Pelham v Moracco, LLC
2017 NY Slip Op 33318(U)
September 7, 2017
Supreme Court, Greene County
Docket Number: 16-0702
Judge: Lisa M. Fisher
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STATE OF NEW YORK
SUPREME COURT GREENE COUNTY

MICHAEL W. PELHAM and SHANNON PELHAM, his wife,

Plaintiffs.

- against -

MORACCO, LLC,

Defendant.

DECISION & ORDER

Index No.: 16-0702
RJI No.: 19-16-9324

PRESENT: HON. LISA M. FISHER:

APPEARANCES: Derek J. Spada, Esq.
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FISHER, J.:

This is a Labor Law §§ 240 (1), 241 (6) matter wherein Plaintiffs sought the tax returns of Defendant for a five-year period prior to the subject accident. Plaintiffs are attempting to demonstrate that the subject premises does not fall within the statutory exception under Labor Law § 240 (1). Defendant objected to the demand as palpably improper because "[t]here is no issue in this case about whether the subject premises were used for commercial purposes" because the subject premises was being constructed as a single-family dwelling. Thus, Defendant claimed obtaining the tax returns was nothing more than a "fishing expedition." Defendant's Verified Answer asserted an affirmative defense "[t]hat defendant was the owner of a single-family dwelling who contracted for but did not direct or control the work."

On the motion, Plaintiffs argue the necessity for demonstrating whether Defendant sought tax deductions on the subject premises as a commercial property. Defendant opposes the motion and cross-moves for a protective order, reiterating that "the single-family exemption does apply to LLC's and corporations" and that "there is nothing which legally distinguished a personal and

corporate defendant for purposes of the Labor Law." Defendant further indicates the subject property was clearly to be used as a single family home. The annexed deposition testimony revealed that the owner, Alex Racco, intended the subject property to be a weekend home for him where he would conduct no business.

"It is well settled that a trial court has 'broad discretionary power in controlling discovery and disclosure, and only a clear abuse of discretion will prompt appellate action'" (*Getman v Petro*, 266 AD2d 688, 690 [3d Dept 1999], quoting *Geary v Hunton & Williams*, 245 AD2d 936, 938 [3d Dept 1997]). Under CPLR § 3101 (a), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" (*see Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968] ["The words, 'material and necessary', are, in our view, 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.*"] [emphasis added]).

After the *Allen* decision, the Legislature amended CPLR § 3101 to do away with the qualifier of "evidence," indicating admissibility, and broadened disclosure to all "matter," indicating anything relevant. Disclosure is "[r]estricted only by a test for materiality of 'usefulness' and 'reason', pretrial discovery is to be encouraged" (*U.S. Ice Cream Corp v Carvel Corp.*, 190 AD 788, 788 [2d Dept 1993]). This includes a "palpably improper" disclosure request.

"A disclosure request is palpably improper if it seeks information of a confidential and private nature that does not appear to be relevant to the issues in the case" (*Saratoga Harness Racing, Inc. v Roemer*, 273 AD2d 887, 889 [3d Dept 2000], quoting *Titleserv Inc v Zenobio*, 210 AD2d 314, 315–16 [2d Dept 1994]). "Given their confidential nature, tax returns are generally not discoverable in the absence of a strong showing that the information is indispensable to the claim and cannot be obtained from other sources" (*Saratoga Harness*, 274 AD2d at 889; *see Zimmer v Cathedral School of St. Mary & St. Paul*, 204 AD2d 538, 539 [2d Dept 1994] ["The plaintiff's tax records are discoverable upon a strong showing of necessity, i.e., that they contain the relevant information which cannot be obtained from any alternative source."]). Therefore, it is necessary to determine whether the disclosure of tax returns are relevant, indispensable, and cannot be obtained from other sources.

Scaffolding and other devices for use of employees is governed by Labor Law § 240 and is known as the "scaffolding law." The Court of Appeals has made it clear that Section 240 (1)

"impos[es] absolute liability" for a breach which has proximately caused an injury (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]; *see Bland v Manocherian*, 66 NY2d 452, 459 61 [1985]). This section provides for the following:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

(Labor Law § 240 [1]).

Included within Labor Law § 240 (1) is an exemption of absolute liability for the "owners of one and two-family dwellings who contract for but do not direct or control the work[.]" This was created because "the Legislature intended to relax the harsh strict liability rule of that statute as against such owners because '[i]t is unrealistic to expect the owner of a one or two family dwelling to realize, understand and insure against the responsibility sections 240 and 241 now place upon him'" (*Van Amerogen v Donnini*, 78 NY2d 880, 882 [1991], quoting *Cannon v Putnam*, 76 NY2d 644, 649 50 [1990]).

However, the Court of Appeals has stated "we find no basis for concluding that this exemption should be expanded to encompass homeowners who use their one or two-family premises entirely and solely for commercial purposes and who hardly are lacking in sophistication or business acumen such that they would fail to recognize the necessity to insure against the strict liability imposed by the statute" (*Van Amerogen*, 78 NY2d at 883; *see Landon v Austin*, 88 AD3d 1127 [3d Dept 2011] ["Although the Legislature has carved out an exemption . . . this exemption does not apply to owners who use their residences purely for commercial purposes."] [citations omitted]; *see also Schaefer v Cohen*, 50 Misc3d 1221(A), Sup Ct, Ulster County 2015, Fisher, J.) ["It is axiomatic that owners of commercial properties—rather than residential—do not fit within the homeowner exemption."]).

Here, the tax returns are without question to be relevant and whether Defendant filed tax deductions through the business cannot be credibly obtained from other sources other than the tax returns. The decision hinges on whether the tax returns are indispensable. The parties are

posturing this matter to be resolved through the 240 (1) and whether the exemption shields liability. This inquiry includes the nature of the dwelling, whether defendant directed or controlled the work, and whether the subject property was "entirely and solely" for commercial purposes. (*See* Labor Law § 240 [1]; *Van Amerogen*, 78 NY2d at 882; *Landon*, 88 AD3d at 1127; *Schaefer*, 50 Misc3d at 1221(A).)

Defendant is a real estate holding company with three properties. While Alex Racco testified the subject property was intended as his weekend home, it is unclear how the arrangement between him and Defendant work, *i.e.*, whether he is paying rent to the Defendant, an LLC. An individual and an LLC are two separate entities and not one in the same. If the tax returns demonstrate that tax deductions were taken by and through the Defendant-business, Defendant may be strictly liable and Plaintiffs prevail. Whereas without the tax returns, Defendant can instantly cloak this evidence and prevail by default on the inquiry whether the subject property was entirely and solely used for commercial purposes. This demonstrates the matter is "material and necessary" to the prosecution and defense of this matter. The Court finds this evidence indispensable. Therefore, Defendant is compelled to disclose the tax returns.

However, given the personal nature of the tax returns, the Court will require Defendant to submit them to chambers for an *in camera* inspection.

Moreover, Defendant's cross-motion for a protective order is partially granted. Plaintiffs' request for five years of tax returns is overbroad. Defendant acquired the property approximately two years prior to the deposition. Therefore, Defendant shall only provide two years of tax returns prior to the deposition when it owned the subject property.

Pending the Court's *in camera* review, the Court will issue its final ruling on the motion to compel and cross-motion to preclude.

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit or rendered academic.

Thereby, it is hereby

ORDERED that Plaintiff's motion to compel shall be subject to an *in camera* inspection and decided thereafter;

ORDERED that Defendant shall submit to the Court within 30 days of the signing of this decision and order, for an *in camera* inspection, the last two years of Defendant's tax returns wherein Defendant owned the subject property; and it is further

ORDERED that Defendant's cross-motion for a protective order is **GRANTED**, in part, limiting the tax returns from five years to two years; and it is further

ORDERED that all other relief not addressed is denied.

This constitutes the Decision and Order of the Court. Please note that a copy of this Decision and Order along with the original motion papers are being filed by Chambers with the County Clerk. The original Decision and Order is being returned to the prevailing party, to comply with CPLR R. 2220. Counsel is not relieved from the applicable provisions of this Rule with regard to filing, entry and Notice of Entry.

IT IS SO ORDERED.

DATED: September 7, 2017
Catskill, New York

ENTER:

HON. LISA M. FISHER
SUPREME COURT JUSTICE

Papers Considered:

1) Notice of motion, dated June 19, 2017; affirmation in support, of Derek J. Spada, Esq., with annexed exhibits, dated June 19, 2017;
2) Notice of cross-motion, dated June 23, 2017; affirmation in opposition and in support of defendant's cross-motion, of David B. Manson, Esq., dated June 23, 2017;
3) Reply affirmation, of Derek J. Spada, Esq., dated July 13, 2017; and
4) Reply affirmation, of David B. Manson, Esq., dated July 17, 2017.