

Virtu Ams., LLC v Spartan Capital Secs., LLC

2019 NY Slip Op 32940(U)

October 3, 2019

Supreme Court, New York County

Docket Number: 656147/2018

Judge: Andrew Borrok

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

VIRTU AMERICAS, LLC,
Plaintiff,

- v -

SPARTAN CAPITAL SECURITIES, LLC, JOSEPH KELLY
Defendant.

-----X

INDEX NO. 656147/2018
MOTION DATE 10/03/2019
MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 44, 47
were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 19, 20, 21, 22, 23,
24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 48, 49, 50
were read on this motion to/for DISCOVERY - PRE-ACTION

Respondents Spartan Capital Securities, LLC (Spartan) and Joseph Kelly move by order to
show cause for a protective order pursuant to CPLR § 3103 barring petitioner Virtu Americas,
LLC (Virtu) from seeking or obtaining any further discovery or disclosure of any kind. Virtu
moves for leave to conduct a targeted forensic examination of certain electronic devices and
records. For the reasons set forth on the record (10/03/2019) and as otherwise set forth below,
both motions are denied.

Virtu commenced an action against Spartan and Mr. Kelly asserting causes of action for fraud
alleging that the respondents engaged in insider trading (Virtu Americas, LLC v Spartan Capital
Securities, LLC et al, Index No. 654742/2018). New York State Supreme Court Justice Charles E.
Ramos granted the respondents' motion to dismiss for failure to state a claim, concluding that

Virtu failed to meet the heightened pleading standard for a fraud claim. Virtu then commenced the instant petition for pre-action discovery. Justice Ramos granted Virtu's petition and allowed virtue to conduct limited discovery including: (i) directing the respondents to produce to petitioner all communications between the respondents and representatives of Amarin Corporation, or between the respondents and any other persons regarding Amarin or the clinical trial conducted by Amarin (the **Amarin Clinical Trial**) within the two weeks preceding September 21, 2018, (ii) permitting the petitioner to take a deposition of Mr. Kelly regarding any communications he had during the two weeks preceding September 21, 208 with any persons regarding Amarin or the Amarin Clinical Trial, and (iii) directing the respondents to preserve and not destroy all potentially relevant information concerning the petitioner's claims relating to the sale of Amarin shares, including but not limited to emails, text messages, voice recordings, and call logs relating to Amarin, a certain press release issued by Amarin on September 24, 2018, and the Amarin Clinical Trial.

Virtu now alleges that Spartan and Mr. Kelly have failed to comply with the court's order regarding pre-action discovery and requests leave to conduct a limited forensic examination of (i) Mr. Kelly's laptops, smartphones, and tablets that he used to conduct Spartan business, (ii) Mr. Kelly's notes and records memorializing his calls with certain purchasers, and (iii) Spartan's electronic records reflecting notes of Mr. Kelly's calls with purchasers.

Pursuant to CPLR § 3102 (c), "[b]efore an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order." Pre-action discovery may be used by a prospective plaintiff to preserve evidence or identify

potential witnesses, but it may not be used as a vehicle to determine whether she has a cause of action at all (*Holzman v Manhattan and Bronx Surface Transit Operating Auth.*, 271 AD2d 346 347 [1st Dept 2000]). As a rule, a petitioner must demonstrate that the pre-action discovery sought is material and necessary to a meritorious cause of action (*id.*, 347).

In this case, Virtue argues that counsel for the respondents have played no role in the location and review of documents or in designing the searches applied in responding to Virtu's discovery requests. Rather, Virtu claims that the respondents have "self selected" certain documents for production. Virtu argues that Mr. Kelly acknowledged that he had communicated with certain purchasers via text message, but did not conduct a search for responsive text messages. Nor did Mr. Kelly search his personal notes or produce them, even after he testified that he took notes of his telephone conversation with the purchasers. Further, Virtu argues that the respondents failed to conduct an adequate email search. Virtu alleges, and Spartan and Mr. Kelly do not dispute, that Mr. Kelly only searched his email inbox (*i.e.*, not his sent box or deleted emails) and his search was limited to the term "Amarin." Both Spartan and Mr. Kelly submitted *Jackson* Affidavits detailing the steps taken to locate and produce responsive documents, but Virtu argues that such affidavits are inadequate and demonstrate major deficiencies in the document searches and production undertaken by Spartan and Mr. Kelly.

An email produced by Spartan and Mr. Kelly after discussions with Virtu regarding the deficiencies in their document production did not contain the word Amarin but did contain the shorthand term "AMRN." This email demonstrates that targeted searches using additional relevant search terms such as AMRN very well could have yielded additional documents.

Merely searching the inbox of Mr. Kelly's email account for the term Amarin was not sufficient and falls short of compliance with Justice Ramos' order.

The forensic examination sought by the petitioners in this case would go beyond Justice Ramos' order and would exceed the narrow scope of pre-action discovery permitted by the CPLR. Virtu may not use the limited pre-action discovery authorized by Justice Ramos in the hope that it will uncover sufficient information to determine whether it has a cause of action against the respondents. On the other hand, the respondents have not complied with Justice Ramos' order and their efforts to locate and produce responsive documents have been substantially inadequate. Therefore, Virtu's motion for leave to conduct a forensic examination is denied and Spartan and Mr. Kelly's motion for a protective order is denied. Virtu is directed to provide up to eight search terms to Spartan and Mr. Kelly within two weeks of the date of the decision and order herein and Spartan and Mr. Kelly shall turn over all responsive documents, including any handwritten notes, text messages, personal and corporate emails, and a privilege log, if needed, to Virtu within thirty days after receipt of the search terms.

Accordingly, it is

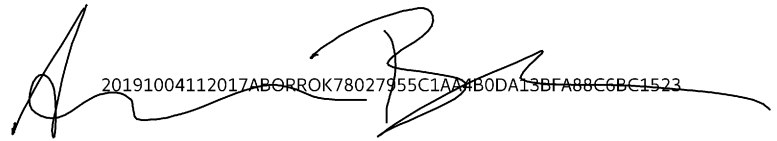
ORDERED that Virtu's motion for leave to conduct a forensic examination is denied; and it is further

ORDERED that Spartan and Mr. Kelly's motion for a protective order is denied; and it is further

ORDERED that Virtu shall produce to Spartan and Mr. Kelly eight search terms within two weeks of the date of the decision and order herein; and it is further

ORDERED that counsel for Spartan and Mr. Kelly shall conduct searches using the eight search terms and shall produce responsive documents, including any handwritten notes, text messages, personal and corporate emails, and a privilege log, if needed, to Virtu within thirty days after receipt of the search terms; and it is further

ORDERED that the parties are directed to appear for a status conference on December 4, 2019, at 11:30 AM (60 Centre St., Room 238).


20191004112017ABORROK78027955C1AA#B0DA15BFA88C6BC1523

10/3/2019
DATE

ANDREW BORROK, 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