

Jaybar Realty Corp. v Armato
2016 NY Slip Op 33057(U)
September 27, 2016
Supreme Court, Westchester County
Docket Number: 57692/2013
Judge: Joan B. Lefkowitz
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FILED: WESTCHESTER COUNTY CLERK INDEX 09/27/2016 02:4

NYSCEF DOC. NO. 287

RECEIVED NYSCEF: 09/27/2016

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
JAYBAR REALTY CORP. and JB PARKS PLACE REALTY,
LLC,

Plaintiffs,

DECISION & ORDER

-against-

Index No.: 57692/2013
Motion Date: June 20, 2016

JOSEPH ARMATO, ADJUSTRITE, INC., MICHAEL CASTELLANO a/k/a MIKE CASTELLANO, VENETIAN CONTRACTING, INC., NATIONWIDE CONTRACTING CONSULTING, INC., CAPITAL ONE, N.A. a/k/a CAPTIAL ONE BANK (USA), N.A. a/k/a CAPTIAL ONE FINANCIAL CORP., SANTANDER BANK, N.A. f/k/a SOVEREIGN BANK, N.A.,

Seq. No: 8

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs Jaybar Realty Corp. and JB Parks Realty, LLC for an order (1) pursuant to CPLR § 3124 to compel the defendants Joseph Armato, Venetian Contracting, Inc. and Nationwide Contracting Consulting, Inc. ("Armato defendants"): (a) to produce any and all documents in their possession responsive to demands 12 - 15 of plaintiffs' post-deposition demands dated January 27, 2016, or alternatively (b) to produce any and all documents in their possession responsive to demands 12 - 14 of plaintiffs' post-deposition demands and with respect to demand 15, direct the Armato defendants to identify those persons included on the list as an exhibit to demand 15 who have not been clients of the Armato defendants and based upon that revised list permitting plaintiffs to submit a supplemental demand requesting documents related to 25 of the people identified on the Armato defendants' revised list and then compelling the Armato defendants to provide any and all documents in their possession responsive to the demand; and (2) pursuant to CPLR § 3126, in the event that the Armato defendants fail to comply with the Court directives regarding the relief set forth above pursuant to CPLR 3124 within 30 days: (a) directing that the issue of plaintiffs establishing two or more predicate acts to show a pattern of activity for their civil claim under the Racketeer Influenced and Corrupt Organizations Act 18 USCA § 1962(c) ("RICO") be deemed resolved in plaintiffs' favor for the purposes of this action; and (b) that the Armato defendants be precluded from (i) opposing plaintiffs' civil RICO claims on the ground that plaintiffs allegedly cannot establish two or more predicate acts to show a pattern of activity and/or (ii) producing any evidence related to any of the property owners identified by plaintiffs in post-deposition demands 12 - 15; together with such other and further relief as the court deems just, equitable and proper.

Order to Show Cause - Affirmation in Support - Exhibits A-Y -
 Memorandum of Law
 Affirmation in Opposition - Exhibits A-D -Affidavit of Service

Upon the foregoing papers and the proceedings held on June 20, 2016, the motion is decided as follows:

Plaintiffs initiated this action by filing a summons and complaint on May 13, 2013; thereafter, plaintiffs filed an amended summons and complaint on July 31, 2014, in which they allege several causes of action against the Armato defendants, including fraud and civil violations of RICO. The Armato defendants interposed an answer on or about October 8, 2014, and issue was joined. By Notice of Motion filed on April 14, 2016, the Armato defendants filed a motion for summary judgment. In a decision filed and entered on July 20, 2016, the Honorable Mary H. Smith, JSC granted the defendants' motion with the respect to virtually all causes of action except those alleging civil violations of RICO, which she denied as premature.¹

Succinctly stated, plaintiffs here allege that the Armato defendants schemed to obtain insurance proceeds intended to pay for repairs to plaintiffs' property after a flood without doing the vast majority of work. Plaintiffs have identified other individuals who they believe the Armato defendants victimized in a similar manner and indeed questioned the defendant Joseph Armato at his deposition regarding those individuals. Plaintiffs are now seeking to obtain documentary evidence from the defendants as to those individuals in demands 12 - 14 of Plaintiffs' Second Demand for Production of Documents dated January 27, 2016, addressed to the Armato defendants. In addition, plaintiffs seek the production of all documents and communications concerning construction, remediation or renovation performed by defendants or their contractors or subcontractors related to the properties and/or owners on a list attached as Exhibit A. Exhibit A is an 11 page printing from a website entitled "Comprehensive List of Joseph Armato's Known Victims."

Plaintiffs' Claims

Plaintiffs assert that the requested documents are necessary in order to prove the alleged civil violation of RICO, 18 USCA § 1962(c), particularly insofar as they must present evidence of two or more predicate acts to establish a pattern of racketeering activity.² Plaintiffs further

¹It appears that all claims as to plaintiff JB Park Place were dismissed based upon that plaintiff's lack of standing.

²To prevail on claim under a 18 USCA § 1962(c), a plaintiff must establish "[t]hat (1) the defendant (2) through the commission of two or more predicate acts (3) constituting a pattern (4) of racketeering activity (5) directly or indirectly conducts, or participates in the conduct of (6) an enterprise (7) the activities of which affect interstate or foreign commerce" *131 Main Street Assocs. v. Manko*, 897 F. Supp 1507, 1526 (SDNY 1995), citing *Moss v Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983),

note that the United States Supreme Court has acknowledged that the statute, by its explicit terms, *see* 18 USCA § 1961(6), requires at least two acts of racketeering activity with the attendant implication that while two acts are necessary, they may not be sufficient. *See Sedima, S.P.R.L. v Imrex Company, Inc.*, 473 US 479, 496 n. 14 (1985). Moreover, plaintiffs assert that the RICO statute defines a pattern of racketeering activity as acts, “the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity, 18 USCA § 1961(6), thereby perform enlarging the temporal scope of discovery.

Furthermore, plaintiffs aver that, in their motion for summary judgment, the Armato defendants contend that the plaintiffs cannot establish a RICO violation in part because of the small number of instances of other disputes plaintiffs document and rely on the deposition testimony of defendant Joseph Armato where Armato was asked about the very individuals plaintiffs have identified as having had disputes with or having been victims of Joseph Armato and which supporting documents plaintiffs have requested in the demand at issue. Plaintiffs contend that it is patently inequitable for the Armato defendants to argue on the one hand that plaintiffs cannot prove their RICO claim while with the other hand refuse to provide the documentary evidence plaintiffs need to so prove. Plaintiffs also emphasize that the Armato defendants’ reliance upon the fact that plaintiffs do not have these documents in urging the court to grant them summary judgment on their RICO claims utterly belies the Armato defendants’ contention that the demands are irrelevant and immaterial.

Additionally, plaintiffs note that the demands at issue are not overbroad and do not entail a fishing expedition as they are limited to other clients who plaintiffs have a good faith basis to believe the Armato defendants defrauded. In particular, demands 12 - 14 are addressed to specific individuals and/or disputes about which Joseph Armato was questioned at his deposition. These demands are tailored further insofar as they seek certain specified classes of documents. While demand 15 admittedly includes a lengthy list, plaintiffs maintain that they have a good faith basis to believe the list is both reliable and credible given that the list includes several of the property owners plaintiffs identified as having had disputes with Joseph Armato over insurance proceeds, the subject of which was explored at Joseph Armato’s deposition. Nevertheless recognizing that the list is lengthy, the plaintiffs propose an alternate approach to ease any alleged burden in the event the court finds it necessary to do so: direct the Armato defendants to identify those persons included on the list as an exhibit to demand 15 who have not been clients of the Armato defendants and based upon that revised list permit plaintiffs to submit a supplemental demand requesting documents related to 25 of the people identified on the Armato defendants’ revised list and then compel the Armato defendants to provide any and all documents in their possession responsive to the supplemental demand.

Armato Defendants’ Contentions

The Armato defendants counter that because plaintiffs have no grounds to assert a RICO

cert. denied 465 US 1025 (1984).

cause of action as a matter of law, the discovery demanded is immaterial and irrelevant. More particularly, the Armato defendants contend that the predicate acts that underlie their alleged racketeering activities do not establish the requisite proximate cause or standing in that the direct victim of the Armato defendants alleged misconduct is the insurance company, not plaintiffs. At oral argument it was revealed that the Armato defendants' prior counsel never filed a motion to dismiss the RICO causes of action on the ground that plaintiffs lack standing and that they, as counsel of record now, would assert same in their reply papers on the then pending motion for summary judgment.³

With regard to Demands 12 - 14, the Armato defendants contend that in the absence of a demonstrable RICO claim, they should not be required to disclose the voluminous documents, some of which are privileged. They note further that these matters have all been resolved and that no determination of fraud was made in any of them.

Additionally, the Armato defendants claim that the discovery demanded is overbroad, unduly burdensome and cannot possibly result in any discoverable information. The Armato defendants maintain that Demand 15 seeks over 145 case files dating back as far as 1996 without any substantiation by plaintiffs that any of the listed individuals were in fact their clients, let alone purported victims of the same RICO scheme. It would require the production of many thousands of documents in a case where plaintiffs are merely contending that there is evidence of fraud because the Armato defendants made a profit.

Discussion

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

³As noted earlier, Justice Smith denied as premature the Armato defendants' motion for summary judgment with respect to the RICO causes of action and in a footnote stated that such a determination "[m]oots the further issue raised by the parties' respective correspondence . . . dated July 1 and July 5, 2016, concerning the propriety of defendants' allegedly having included for the first time in their replying papers the argument that plaintiffs' RICO claims should be dismissed based upon their lack of standing" *see* Decision of July 20, 2016, p. 5, n. 5.

Preliminarily, although the Armato defendants contend that plaintiffs are not entitled to the demanded discovery because they lack standing to assert their RICO claims, no court where the issue has been raised has made any such determination. The Armato defendants recently raised this issue for the first time in their reply papers to their motion for summary judgment. However, Justice Smith denied as premature the Armato defendants' application with respect to the RICO causes of action. *See* Decision of July 20, 2016. As such, the claims remain in the case and the plaintiffs are entitled to discovery on the RICO causes of action.

Simply put, the discovery that plaintiffs seek is material and necessary in light of the issues in this matter. Plaintiffs bear the burden of proving two or more predicate acts which are part of a scheme to establish a pattern of racketeering activity and the demanded discovery goes to the core of their ability to do so. Other instances of the Armato defendants engaging in similar conduct as that alleged here and explored at Joseph Armato's deposition would unquestionably support plaintiffs' efforts to demonstrate the predicate acts which are necessary components of a pattern racketeering activity. Thus, the Armato defendants' argument that the demanded materials are irrelevant and immaterial cannot be countenanced. Further telling in this regard is plaintiffs' observation that the Armato defendants on the one hand assert in their motion for summary judgment that there is no evidence that they engaged in a pattern of racketeering activity as defined by the United States Code, while simultaneously refusing to provide the very documentary evidence plaintiffs need to so prove.

More troubling is the Armato defendants' assertion that the discovery demanded is overly broad and would be unduly burdensome to produce. While the plaintiffs contend the court should summarily reject the assertion because the defendants did not specifically object to each individual demand on the ground that it is unduly burdensome, their proposed alternative signals their recognition of the scope of what they are demanding. The court finds that notwithstanding only the Armato defendants' general objection on burdensomeness grounds, some limitations are appropriate. Accordingly, on or before October 26, 2016, the Armato defendants are directed to provide the documents in their possession responsive to demands 12 – 14 of plaintiffs' post deposition demands dated January 27, 2016. To the extent that the Armato defendants maintain that certain responsive documents are privileged, the defendants shall provide a privilege log, specifying for each respective document on the privilege log, the type of document, the nature of the contents of the document, who prepared the document, the date of the document and the basis for the claimed privilege (CPLR §3122[b]; *Ren Zheng Zheng v Bermeo*, 114 AD3d 743 [2d Dept 2014]).

With respect to demand 15 of plaintiffs' post-deposition demands dated January 27, 2016, on or before October 10, 2016, the Armato defendants shall identify the individuals on the list attached as an exhibit to those demands who have not been clients. On or before October 17, 2016, plaintiffs shall then serve a supplemental demand requesting documents for ten of the individuals identified on the revised list. On or before November 17, 2016, the Armato defendants shall provide the responsive documents in their possession for those ten individuals

along with a privilege log, if applicable.

This court declines plaintiffs' invitation to issue a prospective ruling pursuant to CPLR § 3126 in the event that the Armato defendants fail to comply with its directives with respect to the demanded discovery.

In view of the foregoing, it is

ORDERED that plaintiffs' motion for an order pursuant to CPLR § 3124 to compel the Armato defendants to produce any and all documents in their possession responsive to demands 12 - 15 of plaintiffs' post-deposition demands dated January 27, 2016, or alternatively to produce any and all documents in their possession responsive to demands 12 - 14 of plaintiffs' post-deposition demands and with respect to demand 15, direct the Armato defendants to identify those persons included on the list as an exhibit to demand 15 who have not been clients of the Armato defendants and based upon that revised list permitting plaintiffs to submit a supplemental demand requesting documents related to 25 of the people identified on the Armato defendants' revised list and then compelling the Armato defendants to provide any and all documents in their possession responsive to the demand is granted to the extent that on or before October 21, 2016, the Armato defendants are directed to provide the documents in their possession responsive to demands 12 - 14 of plaintiffs' post deposition demands dated January 27, 2016; and it is further

ORDERED that insofar as the Armato defendants assert that certain documents are privileged, the Armato defendants shall provide a detailed privilege log, specifying for each respective document on the privilege log, the type of document, the nature of the contents of the document, who prepared the document, the date of the document and the basis for the claimed privilege; and it is further

ORDERED that with respect to demand 15 of plaintiffs' post-deposition demands dated January 27, 2016, on or before October 10, 2016, the Armato defendants shall identify the individuals on the list attached as Exhibit A to those demands who have not been clients; and it is further

ORDERED that on or before October 19, 2016, plaintiffs shall serve a supplemental demand requesting documents for ten of the individuals identified on the revised list; and it is further

ORDERED that on or before November 17, 2016, the Armato defendants shall provide the responsive documents in their possession for those ten individuals along with a privilege log, if applicable; and it is further

ORDERED that plaintiffs motion for an order pursuant to CPLR § 3126, directing, in the event that the Armato defendants fail to comply with the Court directives regarding the relief set forth above pursuant to CPLR 3124 within 30 days, that the issue of plaintiffs establishing two or more predicate acts to show a pattern of activity for their civil claim under RICO be deemed resolved in plaintiffs' favor for the purposes of this action and that the Armato defendants be precluded from (i) opposing plaintiffs' civil RICO claims on the ground that plaintiffs allegedly

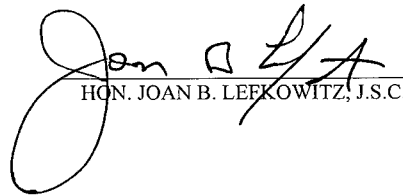
cannot establish two or more predicate acts to show a pattern of activity and/or (ii) producing any evidence related to any of the property owners identified by plaintiffs in post-deposition demands 12 - 15 is denied; and it is further

ORDERED that the parties are directed to appear at a conference in the Compliance Part, Courtroom 800, on November 22, 2016, at 9:30 A.M.; and it is further

ORDERED that plaintiffs are directed to serve a copy of this order with notice of entry upon all parties within 7 days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
September 21, 2016



HON. JOAN B. LEEKOWITZ, J.S.C.

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