

Rasolli Footwear Corp. v COD Capital Corp.
2019 NY Slip Op 31235(U)
April 18, 2019
Supreme Court, New York County
Docket Number: 655554/2017
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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INDEX NO. 655554/2017

RASOLLI FOOTWEAR CORP.,

MOTION DATE 04/09/2019

Plaintiff,

MOTION SEQ. NO. 003

- v -

COD CAPITAL CORP., also known as COD FRIENDLY, and
LOWELL BURK

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41 were read on this motion to/for PROTECTIVE ORDER.

In this action to recover damages for breach of contract and conversion, the defendant moves pursuant to CPLR 3103 for a protective order permitting ongoing discovery to be kept confidential. In the order to show cause initiating this motion, the court, pending hearing of the motion, stayed the directives in its order dated January 30, 2019, compelling the defendant Lowell Burk to produce certain documents and appear for a deposition by a date certain. This motion was first scheduled for oral argument on April 2, 2019. The court gave the plaintiff an additional week within which to submit opposition or to review the proposed confidentiality stipulation submitted by the defendants, but the plaintiff has not filed any opposition or agreed to any part of the stipulation. The motion is granted, without opposition.

In the January 30, 2019, order, the court denied that branch of the plaintiff's motion seeking to amend its complaint to add a cause of action against the defendant COD Capital Corp. (COD) to allege a violation of General Business Law § 349(h), but held in abeyance that branch of the motion seeking to add contentions against Burk that would support piercing COD's corporate veil. In that order, the court directed Burk to produce financial documents concerning both COD's and his own accounts, and directed him to appear for a deposition within 45 days, to aid the court in ascertaining whether such allegations could be added against

Burk. Since some of the discoverable material may involve Burk's personal finances, a confidentiality order is appropriate (see 22 NYCRR 202.5[e][1][i], [ii], [iv]; *Rice v Rice*, 288 AD2d 112 [1st Dept 2001]; see generally *Camenos v F.W. Woolworth Corp.*, 233 AD2d 212 [1st Dept 1996]; *Finch, Pruyn & Co. v Niagara Paper Co.*, 228 AD2d 834 [3d Dept 1996]), although the defendants have not made the necessary showing to warrant the sealing of the file (see *Mosallem v Berenson*, 76 AD3d 345, 348 [1st Dept 2010]; *Danco Labs. v Chemical Works of Gedeon Richter*, 274 AD2d 1 [1st Dept 2000]).

Accordingly, it is

ORDERED that either party may designate documents produced, or testimony given, in connection with this action as "confidential," either by notation on the document, statement on the record of the deposition, written advice to the respective undersigned counsel for the parties hereto, or by other appropriate means; and it is further,

ORDERED that "Confidential Information" shall mean all documents and testimony, and all information contained therein, and other information designated as confidential, if such documents or testimony contain trade secrets, proprietary business information, competitively sensitive information, or other information the disclosure of which would, in the good faith judgment of the party designating the material as confidential, be detrimental to the conduct of that party's business or the business of any of that party's customers or clients; "Producing party" shall mean the parties to this action and any third-parties producing "Confidential Information" in connection with depositions, document production or otherwise, or the party asserting the confidentiality privilege, as the case may be; and "Receiving party" shall mean the party to this action and/or any non-party receiving Confidential Information in connection with depositions, document production, or otherwise; and it is further,

ORDERED that the Receiving party may, at any time, notify the Producing party that the Receiving party does not concur in the designation of a document or other material as Confidential Information, and if the Producing party does not agree to declassify such document

or material, the Producing party may seek a conference with the court, pending which the documents or materials shall continue to be treated as Confidential Information, and in the event that the Producing party does not seek a conference with the Court within five days of the request to declassify, the documents or materials shall no longer be treated as Confidential Information; and it is further,

ORDERED that, except with the prior written consent of the Producing party or by Order of the court, Confidential Information shall not be furnished, shown, or disclosed to any person or entity except to the personnel of plaintiff or defendant actually engaged in assisting in the preparation of this action for trial or other proceeding herein and who have been advised of their obligations hereunder; counsel for the parties to this action and their associated attorneys, paralegals and other professional personnel (including support staff) who are directly assisting such counsel in the preparation of this action for trial or other proceeding herein, are under the supervision or control of such counsel, and who have been advised by such counsel of their obligations hereunder; expert witnesses or consultants retained by the parties or their counsel to furnish technical or expert services in connection with this action or to give testimony with respect to the subject matter of this action at the trial of this action or other proceeding herein; provided, however, that such Confidential Information is furnished, shown or disclosed in accordance herewith; the court and court personnel; an officer before whom a deposition is taken, including stenographic reporters and any necessary secretarial, clerical, or other personnel of such officer; trial and deposition witnesses; and any other person agreed to by the parties; and it is further,

ORDERED that Confidential Information shall be utilized by the Receiving party and its counsel only for purposes of this litigation and for no other purposes; and it is further,

ORDERED that before any disclosure of Confidential Information is made to an expert witness or consultant, counsel for the Receiving party shall provide the expert's written agreement to comply with and be bound by the terms of this order, and counsel for the party

obtaining the agreement shall supply a copy to counsel for the other party at the time of the disclosure of the information required to be disclosed by CPLR 3101(d), except that any agreement signed by an expert or consultant who is not expected to be called as a witness at trial is not required to be supplied; and it is further,

ORDERED that should the need arise for any of the parties to disclose Confidential Information during any hearing or trial before the court, including through argument or the presentation of evidence, and the parties cannot resolve any disputes over the disclosure of Confidential Information between themselves, the parties may seek a conference with the court; and it is further,

ORDERED that counsel for the parties shall not be precluded from using during any deposition in this action any documents or information which have been designated as Confidential Information; and it is further,

ORDERED that a party may designate as Confidential Information any document, information, or deposition testimony produced or given by any nonparty to this action, or any portion thereof and, in the case of documents, designation shall be made by notifying all counsel in writing of those documents which are to be stamped and treated as such at any time up to 15 days after actual receipt of copies of those documents by counsel for the party asserting the confidentiality privilege and, in the case of deposition testimony, designation shall be made by notifying all counsel in writing of those portions which are to be stamped or otherwise treated as such at any time up to 15 days after the transcript is received by counsel for the party asserting the confidentiality privilege; prior to the expiration of such 15-day period, or until a designation is made by counsel, if such a designation is made in a shorter period of time, all such documents shall be treated as Confidential Information; and it is further,

ORDERED that a Receiving Party who seeks to file with the Court any deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated as comprising or containing Confidential Information, and any pleading, brief,

or memorandum which reproduces, paraphrases, or discloses Confidential Information, shall provide all other parties with reasonable advance notice of its intentions; in the event the parties cannot resolve the issues, the parties may seek a conference with the court; and it is further,

ORDERED that any person receiving Confidential Information shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms hereof; and it is further,

ORDERED that any document or information that may contain Confidential Information that has been inadvertently produced without identification as to its confidential nature may be so designated by the party asserting the confidentiality privilege by written notice to the undersigned counsel for the Receiving party identifying the document or information as confidential within a reasonable time following the discovery that the document or information has been produced without such designation; and it is further,

ORDERED that extracts and summaries of Confidential Information shall also be treated as confidential; and it is further,

ORDERED that the production or disclosure of Confidential Information shall in no way constitute a waiver of each party's right to object to the production or disclosure of other information in this action or in any other action; and it is further,

ORDERED that the terms of this order shall continue to be binding after the conclusion of this litigation except: that there shall be no restriction on documents that are used as exhibits in court unless such exhibits were filed under seal as allowed by order of the court and a party may seek the written permission of the Producing party or further order of the court with respect to modification of the order; and it is further,

ORDERED that the terms of this order shall not be deemed to waive any privilege recognized by law, and shall not be deemed an admission as to the admissibility in evidence of any facts or documents revealed in the course of disclosure; and it is further,

ORDERED that within 60 days after the final termination of this litigation by settlement or

exhaustion of all appeals, all Confidential Information produced or designated and all reproductions thereof, shall be returned to the Producing Party or shall be destroyed, at the option of the Producing Party, and in the event that any party chooses to destroy physical objects and documents, such party shall certify in writing within 60 days of the final termination of this litigation that it has undertaken its best efforts to destroy such physical objects and documents, and that such physical objects and documents have been destroyed to the best of its knowledge; and it is further,

ORDERED that notwithstanding anything to the contrary, counsel of record for the parties may retain one copy of documents constituting work product, a copy of pleadings, motion papers, discovery responses, deposition transcripts, and deposition and trial exhibits; and it is further,

ORDERED that the terms of this order shall not be deemed to prohibit or preclude counsel from representing any individual, corporation, or other entity adverse to any party or its affiliates in connection with any other matters, or of communicating with experts particularly retained in connection with this action; and it is further,

ORDERED that the stay set forth in the order to show cause dated March 6, 2019, is vacated and dissolved; and it is further,


ORDERED that the defendant Lowell Burk shall appear for a deposition within 45 days of the entry of this order, limited to the issues of whether he dominated COD Capital Corp., a/k/a COD Friendly, whether he used his domination of that corporation to commit a wrong against the plaintiff, whether he commingled personal assets with those of the corporation, whether he employed that corporation to pay personal debts, and whether he disregarded the corporate form or dispensed with requirements of the corporation law of the state of incorporation of COD Capital Corp., a/k/a COD Friendly; and it is further,

ORDERED that the defendant Lowell Burk shall, prior to the deposition, produce bank accounts, cancelled checks, corporate records, and financial records of COD Capital Corp., a/k/a COD Friendly, for 2016 and 2017; and it is further,

ORDERED that the failure of the defendant Lowell Burk to comply with this order may result in the granting, upon default, of that branch of the plaintiff's motion which seeks to add allegations against him to support its claim to piercing the corporate veil, and the imposition of other sanctions.

This constitutes the Decision and Order of the court.

4/18/2019
DATE



JOHN J. KELLEY, J.S.C.
HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE