dentify all communications and all documents relating to such communications, concerning any of the interrogatories contained in Plaintiff’s First Set of Interrogatories, and any of the document demands contained in Plaintiff’s First Set of Document Demands,” is overly broad and burdensome, and it is not for the court to speculate as to which communications and/or documents might relate to the interrogatories and/or document demands.

Interrogatory no. 4 requests that defendants “[i]dentify all communications and documents concerning BanxCorp’s engagement with and termination of the Firm.” Defendants are required

⁴In their amended interrogatory response, defendants have responded to Interrogatory Nos. 1, 3, 9, and 11.

to answer this interrogatory which is relevant to the Firm's quantum meruit claim and to the issue of whether Mehl acted as an alter ego for BanxCorp.

Interrogatory no. 5, which requests that defendants "[i]dentify all staff of BanxCorp, the dates and time periods in which they performed services for BanxCorp, their dates of employment, the type of services provided and their salaries if applicable," is overly broad and burdensome, particularly as BanxCorp was formed in 1984. In addition, while the Firm asserts that this interrogatory relates to piercing the corporate veil, and that it will show that Mehl used BanxCorp funds as its own bank account, it is not evident how most of the information sought in this interrogatory will lead to evidence material to these issues.

Interrogatory no. 6 requests that defendants identify all bank accounts or credit lines currently held by, used or controlled by BanxCorp, Mehl, or Batsheva Mehl. Defendants shall respond to this interrogatory, to the extent it relates to plaintiff's theory that Mehl is the alter-ego of BanxCorp, including by identifying any bank accounts and/or credit lines owned jointly by Mehl and Batsheva Mehl and/or BanxCorp and Batsheva Mehl. However, as Batsheva Mehl is not a party to this action, defendants are not required to identify bank accounts or credit lines held by Batsheva Mehl individually or with persons or entities other than Mehl or BanxCorp. This finding is without prejudice to the Firm seeking non-party discovery with respect Batsheva's bank accounts or credit lines upon a showing of their relevance.

Interrogatory no. 7 requests that defendants to "[i]dentify all legal matters in which BanxCorp or Mehl is currently a party." The Firm asserts that the interrogatory "will likely show that Mehl is the alter ego of BanxCorp by showing he is deeply involved in all BanxCorp litigation." As the interrogatory is limited to current litigation and may lead to evidence relevant to issues in this

action, defendants are directed to respond to this interrogatory.

Interrogatory no. 8 requests that defendants “[i]dentify all addresses at which BanxCorp ever listed its location or place of business.” This interrogatory should be responded to as it may lead to relevant information related to whether Mehl is an alter ego of BanxCorp.

Interrogatory no. 10 requests that defendants “[i]dentify all vendors used by BanxCorp during the relevant period” (i.e. from the date of BanxCorp’s founding in 1984 until July 10, 2010). Although the Firm claims that this interrogatory will likely show that Mehl is the alter ego of BanxCorp by showing that the vendors dealt solely with Mehl, the court finds that this interrogatory is overly broad and burdensome. See Albert v. Time Warner Cable, 225 AD2d at 248; White Plains Coat & Apron Co, Inc. v. Lehmann, 87 AD2d 629 (2d Dept 1982).

Interrogatory no. 12, which requests that defendants “[i]dentify all attorneys BanxCorp, Mehl, or Batsheva Mehl have ever engaged for any legal matter” is overly broad and constitutes a “fishing expedition.” Nankof v. ARA Services, Inc., 96 AD2d at 494.

Interrogatory no. 13 requests that defendants “[i]dentify all time, month by month, [that] Mehl spent on either the 2007 or 2010 actions during the engagement of the Firm, and on the dispute from May 2007 to present.” This interrogatory is relevant to whether Mehl is an alter-ego of BanxCorp and he shall respond to it. In the event, as asserted by Mehl, he has no records of the time spent on these matters and/or does not recall the amount of time spent on the actions, he shall provide an affidavit to that effect.

Mehl’s Cross Motion for Sanctions

Mehl, appearing *pro se*, cross moves for sanctions, arguing, *inter alia*, that the Firm’s motion to compel as to him is frivolous as the Appellate Division has dismissed the fraudulent inducement

claim and therefore the Firm cannot recover against him in quantum meruit as its work was performed for the corporate defendant BanxCorp. This motion is without merit and ignores, as indicated above, the fact that the Appellate Division has upheld the cause of action against Mehl for quantum meruit.

Conclusion

In view of the above it is

ORDERED that the motion to compel discovery is granted to the extent that within 30 days of the date of this decision and order, defendants shall respond to document request nos 2, 3, 4, 5, and 14, and interrogatory nos. 4, 6, 7, 8, and 13 to the extent specified in this decision and order; and it is further

ORDERED that in the event defendants fail to comply with the immediately preceding paragraph, at the August 1, 2013 status conference scheduled below, the court will consider imposing discovery sanctions/penalties against defendants, as provided in CPLR 3126 and as detailed in the annexed order; and it is further

ORDERED that document requests nos.1,6,7,8,9,10, 11, 12, and 13 and Interrogatory nos. 2,5, 10, and 12 are stricken without prejudice to plaintiff's service of proper document requests after the conducting of depositions and with respect to document request no. 11, plaintiff may obtain BanxCorp tax returns from 2007-2010 upon entering into a confidentiality agreement; and it is further

ORDERED that the cross motion for sanctions is denied; and it is further

ORDERED the parties shall appear for a further status conference on August 1, 2013, at 9:30 am in Part 11, room 351.

Dated: June 27, 2013



HON. JOAN A. MADDEN
J.S.C.