

Gerisamov v Westoil, Ltd.

2017 NY Slip Op 31880(U)

September 7, 2017

Supreme Court, Kings County

Docket Number: 18017/2014

Judge: Sylvia G. Ash

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of September, 2017.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

-----X

GREGORY GERISAMOV,

Plaintiff(s),

- against -

WESTOIL, LTD., ISAAC FAIVUSH, et. al.,

Defendant(s).

-----X

The following e-filed papers numbered 98 to 229 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

DECISION AND ORDER

Index # 18017/2014

Mot. Seq. 4 & 6

Papers Numbered

98-108; 144-173

121-25; 179-186

215-21; 225-29

Upon the foregoing papers, Defendants' motion to quash the subpoenas duces tecum issued by Plaintiff, GREGORY GERISAMOV ("Gerisamov"), upon nonparties JP Morgan Chase Bank, N.A. ("JP Morgan") and Defendant BNP Paribas (Suisse) ("BNP Paribas") and granting them a protective order is hereby DENIED in its entirety. In addition, Defendants' motion, brought by order to show cause, to vacate an Order dated October 1, 2015, which denied Defendants' motion to dismiss the complaint, and upon vacatur, awarding Defendants costs and attorney's fees, is also DENIED in its entirety.

In this action for, among other things, an accounting, conversion and specific performance, Gerisamov alleges that he is a 50% owner of the Defendant corporation, WESTOIL, LTD. ("Westoil") along with Defendant ISAAC FAIVUSH ("Faivush"), the other alleged 50% owner. It is Faivush's position that he is the sole shareholder of Westoil. It is

undisputed that, at one point, 200 shares were issued by Westoil. It is further undisputed that Westoil issued 150 of those shares to nonparty Mikhail Berkovskiy (“Berkovskiy”), an investor in Westoil, and that the remaining 50 shares were divided equally between Gerisamov and Faivush. Sometime in 2009, Berkovskiy died, and, pursuant to the Westoil’s bylaws, Berkovskiy’s shares reverted back to the corporation, a fact that is undisputed by Gerisamov and Faivush but the import of which is in dispute by them.

According to Defendants, the parties entered into three successive stock purchase agreements over the course of four days in late December 2012 whereby Gerisamov agreed to sell his 25 shares for a stated sum¹ and whereby Gerisamov warranted that he was relinquishing all of his shares in Westoil. Defendants claim that the superseding stock purchase agreement is the one dated December 23, 2012, under which Gerisamov allegedly received payment of \$175,000.00 in return for his 25 outstanding shares of Westoil and his resignation as Officer and Director of Westoil. It is Gerisamov’s position that the agreement to sell his shares was void because he never received the stated consideration from Faivush. Gerisamov additionally contends that, assuming he sold the 25 shares, he would still own 75 shares in the corporation, presumably based on the shares that belonged to Berkovskiy and which reverted to the corporation upon his death.

With the instant motion to quash, Defendants argue that Gerisamov’s request for financial information concerning any and all accounts held by Westoil or Faivush at JP Morgan and BNP Paribas constitutes a fishing expedition. Defendants further argue that the subpoenas are facially defective and that the subpoenas must be quashed because Gerisamov’s assertion that he is a current Westoil shareholder constitutes a fraud upon the Court.

In opposition, Gerisamov submits that he is solely seeking the corporate bank records of Westoil, which operates out of Kiev, Ukraine and grosses tens of millions of dollars per year, to support his case and to prove that Faivush is using Westoil as his personal piggy bank. Gerisamov also argues that Defendants lack standing to challenge the subpoenas because case law establishes that bank records belong to the bank and not the bank’s customers.

¹ The amount of consideration differs among the three separate agreements.

Defendants also filed an order to show cause seeking to vacate a Court Order dated October 1, 2015, whereby the Hon. Martin Solomon denied Defendants' CPLR 3211[a][1] motion to dismiss. Based on the transcript of the oral argument of the motion proffered by Defendants, Justice Solomon, in essence, found that the documents relied upon by Defendants were insufficient to grant dismissal of the case. Now, Defendants seek to vacate that Order pursuant to CPLR 5015[a][3] on the basis that recent inconsistent statements by Gerisamov proves that he is committing a fraud upon the Court.

The Court first turns to Defendants' motion to vacate, which is essentially a summary judgment motion under the guise of a CPLR 5015[a][3] application. Contrary to Defendants' assertions, Defendants have not established fraud against Gerisamov as a matter of law. The Court has already made this determination in prior decisions as Defendants have previously moved to dismiss the complaint on this basis. None of the "new" evidence proffered by Defendants changes this Court's determination. Thus, Defendants' current iteration of a summary judgment motion is procedurally barred as well as denied on its merits.

With regards to Defendants' motion to quash, CPLR 3103[a] provides that "a court may make a protective order conditioning or regulating the use of any disclosure device...to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts." The purpose of a subpoena duces tecum is "to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding" (*Velez v Hunts Point Multi-Service Center, Inc.*, 29 AD3d 104, 112 [1st Dept 2006]). "[A] motion to quash a subpoena duces tecum should be granted only where the materials sought are utterly irrelevant to any proper inquiry" (*Id. citing New Hampshire Ins. Co. v Varda, Inc.*, 261 AD2d 135 [1st Dept 1999]). "Moreover, the burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed" (*Gertz v Richards*, 233 AD2d 366, 366 [2d Dept 1996]).

Here, Defendants fail to dispute that Westoil holds accounts with both JP Morgan and BNP Paribas. As Gerisamov seeks bank records of a corporation of which he alleges partial ownership and an accounting for the period during which he was allegedly denied an accounting,

the bank records are clearly relevant to his claims. Thus, Defendants' motion to quash the subject subpoenas is patently without merit.

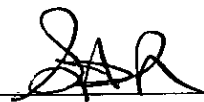
Moreover, the Court notes that Defendants have filed no less than six motions (out of a total of seven) since the commencement of this action three years ago, five of which have been dispositive motions. It is no surprise then that the progression of discovery in this case has been slow-moving. Although the Court is not inclined to believe that the instant motions to quash and to vacate are part of Defendants' litigation strategy to delay prosecution of this matter, the Court nevertheless finds it necessary to end needless motion practice. Accordingly, Defendants are prohibited from filing any motion seeking dispositive relief without first obtaining Court approval.

In conclusion, Defendants' motions are both denied.

The parties are reminded that a discovery conference is scheduled for **Thursday, October 26, 2017**, at 10:00 a.m.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.