SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 14
NASSAU COUNTY

NISSIM ELMAKIES, DOWNSTATE ELMIRA AQUISITION CORP., ELMEN INTERNATIONAL CORP.,

Plaintiffs,

-against-

JEFFREY SUNSHINE, ESQ., JEFFREY SUNSHINE P.C., MOORE & WOODHOUSE LLP, RICHARD WOODHOUSE, ESQ., and JOHN V. MOORE, ESQ.,

Defendants.

Decision and Order

MOTION SUBMITTED: November 5, 2014
MOTION SEQUENCE:06
INDEX NO.:16965-11

The following papers and the attachments and exhibits thereto have been read on the motions:

Notice of Motion	1
Affirmation in Opposition	2
Reply Affirmation	3

Motion pursuant to, *inter alia*, CPLR 2308[a] by the defendants Moore & Woodhouse, LLP, Richard Woodhouse, Esq. and John V. Moore, Esq., for an order: holding non-party Jeffrey Sunshine, Esq., in contempt; compelling him to appear for a deposition and to produce stated records and documents; and for additional relief.

Introduction

In December of 2011, the plaintiffs commenced the within legal malpractice action

against, *inter alia*, the law firms of Jeffery Sunshine, LLP and Moore & Woodhouse, LLP. The complaint alleged in substance that both law firms committed malpractice, misapplied funds entrusted to them and breached stated fiduciary duties arising out of various investment transactions (Complaint at ¶¶ 27-49).

By order dated September 24, 2012, this court dismissed the complaint on statute of limitations grounds insofar as asserted against co-defendants Jeffrey Sunshine and Jeffrey Sunshine, LLP. Thereafter, in early September 9, 2014, the remaining defendants, Moore & Woodhouse, LLP, Richard Woodhouse, Esq., and John V. Moore, Esq ["the defendants"], served upon (now non-party) Jeffery Sunshine, Esq., a subpoena ad testificandum and duces tecum (Nunberg Aff., Exh., "A") (*see* CPLR 3120[1]; 3106[b]; 2302[a]). The September, 2014 subpoena schedules Sunshine for an October 1, 2014 examination and further directs him to bring with him to that examination, stated documents and written materials, as requested in an attached, 34-item document demand (Nunberg Aff., Exh., "A" [Letter of Brett A. Scher, Esq., dated September 26, 2014]).

In response to the defendants' document demands, counsel for Sunshine filed objections to each demand item (but produced no documents), and attached an explanatory letter in which he asserted that the demands were "extremely over broad and unduly burdensome". Nevertheless, counsel: (1) offered to produce Sunshine for an examination pending resolution of the document dispute; and (2) suggested that responses might be more readily forthcoming if the defendants re-crafted and substantially narrowed their demands (Nunberg Aff., Exh., "C").

The parties' subsequent attempts to resolve the document dispute proved fruitless, however, and the defendants now move for an order compelling Sunshine to appear for the requested deposition (with the requested documents), and for further relief holding him in contempt with respect to the subpoena (CPLR 2308[a]; *see also* Judiciary Law §§ 753[A][3]; 750; 751)(Scher Aff., Exh., "A"). Notably, the defendants' submissions do not cite to any specific Judiciary Law section or otherwise specify whether their contempt application is predicated upon an alleged civil or criminal contempt.

For the reasons that follow, the motion is granted in part and denied in part.

The Court's Determination

"To prevail on a motion to punish for civil contempt, the movant must demonstrate that the alleged contemnor violated a clear and unequivocal court order, of which the alleged contemnor had knowledge, thereby prejudicing a right of a party to the litigation" (*In re Executive Life Ins. Co. of New York*, 122 AD3d 629, [2d Dept 2014]; Judiciary Law § 753[A][3]; *Penavic v Penavic,* 109 AD3d 648, 649-650 [2d Dept 2013]; *Rolon v Torres*, 121 AD3d 684 [2d

Dept 2014]; *Matter of McCormick v Axelrod*, 59 NY2d 574, 582-583 [1983]). The burden of proof is on the proponent of the motion to establish the contempt by clear and convincing evidence (*In re Executive Life Ins. Co. of New York*, 122 AD3d at 629, *supra*; *Gomes v Gomes,* 106 AD3d 868, 869 [2d Dept 2013]). "A motion to punish a party for civil contempt is addressed to the sound discretion of the motion court" (*Chambers v Old Stone Hill Rd. Assoc.*, 66 AD3d 944, 946 [2d Dept 2009]; *Penavic v Penavic,* 109 AD3d at 649-650, *supra*). In a criminal contempt proceeding, proof of guilt must be established beyond a reasonable doubt and an essential element on any alleged contempt is willful disobedience (Judiciary Law § 750; *Rolon v Torres*, 121 AD3d at 684, *supra*; *Muraca v Meyerowitz*, 49 AD3d 697, 698 [2d Dept 2008]; *Gomes v Gomes*, 106 AD3d at 869, *supra*).

At bar, there has been no showing – certainly none upon clear and convincing evidence – that Mr. Sunshine's conduct was of the requisite degree and quality to support a finding of civil or criminal contempt (*Penavic v Penavic,* 109 AD3d at 649-650, *supra*; *Chambers v Old Stone Hill Rd. Assoc.*, 66 AD3d at 946, *supra*). The Court notes that the defendants have not cited to any case law governing the standards applicable to contempt findings. In any event, the record supports the conclusion that defendants' demands are overly broad, repetitive and unduly burdensome.

The purpose of a subpoena duces tecum "is 'to compel the production of specific documents that are relevant, material and necessary to facts at issue in a pending judicial proceeding'" (*Matter of Terry D.*, 81 NY2d 1042, 1044 [1993][citations omitted]; *Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014]; *Ferolito v Arizona Beverages USA, LLC*, 119 AD3d 642, 643 [2d Dept 2014]; CPLR 3101[a]).

Although to be sure, the scope of discovery is far-reaching and a subpoena may demand relevant, material and necessary documents (*Matter of Kapon v Koch*, 23 NY3d at 38, *supra*; *Ferolito v Arizona Beverages USA, LLC*, 119 AD3d at 642-643, *supra*, nevertheless, "unlimited disclosure is not required" (*Jet One Group, Inc. v Halcyon Jet Holdings, Inc.*, 111 AD3d 890, 891 [2d Dept 2013]; *Suchorzepka v Mukhtarzad*, 103 AD3d 878 [2d Dept 2013]), and a subpoena which lacks specificity and/or is over broad is unenforceable (*Conte v County of Nassau*, 87 AD3d 558, 559
[2d Dept 2011]; *Fernald v Vinci*, 5 AD3d 596 [2d Dept 2004]; CPLR 3120[2] *cf., New York Cent. Mut. Fire Ins. Co. v Librizzi*, 106 AD3d 921 [2d Dept 2013]). The court possesses broad discretion to supervise disclosure and resolve discovery disputes (CPLR 3103[a]; *Diaz v City of New York,* 117 AD3d 777 [2d Dept 2014]; *Montalvo v CVS Pharmacy, Inc.*, 102 AD3d 842, 843 [2d Dept 2013]).

Preliminarily, it bears noting that each of the 34 requests is prefaced with the disfavored generality,"any and all"; in fact, many of the demands utilize that phrase twice in the same

sentence – and at least one demand item uses it three times (*e.g.*, Item "10"; *see also* "5- 9", "13", "15-17", "28", "33") (*MacKinnon v MacKinnon*, 245 AD2d 690, 691 [3rd Dept 1997]; *Haroian v Nusbaum*, 84 AD2d 532, 533 [2d Dept 1981]; *see also Benzenberg v Telecom Plus of Upstate New York, Inc.*, 119 AD2d 717 [2d Dept 1986]; *Hudson Val. Tree v Barcana*, 114 AD2d 400, 401 [2d Dept 1985]).

More fundamentally, the demands have not been tailored with "reasonable particularity" or made applicable to properly "limited and specific" areas of inquiry (*see* CPLR 3120[2]; *Fernald v Vinci*, 5 AD3d at 596, *supra*; *Botsas v Grossman*, 7 AD3d 654 [2d Dept 2004]; *Optic Plus Enterprises, Ltd. v Bausch & Lomb Inc.*, 35 AD3d 1263 [4th Dept 2006]; *cf., Seattle Pacific Industries, Inc. v Golden Valley Realty Associates*, 54 AD3d 930 [2d Dept 2008]); rather, they are open-ended and lack temporal and/or other reasonable limiting criteria (*New York Cent. Mut. Fire Ins. Co. v Librizzi*, 106 AD3d at 921, *supra*; *Harrison v Bayley Seton Hosp., Inc.*, 219 AD2d 584 [2d Dept 1995]; *Astudillo v St. Francis-Beacon Extended Care Facility, Inc.*, 12 AD3d 469 [2d Dept 2004]).

Indeed, a substantial number of the demands are modeled upon the same or similar format (*e.g.*, Items "5"- "10"; "27-34"). Specifically, these requests open with a demand for "any and all" documents and/or communications, then broadly apply that request to generically described topics – and finally conclude with an all-encompassing generality–namely, language which applies the request to "any and all transactions in the Complaint" (*e.g.*, Items "5-10"). Item "10" of the Demands is typical – albeit in the extreme – since it demands "*Any and all* Documents concerning *any and all* Communications between [the] Woodhouse Defendants and * * * [the plaintiffs] and/or Sunshine concerning [the] Woodhouse Defendants' representation of the Plaintiffs concerning *any and all* transactions referred to in the Complaint" [emphases added]. It is unclear precisely how a litigant would supply responsive documents to this confusing and circular request (*see Optic Plus Enterprises, Ltd. v Bausch & Lomb Inc.*, 35 AD3d at 1263, *supra*). Item "7" is similarly imprecise and ostensibly repetitive of other demands, including Item "10", since it again directs the recipient to produce, "[a]ny and all Documents concerning communications between the Plaintiffs and Defendants concerning any and all transactions referenced in the Complaint". Several other demands are likewise framed in circuitous and confusing language (*see,* Items "20-23" ["Any and all Documents concerning Communications between Sunshine and [the] Woodhouse Defendants concerning identifying persons authorized to act on behalf of [certain third parties]") (*Harrison v Bayley Seton Hosp., Inc.*, 219 AD2d at 584, *supra*). The defendants' demand list concludes with "27" through "34", which – as in the case of Items "5" through "10" – once more collectively demand all documents and/or communications relating to a number of broadly referenced topics – again to be supplied with respect to "any and all transactions . . . referred to in the Complaint" (*see also*, Item "24").

It is settled that the burden of serving a proper demand in the first instance rests with

counsel (*New York Cent. Mut. Fire Ins. Co. v Librizzi*, 106 AD3d at 922, *supra*; *Bell v Cobble Hill Health Ctr., Inc.*, 22 AD3d 620, 621 [2d Dept 2005]), and that courts are not obligated to prune defective demands or requests (*Scorzari v Pezza,* 111 AD3d 916 [2d Dept 2013]; *Greenfield v Board of Assessment Review for Town of Babylon,* 106 AD3d at 909 [2d Dept 2013]). Moreover, the fact that an otherwise defective demand may include within its reach discoverable material does establish that it is a proper and enforceable request (*New York Cent. Mut. Fire Ins. Co. v Librizzi*, 106 AD3d at 921, *supra*; *Latture v Smith,* 304 AD2d 534, 536 [2d Dept 2003]).

However, in the exercise of the court's discretion, that branch of the defendants' application which is to compel Sunshine to appear for a deposition is granted to the extent that, if the movants be so advised, they may schedule Mr. Sunshine's deposition at a mutually agreed upon date within 30 days of the date of this order.

The court has considered the defendants' remaining contentions and concludes that they are lacking in merit.

Accordingly, it is,

ORDERED that the motion pursuant to CPLR 2308[a] by the defendants Moore & Woodhouse, LLP, Richard Woodhouse, Esq. and John V. Moore, Esq., is granted to the limited extent that, if the movants be so advised, they may schedule Mr. Sunshine's deposition at a mutually agreed upon date within 30 days of the date of this order. In all other respects, it is ordered that the motion is denied.

The foregoing constitutes the decision and order of the Court.

DATE: February 9, 2015

Hon. Vito M. DeStefano, J.S.C.