

8430985 Can., Inc. v Frydman
2020 NY Slip Op 30352(U)
February 7, 2020
Supreme Court, New York County
Docket Number: 154932/2016
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON

PART

IAS MOTION 37EFM

Justice

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INDEX NO. 154932/2016

8430985 CANADA, INC.,

MOTION DATE 11/15/2019

Petitioner,

MOTION SEQ. NO. 009

- v -

JACOB FRYDMAN, JFURTI LLC, JACOB FRYDMAN 2000
IRREVOCABLE TRUST, MONICA LIBIN 2000
IRREVOCABLE TRUST,

**DECISION + ORDER ON
MOTION**

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 288, 289, 290, 291, 292, 293, 294

were read on this motion for

DISCOVERY

Upon the foregoing documents, petitioner's motion to compel discovery is granted to the extent set forth below.

In this special proceeding, petitioner moves, pursuant to CPLR 3124, for an order compelling respondents Jacob Frydman (Frydman), JFURTI LLC (JFURTI), Jacob Frydman 2000 Irrevocable Trust, and Monica Libin 2000 Irrevocable Trust (together, the Trusts) (collectively, respondents) to provide discovery. Petitioners also move for an order compelling the law firm of Wrobel Markham LLP to file a notice of appearance for the Trusts.

Background

Petitioner commenced this turnover proceeding to collect on a money judgment entered on September 4, 2015 against United Realty Advisors LP (United) in a separate action brought in Supreme Court, New York County (NY St Cts Elec Filing [NYSCEF] Doc No. 277, second amended petition ¶ 1). Petitioner alleges that Frydman was the CEO, Chairman and controlling holder of United, that United subsequently changed its name to First Capital Advisors LP (FCA),

and that Frydman or his affiliated entities sold FCA on September 15, 2015 to nonparty First Capital Real Estate Investments LLC (FCREI) in exchange for a \$2 million capital contribution to FCA (*id.*, ¶¶ 3-4). It is further alleged that Frydman diverted the \$2 million FCA received from the transaction to JFURTI and the Trusts so FCA could escape satisfying petitioner's judgment (*id.*, ¶¶ 5, 10-11, 39 and 82-84).

The compliance conference order dated July 23, 2019 set September 30, 2019 as the date the parties must respond to all discovery and inspection requests and interrogatories (NYSCEF Doc No. 252, affirmation of Andrew J. Ryan [Ryan], exhibit 1 at 1). Petitioner then served upon respondents a first demand for production of documents dated August 8, 2019 and a first set of interrogatories dated August 8, 2019 seeking discovery related to the transaction between FCA and FCREI and records pertaining to Frydman, JFURTI and the Trusts. In their September 20, 2019 response, respondents claimed that petitioner's discovery demands were vague, ambiguous, overbroad or unduly burdensome, or sought documents already in petitioner's possession (NYSCEF Doc No. 255, Ryan affirmation, exhibit 4 at 5-6). Petitioner claims that respondents have not provided their answers to the interrogatories.

Petitioner now moves to compel respondents to furnish documents responsive to item nos. 21, 22, 23 and 24 of its discovery demand and to answer its first set of interrogatories.¹ Respondents oppose the motion on the ground that they have since supplemented their discovery responses and furnished petitioner with all documents in their possession or control and have answered the interrogatories, thereby rendering the instant motion moot. Petitioner, in reply,

¹ Although petitioner failed to tender an affirmation of good faith (*see Molyneaux v City of New York*, 64 AD3d 406, 407 [1st Dept 2009]; *see also* Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a] [2]), the requirements set forth in 22 NYCRR 202.7 [c] are met by way of the parties' correspondence annexed to the motion (*see e.g. Cuprill v. Citywide Towing & Auto Repair Servs.*, 149 AD3d 442, 443 [1st Dept 2017]).

contends that respondents' exchanges are deficient in view of Frydman's deposition testimony in this proceeding, discussed further *infra*.

Discussion

CPLR 3101 calls for full disclosure of all evidence material and necessary in the prosecution or defense of an action. Under CPLR 3124, the court may compel a party to provide discovery, and the party seeking discovery must show that "the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Abrams v Pecile*, 83 AD3d 527, 528 [1st Dept 2011] [internal quotation marks and citation omitted]).

As an initial matter, respondents have not submitted a copy of their discovery or interrogatory responses for the court to examine, nor have they moved for a protective order (*see* CPLR 3122 [a] [1]). When a party has not moved for a protective order, the court's review is limited to whether the demands are "palpably improper" (*Haller v North Riverside Partners*, 189 AD2d 615, 616 [1st Dept 1993]), or seek privileged information (*see Anonymous v High School for Envtl. Studies*, 32 AD3d 353, 358-359 [1st Dept 2006], *rearg denied* 2006 NY App Div LEXIS 12890 [1st Dept 2006]). Respondents have not argued that the demands seek confidential information or are palpably improper.

In any event, the court finds that the discovery petitioner seeks is material and relevant to its claims in this proceeding (*see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [stating that the "test is one of usefulness and reason"]). Item no. 22 in petitioner's discovery demands seeks post-August 17, 2015 documents and communications related to FCA and its debts and insolvency and the consideration FCA received for entering into the transaction with FCREI (NYSCEF Doc No. 253, Ryan affirmation, exhibit 2 at 13-14). Item no. 23 calls for the

production of documents and communications related to any debts owed by the Trusts to Frydman (*id.* at 14). Item no. 24 seeks documents and communications regarding a wire transfer made to JFURTI from FCREI in the amount of \$2,553,554 in January 2016 (*id.* at 14). These items are sufficiently specific as to their subject matter and scope and set the timeframe for respondents to perform a search for responsive documents. The discovery is also relevant and material to petitioner's allegations that JFURTI received the \$2 million payment from FCREI that was meant for FCA, that Frydman controls JFURTI and the Trusts, and that both Trusts are indebted to him (NYSCEF Doc No. 277, ¶¶ 24, 82-83; NYSCEF Doc No. 292, Ryan reply affirmation, exhibit 3 at 209-211). However, item no. 21, which seeks "[a]ny other document and/or communication on or after August 17, 2015 relevant to a claim or defense to the Second Amended Petition or this Action" (NYSCEF Doc No. 253 at 13), is palpably improper because it is vague and overbroad, and any responsive documents could include potentially privileged information. A demand that is vague and overbroad can be deemed palpably improper (*see Lerner v 300 W. 17th St. Hous. Dev. Fund Corp.*, 232 AD2d 249, 250 [1st Dept 1996]).

Regarding petitioner's interrogatories, "[w]here interrogatories submitted are unduly burdensome and prolix as to be oppressive, the appropriate remedy in such circumstances is not judicial pruning but vacatur of the interrogatories in their entirety" (*Mendler v Mendler*, 135 AD2d 469, 470 [1st Dept 1987]). Petitioner acknowledges having received respondents' belated answers, but contends that the answers to item nos. 7, 8, 9, 11 and 12 are deficient. As noted above, respondents have not moved for a protective order nor have they furnished the court with a copy of their responses. Furthermore, the court finds that respondents' answers, submitted with petitioner's reply, are deficient.

Item no. 7 of petitioner's first set of interrogatories seeks the identification of any non-cash consideration received by FCA on the transaction, and item no. 12 seeks the identification of any consideration Frydman or JFURTI received from the transaction (NYSCEF Doc No. 254, Ryan affirmation, exhibit 3 at 9). At his deposition, Frydman ably answered whether FCA received any consideration in exchange for restructuring payment on the transaction between FCA and FCREI (NYSCEF Doc No. 292 at 168). Item no. 8 seeks the identification of the date, recipient bank and account number for payments received under a "Side Letter Note" (NYSCEF Doc No. 254 at 9), and Frydman testified at his deposition that payment had been made (NYSCEF Doc No. 292 at 199-204). Petitioner is entitled to additional responses for item nos. 7 and 8. In view of Frydman's testimony that the Trusts are JFURTI's sole members (NYSCEF Doc No. 256, Ryan affirmation, exhibit 5 at 86), petitioner is entitled to a supplementary response to item no. 9, which seeks an answer as to whether the Trusts or another intermediary holding company owns JFURTI (NYSCEF Doc No. 254 at 9). Item no. 11 calls for the identification of "all documents or communications in respondents' custody or control from September 15, 2015 to June 2, 2016 referencing [petitioner], the Underlying Action, the Judgment and/or whose obligation it was to pay the Judgment at any time during that period" (NYSCEF Doc No. 254 at 10). Respondents objected and stated that "[t]his Request is not proper for an interrogatory and Petitioner is referred to the documents already produced in response to Demand for Documents" (NYSCEF Doc No. 290, Ryan reply affirmation, exhibit 1 at 7). However, the answer appears to contradict Frydman's testimony regarding representations made in writings to him by a nonparty as to which entity would satisfy petitioner's judgment (NYSCEF Doc No. 292 at 122). Thus, petitioner is entitled to a supplemental response to item no. 11 as well.

The court notes that respondents need not create documents responsive to petitioner's demands if such documents do not exist (*see Curran v New York City Tr. Auth.*, 161 AD3d 649, 649 [1st Dept 2018]), nor are they required to produce documents that are not within their possession, custody or control (*see CPLR 3120 [1] [i]*). Nevertheless, to the extent the items sought may be produced, then respondents shall do so within the time prescribed below. To the extent responsive documents do not exist or are no longer in respondents' possession, custody or control, as respondents have claimed, then they shall produce an affidavit from an affiant with personal knowledge detailing the unavailability of the documents, "where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search [was] conducted in every location where the records were likely to be found" (*Henderson-Jones v City of New York*, 87 AD3d 498, 505 [1st Dept 2011] [internal quotation marks and citation omitted]).

Lastly, petitioner moves for an order directing respondents' counsel, Wrobel Markham LLP, to file a notice of appearance. Pursuant to CPLR 320 (a), service of an answer constitutes a formal appearance in a proceeding. Moreover, "a party can also appear informally by, substantially participating in the litigation" (*Matter of Sessa v Board of Assessors of Town of N. Elba*, 46 AD3d 1163, 164 [3d Dept 2007]). In this instance, respondents' service of answers to the amended petitions constitutes a formal appearance (NYSCEF Doc No. 164 at 1; NYSCEF Doc No. 204 at 1). In any event, this Court does not believe that it has the authority to order an attorney to file a notice of appearance.

Accordingly, it is

ORDERED that the branch of petitioner's motion seeking to compel discovery is granted to the extent that respondents shall supplement their responses to item nos. 22, 23 and 24 of

petitioner's first demand for production of documents dated August 8, 2019, together with a privilege log with respect to any responsive documents in accordance with CPLR 3101 (b) and (c), and shall supplement their responses to item nos. 7, 8, 9, 11 and 12 of petitioner's first set of interrogatories dated August 8, 2019, within 30 days after service of a copy of this order with written notice of entry, and the balance of the discovery motion is denied; and it is further

ORDERED that if responsive documents cannot be located, then respondents shall furnish petitioner with a detailed affidavit in conformity with *Henderson-Jones v City of New York* (87 AD3d at 405), discussed above, within 30 days after service of a copy of this order with written notice of entry; and it is further

ORDERED that the branch of petitioner's motion seeking to compel respondents' counsel, Wrobel Markham LLP, to file a notice of appearance is denied.

2/7/2020
DATE

ARTHUR F. ENGORON, 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 type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" 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"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	