

Berkun Family LLC v Abacus Fed. Sav. Bank

2017 NY Slip Op 31781(U)

August 17, 2017

Supreme Court, New York County

Docket Number: 653534/2014

Judge: Arthur F. Engoron

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

-----X
THE BERKUN FAMILY LLC and THE TUTTMAN
FAMILY LLC,

Plaintiff,

Index Number: 653534/2014

Sequence Number: 002

- against -

Decision and Order

ABACUS FEDERAL SAVINGS BANK, 183 CANAL
ST. CORP., GLOBAL PALATE, INC., THOMAS
SUNG, VERA SUNG and JILL SUNG,

Defendants.

-----X
Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used on the motion by defendants Abacus Federal Savings Bank, Thomas Sung, and Jill Sung to compel plaintiffs to respond to said defendants' Second Demand for Interrogatories and Second Demand for Discovery and Inspection, and for a conditional order of preclusion; and plaintiffs' cross-motion to strike the moving defendants' answer or, in the alternative, to compel the moving defendants to produce documents responsive to plaintiff's Second Demand for Production of Documents:

Papers Numbered:

Notice of Motion - Affirmation - Exhibits	1
Notice of Cross-Motion - Affirmation - Exhibits	2
Affirmation in Opposition to Cross-Motion and in Further Support of Motion - Exhibits	3
Reply Affirmation in Further Support of Cross-Motion - Exhibit	4

Upon the foregoing papers, the motion and cross-motion are each granted in part and denied in part.

Background

At first glance, this is a seemingly straightforward matter in which plaintiffs The Berkun Family LLC ("Berkun") and The Tuttmann Family LLC ("Tuttman") (collectively, "plaintiffs"), the owners of the commercial building located at 183 Canal Street, New York, New York ("183 Canal"), seek to recover from defendant Abacus Federal Savings Bank ("Abacus"), a commercial tenant of 183 Canal, and the other defendants – Abacus' alleged alter-egos – rent, additional rent, costs, and attorneys fees for Abacus' alleged fraudulent assignment of the commercial lease to 183 Canal St. Corp. ("Canal St."). The amended verified complaint (deemed by this Court to be filed on August 3, 2015 [see NYSCEF Doc # 34]), asserts causes of action for: (1) a declaration that, notwithstanding the lease assignment from Abacus to Canal St., all defendants are liable for rent under the commercial lease (first cause of action); (2) breach of the implied covenant of

good faith and fair dealing (second cause of action); (3) unjust enrichment (third cause of action); and (4) breach of lease (fourth through seventh causes of action). The matter, however, is complicated by the fourteen counterclaims raised in the Answer of Abacus and defendants Thomas Sung and Jill Sung (collectively, the “Abacus/Sung defendants”), based upon their allegations that Abacus owned the adjoining building at 181 Canal Street (“181 Canal”), and that the parties entered into an oral “joint-venture” on May 16, 1994 whereby they agreed to combine both buildings (183 Canal and 181 Canal) and to operate them as a single entity.

In view of the parties’ respective claims, the nature and scope of the parties’ relationship – did they have a straight-forward landlord/tenant relationship as plaintiffs contend, or are they joint-venturers as the Abacus/Sung defendants contend – is at least one threshold issue, the other being whether defendants are alter-egos of one another, for which proof should be exchanged, or so it would seem to this Court. However, as more fully discussed below, despite two rounds of written discovery demands and several Court orders, neither plaintiffs nor the Abacus/Sung defendants have produced much by way of documentary evidence. Instead, plaintiffs and the Abacus/Sung defendants have rejected – flatly and by way of boiler-plate language – the other’s discovery requests and blame each other for alleged wilful and contumacious conduct in failing to produce documents in response to demands that are allegedly “reasonably calculated to lead to the discovery of admissible evidence.” For the record, plaintiffs served a Supplemental Demand for the Production of Documents that contains 88 separate document requests (the first such demand contained 86 separate document requests), and the Abacus/Sung defendants serve a second document demands that contain 28 separate document requests and second interrogatories that contain 15 separate questions.

Consequently, the Abacus/Sung defendants now move, and plaintiffs now cross-move, for discovery sanctions.

Discussion

CPLR 3101(a) provides, in pertinent part, that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” Trial courts have wide discretion to determine whether the information sought is “material and necessary,” and the phrase is “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.” Allen v Crowell–Collier Publ. Co., 21 NY2d 403, 406 (1968) (“The test is one of usefulness and reason”); CMRC Corp., Ltd. v State, 270 AD2d 27, 31 (1st Dep’t 2000); U.S. Ice Cream Corp. v Carvel Corp., 190 AD2d 788, 788 (2nd Dep’t 1993) (“Restricted only by a test for materiality of ‘usefulness’ and ‘reason’, pretrial discovery is to be encouraged”).

Here, neither party has identified, with specificity, their respective discovery requests, to which they feel they are entitled to a response. Rather, each party asserts that they are entitled to all of the documents and information requested – a total of 131 separate demands – to which the other replies, essentially, “no, you are not.” In doing so, the parties would have this Court read each document demand and interrogatory and response thereto in order, basically, to re-write them – a task which this Court is not required to, and will not, undertake. Rather, having reviewed the subject discovery demands and responses, this Court finds that both parties are guilty of serving

discovery demands which are vague, ambiguous, over-broad (and often duplicative), and that do not set forth an appropriate time limitation. While some of the discovery demands do not suffer from any deficiencies, this Court declines to engage in a line-by-line analysis thereof in order to determine which are appropriate.

Accordingly, this Court grants the motion and cross-motion to the extent that it directs the parties to produce, as an initial matter and without limitation to further and supplementary discovery, the following documents, all of which this Court finds are "material and necessary" to plaintiffs' claims and the Abacus/Sung defendants' defenses and counterclaims, and all for the period from May 1994 (the date of the alleged oral "joint-venture") to the present. The Court recognizes that each party may not have possession, custody, or control of certain of the documents (for instance, as one example, plaintiffs obviously may not have the corporate documents of Abacus and Canal St., and vice-versa), and that some of the documents may have been produced, but trusts that the parties will respond appropriately and produce full and complete document responses:

- (1) The lease for the commercial space the Abacus/Sung defendants occupied, and any addenda, riders, amendments, and renewals thereto;
- (2) All rent bills, correspondence, e-mails, cancelled checks, money-orders, wire transfer documents, and other documents between the parties relating to Abacus's payment of rent or "use and occupancy" for the subject commercial space;
- (3) All correspondence, e-mails, notes, and other documents between the parties relating to Abacus's commercial tenancy;
- (4) The assignment of lease from Abacus to Canal St.;
- (5) All correspondence, e-mails, notes, demands, and other documents relating to the assignment from Abacus to Canal St.;
- (6) The deeds for 183 Canal and 181 Canal;
- (7) The Certificate(s) of Occupancy for 183 Canal and 181 Canal, and any amendments thereto;
- (8) Contracts, correspondence, and any other documents relating to the manner in which plaintiffs obtained title to 183 Canal;
- (9) Contracts, correspondence, and any other documents, relating to plaintiffs' sale of 183 Canal in November 2015;
- (10) Contracts, correspondence, and any other documents, relating to ownership of 181 Canal;
- (11) Contracts, purchase orders, bills and proof of payment thereof, correspondence, applications and filings with governmental authorities relating to any and all renovations

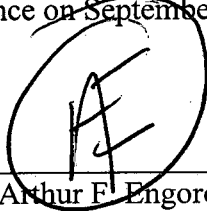
- to 183 Canal and 181 Canal, in furtherance of combining the two buildings into one building;
- (12) Contracts, purchase orders, bills and proof of payment thereof, correspondence, applications and filings with governmental authorities relating to any and all repairs and improvements to 183 Canal and 181 Canal;
 - (13) All insurance policies for 183 Canal and 181 Canal;
 - (14) Plaintiffs' Operating Agreements and all amendments thereto;
 - (15) Abacus' organizational documents, including but not limited to articles/certificates of incorporation, by-laws, resolutions, membership agreements, stock certificates, and any amendments thereto, and any other documents filed with the State of New York, the Federal Deposit Insurance Company, and any other governmental body;
 - (16) All documents relating to the relationship between Abacus and its owners, officers, directors, employees;
 - (17) All documents relating to the individual defendants' interests in Abacus, including but not limited to documents reflecting capital contributions;
 - (18) Canal St.'s organizational documents, including but not limited to articles/certificates of incorporation, by-laws, resolutions, membership agreements, and stock certificates, and any amendments thereto, and any other documents filed with the State of New York, the Federal Deposit Insurance Company, and any other governmental body;
 - (19) All documents relating to the relationship between Canal St. and its owners, officers, directors, employees;
 - (20) All documents relating to the individual defendants' interests in Canal St., including but not limited to documents reflecting capital contributions;
 - (21) The corporate federal and state tax returns of: (i) plaintiffs; (ii) Abacus; and (iii) Canal St.;
 - (22) Leases for the other commercial/office spaces in 183 Canal and 181 Canal;
 - (23) All documents relating to any relationship or association between Good-Land Management Corp. and Abacus, including but not limited to contracts, agreements, assignments, deeds, mortgages, transfer documents, correspondence, and e-mails; and
 - (24) All documents upon which the Abacus/Sung defendants will rely to support its claim that the parties entered into an "oral joint-venture" in May 1994.

Production of the foregoing documents by plaintiffs and the Abacus/Sung defendants is to be made in compliance with CPLR 3122(b) and (c), and with bates-stamped documents, by **October 20, 2017**. This matter is scheduled for a **Status Conference on September 12, 2017 at 2:30 p.m.** in Part 37, 80 Centre Street, Room 328, during which the Court will resolve issues relating to the Interrogatories, and any other or further issues regarding document production.

Conclusion

Motion and cross-motion to compel discovery responses or for discovery sanctions granted to the extent of directing the movant and cross-movant to produce documents set forth herein by October 20, 2017 and to appear for a Status Conference on September 12, 2017 at 2:30 p.m.

Dated: August 17, 2017



Arthur F. Engoron, J.S.C.