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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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AQ ASSET MANAGEMENT LLC (as Successor to Artist House Holdings Inc.), ANTIQUORUM, S.A., ANTIQUORUM USA, INC. and EVAN ZIMMERMANN,

Plaintiffs,

Index No. 652367/2010

-against-

DECISION & ORDER

MICHAEL LEVINE, HABSBURG HOLDINGS LTD. and OSVALDO PATRIZZI

Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

Motion Sequence Nos. 29 and 35 are consolidated for disposition. In one branch of Motion Sequence No. 29, defendants Habsburg Holdings Ltd. (Habsburg) and Osvaldo Patrizzi (collectively, defendants) seek to hold Michael Levine in default for failing to serve a responsive pleading to their amended answer in which they asserted twelve cross-claims against him. Separately, in the same motion, defendants seek leave to subpoena certain financial records from the banks where Levine maintained his escrow accounts and also request an order compelling Levine to provide additional documents supposedly necessary for a full accounting to be had of the funds he held in escrow on their behalf. Levine opposes, and cross-moves to dismiss the majority of the amended cross-claims. In Motion Sequence No. 35, defendants seek leave to subpoena certain records from the financial institutions utilized by plaintiff Evan Zimmermann and request an order directing Zimmermann to fully account for the funds he received as transfer escrow agent. Zimmermann opposes.

I. Background

Familiarity with the events, transactions and documents underlying this action is presumed, given the numerous previous decisions rendered. Pursuant to an order dated March 22, 2013, Levine deposited $3,420,787.01 into court, which he claimed represented the remaining balance of the escrow funds at issue in this action. By order dated April 9, 2013, he was directed to account for his handling of the escrow from the time of receipt until the time of deposit. Levine produced an affidavit of account, which he claims sets forth all of the transactions related to the escrow, with supporting exhibits attached. According to Levine's affidavit, the principal, original escrow amount remaining was $3,405,979.68; the amount deposited with the court included accrued interest to which Levine claims he is entitled. By order dated October 16, 2013, pursuant to a decision by the Appellate Division, the court directed that the monies deposited by Levine be released to defendants' attorney (NYSCEF Doc No. 1053).

On April 22, 2013, plaintiffs served a reply to defendants' original counterclaims. On May 6, defendants served an amended answer, containing counterclaims against plaintiffs and cross-claims against Michael Levine. Though the amended answer contained a demand that Levine answer (*see* amended cross-claims ¶ 305; CPLR 3011), Levine has refused to do so.

II. Standard

"Supreme Court is vested with broad discretion to supervise disclosure and . . . its orders in this regard should not be disturbed absent an abuse of that discretion" (*Cook v HMC Times Square Hotel, LLC*, 112 AD3d 485, 485 [1st Dept 2013] quoting *Daniels v City of New York*, 291 AD2d 260, 260 [1st Dept 2002]). The court has the power to issue an order "denying, limiting, conditioning or regulating the use of any disclosure device," for the purpose of

preventing "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103 [a]). "Generally, the supervision of disclosure is left to the broad discretion of the trial court, which must balance the parties' competing interests" (*County of Suffolk v Long Is. Power Auth.*, 100 AD3d 944, 946 [2d Dept 2012] quoting *Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 1284 [2d Dept 2011]).

Further, on a motion to dismiss the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty* Corp., 60 NY3d 491 [2009]; *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 [1st Dept 2003] citing *McGill v Parker*, 179 AD2d 98, 105 [1992]; *Mazzai v Kyriacou*, 98 AD3d 1088, 1090 [2d Dept 2012]; *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 [1998]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (*Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Dismissal on the basis of documentary evidence, per CPLR 3211(a)(1), however, is warranted where such evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 [2001] quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff (*Amaro*, 60 NY3d at 491). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." (*Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 [1st Dept 1994]).

III. Discussion

A. Default Judgment

As indicated at oral argument, the issue of Levine's responsive pleading shall be resolved by requiring him to serve an answer to defendants' cross-claims within twenty days. That branch of the motion seeking to hold him in default for failing to answer, therefore, is denied.

B. Cross-Motion to Dismiss

In their amended answer defendants allege that, acting in concert with Zimmermann and Artist House, Levine misled Patrizzi as to the contents of the Distribution Agreement, thereby inducing him to sign it. That agreement was later used to confer voting rights on Zimmermann, who in turn used his power to join with Artist House in removing Patrizzi from management and, later, in reducing defendants' shares in the Company to zero. Defendants also have called into question the final $300,000 payment Levine claims to have made from the escrow to procure a financing commitment from an entity known as Karastir LLC (Karastir), contending that they never authorized that disbursement. These allegations are sufficient to sustain defendants' third and fourth cross-claims against Levine for fraud and breach of his fiduciary duties as escrow agent. Similarly, defendants' first cross-claim for a declaratory judgment that they are entitled to all funds or shares that were delivered to or held by Levine as part of the stock transaction is viable, as is their demand for an accounting.

The other cross-claims challenged here lack merit. The second cross-claim seeks a declaration that defendants have satisfied all of their obligations under the stock purchase agreement and bear no further liability arising out of the stock transaction. Defendants do not explain how any controversy regarding their obligations thereunder could implicate Levine, who

was not a party to the transaction. The second cross-claim is dismissed.

Since the court has previously held that defendants cannot maintain any claim based on their supposed entitlement to a certain payment of $2 million that was made to Levine's escrow account in 2006 and released by him to Antiquorum in 2010 (decision & order, Mar 28, 2013, 18-19), the eighth, eleventh and twelfth cross-claims (for constructive fraud, conversion and fraudulent concealment) are dismissed in their entirety, and the third cross-claim for fraud is also dismissed to the extent it relates to the transfer of these funds. Defendants are attempting to use their right to replead to improperly circumvent a decision on the merits which has not been reversed or modified and for which they did not seek reargument (*DiPasquale v Sec. Mut. Life Ins. Co. of New York*, 293 AD2d 394, 395 [1st Dept 2002] citing *Societe Nationale d'Exploitation Industrielle des Tabacs et Allumettes v Salomon Bros. Intl., Ltd.*, 268 AD2d 373, 374 [1st Dept 2000] *lv denied* 95 NY2d 762 [2000]; *Romano v Kassebaum*, 250 AD2d 661, 662 [2d Dept 1998]; *see also The Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 98 [1st Dept 2012] [upholding dismissal of second action commenced prior to modification of motion court's dismissal of first action on merits]).

Defendants also relate that Levine persuaded them to authorize him to use the escrow funds to procure a line of credit "for [Antiquorum S.A.] and/or Patrizzi to enable them to pay Habsburg . . . the amount to which it was entitled from the sale of" the Company's inventory that was on hand at the time of the closing of the stock transaction (amended counterclaims, ¶ 42). Defendants acknowledge authorizing Levine to make disbursements on three separate occasions from the escrow funds in order to pay the fees (amounting to $625,000) necessary to obtain such financing from Karastir. Nonetheless, defendants now allege that they did so "without

knowledge of the details of the transaction," and only agreed because Levine insisted that they were obligated to obtain such financing under the stock purchase agreement, a position that they now believe to be incorrect. On this basis, they seek damages from Levine on theories of fraud and breach of his fiduciary duties as both escrow agent and as their attorney (third, fourth and seventh cross-claims).

The documentary evidence submitted on this motion shows that Levine fully informed Patrizzi and Verhoeven of the terms of the financing arrangement and its purpose, which was to ensure that funds were available to pay Habsburg the amount it was supposedly due under the stock purchase agreement for the inventory on hand at the time of closing (affidavit of Kerry Gotlib, sworn to on Aug 1, 2013, exhibits DD–FF; affidavit of Michael Levine, sworn to on Sept 2, 2013, exhibits 7–9). Levine also made clear that the *need* for this arrangement arose from defendants' own apparent failure to either sell the inventory in question, to set aside sufficient proceeds for the benefit of Habsburg, or to inform him of what items had been sold and what proceeds had been obtained from such sales. The price of obtaining the commitment was disclosed (Gotlib affidavit, Aug 1, 2013, exhibit DD ["it will costs us about $100,000 US per month"]; Levine affidavit, Sept 2, 2013, exhibit 8 ["the fee is $325,000"]) as was the fact that it was merely a commitment, to be fulfilled only in the event that Habsburg demanded payment. Given that Levine kept defendants informed of all material "details of the transaction[s]" with Karastir, and that they approved of the transactions (Levine affidavit, Sept 2, 2013, exhibit 9 ["Dear Mike . . . I herewith confirm that you should go ahead and arrange for a commitment for the entire CHF 16 million"]), it is unclear how Levine breached his fiduciary duties or committed fraud in this regard. Defendants, who are presently attempting to enforce Habsburg's purported

rights to the inventory against *plaintiffs*, do not explain why securing a financing commitment to make sure this obligation could be paid off was imprudent or unnecessary; nor do they explain why they would not have been able to discern the supposedly frivolous nature of these commitments from the outset. Thus, the third and fourth cross-claims are dismissed insofar as they relate to the disbursement of $625,000 to Karastir from the escrow fund.

In their related, seventh cross-claim, defendants charge Levine with breaching his fiduciary duties to them as their supposed attorney. In particular, defendants allege that Levine was actually acting on Karastir's behalf in procuring the loan commitments and that he failed to disclose a conflict of interest he had with Patrizzi regarding the Distribution Agreement. The basis for the former claim seems to be that defendants now believe that Karastir's fees were excessive and that Levine apparently drafted the loan procurement agreements. These allegations do not suffice to raise defendants' claim above the level of speculation. Regarding the latter claim, the Appellate Division has already held that the disclaimer in the Distribution Agreement adequately disclosed any potential conflict between Levine and Patrizzi thereunder (*AQ Asset Mgt. LLC v Levine*, 111 AD3d 245, 258 [1st Dept 2013]). Hence, this cross-claim is dismissed.

The amended answer further asserts that, to the extent defendants are found liable for any claims asserted in the complaint, "any and all liability of [defendants] is due to the actions of Levine, and Levine should be found liable for damages to the full extent [defendants] are found liable" (amended counterclaims, ¶¶ 262, 290). To state a claim for contribution, a defendant must allege that the third-party from whom he seeks contribution owes a duty to plaintiff, that the third-party breached that duty, and that such breach contributed to plaintiff's injuries (*Crow-Crimmins-Wolff & Munier v County of Westchester*, 90 AD2d 785 [2d Dept 1982] citing *Schauer*

v Joyce, 54 NY2d 1, 5 [1981]). Consequently, to state a viable cause of action here for contribution, defendants must allege that Levine owed a duty to *plaintiffs* and that his breach of that duty contributed to the injury for which plaintiffs are now suing defendants. The complaint, however, seeks recovery from defendants because (1) the disbursement instructions defendants gave Levine in 2006 were incorrect[1] and (2) Habsburg breached the stock purchase agreement by failing to deliver the balance of its shares of Antiquorum S.A. Nothing in defendants' amended answer indicates that Levine was at fault for following defendants' disbursement instructions or was responsible for Habsburg's supposed failure to deliver the balance of its shares. Indeed, defendants' stated basis for holding Levine responsible for their potential liability is that "Levine's conduct, in drafting the SPA and interpreting it against [defendants] so as to support the 'clawback' claim, assists Zimmermann in his untenable claim of [defendants'] liability under such claim" (affidavit of Kerry Gotlib, sworn to on Sept 30, 2013, ¶ 24). This is, at best, a claim for legal malpractice, which the court has previously dismissed as time-barred (decision & order, Mar 28, 2013). The sixth and tenth cross-claims are dismissed.

C. Accounting and Discovery

Pursuant to the stock purchase agreement, Artist House was to transfer $30 million in installments to Zimmermann; Zimmermann was to transfer the funds to Levine, who was to hold them in escrow. It is not disputed that Artist House in fact transferred the $30 million to Zimmermann, nor is it disputed that Levine received $30 million to hold in escrow on their

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[1] These claims would appear to have been dismissed by the Appellate Division's decision in this action (111 AD3d 245). This court signed a declaratory judgment, which, *inter alia*, dismissed a number of the causes of action in the complaint, but that judgment has apparently not yet been entered (CPLR 5016 [a] ["A judgment is entered when, after it has been signed by the clerk, it is filed by him"]).

behalf (amended answer, ¶ 11; affidavit of Osvaldo Patrizzi, sworn to on Mar 28, 2012, ¶ 23).

Defendants have demanded the production of every bank statement for every bank account maintained by either Levine or Zimmermann from the date of the transaction. The purpose of these demands was ostensibly to obtain an accounting from the two escrow agents regarding their duties as escrowees under the stock purchase agreement. This request is overbroad. The purpose of an equitable accounting is for a fiduciary to give a statement of the monies he received and disbursed on behalf of his principal. While they are free to examine their agents and require the production of documents or proof that could substantiate the fiduciaries' account, defendants are improperly seeking to transmute their right to know how much of their money remains in escrow into an open license to conduct a full-fledged investigation of their agents' escrow *accounts*. They are not entitled to records of activity in Zimmermann's and Levine's bank accounts unrelated to this case. Both Zimmermann and Levine have used their accounts for transactions other than the one at issue. A wholesale production of those accounts' financial records would yield a great deal of irrelevant (and possibly privileged) information without any way to determine which transactions were or were not related to the escrow funds.

Rather than spend any more time and resources reconstructing Zimmermann's and Levine's various transactions over the course of the last eight years, the court ultimately ordered Levine to provide a sworn statement of how the original $30 million escrow had been reduced to the sum deposited into court in March 2013, i.e., an accounting. Levine produced the ordered documents. His accounting presents a clear narrative of the amounts he received into escrow, what monies he disbursed from escrow and why, and attaches documents which ostensibly support the story he tells. Defendants need not accept that Levine's accounting is true or

accurate, but the relevant inquiries at this point are whether defendants authorized the various disbursements, whether Levine's numbers are accurate and actually add up to the claimed residue, and whether he actually made the disbursements he claims to have made. If defendants can show that a debit was not authorized (an issue that additional bank records will not clarify), it is ultimately irrelevant "where the money went" – it is enough to show that it was impermissibly deducted from the escrow. Levine's accounting constitutes a binding representation as to what became of the escrow funds and is sufficient for defendants to determine, based on their knowledge of their own instructions and basic arithmetic, whether the claimed remaining amount of $3,405,979.68 is in fact correct. The one item which requires further comment from Levine is a final $300,000 debit in favor of Karastir which defendants deny authorizing[2] and which Levine appears not to have actually distributed. Levine provides no check or other proof of any such payment. He merely avers that he moved that sum (in two installments) from one of his accounts to another, supposedly awaiting disbursement instructions from Karastir, and for all that can be seen from his accounting, he is still holding the $300,000. Defendants, however, are free to ask Levine at his deposition (which, more than three years into this action, has still not been held) whether he in fact paid Karastir this sum, by what method that payment was made, what documentary proof there is of that payment, who might have such documents, and why such documents have not been provided hitherto.

In any case, it is evident that the production of more bank records would yield more

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[2] Defendants deny authorizing other disbursements, including a $1 million loan to Antiquorum, and note that the loan appears not to have been repaid in full. The court's decision here with regard to defendants' motion against Levine is limited to holding that he has adequately complied with defendants document demands. It should not be construed as a discharge of Levine or a finding that his affidavit of account is true.

questions than answers. In response to defendants' requests and this court's orders, Zimmermann produced bank records showing $30 million passing through his account in December 2005 and January 2006, consistent with his duties as transfer escrow agent. In addition, however, Zimmermann produced records showing transactions subsequent to closing, some of which defendants have been able to identify and some of which they have not. Having repeatedly argued that they have gotten too *little* from the escrow agents, defendants now protest that they do not understand the bank records that they *have* received, and seek an order from the court directing Zimmermann to *explain* to them the relevance of the documents that he produced in response to their own demands. There is no reason that defendants cannot obtain this information by simply deposing Zimmermann.[3]

Defendants, however, argue that the financial records are necessary to verify the identities of the recipients of various disbursements which were not made by wire transfer or check. This is spurious. Defendants have conceded that fees were owed to Levine and an individual known as Taro Yamakawa. Why Taro Yamakawa directed Levine to divide a portion of his commission between two separate bank accounts or to whom he decided to pay the balance of his fee is irrelevant. Defendants have no right to the money, and Yamakawa has never claimed that he was not paid. The same can be said for the fee due to Levine.

Similarly pointless are defendants' protestations that while the bank records they have show $30 million going *into* Zimmermann's account, $30 million going *out* of Zimmermann's account in installments, and $30 million being deposited in Levine's account in installments of equal amounts on the same dates, the records do not conclusively show that Zimmermann

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[3] Zimmermann, like all other parties, has yet to be deposed as of the date of this decision.

transferred the money directly to Levine. As mentioned above, there is no dispute that after closing, Levine was holding $30 million in escrow on defendants' behalf. Finally, as the stock purchase agreement explicitly awards the interest on the escrow funds to Levine (Gotlib affidavit, Aug 1, 2013, exhibit A, § 13.6), there is no need at present to satisfy defendants' curiosity as to how much interest was earned.

In short, both Levine and Zimmermann have produced sufficient financial records for defendants to ascertain, based on their own knowledge, whether they have received the entirety of the funds due to them under the stock sale. The production of further financial records would serve no legitimate purpose, and the court regards defendants' pursuit of these records as nothing more than a fishing expedition unrelated to the pleadings. This is far from the first time that the court has had to address the question of the production of these rather unimportant documents: it has already been the subject of (at least) two motions and innumerable conferences, both in person and by telephone, which has consumed hours of the court's and the parties' time. More than 1,200 documents have been filed in this case, and the motion tally is currently at thirty seven. Unwisely, the court until now has neglected to enforce the clear holding of the Appellate Division that "[w]here, as here, discovery demands are palpably improper in that they are overbroad . . . or seek irrelevant or confidential information, the appropriate remedy is to vacate the entire demand rather than prune it" (*Bell v Cobble Hill Health Ctr., Inc.*, 22 AD3d 620, 621 [2d Dept 2005] [citations omitted]). It is

ORDERED that the motion of defendants Habsburg Holdings Ltd. and Osvaldo Patrizzi against or concerning Michael Levine is granted in part, to the extent that Levine is hereby directed to answer the cross-claims alleged against him in defendants' amended answer, dated

May 6, 3013, within twenty (20) days of service of this order upon him with notice of entry, and is otherwise denied; and it is further

ORDERED that the cross-motion of Michael Levine to dismiss all but the ninth cross-claim alleged against him in the amended answer is granted in part, to the extent of dismissing the second, sixth, seventh, eighth, tenth, eleventh and twelfth cross-claims in their entirety, and the third and fourth cross-claims to the extent described in the decision hereinabove, and is otherwise denied; and it is further

ORDERED that the motion of defendants Habsburg Holdings Ltd. and Osvaldo Patrizzi for leave to issue certain subpoenas or obtain an accounting from plaintiff Evan Zimmermann is denied.

Dated: February 27, 2014

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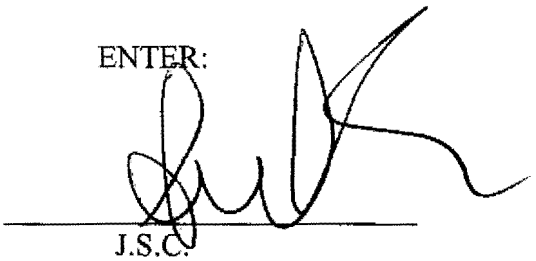

J.S.C.