

**Arrowhead Capital Fin., Ltd. v Seven Arts Pictures
PLC**

2014 NY Slip Op 31668(U)

June 26, 2014

Sup Ct, New York County

Docket Number: 601199/2010

Judge: Shirley Werner Kornreich

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SHIRLEY WERNER KORNREICH
J.S.C**

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

-----X
ARROWHEAD CAPITAL FINANCE, LTD.,

Plaintiffs,

-against-

DECISION & ORDER

SEVEN ARTS PICTURES PLC, SEVEN ARTS FILMED
ENTERTAINMENT, LTD., DEAL INVESTMENTS, LLC,
DEAL PRODUCTIONS, LLC, SEVEN ARTS
PICTURES, INC., SEVEN ARTS FUTURE FLOWS I,
RECTIFIER PRODUCTIONS, and POOL HALL
PRODUCTIONS, LLC,

Index No.: 601199/2010

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.

Motion Sequences 003, 004 and 005 are consolidated for disposition.

Plaintiff/judgment creditor, Arrowhead Capital Finance, Ltd. (Creditor), moves (Seq 003), pursuant to CPLR 5224, for permission to serve information subpoenas on several non-resident defendant/judgment debtors by serving their attorney of record, Ross & Amar, LLC (R&A). The judgment has not been paid.¹ The defendant entities the Creditor seeks to serve are Deal Investments, LLC, Deal Productions, LLC, Seven Arts Pictures, Inc. (SAP), Rectifier Productions, LLC (Rectifier), Pool Hall Productions, LLC, and Seven Arts Filmed Entertainment, Ltd. (SAFE), the last of which defaulted on the motion (collectively, Target Debtors, without SAFE, Responding Debtors). Doc 167.² It is undisputed that none of the Target Debtors is a New York entity, except Rectifier, which is a New York limited liability

¹ The judgment, dated September 12, 2012, was entered on October 10, 2012. The court's decision, dated June 22, 2012, granted partial summary judgment to the Creditor and was affirmed by the Appellate Division on October 17, 2013.

² References to "Doc" followed by a number refer to documents filed in the New York State Electronic Filing System.

company. Doc 128. The address to which the Secretary of State would mail process served on Rectifier is in California. *Id.*

The Responding Debtors move by separate motions to disqualify Barry Goldin (Seq 004) and to stay further proceedings in this action (Seq 005). They raise the following points: 1) the Responding Debtors have no assets; 2) Seven Arts Pictures PLC (PLC, which is neither a Target nor a Responding Debtor) is subject to a stay, pursuant to §1520 of the U.S. Bankruptcy Code (BC); 3) SAFE is subject to an involuntary creditor liquidation proceeding in the UK; and 4) the Creditor's attorney, Barry Goldin, should be disqualified because he has confidential information relating to PLC, SAFE and SAP (collectively, Adverse Parties), which Mr. Goldin obtained while serving as *opposing* counsel to said entities.

For the reasons that follow, the motion to serve the Target Debtor's attorney with information subpoenas is granted on default as to SAFE and otherwise denied, and the motions of the Responding Debtors are denied.

Stay against PLC

The stay of proceedings against PLC does not affect the Target Debtors. BC §§1520 & 302; *Wedgeworth v Fireboard and Corp.*, 706 F2d 541, 544 (5th Cir. 1983)(bankruptcy stay does not affect co-defendant of debtor). Therefore, a stay against PLC does not prevent service of information subpoenas on the Target Debtors' New York attorney.

Involuntary Creditor Proceeding against SAFE

SAFE is not a Responding Debtor. Hence, it defaulted on the motion. Further, the two orders submitted to demonstrate that SAFE is subject to an involuntary creditor liquidation do not contain a stay of proceedings against SAFE. Doc 170. The court declines to exercise its

discretion to stay discovery concerning assets available to satisfy the judgment. Even if the liquidation does involve assets of SAFE, discovery will not affect its assets or the priority of the judgment.

Disqualification of Goldin

The motion to disqualify Goldin is based upon the possibility that he is in possession of confidential information that he obtained serving as *opposing counsel to the Adverse Parties* in: 1) eight lawsuits unrelated to this action, referred to by the Responding Debtors as the “Jonesfilm Litigation”; and 2) a defamation action that non-parties Peter Hoffman and his wife brought against non-party David Bailey in a Louisiana federal court (Defamation Case). Docs 171 & 173.

Peter Hoffman is a principal of and controls the Target Debtors. His affidavit says that he is the Chief Executive Officer (CEO) of SAP, one of the Responding Debtors, that SAP is the managing and controlling member of the other Responding Debtors, and that SAP is a subsidiary of PLC, of which Mr. Hoffman was CEO until November 2011. Doc 168. Mr. Hoffman’s concern is that Mr. Goldin will use confidential information he gained in the Jonesfilm Litigation, specifically the Hoffmans’ personal tax returns and information about the finances of the Responding Defendants and their affiliates. *Id.* Responding Debtors state that while acting as adverse counsel to SAP, PLC and SAFE, Mr. Goldin learned confidential information during “document discovery in the Jonesfilm Litigation”. Doc 168, ¶4; Doc 180, p 2. With respect to the Defamation Case, Mr. Hoffman alleges that Bailey is a former employee of SAP, SAFE and PLC and was privy to confidential information about those entities. Doc 168.

Attorneys owe a continuing duty to *former clients* not to reveal confidences learned in the course of their professional relationship. It is this duty that provides

the foundation for the well-established rule that a lawyer may not represent a client in a matter and thereafter represent another client with interests materially adverse to interests of the former client in the same or a substantially related matter.

Kassis v Teacher's Ins. & Annuity Ass'n, 93 NY2d 611, 615-616 (1999) [emphasis supplied].

Disqualification is entrusted to the sound discretion of the court. *Albert Jacobs, LLP v Parker*, 94 AD3d 919 (2d Dept 2012). An attorney should be disqualified when the party moving for such relief has disclosed information to the attorney in confidence that relates to the subject matter of the action in which disqualification is sought. *Id.* In *Albert Jacobs*, the attorney disqualified had not represented an adverse party, but had gained confidential information relating to the action in which disqualification was sought. The plaintiff/law firm was suing its former client for a fee. The court disqualified the defendant/client's attorney because the case for which the fee was owed had been discussed during merger negotiations between the plaintiff/law firm and the firm defending the client in the ensuing fee dispute.

In support of the disqualification motion, Mr. Hoffman submitted a settlement agreement relating to the Jonesfilm Litigation (Settlement) that contains a confidentiality provision. However, the confidentiality agreement does not bar Mr. Goldin from using information about the Adverse Parties that he learned during discovery in the Jonesfilm Litigation. The confidentiality provision in the Jonesfilm Litigation was not e-filed.³ It provides that:

The Parties agree to keep the settlement negotiations leading up to this Agreement and the terms and conditions of this Agreement confidential and not to disclose any of them to any third party, except as required or compelled by law or legal process, or with the prior written consent of all parties

³ Part of the Jonesfilm Litigation settlement was e-filed as Doc 171.

An information subpoena is used to obtain “disclosure of all matter relevant to the satisfaction of the judgment.” CPLR 5223. First, Mr. Goldin will not be required to disclose anything to a third-party in order to question the Target Debtors about assets available to satisfy the judgment. Mr. Goldin will be asking questions, not making disclosures. Further, Mr. Hoffman presumably will be the witness for the Target Debtors, as he controls them. He is not a third-party. He already knows about the Jonesfilm Litigation Settlement, to which he was a signatory. Second, Responding Debtors state that Mr. Goldin learned confidential information during “document discovery in the Jonesfilm Litigation”. Doc 180, p 2. Thus, the information was not obtained during negotiations for the Settlement and does not consist of the terms thereof, as set forth in the confidentiality provision. Third, the Hoffmans’ personal assets are not related to this case because they are not liable for the judgment. Lastly, even if there were some information about the assets of SAFE, PLC and SAP that Mr. Goldin learned during the Settlement negotiations, this court would not exercise its discretion to bar the Creditor from using the attorney of its choice to collect the judgment. *Roberts v Corwin*, 2014 NY Slip Op 4563 (1st Dept, June 19, 2014) citing *S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443 (1987).

With respect to the Defamation Case, Mr. Hoffman says that Bailey, in his capacity as an employee, was required to keep confidential any information he learned regarding “PLC, SAFE and their business.” Doc 168. Mr. Hoffman says that he believes that “Bailey will and has given confidential information to Goldin with respect to the business and activities of SAP, PLC and SAFE.” Assuming the truth of that statement, Mr. Goldin has no confidentiality obligation to SAP, PLC or SAFE because he did not represent them in the Defamation Case. Those entities

did not confide information in him with an expectation that, as an attorney, he would hold their confidences inviolate.

The Responding Debtors Have No Records or Assets

This is not a defense to issuance of the information subpoenas. If that is the case, the witness who responds to the subpoenas can so state.

Service on Counsel of Record for the Target Debtors

Service of a supplementary proceeding subpoena upon the attorney for a non-resident debtor is permissible. *Coutts Bank [Switzerland] v Anatian*, 275 AD2d 609, 612-613 (1st Dept 2000); *GE v Metals Res. Group Ltd.*, 293 AD2d 417 (1st Dept 2002). The courts records reflect that on June 10, 2014, the Responding Debtors filed a consent to change their attorney to Raymond J. Markovich, Esq. Doc 214. Steven Ross of R&A submitted a letter to the court saying that his firm was not retained to represent defendants in post-judgment matters. Doc 136.

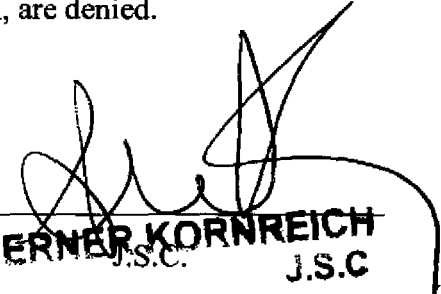
CPLR 321(b) provides that an attorney of record may withdraw by filing a consent to change attorney or upon motion. The purpose of the rule is "to afford protection to adverse parties, by eliminating disputes and uncertainty as to whether and when the authority of an attorney representing an opponent terminated". *MacArthur v Hall, McNicol, Hamilton & Clark*, 217 AD2d 429, 429-430 (1st Dept 1995); *Hendry v Hilton*, 283 AD 168 (2d Dept 1953)(until attorney of record is discharged in mode prescribed by statute, he is authorized to act for all purpose incidental to the entry and enforcement of the judgment and his authority is unabated as to adverse parties). As R&A is counsel of record for SAFE, it can be served by service on R&A. The Responding Debtors may be served by serving their current attorney of record, Raymond J. Markowich, Esq. Accordingly, it is

ORDERED that the motion by plaintiff Arrowhead Capital Finance, Ltd., to serve subpoenas, pursuant to CPLR 5224, on defendants/judgment debtors Seven Arts Filmed Entertainment, Ltd. (SAFE), Deal Investments, LLC, Deal Productions, LLC, Seven Arts Pictures, Inc., Rectifier Productions, LLC , and Pool Hall Productions, LLC, by serving them on Ross & Asmar, LLC, as attorney of record for said defendants/judgment debtors, is granted as to SAFE on default, and denied as to the other said defendants/judgment debtors; and it is further

ORDERED that the motions by Deal Investments, LLC, Deal Productions, LLC, Seven Arts Pictures, Inc., Rectifier Productions, LLC , and Pool Hall Productions, LLC, to disqualify Barry Goldin, and to stay further proceedings in this action, are denied.

Dated: June 26, 2014

ENTER:


SHIRLEY WERNER KORNREICH
J.S.C. J.S.C.