

Iacovacci v Brevet Holdings, LLC
2019 NY Slip Op 32685(U)
September 10, 2019
Supreme Court, New York County
Docket Number: 158735/2016
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH PART IAS MOTION 18EFM

Justice

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INDEX NO. 158735/2016

PAUL IACOVACCI,

MOTION DATE 08/14/2019

Plaintiff,

MOTION SEQ. NO. 020

- v -

BREVET HOLDINGS, LLC, BREVET SHORT DURATION
PARTNERS, LLC, BREVET SHORT DURATION
HOLDINGS, LLC

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 020) 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 677, 678, 679, 681, 682

were read on this motion to/for MISC. SPECIAL PROCEEDINGS

Upon the foregoing documents, defendants move for letters rogatory, seeking international judicial assistance to obtain discovery from entities in Canada. Plaintiff cross moves for an order directing the limited deposition of Douglas Monticciolo prior to deposing any Canadian non-party witnesses in the event that the Court grants defendants' motion.

"A deposition may be taken on written questions when the examining party and the deponent so stipulate or when the testimony is to be taken without the state. A commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state" (CPLR 3108).

The burden is on the movants to demonstrate that letters rogatory would be "necessary or convenient" by including in their application, inter alia, "allegations that the proposed out-of-State deponent would not cooperate with a notice of deposition or would not voluntarily come within this State or that the judicial imprimatur accompanying a commission will be necessary or

helpful” (MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC, 103 AD3d 486, 488 [1st Dept 2013], quoting Reyes v Riverside Park Community [Stage I], Inc., 59 AD3d 219, 219 [1st Dept 2009] [internal quotation marks omitted]; see Sorrentino v Fedorczuk, 85 AD3d 759, 760-61 [2d Dept 2011]). Defendants must also show that the information sought is not otherwise available (MBIA Ins. Corp., 103 AD3d at 487) and, because this is an international issue, that “the information sought is crucial ‘to the resolution of a key issue in the litigation’” (Punwaney v Punwaney, 2016 NY Slip Op 31178[U], *3 [Sup Ct, NY County 2016], quoting Richbell Info. Servs., Inc. v Jupiter Partners L.P., 32 AD3d 150, 156-58 [1st Dept 2006]).

Defendants have met their burden as their application demonstrates that the Sprott entities had provided some of Kapoor’s documents but Sprott refused to provide anything further without an order of the Court; and that Kapoor and Kashyap are no longer employed by Sprott, therefore Sprott could not produce them, but that Sprotts’ counsel also refused to voluntarily provide their last known addresses without an order of the Court.¹ Defendants’ also submitted evidence showing that the Sprott entities, Kapoor, and Kashyap are uniquely situated to provide relevant and material evidence, central to the issues in this case concerning defendants’ allegations that, inter alia, plaintiff used proprietary Brevet documents and diverted business away from Brevet while still employed with Brevet. For example, defendants submit e-mails from August and September 2016 sent from plaintiff’s personal e-mail account, attaching documents labeled as “financial models” for Sprott, and indicate that plaintiff had various meetings with Kapoor and Kashyap. This evidence provides a sufficient basis showing that further inquiry is essential to prove or disprove the allegations and issues in this litigation.

¹ Although no evidence has been provided demonstrating that Kashyap has voluntarily refused to provide documents and/or appear for a deposition, it would be futile to direct defendants to first attempt to gain his appearance voluntarily when these letters rogatory are going to be issued anyway.

Contrary to plaintiff's contentions, defendants do not need to exhaust all other discovery devices before seeking letters rogatory. They must show that the foreign non-party won't voluntarily comply with their demands, which has been demonstrated here. Further, the parties, including Monticciolo as defendants' representative, do not need to be deposed first. In fact, the Court finds that such discovery from the Canadian entities would give both sides the information necessary to conduct more meaningful depositions of plaintiff and Monticciolo. What plaintiff fails to understand is that Kapoor's testimony cannot serve as a substitute for plaintiff's nor Monticciolo's testimony — as set forth above, Kapoor is in a unique position to give information related to this case. It would be absurd for the parties, and the Court, to take plaintiff's explanations and interpretations of all the evidence submitted thus far and consider it to be the final word of the dispute. Indeed, defendants correctly argue that plaintiff's interpretations of the evidence submitted in support of the instant motion were essentially arguing the substantive merits of the counterclaims in this action — which is inappropriate at this juncture.

Consequently, the Court denies plaintiff's cross-motion for a limited deposition of Monticciolo before Kapoor. Plaintiff's concerns that Monticciolo would "shape" his testimony to conform to Kapoor's are unfounded. This Court cannot discern any factual support or conceive of any hypothetical scenario behind this, especially as it concerns facts about the alleged encounters between Monticciolo and Kapoor for which they have shared personal knowledge. For example, if Kapoor hypothetically testifies that Monticciolo harassed and intimidated him during their encounters, is plaintiff suggesting that Monticciolo would testify similarly and admit the same? As it concerns Kapoor's interactions with plaintiff, there is no indication that Monticciolo had any part of it and, therefore, would not have personal knowledge as to, e.g., the

substance of the communications between plaintiff and Kapoor. Indeed, this is the whole reason why Kapoor needs to be deposed.

Plaintiff also raises the concern that the proposed letters rogatory are skewed and contain misstatements of fact. The Court will work with the parties to draft a neutral statement of facts to be included in the letters rogatory. Plaintiff may wish to submit specific contentions to counter the defendants' contentions, or otherwise provide an edited version of defendants' document (NYSCEF Doc. No. 601) or counter proposed letters rogatory. The proposed changes will be discussed at the parties' next compliance conference on September 18, 2019.

Accordingly, defendants' motion is granted and letters rogatory will be issued at a later date; and plaintiff's cross-motion is denied. This constitutes the decision and order of the Court.

9/10/2019

DATE



ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE