

Gold v Doral Fabrics, Inc.

2015 NY Slip Op 32552(U)

April 27, 2015

Supreme Court, New York County

Docket Number: 158996/2015

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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CHERYL GOLD, as Preliminary Executrix of the
ESTATE OF EUGENE P. GOLD,

DECISION/ORDER
Index No.: 158996/2015

Petitioner,

For a judgment under Article 78 of the New York
Civil Practice Law and Rules compelling
Respondents to allow an inspection of the books
and records of Doral Fabrics, Incorporated

- against -

DORAL FABRICS, INCORPORATED and
KENNETH GOLD,

Respondents,

_____ x

CHERYL GOLD, as Preliminary Executrix of the
ESTATE OF EUGENE P. GOLD,

Index No.: 158997/2015

Petitioner,

For a judgment under Article 78 of the New York
Civil Practice Law and Rules compelling
Respondents to allow an inspection of the books
and records of Potomac, Incorporated

- against -

POTOMAC MILLS, INC. and KENNETH GOLD,

Respondents.

_____ x

These two books and records proceedings were commenced by petitioner Cheryl Gold, as executrix of the estate of her father, Eugene P. Gold, against her brother, respondent Kenneth Gold, and two companies in which the estate is a majority shareholder, respondents Doral Fabrics, Inc. (Doral Fabrics) and Potomac Mills, Inc. (Potomac Mills) (collectively, the

Companies). Cheryl Gold sought, among other things, orders directing respondents to produce for inspection fourteen specific categories of records of the Companies for “the period of 2009 to date.” Both petitions allege causes of action pursuant to Business Corporation Law § 624 and the common law right to inspect books and records. Potomac Mills defaulted on the petition against it. In opposition to the petitions, Kenneth Gold and Doral Fabrics argued principally that Cheryl Gold was not seeking the records for a proper purpose. Kenneth Gold also argued that he was not an “officer or agent” of Potomac Mills and thus could not be compelled to permit inspection of that company’s records pursuant to BCL § 624. This court granted the petitions by decision on the record on December 17, 2015, the transcript of which was so-ordered on January 25, 2016, and by short form orders also dated January 25, 2016.

Cheryl Gold now moves in both proceedings to punish respondents for contempt for having willfully disobeyed the January 25, 2016 orders. These motions are consolidated for the purposes of disposition. Cheryl Gold contends that despite numerous opportunities to comply with the orders, respondents have produced no records from Potomac Mills. She further contends that the only records from Doral Fabrics that were produced consisted of corporate tax returns for years 2007 through 2014, “financial statements for the year ended February 28, 2006, and ten months ended December 31, 2008,” and copies of stock certificates issued to Kenneth Gold and Eugene Gold. (Gold v Potomac Mills, Inc., Jeremias Aff. In Supp. ¶¶ 26-27 [NYSCEF No. 26].)

In opposition to the motions, respondents Kenneth Gold and Doral Fabrics argue that the January 25, 2016 orders directed them to produce books and records pursuant to BCL § 624. They also vaguely assert that Kenneth Gold voluntarily produced records that he “was able to gather,” which exceeded the required scope of production under that statute. (Gold v Doral

Fabrics, Inc., Gold Aff. ¶ 4 [NYSCEF No. 54].) Respondent Potomac Mills has defaulted on the motion. Respondent Kenneth Gold does not dispute that no Potomac documents have been produced.

It is well settled that “the common-law right of inspection is broader than the statutory right” of inspection of a corporation’s books and records. (Retirement Plan for Gen. Empls. Of the City of N. Miami Beach v The McGraw-Hill Companies, Inc., 120 AD3d 1052, 1056 [1st Dept 2014].) This court’s prior decision on the record made a finding that Kenneth Gold was in control of access to the business premises shared by Potomac Mills and Doral Fabrics, and was an agent for purposes of inspection under BCL § 624. The short form orders granted the petitions, stating that the petitions were brought “pursuant to Business Corporation Law § 624 and the common law.” The orders thus contemplated discovery beyond the scope of BCL § 624.

Nevertheless, for a party to be punished for contempt, it must be shown by “clear and convincing evidence that [the party] knowingly disobeyed clear and unequivocal orders of the court, causing prejudice.” (Simens v Darwish, 104 AD3d 465, 466 [1st Dept 2013], citing McCormick v Axelrod, 59 NY2d 574, 582-583 [1983].) In order to avoid any confusion as to the scope of this court’s January 25, 2016 orders, the court hereby holds that the petition in each case should be granted to the extent of requiring production of all the requested books and records, pursuant to both BCL § 624 and the common law. The court adheres to its findings in the December 17, 2015 decision that the records are sought for a proper purpose and that Kenneth Gold is obligated to produce the records. It is noted that respondents have not claimed that Cheryl Gold’s demand for the records is overbroad.

(I) With respect to Gold v Doral Fabrics, Inc. & Kenneth Gold (Index. No. 158996/2015),

it is accordingly hereby

(a) ORDERED that the petition is granted to the following extent: Respondents Kenneth Gold and Doral Fabrics, Inc. shall produce for inspection and copying by petitioner or her agents the books and records specifically identified in the Wherefore Clause – paragraph (i), subparagraphs (a)-(n), of the petition. To the extent that the requested records have been kept electronically, the records may be produced in electronic form; and to the extent that the requested records have been kept only in paper form, they shall be produced in paper form. Such production shall be made by respondents, jointly and severally, on May 24, 2016 at 10:00 a.m. at Doral Fabrics' office, this date and location having been mutually agreed to by petitioner and respondents Doral Fabrics and Kenneth Gold. This date is final and shall not be extended absent good cause shown in advance of the deadline; and it is further

(b) ORDERED that in the event respondents cannot locate documents responsive to any given category, respondent Kenneth Gold shall serve petitioner with a detailed affidavit on personal knowledge that a diligent search for such document(s) has been made, specifying the efforts to locate such documents. Such affidavit shall be served by May 24, 2016 at 10:00 a.m.; and it is further

(c) ORDERED that the parties shall confer on payment for the copying of any records provided in paper form. In the event that they are unable to reach agreement, plaintiff shall initially bear the cost of copying, without prejudice to an application for re-payment at the time of any further proceeding regarding compliance with the instant order; and it is further

(d) ORDERED that petitioner Cheryl Gold's motion to punish for contempt is denied without prejudice to a new motion in the event of non-compliance with this order.

(II) With respect to Gold v Potomac Mills, Inc. & Kenneth Gold (Index No.

158997/2015) it is hereby

(a) ORDERED that the petition is granted to the following extent: Respondents Kenneth Gold and Potomac Mills, Inc. shall produce for inspection and copying by petitioner or her agents the books and records specifically identified in the Wherefore Clause – paragraph (i), subparagraphs (a)-(n), of the petition. To the extent that the requested records have been kept electronically, the records may be produced in electronic form; and to the extent that the requested records have been kept only in paper form, they shall be produced in paper form. Such production shall be made by respondents, jointly and severally, on May 24, 2016 at 10:00 a.m. at Potomac Mills' office, this date and location having been mutually agreed to by petitioner and respondent Kenneth Gold. This date is final and shall not be extended absent good cause shown in advance of the deadline; and it is further

(b) ORDERED that in the event that respondents cannot locate documents responsive to any given category, respondent Kenneth Gold shall serve petitioner with a detailed affidavit on personal knowledge that a diligent search for such document(s) has been made, specifying the efforts to locate such documents. Such affidavit shall be served by May 24, 2016 at 10:00 a.m.; and it is further


(c) ORDERED that the parties shall confer on payment for the copying of any records provided in paper form. In the event that they are unable to reach agreement, plaintiff shall initially bear the cost of copying, without prejudice to an application for re-payment at the time of any further proceeding regarding compliance with the instant order; and it is further

(d) ORDERED that petitioner Cheryl Gold's motion to punish for contempt is

denied without prejudice to a new motion in the event of non-compliance with this order.

This constitutes the decision and order of the court.

Dated: New York, New York
April 27, 2015



MARCY FRIEDMAN, J.S.C.