

Matter of Estrema v Demirakos
2018 NY Slip Op 33819(U)
August 14, 2018
Supreme Court, Nassau County
Docket Number: 600947-17
Judge: Jerome C. Murphy
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**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

In the Matter of the Application of

**DEBORAH ESTREMA, a shareholder of GREEN
WAVE ABSTRACT CORP., suing in the right of
GREEN WAVE ABSTRACT CORP.,**

Plaintiff,

- against -

**BEATRICE DEMIRAKOS, in her capacity as
president of GREEN WAVE ABSTRACT CORP.,
and GREEN WAVE ABSTRACT CORP. (nominal
defendant),**

Defendants.

TRIAL/IAS PART 14

Index No.: 600947-17

Motion Date: 5/18/18

Sequence No.: 001

DECISION and ORDER

Mod

The following papers were read on this motion:

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PRELIMINARY STATEMENT

Plaintiff brings this application for an order: (1) pursuant to CPLR § 3124 compelling non-party On Point Land Services Corp. to produce documents and other information demanded in a subpoena duces tecum served on or about February 26, 2018; (2) disqualifying Anthony Nozzolillo, Esq. from serving as counsel for On Point in this action; (3) pursuant to CPLR § 1001 adding On Point as a necessary party; and (4) granting such other and further relief as is deemed just, proper and equitable. Non-Parties, On Point Land Services Corp. and Keen

Settlement Services, Inc. have submitted opposition to this application. Defendant has also submitted an Affidavit in Opposition.

BACKGROUND

Deborah Estrema and Beatrice Demirakos, having met one another in 2013, joined forces to incorporate Green Wave Abstract Corp., through which they, each a 50% shareholder, would take over the operations of Legacy Abstract Corp. Defendant was a 20% shareholder in Legacy. In 2009, another shareholder, an attorney, was convicted of criminally fraudulent real estate mortgage transactions, for which he was disbarred and imprisoned. Legacy was forced to close.

In 2013, plaintiff and defendant formed Green Wave Settlement Corp., to serve as a settlement agent for mortgage lenders. In or about November 2015, Anthony Nozzolillo, Esq. was hired as in-house counsel. The existing CPA was replaced by Nozzolillo's cousin. Plaintiff also claimed that Nozzolillo was performing private legal work, including using the company's bank accounts for depositing and disbursing checks involving his private practice. Plaintiff seeks to have Nozzolillo barred from representing Keen Settlement Services, Inc. in connection with the plaintiff's efforts to compel Keen to respond to a subpoena duces tecum. This issue has been rendered moot by the retention of another attorney to represent defendant Green Wave and non-party Keen.

DISCUSSION

CPLR § 3101(a) provides 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 by . . . (4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required." The action in which the service of a subpoena on Keen Settlement Services arises, is an action by Deborah Estremer, suing in a shareholder's derivative suit on behalf of Green Wave Settlement Corp. The Complaint alleges that, as a result of internal disputes between Estrema and Demirakos, essentially involving personal loans from Estrema to Demirakos, and Estrema's diversion of Green Wave's funds to repay the outstanding balance of the loans in 2016. Demirakos denies that Estrema loaned her money. Instead, she asserts that Estrema gifted \$20,000 in 2011, as thanks for making her a 50% shareholder in Green Wave Abstract Corp., and her contribution of assets to commence operations.

Demirakos also relates a financial issue in which Estrema deposited \$41,000 into Demirakos' private account, so that Demirakos could reimburse her sister funds which she owed

her. The \$41,000 was allegedly repaid in full within 13 months from April 2014 through May 2015. Six months later, in November 2015, the diversion of funds to Estrema began. Dimirakos disputes Estrema's claimed justification that the defalcation was for the purpose of repaying a loan, in that it had been repaid in full before November 2015.

As a result of this action, for which Estrema apologized, and returned the funds, Demirakos berated Estrema, and occupied office space across the hall from the corporation, allegedly taking assets and employees of Green Wave Settlement, and in December 2016, formed two new corporations, On Point Land Services, Inc., and Keen Settlement Services, Inc. Plaintiff claims to have attempted to resolve the differences, including consenting to a voluntary dissolution of the subject corporation, and a buyout of her interest. Ultimately, Estrema sought an Order dissolving the company, which was granted on July 19, 2017.

The Complaint (Exh. "A" to Affirmation in Opposition) asserts Four Causes of Action. The First is that Defendant has unlawfully converted the company's inventory and materials, facilities, equipment, fixtures, vehicles, customer base, good will, and property to the benefit of herself personally and/or Keen Settlement Services, Inc. The Second Cause of Action alleges that defendant has diverted the corporation's business opportunities for the benefit of herself and Keen Settlement Services, Inc. In the Third Cause of Action, plaintiff alleges that, by wrongfully converting the assets of and diverting corporate opportunities for the benefit of herself and/or Keen Settlement Services, Inc., defendant, as president of the subject corporation, is in violation of BCL § 720 by failing to perform her duties in the management and disposition of the subject corporation's assets, over which she had authority. Plaintiff alleges in the Fourth Cause of Action that by the same conduct alleged in the Third Cause of Action, defendant has breached the Fiduciary Duty which she owed to the subject corporation.

The issue presented is whether or not the information and documents demanded is material or necessary to the prosecution of the action (Exh. "A"). In response to the subpoena, by correspondence dated March 2, 2018, Keen Settlement Services, Inc. objected to the specific requests on the ground that they were "oppressive, overly broad, unduly burdensome, and/or seeks information not reasonably calculated to lead to admissible evidence, including without limitation because the Request seeks information unrelated to any claim or defense in the Action". As to some requests, the objections include the availability from other sources, or that the Requests are vague and ambiguous.

Both Demirakos and Natraj S. Bushman, Esq., of Torturo Law, P.C. have submitted

opposition to the motion. The Demirakos affidavit is directed to the alleged misconduct by Estrema, and denies that any assets of Green Wave Settlement Corp. were transferred to her new companies of On Point Land Services Corp. and Keen Settlement Services. She asserts that Estrema failed to make a reasonable demand for a buyout, made no contribution to the winding up of Green Wave business, and continued to make withdrawals from the business accounts without authority to do so.

In this motion, Estrema asserts that the issue of the disqualification of counsel is not moot, as has previously been asserted without opposition. She now contends that Anthony Nozzolino, formerly the general counsel for Green Wave, is now of counsel to Torturra Law, P.C., and that Torturra should be disqualified.

There are eighteen (18) specific requests set forth in the Subpoena. The Court analyzes them as follows:

- A. Plaintiff seeks a copy of On Point Land Service, Inc's ("On Point") certificate of incorporation
Defendant is directed to produce one, if they have a copy of it in their files. It is undoubtedly available elsewhere.
- B. Names and residential addresses of all On Point shareholders
Defendant is not required to provide this information as it is not relevant, and is not likely to lead to admissible evidence.
- C. Names and residential addresses of all On Point officers.
Defendant is not required this information as it is not relevant, and is not likely to lead to admissible evidence
- D. Names and residential addresses of all employees and outside contractors of On Point
Defendant is not required this information as it is not relevant, and is not likely to lead to admissible evidence
- E. Leases or rental agreements to which On Point. is a party.
Defendant is not required this information as it is not relevant, and is not likely to lead to admissible evidence
- F. Copies of all bank statements for all bank accounts held in the name of On Point, including copies of all canceled checks , from December 1, 2016 to the present
Defendant is to provide bank statements from December 1, 2016 to present, but is

not required to provide copies of canceled checks, as the expenditures by On Point is irrelevant and not likely to lead to admissible evidence.

- G. Copies of all title invoices produced by On Point. for period December 1, 2016 to present.

The subject corporation was dissolved on July 17, 2017. To the extent that invoices may reflect bills for services performed by Green Wave , it may constitute or lead to admissible evidence. Defendant is to produce copies of invoices from December 1, 2016 to July 17, 2017

- H. All remittance reports filed by On Point with Old Republic and/or Security of Baltimore and any other underwriting entity for the period December 12016 to present

The subject corporation was dissolved on July 17, 2017. To the extent that remittance reports may reflect services performed by Green Wave Settlement Corp., Inc., it may constitute or lead to admissible evidence. Defendant is to produce copies of remittance reports from December 1, 2016 to July 17, 2017

- I. Copies of invoices received by On Voice from abstractors
Defendant is to produce invoices received by On Point for the period December 1, 2016 to July 17, 2017 only because they may include invoices for services rendered to Green Wave

- J Copies of On Point's payroll records for the period December 1, 2016 to present.
Defendant is not required to produce payroll records as they are irrelevant and are not likely to lead to admissible evidence.

- K. Copies of On Point's quarterly payroll reports
Defendant is not obligated to provide payroll reports as they are irrelevant and will not lead to admissible evidence

- L. Copies of Quickbooks entries or any other entries in another accounting software pertaining to On Point for the period December 1, 2016 to present
Defendant is not required to produce Quickbook or other software entries as they are irrelevant to the claims in the Complaint, and are not likely to lead to admissible evidence

- L. Billing statements for credit cards in the name of Keen Settlement Services, Inc. for the period December 1, 2016 to present

- Defendant is not required to produce credit card records of Keen Settlement Services, Inc. The payment of expenses of defendant by Keen Settlement Services, Inc. is not relevant and are not likely to lead to admissible evidence
- M. Copies of all entries in Snapclose/Cornerstone or other title software utilized by On Point
- Defendant is not required to produce copies of entries in Snapclose/Cornerstone or other software, as the material is irrelevant and not likely to lead to admissible evidence
- N. Copies of invoices to On Point from Snapclose/Cornerstone or other software provider
- This material is irrelevant and not likely to lead to admissible evidence. Defendant is not obligated to provide
- O. Billing Statements for credit cards in the name of On Point from December 1, 2016 to present
- Defendant is not required to provide, as it is irrelevant and not likely to lead to admissible evidence
- P. Copies of Invoicing Reports from all production companies with which On Point did business from December 1, 2016 to present
- Defendant is not required to provide, as it is irrelevant and not likely to lead to admissible evidence
- Q. Copies of insurance policies for which On Point has paid premiums from December 1 to present
- Defendant is not required to provide, as it is irrelevant and not likely to lead to admissible evidence
- R. Copies of All Point 's quarterly sales tax returns from December 1, 2016 to present
- Defendant is not required to provide, as it is irrelevant and not likely to lead to admissible evidence
- S. Identities of all persons or entities to whom notice was sent that between December 16, 2016 and April 10, 2017 that On Point would be operating a title business
- Defendant is not required to provide, as it is irrelevant and not likely to lead to

admissible evidence

The application to add On Point as a necessary party is denied. CPLR § 1001 provides that [p]ersons ought to be made a party if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. The presence of Keen Settlement Services, Inc. is not necessary to provide complete relief in the action, nor will it be inequitably affected by a judgment in the action.

The disqualification of Anthony Nozzolillo, Esq. As counsel for On Point was thought to have been rendered moot, as defendants have retained other counsel to appear on their behalf. However, plaintiff claims that Nozzolillo, formally general counsel for Green Waves, serves as “Of Counsel” to Torturo Law.

In *Moray v. UFS Industries, Inc. v. UFS Industries, Inc.*, 165 A.D.3d 781, (2d Dept. 2017), the Court granted the disqualification of the law firm for the plaintiff. The Court held that in motions to disqualify an attorney or a law firm on the ground of conflict of interest, the moving party has the burden of demonstrating (1) the existence of a prior attorney-client relationship between the moving party and the opposing counsel, (2) that the matters involved in both representations are substantially related, and (three) that the interests of the present client and former client are materially adverse, citing Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.101. When the moving party is able to demonstrate each of these factors, an irrebuttable presumption of disqualification follows (*McCutchen v. 3 Princesses & AP Trust Dated Feb.3, 2004*, 138 A.D.3d 1223, 1226 [3d Dept. 2004]).

As in *Moray*, there is a reasonable probability of disclosure of confidential information obtained during Nuzzalillo’s employment as general counsel for Green Waived. Even if the irrebuttable presumption of disqualification does not attach to Torturo Law Firm, disqualification may be warranted based on an appearance of impropriety. The disqualification of an entire firm they be avoided by appropriate ethical screening. An example is a “Chinese Wall”, which isolates the attorney possibly tainted with the conflict of interest from the rest of the firm with respect to a particular matter. Considerations in determining whether such actions are adequate include: (1) instructions given to and the exchange of information between the disqualified attorney and the other members of the firm; (2) restricted access to files and other information about the case; (three) the size of the law firm and its structural divisions; (4) the likelihood of contact between the quarantined lawyer and the other members of the firm, and the timing of the screening (7A

C.J.S. Attorney & Client § 217).

In this case, the Toturo Law Firm is located on McDonald Avenue, in Brooklyn, while Nozzolillo maintains his office in Merrick, Long Island, it would not be difficult to restrict the files from the view of Nozzolillo, as they are in separate locations. On the other hand, both officers appear to be sole practitioners, so that the concept of a Chinese Wall is impractical.

But because Nozzolillo served as the attorney for both Estrema and Demirakos in the operation of Green Wave Settlement Corp., the Court determines that it is more prudent to disqualify the Torturro Firm from proceeding on behalf of Keen Settlement Services, Inc., and On Point Land Services, in which the positions of Estrema and Demirakos are diametrically opposed to one another.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York

August 14, 2018

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED

AUG 15 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE