

Kalish v Fernandez
2013 NY Slip Op 34214(U)
July 9, 2013
Supreme Court, Nassau County
Docket Number: 006179-11
Judge: Timothy S. Driscoll
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
**SOLOMON KALISH and ADEX MANAGEMENT
CORP., individually and derivatively as members of
MRI ENTERPRISES, LLC,**

**TRIAL/IAS PART: 16
NASSAU COUNTY**

Plaintiffs,

**Index No: 006179-11
Motion Seq. No. 6
Submission Date: 5/20/13**

-against-

**BENITO FERNANDEZ, HORIZONS INVESTMENT
CORP., WARMINSTER INVESTMENT CORP.,
ALLAN HAUSKNECHT, M.D., COMPREHENSIVE
IMAGING OF NEW YORK, PLLC, and MRI
ENTERPRISES, LLC,**

Defendants.
-----X

The following papers having been read on this motion:

**Notice of Motion, Affidavit in Support and Exhibit.....x
Affirmation in Opposition, Affidavit in Opposition and Exhibits.....x**

This matter is before the Court for decision on the motion filed by Plaintiffs Solomon Kalish ("Kalish") and Adex Management Corp. ("Adex"), individually and derivatively as members of MRI Enterprises, LLC on February 27, 2013 and submitted on May 20, 2013. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order confirming the referee's report of Special Referee Thomas V. Dana dated January 17, 2013 ("Referee's Report") (Ex. A to Kalish Aff. in Supp.) directing

Defendants Benito Fernandez ("Fernandez"), Horizons Investment Corp. ("Horizons"), Allan Hausknecht ("Hausknecht"), Comprehensive Imaging of New York, PLLC ("CINY") and MRI Enterprises, LLC ("MRI-LLC") ("Defendants") to produce bank statements, bank deposit slips, records of wire transfers, payments to or from Alliance Imaging, all payments and reimbursements received from Health and Hospital Corporation ("HHC"), and transfers of funds to members of MRI LLC or CINY ("Disputed Discovery") (Referee's Report at pp. 14-15).

Defendants oppose the motion.¹

B. The Parties' History

The parties' history is set forth in detail in prior decisions of the Court regarding this matter and, accordingly, will not be set forth again herein. As noted in the prior decisions, the Complaint describes this lawsuit as an action for declaratory and injunctive relief, as well as money damages, arising from the alleged breach of certain agreements concerning MRI-LLC and CINY. Kalish is the owner of Adex, which is a member of MRI-LLC with a 20% ownership interest. Until his removal in March of 2011, Kalish was also the President of MRI-LLC and administrator of CINY. Horizons is a member of MRI-LLC with a 40% ownership interest. Fernandez owns and controls Horizons and Warminster. Hausknecht, a physician, is a member of MRI-LLC with a 20% ownership interest. Hausknecht owns CINY, a professional medical corporation. The Complaint contains thirteen (13) causes of action: 1) breach of the Agreement by the firing of Kalish, 2) breach of the Agreement by diverting HHC payments to CINY and thereby depriving Plaintiffs of monies due them, 3) breach of the Operating Agreement by the firing, which was effected without the required vote, 4) breach of the Operating Agreement by diverting HHC payments to CINY without the required notice and vote, 5) request for a constructive trust on revenues received by CINY from HHC pursuant to the 2010 Contracts, 6) unjust enrichment by Fernandez and Hausknecht, 7) conversion of MRI-LLC assets by Hausknecht, Fernandez and CINY, 8) breach of fiduciary duty by Hausknecht and Fernandez, 9) a derivative claim on behalf of MRI-LLC, for which any demand would be futile; 10) waste of MRI-LLC's assets by Hausknecht and Fernandez, 11) request for a declaratory judgment as to Kalish's continued employment, the firing, the address to which HHC payments should be sent,

¹ The Court previously dismissed this action as to Defendant Warminster Investment Corp.

the diversion of funds to CINY, sums owed by CINY to MRI-LLC, and the amount of profit distributions due to Plaintiff, 12) a request for preliminary and permanent injunctive relief, and 13) a request for an accounting from Defendants.

The Referee's Report reflects that Plaintiffs argued that they need the Disputed Discovery to "lay a foundation for" their right to an accounting (Referee's Report at p. 5). The Referee's Report reflects the following colloquy between the Referee and Plaintiffs' Counsel:

THE COURT: In other words, are you basically saying to me that you need a minimal amount of documentary discovery in order to lay a foundation for your right to an accounting. Is that what you're saying?

MR. KALISH: That is what I'm saying.

Referee's Report at p. 5.

In opposition, Defendants argued that Kalish only has a right to an accounting of MRI-LLC, in which he has an interest, but has no right to an accounting of CINY, in which he has no interest (*id.* at p. 6). In directing Defendants to produce the Disputed Discovery, the Referee noted as follows:

Defendants' diversion of payment from MRI LLC to CINY is a critical issue in this lawsuit; hence, Plaintiff is entitled to discover some basic material and necessary information about such payments to CINY in order to establish his entitlement, if any, to the right of an accounting, as well as to prove his diverse other causes of action. In accordance with case law this does not mean that the Plaintiff is entitled to uncontrolled and unfettered disclosure of Defendant CINY, especially as he has no ownership interest therein, and as he has not yet established his right to an accounting; however, in *LSY International Inc., et al v. Stuart Kirsner*, 140 App. Div. 2d 256, the Court held at Page 256 that, "in determining the extent to which items are discoverable, a Court must distinguish between examinations relating to the right to an accounting and the accounting itself, permitting the former, but denying the latter until the right to an accounting has been established", and the case of *Equities Holding Company v. Victor K. Kem*, 90 App. Div. 2d 759 as stands Plaintiff's discovery basis [sic] where the action is as here for more than just an accounting provided that Plaintiff's requests are not for documents of every conceivable description and are specific and particular in nature.

In the instant case, the Complaint not only states a cause of action for an accounting, it also includes a breach of contract, that is diversion of funds from MRI LLC to CINY, breach of fiduciary duty, conversion, a derivative claim on behalf of MRI, unjust enrichment, etc., it goes on, for which additional claims discovery is both necessary and material; therefore for the relevant period only, and I'm going to question Mr. Kalish as to the relevant period in a moment. Defendants are to produce [the Disputed Discovery].

4] Hence Plaintiff is permitted discovery as to only six of his thirty-four documentary requests to prove his diverse causes of action and to attempt to establish his right to an accounting.

Referee's Report at pp. 13-15.

C. The Parties' Positions

Plaintiffs ask the Court to issue an Order confirming the Referee's Report, and awarding Plaintiffs the costs of the instant motion to confirm.

Defendants oppose the motion based on their contention that the Referee, in issuing his Report which directs the production of certain confidential business records of CINY, misapprehended the applicable facts and law. Defendants submit that it is undisputed that Plaintiffs are not members, partners or owners of CINY, and have no equity interest in CINY, which Kalish conceded (Referee's Report at p. 4). Thus, Defendants contend, Plaintiffs do not have not the right to review, or have access to, CINY's financial books and records.

Defendants affirm that Kalish is currently incarcerated in federal prison as a result of his conviction of federal charges involving bribery and kickbacks involving New York City hospitals ("Conviction"), and provide supporting documentation (Ex. B to Schlesinger Aff. in Opp.; Hausknecht Aff. in Opp.). Defendants submit that the Conviction is critical to this action in light of the fact that it was Kalish's criminal conduct that resulted in his termination, and the termination of Adex, Kalish's entity.

Defendants note that the Court previously denied Plaintiffs' Order to Show Cause seeking injunctive relief (Ex. C to Schlesinger Aff. in Opp.), including Plaintiffs' applications for an Order, *inter alia*, 1) directing that Kalish is the Administrator of CINY and President of MRI-LLC; 2) directing Defendants to deposit and maintain all current and future revenues of CINY and MRI-LLC in a segregated account; and 3) directing that the address for CINY and MRI-LLC should continue to be Kalish's home address. Defendants submit, further, that the Referee properly determined that Plaintiffs have not yet established their right to an accounting (Referee's Report at p. 13). Thus, Defendants submit, Plaintiffs are not yet entitled to review CINY's confidential books and records as a matter of law and the Referee erred in directing Defendants to produce the Disputed Discovery.

RULING OF THE COURT

A. Disclosure

CPLR § 3101(a) broadly mandates full disclosure of all matter material and necessary in the prosecution or defense of an action, and this provision is liberally interpreted in favor of disclosure. *Francis v. Securitas Security Services USA, Inc.*, 102 A.D.3d 739, 740 (2d Dept. 2013), citing, *inter alia*, *Kavanaugh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 954 (1998) and *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968).

The principle of full disclosure, however, does not give the party the right to uncontrolled and unfettered disclosure, and the trial courts have broad power to regulate discovery to prevent abuse. *Gilman & Ciocia, Inc. v. Walsh*, 45 A.D.3d 531 (2d Dept. 2007), quoting *Barouh Eaton Allen Corp. v. International Bus. Machs. Corp.*, 76 A.D.2d 873, 874 (2d Dept. 1980).

The trial court is afforded broad discretion in supervising disclosure and its determinations will not be disturbed unless that discretion has been clearly abused. The deference afforded to the trial court regarding disclosure extends to its decision to confirm a referee's report, so long as the report is supported by the record. *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 11 N.Y.3d 843, 845 (2008), quoting *Di Mascio v. General Elec. Co.*, 307 A.D.2d 600, 601 (3d Dept. 2003) (internal citations omitted).

B. Discovery in Accounting Actions

It is well established that in an action for an accounting the plaintiff is not entitled to examine the defendant with regard to items which are essentially fiscal in nature until, by an interlocutory judgment, plaintiff has established his right to an accounting. *Alderman v. Eagle*, 41 A.D.2d 641 (2d Dept. 1973), citing *Rector, Churchwardens & Vestrymen of Church of Holy Trinity v. Munsell*, 11 A.D.2d 698 (2d Dept. 1960); *Tooley v. Exempt Firemen's Benevolent Assn. of City of Yonkers*, 13 A.D.2d 685 (2d Dept. 1961).

In *Corwin v. Kaufman*, 37 A.D.2d 838 (2d Dept. 1971), an action for a judgment declaring that a partnership between the parties was dissolved and for an accounting, the trial court denied defendants' motion to modify the plaintiff's notice of oral examination by eliminating all of the books and records referred to in that notice. *Id.* The Appellate Division, Second Department reversed that order, holding that the right to an accounting based on the existence of a partnership agreement must be established before examination of the account itself may be had. *Id.* The Second Department rejected plaintiff's argument that he required the account books to determine when his cause of action accrued, holding that "[a]gain, no such cause of action has been established as yet which would warrant the production of the account

books for this purpose." *Id.*

The principle that discovery of fiscal matters in an action for an accounting may not be obtained unless and until plaintiff has established a right to an accounting has been specifically applied in cases of disputed partnerships as well as those of disputed joint ventures. *LSY International, Inc. v. Kerzner*, 140 A.D.2d 256 (1st Dept. 1988), citing *Corwin v. Kaufman*, 37 A.D.2d 838 (2d Dept. 1971) and *Barnett Robinson, Inc. v. F. Staal, Inc.*, 43 A.D.2d 826 (1st Dept. 1974). In determining the extent to which items are discoverable, a court must distinguish between examinations relating to the right to an accounting and the accounting itself, permitting the former but denying the latter until the right to an accounting has been established. *LSY International, Inc. v. Kerzner*, 140 A.D.2d at 256, quoting 3A Weinstein-Korn-Miller, NY Civ Prac para. 3101.18.

C. Application of these Principles to the Instant Action

The Court denies Plaintiffs' motion to confirm the Referee's Report. The Referee's Report reflects that Plaintiffs seek the Disputed Discovery to "lay a foundation for" their right to an accounting (Referee's Report at p. 5). The legal principles outlined herein, however, establish that Plaintiffs must first establish their right to an accounting before they may obtain discovery of fiscal matters. Plaintiffs concede that they have no ownership interest in CINY and have not yet established their right to an accounting with respect to that entity. Accordingly, at this juncture, they are not entitled to the Disputed Discovery which involves financial information regarding CINY.

All matters not decided herein are hereby denied.

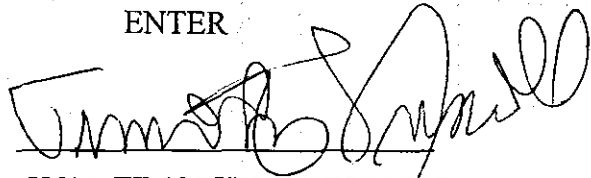
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Certification Conference on August 6, 2013 at 9:30 a.m.

DATED: Mineola, NY

July 9, 2013

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

JUL 15 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE