

Azrak v Carter Enters. LLC

2019 NY Slip Op 30902(U)

March 6, 2019

Supreme Court, Kings County

Docket Number: 510149/15

Judge: Karen B. Rothenberg

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of March, 2019.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

-----X
DIANA AZRAK, individually, and on behalf of,
CARTER INDUSTRIES, INC.,

Plaintiff,

- against -

Index No. 510149/15

CARTER ENTERPRISES LLC, SAUL WOLF, CARTER INDUSTRIES, INC., CHAIM WOLF, THE ETZ CHAIM CHARITABLE TRUST, and ETZ CHAIM FOUNDATION,

Defendants.
-----X

The following papers numbered 1 to 16 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-3</u> <u>4-5</u> <u>6-7</u>
Opposing Affidavit (Affirmation) _____	<u>8, 9, 10</u> <u>7</u> <u>11</u>
Reply Affidavit (Affirmation) _____	<u>12-15</u> <u>11</u>
Sur Reply (Letter) dated October 10, 2018 _____	<u>16</u>

Upon the foregoing papers in this shareholder derivative action, plaintiff Diana Azrak (Azrak), individually and on behalf of Carter Industries, Inc. (Carter Industries), moves (in motion seq.14), by order to show cause, for an order, pursuant to CPLR 2221 (d) and (e), granting her leave to renew and/or reargue the court's July 12, 2018 decision and order to the extent that it denied: (1) Azrak's motion, pursuant to CPLR 3124, to compel defendants Carter Enterprises LLC (Carter Enterprises), Saul Wolf, Carter Industries, Inc. (Carter

Industries), Chaim Wolf, the Etz Chaim Charitable Trust (the Trust) and the Etz Chaim Charitable Foundation (the Foundation) (collectively, defendants) to produce documents responsive to her document requests, and (2) Azrak's cross motion, pursuant to CPLR 3124, to compel compliance with the November 17, 2017 and January 3, 2018 subpoenas duces tecum that she served on non-parties Abraham Backenroth (Backenroth) and Ephriam Adler (Adler), respectively.

Non-parties Backenroth and Adler move (in mot. seq. 15) for an order: (1) quashing, fixing conditions and/or modifying Azrak's July 30, 2018 subpoenas duces tecum (July 30, 2018 Subpoenas), pursuant to CPLR 2304, and (2) issuing a protective order, pursuant to CPLR 3103, denying, limiting, conditioning and/or regulating their obligation to produce documents in response to Azrak's July 30, 2018 Subpoenas so as to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice.

Azrak cross-moves (in mot. seq. 17) for an order, pursuant to CPLR 3124, compelling Backenroth and Adler to comply with the July 30, 2018 Subpoenas.

Background

This Shareholder Derivative Action

As described in greater detail in the July 12, 2018 Order, Azrak commenced this shareholder derivative action seeking to obtain an interest in Carter Industries and damages because defendants allegedly misappropriated business opportunities from Carter Industries.

Carter Industries was allegedly formed in 1995 by Sam Wolf (Wolf) and Marvin

Azrak, plaintiff's late husband. Azrak alleges that Wolf and her husband each held 50% of the issued shares of Carter Industries, and that, when her husband passed away on January 22, 2008, she became the owner of her late husband's 50% share in Carter Industries. In their verified answer, defendants explicitly "deny that Diana Azrak is an owner of Fifty Percent of the issued and outstanding shares of [Carter] Industries . . ." and assert an affirmative defense challenging Azrak's standing.

In March 2017, during the pendency of this action, Saul Wolf sold his 50% interest in Carter Industries to Backenroth and Adler.

The July 12, 2018 Order

The July 12, 2018 Order was issued in response to seven discovery motions and cross motions, all of which involved discovery requests to establish Azrak's alleged damages based on the value of Carter Industries. In the July 12, 2018 Order, the court recognized that:

"[r]esolution of these motions and cross motions would require a detailed consideration of the demands made by each party and a review of the documents already provided to determine if any additional discovery is warranted. Given the voluminous amount of discovery that plaintiff has already obtained, this would most certainly be a long and arduous task for the court, and may well require the appointment of a referee or Judicial Hearing Officer to oversee discovery (*see generally* CPLR 3104)"

Importantly, in the July 12, 2018 Order, the court specifically noted that "[i]f plaintiff cannot establish that her husband's 50% interest in Carter Industries passed to her upon his death, no additional discovery would be warranted . . ." Thus, "in the interest of judicial economy and expediency, and in an effort to prevent the parties from incurring what may well be

unnecessary attorneys' fees . . ." the court ordered, sua sponte, that "the trial of this action should be bifurcated and that the issue of plaintiff's ownership in Carter Industries be determined before any further requests for discovery are addressed." The court determined that "given the fact that the complex financial issues involved in determining damages herein are not intertwined with the issue of plaintiff's ownership interest in Carter Industries, a sua sponte order bifurcating the issues raised in this action is warranted."

The court did not reach the merits of Azrak's motion to compel defendants to produce documents responsive to her document requests or Azrak's cross motion to compel compliance with the November 17, 2017 and January 3, 2018 subpoenas duces tecum that she served on non-parties Backenroth and Adler, respectively. Instead, the court framed an issue for determination and directed that it proceed to determine the threshold issue of Azrak's ownership interest in Carter Industries. Consequently, the July 12, 2018 Order provided that "all relief requested in the pending motions and cross motions is denied, with leave to renew, if appropriate, *after said issue is resolved*" (emphasis added).

The July 12, 2018 Order further provided that "[e]ach party is, however, granted leave to serve an additional demand for outstanding discovery *as it pertains solely to the issue of ownership of Carter Industries* within 30 days after service of a copy of this decision with notice of entry" (emphasis added).

Less than three weeks after the July 12th order, Azrak served the July 30, 2018 subpoenas on Backenroth and Adler seeking broad categories of documents that are

irrelevant to that discrete issue. The July 30, 2018 Subpoenas seek the production of 15 categories of documents, most of which are virtually identical to the documents that Azrak requested previously.

*Azrak's Motion for Leave to Reargue
and/or Renew the July 12, 2018 Order*

Azrak now moves, by order to show cause, for leave to reargue and/or renew the court's July 12, 2018. Azrak submits an affidavit in support, in which she specifically explains that "it cannot be legally disputed that I am a 50% owner of Carter Industries." Azrak submits documents and correspondence in an effort to establish her ownership in Carter Industries, including a redacted copy of the purported Last Will and Testament of her late husband. Azrak also contends that the court's May 13, 2016 order, which granted Azrak's motion for an accounting of the books and records of Carter Industries based on Azrak's submission of Schedule K-1s, "held conclusively that [Azrak] is a shareholder . . ." Azrak thus argues that "[t]he Court's May 2016 order is law of the case [and] a trial as to whether Plaintiff is a Carter Industries shareholder is an unnecessary rerun."

Carter Industries, in opposition, argues that Azrak's motion "fashioned as one to renew and reargue . . . really seeks summary judgment" regarding her ownership interest in Carter Industries. Arguing that "the issue of whether or not [Azrak] owns 50% of Industries has never been conclusively established for all purposes, but merely within the context of a prior discovery motion." Carter Industries explains that the May 2016 order "only held that because Plaintiff pled an ownership interest in Industries and the defendants failed to

adequately rebut this allegation, that Plaintiff was entitled to certain discovery.” Carter Industries further contends that the July 12, 2018 Order “was absolutely correct to require the parties to first focus their efforts on the discrete and threshold issue surrounding Plaintiff’s purported ownership interest in [Carter] Industries, prior to the continuation of any further prolonged, expensive and burdensome discovery.”

Defendants Saul Wolf, Carter Enterprises and Chaim Wolf also oppose Azrak’s motion on the same grounds asserted by Carter Industries.

Discussion

Azrak’s Motion to Reargue and/or Renew

“A motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (CPLR 2221[d] [2]). A motion pursuant to CPLR 2221 to renew, on the other hand, “must be (1) based upon new facts not offered on the prior motion that would change the prior determination, and (2) set forth a reasonable justification for the failure to present such facts on the prior motion” (*Matter of Nelson v Allstate Ins. Co.*, 73 AD3d 929, 929 [2010]).

Here, Azrak has failed to demonstrate that this court either overlooked or misapprehended matters of fact or law in the July 12, 2018 Order when it bifurcated the action and ordered that the issue of Azrak’s ownership in Carter Industries be determined before any further requests for discovery are addressed. As set forth in the July 12, 2018

Order, CPLR 603 provides that “[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue . . . prior to the trial of the others.” In addition, CPLR 4011 provides that “[t]he court may determine the sequence in which the issues shall be tried and otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum.” Thus, the court, has the statutory authority to order a separate trial of the discrete and threshold issue of Azrak’s ownership in Carter Industries. Contrary to Azrak’s contention, this court’s May 13, 2016 discovery order did not establish Azrak’s ownership interest in Carter Industries, but rather, determined that Azrak was entitled to an accounting based on her *alleged* ownership interest in Carter Industries and her submission of Schedule K-1s to support that allegation in the complaint.

Azrak’s motion for leave to renew, on the other hand is likewise denied. The July 12, 2018 Order specifically provided that “all relief requested in the pending motions and cross motions is denied, *with leave to renew, if appropriate, after said issue [of Azrak’s ownership in Carter Industries] is resolved*” (emphasis added). Thus, Azrak was already granted leave to renew her discovery motion and cross motion, but only after the threshold issue of her ownership in Carter Industries was resolved.

***Backenroth and Adler’s Motion To
Quash the July 30, 2018 Subpoenas and
Azrak’s Cross Motion To Compel Compliance***

A party or nonparty moving to quash a subpoena has the burden of establishing either

that the requested disclosure “is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious” (*Matter of Kapon v Koch*, 23 NY3d 32, 34 [2014]; see also *Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331–332 [1988]; *Hudson City Sav. Bank v 59 Sands Point, LLC*, 153 AD3d 611, 612-613 [2017]; *Ferolito v Arizona Beverages USA, LLC*, 119 AD3d 642, 643 [2014]). “Should the [movant] meet this burden, the subpoenaing party must then establish that the discovery sought is material and necessary to the prosecution or defense of [the] action” (*Matter of Kapon v Koch*, 23 NY3d at 34).

Backenroth and Adler’s motion to quash Azrak’s July 30, 2018 Subpoenas is granted because the July 30, 2018 Subpoenas exceed the scope of the limited discovery explicitly authorized in the July 12, 2018 Order. Backenroth and Adler have satisfied their burden of establishing that the discovery requested is irrelevant to the limited question of *Azrak’s* ownership of Carter Industries. Azrak, in contrast, has not established that the discovery she seeks from Backenroth and Adler in the July 30, 2018 Subpoenas is material and necessary to the issue of her ownership. Consequently, Azrak’s cross motion to compel Backenroth and Adler to comply with her July 30, 2018 Subpoenas is denied with leave to serve subpoenas, if necessary after Azrak’s claim of ownership has been resolved. Accordingly, it is

ORDERED that Azrak’s motion for leave to reargue and/or renew the July 12, 2018 Order is denied; and it is further

ORDERED that the branch of Backenroth and Adler's motion seeking to quash Azrak's July 30, 2018 Subpoenas is granted; and it is further

ORDERED that Azrak's cross motion to compel Backenroth and Adler to comply with her July 30, 2018 Subpoenas is denied; and it is further

ORDERED that the parties shall appear on April 22, 2019, at 11 am at Part 35, room 574 for conference before trial or hearing to determine Azrak's ownership interest, if any, in Carter Industries.

This constitutes the decision and order of the court.

E N T E R



J. S. C.

Karen B. Rothenberg
Justice, Supreme Court

KINGS COUNTY CLERK
FILED
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