

Inter/Media Time Buying Corp. v Chief Media LLC

2014 NY Slip Op 31280(U)

May 13, 2014

Sup Ct, New York County

Docket Number: 153674/2013

Judge: Milton A. Tingling

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
INTER/MEDIA TIME BUYING CORPORATION
and INTERQUANTUM LLC,

Part 44

Index No. 153674/2013

Petitioner,
-against-

CHIEF MEDIA LLC,

Respondent.

Decision

HONORABLE JUSTICE Milton A. Tingling:

Inter/Media Time Buying Corp. and Interquantum LLC (Petitioners) move for an Order compelling nonparty Chief Media LLC (Respondent) to produce documents relating to Respondent's relationship and communications with Defendant Biotab Neutraceuticals, Inc. (Biotab).

In November 2013, Petitioners commenced a lawsuit (California Action) against Defendant for breach of contract and fraud. Defendant filed a demurrer to the fraud claim, alleging that Petitioners had not pleaded the claim with sufficient particularity. The California Court granted Biotab's demurrer, with leave to amend the complaint. Petitioners have filed an amended complaint with a revised fraud claim. Defendant has filed another demurrer to dismiss the fraud claim. The California Court's decision in regards to this issue is currently pending.

Petitioners served Defendant with a Discovery Demand requesting three hundred and ninety documents, including all communications between the Defendant and the Respondent in regards to their contract. Defendant objected to Petitioners' Demand on the ground that these documents are highly sensitive and confidential. Defendant claimed that Petitioners' Demand was unduly burdensome, unrelated to the issues, and harassing. Petitioners filed a motion for an Order to compel Defendant to produce the documents. The California Court ordered Defendant

to (i) supplement its responses to Petitioners' document requests and (ii) provide a privilege log. However, the California Court did not rule on whether Defendant should be compelled to produce the documents requested by Petitioners. Rather, it directed the parties in the California Action to engage in a meet-and-confer process to determine the extent to which the parties could resolve the issue of document production.

In December 2012, Petitioners issued a subpoena duces tecum on Respondent pursuant to CPLR § 3119 seeking information relating to its relationship with Defendant. Respondent timely objected to this subpoena. In March 2013, Petitioners withdrew the December subpoena and issued another one on the Respondent, which they claim addressed Respondent's procedural objections. Respondent also timely objected to the March subpoena.

In April 2013, Petitioners filed a petition seeking an Order to compel production of documents. Respondent objects to the petition on several grounds. Respondent alleges under the case law of the First Department, parties must demonstrate "special circumstances" to warrant discovery from a nonparty, which Petitioner has failed to do. In tandem with this allegation, Respondent also claims in New York parties cannot seek discovery from nonparties when it is obtainable from other sources. Respondent alleges that all the discovery Petitioners seek from Respondent can be obtained from Defendant in the original California Action, and that Petitioners are in fact seeking the exact same information from Defendant.

Respondent asserts the discovery sought by the Petitioners is only relevant to the fraud claim. Respondent believes it should not be prematurely burdened with disclosure obligations which may prove to be unnecessary should the California Court dismiss the Petitioner's fraud claim.

Finally, Respondent claims Petitioner is a competitor of Respondent, and is seeking highly confidential information from Respondent in an attempt to both investigate potential claims against Respondent and to gain a commercial advantage over Respondent. Respondent alleges the petition amounts to a “fishing expedition”.

Petitioners allege that the First Department no longer requires a showing of “special circumstances” in order to compel discovery from a nonparty. Petitioners claim that even if “special circumstances” are required, under New York’s liberal discovery rules, the standard would be met on a “mere showing that the material is needed to prepare fully for trial”, which they believe is present here.

Petitioners allege there is no requirement to show that the documents Petitioners are seeking from Respondent are obtainable from other sources. Petitioners further allege that even if it was a requirement, Respondent’s claim that the documents sought in the petition are obtainable from Defendant is false. Petitioners claim that Respondent has made no showing that Defendant has, or ever intends to, produce the documents Petitioners seek from it. Petitioners dispute the allegation that they are seeking the exact same information from both Respondent and Defendant, and believe the only way to make a determination about the overlap between Respondent’s and Defendant’s documents is to examine Respondent’s documents.

Petitioners contend they are seeking documents which relate to more than just the fraud claim in the California Action. Petitioners further contend that even if the documents were only relevant to the fraud claim, Respondent has made no showing that California prohibits discovery pending a motion to dismiss and that the Court in the California Action will most likely not dismiss the fraud claim.

Petitioners dispute Respondent's allegation that the petition is a "fishing expedition". Petitioners claim they will gain no competitive advantage from the documents being sought. Petitioners also claim that they have offered to execute an "Attorney's Eyes Only" agreement, which they believe would take care of any confidentiality issues.

In addition to its Opposition to Petitioners' motion for an Order to compel, Respondent has made a motion for a Protective Order. Respondent asks the Court that should it direct Respondent to produce documents, it should also (i) direct Petitioners to pay all costs prior to receipts of documents, (ii) narrow the scope of the requests, and (iii) appoint a referee to oversee the discovery process. Petitioners contend that Respondent's motion should be denied in its entirety.

In regards to disclosure, the First Department makes a distinction between parties and nonparties. "For disclosure purposes, a party is distinguished from a nonparty and where disclosure is sought against a nonparty more stringent requirements are imposed on the party seeking disclosure" (See Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 A.D.3d 104 (N.Y. App. Div. 1st Dep't 2006)). In 2003, the legislature amended CPLR § 3120, dispensing of the requirement that a party seeking documentary evidence must make a motion on notice first (See Velez v. Hunts Point Multi-Serv. Ctr., Inc., supra). Now, a party seeking such documents is only required to serve a subpoena duces tecum on the nonparty, outlining "the time, place and manner of making the inspection, copy, test or photograph, and setting forth individually or by category the items to be inspected and describing each item and category with reasonable particularity" (See Velez v. Hunts Point Multi-Serv. Ctr., Inc., supra). The First Department has held that the legislature's amendment has not done away with the requirement that a party seeking

documentary evidence from a nonparty must give notice stating the reasons and circumstances for which the evidence is being sought (See Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 A.D.3d 104 (N.Y. App. Div. 1st Dep't 2006); Reuters Ltd. v. Dow Jones Telerate, 231 A.D.2d 337 (N.Y. App. Div. 1st Dep't 1997)).

The First Department has also held that a showing of “special circumstances” is no longer required when a party is seeking disclosure from a nonparty, but rather a showing that the evidence is “material and necessary” (see Schroder v. Consolidated Edison Co., 249 A.D.2d 69 (N.Y. App. Div. 1st Dep't 1998); BAll Banking Corp. v. Northville Indus. Corp., 204 A.D.2d 223, 225 (N.Y. App. Div. 1st Dep't 1994)). In Kooper v. Kooper, the Second Department stated that “Beyond the requirement of materiality and necessity which defines the scope of permissible discovery, a disclosure request directed to a nonparty implicates considerations in addition to those governing discovery from a party” (see Kooper v Kooper, 74 A.D.3d 6, 11 (N.Y. App. Div. 2d Dep't 2010)).

A significant consideration is whether a party can obtain the requested evidence from its adversary or from an independent source (see Kooper v Kooper, *supra*). If the party issuing the subpoena has failed to show that the evidence sought cannot be obtained from sources other than the third party, then disclosure will not be granted (see Tannenbaum v. Tenenbaum, 8 A.D.3d 360 (N.Y. App. Div. 2d Dep't 2004); Moran v. McCarthy, Safrath & Carbone, P.C., 31 A.D.3d 725 (N.Y. App. Div. 2d Dep't 2006)). However, the Courts do not rely on this consideration exclusively and will weigh other circumstances which are relevant in the context of the particular case (see Kooper v Kooper, 74 A.D.3d 6, 11 (N.Y. App. Div. 2d Dep't 2010)).

Here, Petitioners have failed to show the disclosure being sought cannot be obtained from Defendant. Petitioners' argument that Respondent's reasoning against disclosure is invalid

because it has failed to show that Defendant intends to produce the documents is wrong, as the burden rests with Petitioners to make this showing. Since the California Action is still in its early stages, it is premature for Petitioners to make a showing, or for the Court to make a determination, that Defendant is unable to provide said documents. The other circumstances in the case, such as the issue of the confidentiality of the requested documents, further weigh against a grant of disclosure.

Accordingly, the Court denies Petitioners' request for an Order directing Respondent to disclose documents relating to its relationship with Defendant, with leave to renew. This constitutes the Decision and Order of the Court.

5/13/14



J.S.C.