

Rothman v RNK Capital, LLC
2017 NY Slip Op 32095(U)
October 5, 2017
Supreme Court, New York County
Docket Number: 150120/15
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ZOR ROTHMAN and REVERSING ENTROPY, LLC,9

Index No. 150120/15

Motion seq. no. 003

Plaintiffs,

DECISION AND ORDER

-against-

RNK CAPITAL, LLC, GREY20 FUND LP, ORGANICA
WATER, SUNRAY POWER MANAGEMENT, LLC,
ROBERT KOLTUN, and JOHN DOES NOS. 1-2,

Defendants.
-----X

BARBARA JAFFE, J.:

For plaintiffs:

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By notice of motion, plaintiffs move pursuant to CPLR 3120 for an order compelling defendants to provide complete responses to plaintiffs' discovery demands dated August 11, 2016, and awarding sanctions against defendants, including plaintiffs' reasonable attorney fees and costs and disbursements for the motion. Defendants oppose and, by notice of cross motion, move pursuant to CPLR 3120 for an order compelling plaintiffs to provide a response to defendants' discovery demands dated September 30, 2016, and awarding costs, disbursements, and attorney fees in connection with the two motions. Plaintiffs oppose the cross motion.

This action involves claims related to plaintiffs' investment and membership in defendant RNK Capital, LLC and related entities. The pertinent facts are set forth fully in the decision and order dated August 26, 2015, on defendants' pre-answer motion to dismiss the complaint.

(NYSCEF 25). I denied that motion as to the following claims set forth in plaintiffs' amended complaint filed on or about March 2, 2015:

- (1) In the first cause of action, plaintiffs allege that when Reversing Entropy, LLC (RE) received a distribution from RNK's capital account in February 2013, RNK, without plaintiffs' consent and contrary to their agreement, deducted over \$17,000 from the distribution and has refused to pay it to RE despite due demand;
- (2) In the second cause of action, they allege that RE was entitled to review RNK's books and records, that RE gave RNK reasonable notice of its intent to have its accountant examine the books and records, and that RNK has refused to make them available for inspection;
- (3) In the third cause of action, it is alleged that Rothman was entitled to receive five percent of the Cleanwater shares distributed to Grey20 Fund LP (Grey20), but did not receive them;
- (6) In the sixth cause of action, plaintiffs assert that on or about September 1, 2004, Rothman loaned Koltun \$50,000 with the understanding that it would be repaid with interest, and that instead of repaying it, on or about December 1, 2005, it was agreed that Koltun would convert the \$50,000 loan into an investment with Grey K Environmental Fund (GreyK). Beginning in September 2014, Rothman requested that Koltun confirm the investment in writing, but Koltun refused to do so and has also refused to give the benefits of the investment to Rothman.

I also granted dismissal of all claims against defendant Koltun individually except for the sixth cause of action, and plaintiff's claim for punitive damages. (NYSCEF 1).

Thereafter, plaintiffs moved for an order directing defendants to provide access to defendants' books and records for inspection in order to determine, among other things, defendants' current financial status, their assets, liabilities, income, and expenses. (NYSCEF 30). By decision and order dated July 14, 2016, I denied the motion, finding that plaintiffs had not satisfied their burden under Delaware Law § 6 Del. C. 18-305 absent a showing of a proper purpose for the inspection and identification of the documents sought. (NYSCEF 55).

II. PLAINTIFFS' DISCOVERY DEMANDS

In plaintiffs' August 2016 discovery demands, they seek information broadly related to defendants' finances and financial transactions, and any documents related to plaintiffs' investment or membership. (NYSCEF 61).

By response dated September 30, 2016, defendants object conclusorily to all of the demands on the grounds that they are vague, ambiguous, overly broad and unduly burdensome, and seek information neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and as the documents are protected from disclosure by the attorney-client privilege, work product privilege, or otherwise by applicable privileges, laws, and rules. Defendants agree, however, to produce documents responsive to two of the demands relevant to RE's distribution referenced in plaintiffs' first cause of action, if such documents are in defendants' possession, custody or control. (NYSCEF 64).

Defendants contend that the documents sought by plaintiffs are not discoverable given the denial of the motion for an inspection of their books and records, and that upon the entry of a confidentiality order, they produced eight pages of documents related to RE. They otherwise argue that the other documents sought are irrelevant and overbroad. (NYSCEF 76).

Plaintiffs maintain that they are entitled to all of defendants' books and records, and that defendants have produced no documents related to plaintiffs' remaining claims beyond the eight pages provided. (NYSCEF 90).

That plaintiffs' request to inspect defendants' books and records pursuant to Delaware law was denied has no bearing on their entitlement to discovery related to the claims asserted in this lawsuit, and defendants submit no authority showing otherwise. However, as plaintiffs

assert in their second cause of action that they are entitled to review defendants' books and records, which defendants deny, and as no determination has been made as to that claim, plaintiffs may not seek the books and records through discovery as by doing so they request the ultimate relief on this claim through the guise of discovery. (*See e.g., Macklowe v 42nd St. Dev. Corp.*, 157 AD2d 566 [1st Dept 1990] [where defendants asserted claim for accounting of partnership, and then sought discovery of partnership records, court properly denied discovery as party may not seek through discovery ultimate relief sought on merits of claim]; *see also AAA Vascular Care, PLLC v Integrated Healthcare Mgt., LLC*, 99 AD3d 642 [2d Dept 2012] [motion to compel production of defendants' database properly denied as plaintiffs asserted as cause of action immediate turnover and possession of all of defendants' records; requiring production of database would improperly grant ultimate relief sought]; *Wolther v Samuel*, 110 AD2d 506 [1st Dept 1985] [as essential relief sought in action was in nature of accounting, discovery as to financial information not obtainable unless and until plaintiff establishes right to accounting]).

To the extent that plaintiffs seek information relevant to their first, third, and sixth causes of action, defendants do not show that responsive documents are irrelevant, not reasonably calculated to lead to admissible evidence or privileged, defendants' conclusory objections notwithstanding. (*See e.g., New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 105 AD3d 716, 718 [2d Dept 2013] [plaintiff failed to "articulate any actual basis or specific reasoning for its conclusory assertion" that requested material was privileged]).

III. DEFENDANTS' DISCOVERY DEMANDS

As it is undisputed that plaintiffs responded to defendants' September 2016 demands, and as defendants do not show that the responses are insufficient, having failed to controvert

plaintiffs' counsel's assertions in his letter dated April 5, 2017, defendants' cross motion is moot.

IV. SANCTIONS

I decline to award sanctions against either party at this juncture. However, if defendants fail to comply timely with this order, plaintiffs may renew their application for sanctions.

V. CONCLUSION

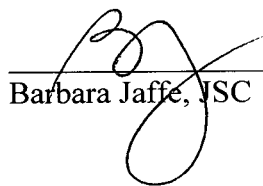
Accordingly, it is hereby

ORDERED, that plaintiffs' motion is granted to the extent of directing defendants, within 20 days of the date of this order, to provide plaintiffs with copies of all responsive documents in their possession, custody, or control related to plaintiffs' first, third, and sixth causes of action, and is otherwise denied; it is further

ORDERED, that defendants' cross motion is denied; and it is further

ORDERED, that the parties appear for a further compliance conference on November 29, 2017 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

ENTER:


Barbara Jaffe, JSC

DATED: October 5, 2017
New York, New York