SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN PART IAS MOTION 3

Justice

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INDEX NO. 651695/2015

NORDDEUTSCHE LANDESBANK GIROZENTRALE, HANNOVER FUNDING COMPANY LLC,

MOTION DATE 02/23/2018

Plaintiff,

MOTION SEQ. NO. 010

- V -

LYNN TILTON, PATRIARCH PARTNERS, LLC, PATRIARCH PARTNERS XIV, LLC,PATRIARCH PARTNERS XV, LLC,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 448, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 496, 497, 500

were read on this motion to/for DISCOVERY

Upon the foregoing documents, it

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

5/ 24 /2018
DATE

HON. EILEEN BRANSTEN
J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

APPLICATION: [ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER

[ ] SETTLE ORDER [ ] SUBMIT ORDER

CHECK IF APPROPRIATE: [ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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NORDDEUTSCHE LANDESBANK GIROZENTRALE, HANNOVER FUNDING COMPANY LLC,

Plaintiffs,

- v -

LYNN TILTON, PATRIARCH PARTNERS, LLC, PATRIARCH PARTNERS XIV, LLC, PATRIARCH PARTNERS XV, LLC,

Defendants.

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Index No. 651695/2015

Motion Date: 2/23/2018

Motion Seq. No. 010

DECISION AND ORDER

BRANSTEN, J.

In this action, Plaintiffs Norddeutsche Landesbank Girozentrale and Hannover Funding Company LLC allege Defendants Lynn Tilton; Patriarch Partners, LLC; Patriarch Partners XIV, LLC; and Patriarch Partners XV, LLC (collectively "Patriarch") committed fraud in connection with their management of two collateralized debt obligation ("CDO") funds: Zohar II 2005-1, Limited and Zohar III, Limited (collectively, the "Zohar Funds"). Presently before the Court is Defendants' motion for a protective order. For the following reasons, Defendants' motion is denied.

I. Background

The facts underlying this action have been discussed in detail in previous motions. Accordingly, the Court will only provide background pertinent to the instant motion.

On September 27, 2017, Defendants moved for a protective order prohibiting Plaintiff from (1) obtaining tax information relating to the Zohar Funds and (2) taking the depositions of non-parties Fred Goldberg and Jeffrey Bowden (Motion Seq. 006, the "First Protective Order Motion"). The tax documents at issue were Form K-1s and Schedule 1099s from eleven different manufacturing companies the Zohar Funds had invested in (the "Portfolio Companies"), the Zohar Fund tax databases and book-to-tax analyses created by Patriarch, and a 2012 presentation prepared for the Internal Revenue Service relating to the Zohar Funds.

Plaintiffs also sought to take the depositions of Jeffrey Bowden and Fred Goldberg. Mr. Bowden is an accountant at Anchin, Block & Anchin and former employee of Defendant Patriarch Partners, LLC ("Patriarch"). On August 18, 2017, Carlos Mercado, the controller of Patriarch, testified that the final databases were sent to Anchin, Block & Anchin. Plaintiffs sought to depose Mr. Bowden regarding the tax databases, the book-to-tax analyses, the Portfolio Companies owned by the Zohar Funds, and any equity distributions the Portfolio Companies made to the Zohar Funds. Mr. Goldberg is a tax attorney at Skadden, Arps, Slate, Meagher & Flom LLP who represented Ms. Tilton. Plaintiffs sought to depose Mr. Golderg regarding a 2012

presentation Mr. Goldberg presented to the IRS regarding the Zohar Funds, in which he represented that recovery on the loans made by the Zohar Funds were "speculative."

Defendants argued that the tax information, including Mr. Bowden and Mr. Goldberg's testimony, was Ms. Tilton's personal tax information. The Court found the tax information belonged to the Zohar Funds and was not purely Ms. Tilton's personal tax information. Kim Affirm. Ex. A at 26:25-35:21. Moreover, the Court held Plaintiffs had demonstrated the information was material and necessary to their claim because the information revealed equity distributions that were allegedly misappropriated by Defendants. *Id.* at 35:17-18. Accordingly, by Decision and Order dated January 9, 2018, this Court denied Defendants' First Protective Order Motion. Defendants appealed the Court's decision, which is currently pending before the First Department.

II. Discussion

Defendants now move for a protective order pursuant to CPLR 3103: (1) prohibiting the discovery of tax-related information that post-dates April 2012; (2) requiring that any deposition of Fred Goldberg and Jeffrey Bowden proceed in the first instance by written question; and (3) requiring, if necessary, any oral depositions of Mr. Goldberg or Mr. Bowden occur only upon further order of the Court upon a showing of good cause.

A. *Legal Standard*

Pursuant to CPLR 3101, there shall be "full disclosure of all matter material and necessary" to prosecute or defend an action. The words "material and necessary" have been interpreted liberally to require disclosure 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 Pub. Co.*, 21 N.Y.2d 403, 406 (1968).

The Court also has broad power to regulate discovery to prevent abuse. *Barouh Eaton Allen Corp. v. Int'l Bus. Machs. Corp.*, 76 A.D.2d 873, 873 (2d Dep't 1980). A court has the power to issue a protective order regulating the use of any disclosure device pursuant to CPLR 3103(a). Where the disclosure process is being used to "harass or unduly burden a party, a protective order eliminating that abuse is necessary and proper." *See Barouh*, 76 A.D.2d at 874.

B. *Post-2012 Tax Information*

Defendants request the Court issue a protective order prohibiting discovery of tax-related information after the year 2012. Defendants argue any tax-related information post-dating 2012 is irrelevant to Plaintiffs' fraud claim because Plaintiffs voluntarily sold their investments in April 2012.

Plaintiffs argue the post-2012 tax information is relevant because Defendants continued to manage the Zohar funds after 2012 and the information may be relevant to the elements of fraudulent inducement, namely falsity, scienter, and loss causation.

Defendants have already produced post-2012 tax documents in this action, including 83 tax databases, 13 book-to-tax documents, numerous Schedules K-1 and Forms 1099, and copies of the 2012 IRS presentation. Maloney Affirm. ¶¶ 10-12. Plaintiffs assert these documents contain relevant information to this action, specifically that Defendants extracted equity distributions from the Zohar Funds, reported to Zohar investors that loans were performing well when they told the IRS otherwise, and continued to lend Zohar Fund monies to the Portfolio Companies. Kim Affirm. ¶ 17. Plaintiffs argue that the post-2012 documents relate to a pattern of fraudulent activity. In some cases, evidence of defendant's subsequent conduct may be relevant to defendant's fraudulent intentions. *See Adelaide Prods., Inc. v. BKN Int'l AG*, 15 A.D.3d 316, 316 (1st Dep't 2005). Moreover, Defendants have not requested to claw-back the post-2012 documents they have already produced.[1] *See* Kim Affirm. ¶ 16.

Plaintiffs also assert Defendants have put their conduct as Collateral Managers of the Zohar Funds, through their resignation in March 2016, at issue by arguing Plaintiffs should have held their Zohar notes until maturity. Parties are entitled to discovery relating to arguments affirmatively raised as a defense. *See Croston v. Montefiore Hosp.*, 191 A.D.2d 295, 295 (1st Dep't 1993); *N.Y. City Asbestos Litig. v. A.O. Smith Water Prods. Co.*, 2014 WL 2623897, at *1-2 (Sup. Ct. N.Y. Cnty. June 11, 2014) (Hietler, J.).

[1] While Defendants have requested Plaintiffs not use or rely on those documents in this proceeding, they have not sought to claw-back those documents. Maloney Affirm. ¶¶ 11-12.

Thus, the Court finds there is a colorable argument to seek the tax-related documents to establish Defendants' pattern of conduct and to rebut Defendants' affirmative defense.

Defendants further argue the request for documents is unduly broad because Plaintiffs seek tax information for the years after they sold their interests in the Zohar Funds. Defendants cite to *Casey v. Prudential Securities, Inc.*, 268 A.D.2d 833 (3d Dep't 2000) in support of their argument. In that case, Plaintiff commenced a putative class action against Defendant Prudential Securities, Inc. for alleged fraudulent misrepresentations that induced him to buy stocks, which he ultimately sold at a loss. The trial court denied Prudential's request for a protective order prohibiting discovery beyond the date of Plaintiff's sale of the stock. *Casey*, 268 A.D.2d at 834. On appeal the Third Department reversed, holding that plaintiff's request for documents was unduly broad because it concerned transactions that occurred after plaintiff sold his stock and limiting defendant's disclosure to the period that plaintiff owned the stock. *Id.* at 836. Defendants argue *Casey* is applicable here because Plaintiffs are seeking information post-dating the sale of their interests in the Zohar Funds.

However, *Casey* dealt with discovery prior to class certification, which was an important consideration in the Third Department's decision to limit discovery to the time period when Plaintiff held the shares. In addition, the Third Department found that the discovery request was unduly broad in light of the volume of trades in the categories of securities subject to disclosure. *Casey*, 268 A.D.2d at 836. Here, Defendants have not made any argument regarding the burden of producing the post-2012 documents.

The Court finds Defendants have not met their burden of establishing that Plaintiffs' discovery requests for post-2012 tax information were merely intended to harass or unduly burden Defendants. *See Barouh Eaton Allen Corp. v. Int'l Bus. Machs. Corp.*, 76 A.D.2d 873, 874 (2d Dep't 1980). Accordingly, Defendants' motion for a protective order regarding the post-2012 tax-information is DENIED. Nevertheless, the Court notes that there should be a limit to the relevant time period of discoverable tax-related information. Plaintiffs offered to establish 2015 as the cut-off date for discovery. Therefore, discovery will be limited to the production of tax-related information through the year 2015.

C. *Depositions of Mr. Bowden and Mr. Goldberg*

Defendants also request that Mr. Goldberg and Mr. Bowden's depositions proceed in the first instance by written questions or, in the alternative, oral depositions occur only upon a showing of good cause. Pursuant to CPLR 3108, "[a] deposition may be taken on written questions when the examining party and the deponent so stipulate or when the testimony is to be taken without the state."

Defendants assert there will be numerous privilege objections raised during Mr. Bowden and Mr. Goldberg's depositions based on Mr. Bowden's role as Ms. Tilton's accountant and Mr. Goldberg's role as Ms. Tilton's personal tax attorney. As noted at the December 13, 2017 conference, the invocation of the attorney-client privilege may not be used as a blanket privilege to avoid deposition. Kim Affirm. Ex. A at 43:10-44:11.

While the Court is cognizant of the potential issues regarding privilege that may arise during depositions, both Mr. Bowden and Mr. Goldberg will be represented by counsel who will make the appropriate objections to any questions that may call for privileged information or may otherwise expose the deponent to potential sanctions.[2]

Defendants also contend there is nothing to be gained from the spontaneity of an oral deposition. In *Matter of Miller*, 233 A.D.2d 236 (1st Dep't 1996), the Surrogate's Court permitted the deposition of decedent's counsel to proceed by written questions due to the witness's concerns about inadvertently divulging privileged information and the fact that "nothing was to be gained by the spontaneity of an oral deposition." *Matter of Miller*, 233 A.D.2d at 237. Here, Defendants have not shown that "nothing would be gained by the spontaneity of oral deposition." The mere risk of inadvertent disclosure alone is insufficient to require deposition proceed by written questions.

In addition, the Court notes Plaintiffs have sought to take Mr. Bowden and Mr. Goldberg's depositions since August and September 2017, respectively. This case was commenced in May 2015 and discovery still not been completed. The Court finds that proceeding with written deposition questions would only prolong the completion of depositions and would not be an effective cost saving mechanism for either party.

[2] The parties are reminded that any objections shall be noted, the answer shall be given, and the deposition shall proceed, as provided in Section 221.1(a) of the New York Codes, Rules, and Regulations. In addition, the objection should be stated succinctly and "framed so as not to suggest an answer to the deponent." 22 N.Y.C.R.R. § 221.1(b).

The parties are entitled to proceed with discovery as they see fit. While a movant has the option of conducting deposition by written question, pursuant to CPLR 3108, that does not preclude the other party from electing to proceed with an oral deposition. *See Lane Bryant, Inc. v. Cohen*, 86 A.D.2d 805, 805 (1st Dep't 1982). Here, Plaintiffs do not consent to conducting the depositions by written questions. Therefore, the Court finds that proceeding with written deposition questions would not be an appropriate discovery mechanism in this instance.

Finally, the Court has already ruled that the parties should proceed with Mr. Bowden and Mr. Goldberg's depositions. Thus, the Court finds Plaintiffs do not need to make any further showing of good cause to conduct oral depositions. Accordingly, Defendants' motion for a protective order requiring Mr. Bowden and Mr. Goldberg's deposition proceed by written question or alternatively requiring Plaintiffs to show good cause to conduct oral depositions is DENIED.

III. Conclusion

Accordingly, Defendants' motion for a protective order is DENIED.

Dated: New York, New York
May 24, 2018

ENTER

HON. EILEEN BRANSTEN
J.S.C.