

**Stathakis v Stark Fish Inc.**

2019 NY Slip Op 32530(U)

July 12, 2019

Supreme Court, Queens County

Docket Number: 701505/2016

Judge: Joseph Risi

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Joseph Risi, A.J.S.C. IA Part 3

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EMMANOUIL STATHAKIS, a shareholder of STARK  
FISH INC. on behalf of himself and in right of STARK  
FISH INC.,

Index  
Number: 701505/2016

Plaintiffs,

**DECISION / ORDER**

-against-

STARK FISH INC., OMIROS GIOUROUKOS, STARK  
SEAFOOD INC., and SOUNIO TRUCKING, INC.

Motion Seq. No. 6

Defendants.

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The following numbered papers read on this motion by plaintiff Emmanouil Stathakis, a shareholder of Stark Fish Inc., on behalf of himself and in right of Stark Fish Inc. (plaintiff), for an order pursuant to CPLR 3214, compelling defendant Omiros Giouroukos (Giouroukos), to produce all reports, analyses, memorandum, work papers, correspondence and other related documents that were created and/or used by non-party Michael Grossman (Grossman) and/or his firm with respect to his engagement by respondent Stark Fish Inc., and to extend the deadline for filing the Note of Issue.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	EF 159-177, 203-221
Answering Affidavits - Exhibits .....	EF 178-181
Reply Affidavits .....	EF 183

Upon the foregoing papers, it is ordered that the motion is determined as follows:

This is an action sounding in dissolution of Stark Fish Inc., breach of fiduciary duty, wasted, misappropriated and/or diverted assets, money and business, unjust enrichment, and for the appointment of a temporary receiver of the property and effects of Stark Fish Inc. As is relevant, in an order dated March 5, 2018, this Court joined the instant action for trial with a related action

commenced under Index No. 704204/2014 (*Stathakis v Stark Fish Inc.*). The Court notes that petitioner has made a simultaneous, identical motion to the instant motion, in that related action. It is also noted that both petitioner and Giouroukos have submitted, for the Court's consideration, identical documents in support of their respective contentions in both actions.

Plaintiff now moves pursuant to CPLR §3214, to compel Giouroukos to produce all reports, analyses, memorandum, work papers, correspondence and other related documents that were created and/or used by Grossman and/or his firm with respect to his engagement by Stark Fish Inc. Plaintiff has contended that, based upon issues raised by non-party Robert Goldfarb's inability to perform an analysis of Stark Fish Inc.'s records, Giouroukos, on behalf of Stark Fish Inc., then retained Grossman to "re-categorize" Stark Fish Inc.'s records. Plaintiff further contends that despite repeated disclosure requests, Giouroukos has failed to produce internal documents, such as reports, analyses, memorandum, work papers, correspondence and other related documents that were created and used Grossman and his firm with respect to his work for Stark Fish Inc.

In opposition, Giouroukos has argued that while Grossman and his firm were retained to perform the function of determining whether Stark Fish Inc.'s books and records accurately reflected the business activity of the company, Grossman and his firm were also retained to provide litigation preparation support to Giouroukos' counsel in the instant litigation. Giouroukos has further argued that he has produced and/or made available for inspection all accounting records and materials relating to the business activity of Stark Fish Inc., and that the analyses, work papers and reports that Grossman and his firm later prepared in preparation for, and to aid Giouroukos' counsel in the defense of the instant litigation is not subject to disclosure pursuant to CPLR §3101(d)(2).

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." "The phrase 'material and necessary' should be 'interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason'" (*Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; see CPLR 3101; *Kayantas v Rest. Depot, LLC*, \_\_\_ AD3d \_\_\_, \_\_\_, 2019 NY Slip Op 04367, \*2 [2d Dept 2019]). This Court is vested with broad discretion to determine what is "material and necessary" (CPLR §3101; see *Napoli v Crovello*, 49 AD3d 699 [2d Dept 2008]; *Auerbach v Klein*, 30 AD3d at 452).

CPLR §3101(d)(2), relating to trial preparation materials, provides the following:

"Subject to the provisions of paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has

substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.”

In support of his motion, upon these papers, plaintiff has failed to satisfy his burden. Under the particular circumstances of this case and after a thorough examination, the Court has determined that the record before it reflects that Giouroukos has responded to plaintiff’s disclosure demands by providing copies of and/or access to various financial records, including but not limited to, “QuickBooks journal entries” that were re-categorized by Grossman, and all correspondence between Grossman, Giouroukos and Stark Fish Inc. The Court has further determined that plaintiff has, otherwise, failed to adequately demonstrate that further disclosure will lead to material and relevant evidence in this matter because he has failed to make a sufficient showing that he has substantial need of the materials created by Grossman and Giouroukos for the preparation of the instant litigation because he is unable, without undue hardship, to obtain the substantial equivalent of the materials by any other means (CPLR §3101 [a]; *see generally Agovino v Taco Bell 5083*, 225 AD2d 569, 570 [2d Dept 1996]).

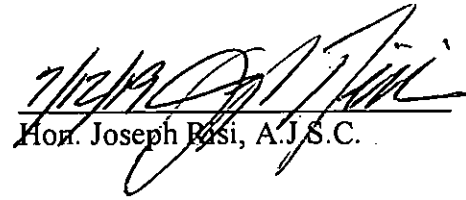
It is true, as plaintiff contends, that “[m]ixed purpose reports are not exempt from disclosure under CPLR §3101 (subd [d], par 2)” (*Micro-Link, LLC v Town of Amherst*, 155 AD3d 1638, 1643 [4th Dept 2017], quoting *Zampatori v United Parcel Serv.*, 94 AD2d 974, 975 [4th Dept 1983]), and that Giouroukos has “claim[ed] that particular records or documents are exempt or immune from disclosure” (*Micro-Link, LLC v Town of Amherst*, 155 AD3d at 1643). Contrary to plaintiff’s contentions, however, in opposition, Giouroukos has satisfied his burden by identifying that a forensic report that Grossman prepared for Giouroukos’ counsel mentioned by counsel in a settlement negotiation and any correspondence between Grossman and Giouroukos’ counsel’s office, including analyses, work papers and reports prepared by Grossman for the purpose of litigation, are protected under CPLR §3101(d)(2) (*see Ligoure v City of New York*, 128 AD3d 1027, 1028 [2d Dept 2015]; *see also Central Buffalo Project Corp. v Rainbow Salads*, 140 AD2d 943, 944 [4th Dept 1988]). Therefore, based upon the above, plaintiff is not entitled to the relief sought on this branch of the motion.

Plaintiff has also moved to extend the deadline for filing the Note of Issue and Giouroukos has not opposed this branch of the motion. Taking into consideration plaintiff’s contention that, among other things, Giouroukos was delayed in responding to disclosure requests, which has left documentation that was provided in disclosure to be reviewed, as well as taking into consideration the stage of this proceeding as well as the stage of the joined action, the deadline for the end of disclosure and the filing of the Note of Issue is extended to August 30, 2019. In the interest of judicial economy and the resolution of this matter, the parties are, hereby, ordered to expeditiously complete all disclosure.

Accordingly, the branch of plaintiff's motion to extend the deadline for filing the Note of Issue is granted, as discussed above, and the motion is denied in all other respects.

This is the decision and order of the Court.

Dated: July 12, 2019

  
Hon. Joseph Pasi, A.J.S.C.

**FILED**  
**JUL 18 2019**  
**COUNTY CLERK**  
**QUEENS COUNTY**