Stagg, Terenzi, Confusione & Wabnik, LLP v Clark Dodge Holding, LLC
2018 NY Slip Op 34603(U)
March 20, 2018
Supreme Court, Nassau County
Docket Number: Index No. 602904/2015
Judge: Arthur M. Diamond

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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STAGG, TERENZI, CONFUSIONE & WABNIK, LLP,

Plaintiff,

-against-

CLARK DODGE HOLDING, LLC, CLARK DODGE & CO., INC., CLARK DODGE ASSET MANAGEMENT LLC, CLARK DODGE FINANCE, LLC, JOSEPH V. DIMAURO and MICHAEL CLARK

Defendants.

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TRIAL PART: 7

NASSAU COUNTY

INDEX NO: 602904/2015

MOTION SEQ # 9, 10, 12 13, 14

SUBMIT DATE : 2/27/18

The following papers having been read on this motion:

Order to Show Cause (Non-Party Halloran) 1
Opposition (Plaintiff) 2
Order to Show Cause (Non-Parties 5C Capital and Sanders) 3
Opposition (Plaintiff) 4
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Opposition (Plaintiff) 10

This Court, having begun a trial in this matter on November 21, 2017, and continued this trial on January 9, 2018, and January 10, 2018, and still needing to continue the trial, has now been presented with five (5) separate orders to show cause. Non-party Halloran has moved to quash a subpoena served upon it by Plaintiff; in addition, non-parties 5C Capital and Sanders seek to quash several subpoenas served upon them and for information about their business with some Defendants herein. Plaintiff has also filed its own motion to hold Defendants Clark Dodge Holdings (hereinafter "CD Holdings"and DiMauro in contempt, pursuant to CPLR §5251 and Judiciary Law §753. Based upon the following, non-party Halloran's motion is granted in its entirety, Plaintiff's motion for contempt is granted to the following extent, and the remaining motions to quash by non-parties 5C Capital and Sanders are also granted to the following extent.

Pursuant to CPLR §4503(a), the attorney-client privilege prohibits an attorney from disclosing a confidential communication had with a client in the course of professional employment unless the client has waived the privilege. D'Alessio v. Gilberg, 205 AD2d 8, 617 NYS2d 484 (2nd Dept., 1994). Generally, the party asserting a privilege has the burden of establishing the right to such privilege and must show that the information sought to be protected from disclosure was a confidential communication between an attorney and a client for the purpose of obtaining legal advice or services. All Waste Systems, Inc. v. Gulf Insurance Co., 295 AD2d 379, 743 NYS2d 535 (2nd Dept., 2002). This privilege must be narrowly construed and its application must be consistent with the purposes underlying the immunity. Sieger v. Zak, 60 AD3d 661, 874 NYS2d 535 (2nd Dept., 2009).

The first subpoena being challenged herein was that served upon non-party Halloran, an attorney who was retained to provide legal services to Defendant Clark Dodge Asset Management (hereinafter "CDAM") in July 2017. The subpoena requests not only an appearance at trial to testify as a witness in this matter, but also to provide documents concerning payment from Defendant CDAM to Mr. Halloran and for documents involving any claims amongst Defendant CDAM and non-party 5C Capital. The affirmation provided by Mr. Halloran satisfies this Court that the relationship between Defendant CDAM and himself is one that falls within the purview of CPLR §4503, whereas the opposition by Plaintiff has not indicated any waiver on the part of Defendant CDAM. Accordingly, the motion to quash the subpoena dated January 19, 2018, for information sought of non-party Halloran is granted.

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A subpoena duces tecum may not be used for purposes of discovery or to ascertain the existence of evidence. Wahab v. Agris & Brenner, LLC, 106 AD3d 993, 965 NYS2d 352 (Mem) (2nd Dept. 2013). Rather, its purpose is to compel specific documents that are relevant and material to facts at issue in a pending judicial proceeding. Murray v. Hudson, 43 AD3d 936, 841 NYS2d 645 (2nd Dept. 2007).

In determining whether to quash a subpoena duces tecum, a court must determine, among other things, whether the documents sought by the subpoena were relevant to the investigation and if such relevance is challenged, it is incumbent upon the issuer to come forward with a factual basis establishing a reasonable relation to the matter under investigation. In the Matter of N. (Anonymous) v. Novello, 13 AD3d 631, 787 NYS2d 379 (2nd Dept., 2004). An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry. Kapon v. Koch, 23 NY3d 32, 988 NYS2d 559 (2014).

At the conclusion the portion of this proceeding held on November 21, 2017, the day in which non-party Sanders testified at trial, Plaintiff requested this Court to direct certain documentation to be produced by Defendants that had not been previously disclosed, although requested. After a brief conversation with counselors, this Court informed the parties that whatever documentation was missing that should have been disclosed related to the witness' cross-examination the Court would order to be produced, whereas the remaining documents requested would not be required. This Court stated, in no uncertain terms, discovery would not be restarted in the middle of trial, nor would such documents not disclosed be permitted in evidence.

Thereafter, between January 17, 2018, and January 19, 2018, Plaintiff served twenty-four (24) separate trial subpoenas on various non-parties, seeking information they allege is relevant to the instant proceedings. Many of the items sought seek information sought by a non-party which has also been the subject of another subpoena served upon a different non-party. Non-party movants 5C Capital and Sanders have asserted that all subpoenas are irrelevant to the underlying trial and/or the information sought may be obtained through a combination of other party witnesses, witnesses who have already testified, or both. Plaintiff has countered those arguments asserting they are indeed relevant. Neither side appears willing to conceded that any of the items sought via these subpoenas should or should not be produced based upon the papers, leaving this Court to use its discretion herein in deciding the instant motions.

The extent and breadth of the items sought greatly exceed the expectations of this Court and are inconsistent with the directives of this Court during the proceedings as stated on November 21, 2017. However, consistent with the statements placed on the record that date, this Court is of the opinion that some of the items sought bare disclosure prior to this trial resuming, as they are relevant to testimony that has already been provided in this action. Therefore, the motion to quash subpoenas dated January 17, 18, and 19 of 2018, addressed to non-party 5C Capital and non-party Sanders, respectively, is hereby denied in its entirety. These non-parties shall produce the requested documentation on or before April 9, 2018; moreover, Mr. Sanders shall return before this Court upon the trial resuming so that he may be recalled if requested for purposes of inquiry based upon this discovery only. In addition, the request to quash the subpoena addressed to Chase Bank, dated January 18, 2018, is also denied, and Chase shall supply the requested documents on or before April 9, 2018, as well.

As to the items requested of non-parties McCabe, Aramon, Ardino, Asta, Bannon, Hunter, Marson, Munk, Prue, Automated Data Processing, Amex, Walsh, Charles Schwab, Dryland, Devine, Shikes, Paychex, Royal Bank of Canada, Terminal Ventures, and Guardian Life, the motions to quash these subpoenas are granted in its entirety. These non-parties need not provide the requested items in the current action at this time pursuant to the subpoenas dated January 17, 18, or 19, 2018, respectively.

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A party seeking to hold another in civil contempt has the burden of proving the contemptuous conduct by clear and convincing evidence. Gray v. Giarrizzo, 47 AD3d 765, 850 NYS2d 549 (2nd Dept., 2008). In order to punish a judgment-debtor for contemptuous conduct in reference to an enforcement device of a money judgment, the judgment-creditor must establish refusal or willful neglect on the part of the judgment-debtor. Id at 766, 549. A subpoenaed witness must be shown to be in possession of or have reasonable access to the information sought in order for the subpoenaed witness to be held in civil contempt. Id at 766, 549. The party seeking a contempt order must prove actual loss, failing which the court may only impose a fine which does not exceed the complainant's costs and expenses, plus an additional two hundred fifty dollars ($250.00), legal fees, and disbursements. Matter of Barclays Bank v. Hughes, 306 AD2d 406, 761 NYS2d 278 (2nd Dept., 2003). The knowing disobedience of a lawful court order, by a party which impairs the rights or remedies of another is a factual determination to be made by made by the trial Court, which may use its discretion in deciding such applications. Id at 407, 278.

Here, the basis asserted by Plaintiff to hold both Defendant CD Holdings and Defendant DiMauro in civil contempt was two transactions on March 14, 2016, totaling six hundred seventy dollars ($670.00), made from an account in the name of Defendant Clark Dodge Holdings, only. The transactions in question were made at a time after a default judgment was entered against Defendant CD Holdings, only. Although the motion has not been opposed by either Defendant CD Holdings or DiMauro, this Court can only hold Defendant CD Holdings in contempt, since the judgment was only in the name of this Defendant and the name on the subject account was only this Defendant. Accordingly, Defendant CD Holdings is hereby fined in the amount of nine hundred twenty dollars ($920.00), pursuant to Judiciary Law §773. It should be noted that although Plaintiffs have requested interest, costs, and attorneys' fees in their motion, they have not submitted any authority to support the request for interest, nor have they submitted an affirmation stating their fees and costs for the instant motion.

The Sheriff of the County of Nassau is directed, upon delivery of a duly certified copy of this order, to collect the fine in the amount of nine hundred twenty dollars ($920.00) hereby imposed upon Defendant CD Holdings, and pay same over to Plaintiff herein.

Plaintiff shall file and serve a copy of the within order with notice of entry upon all parties involved with the motion practice decided herein on or before March 30, 2018. The parties shall return before this Court to continue the trial herein in Part 7 of Supreme Court, Nassau County, on April 16, 2018, at 9:30am. The trial shall continue on this date and on successive days until completed.

Finally, all requests for sanctions are hereby denied at this time.

This hereby constitutes the decision and order of this Court.

ENTER

DATED: March 20, 2018

HON. ARTHUR M. DIAMOND
J.S.C.

ENTERED
MAR 26 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE