

**Schutty v Duffy**

2020 NY Slip Op 30901(U)

March 31, 2020

Supreme Court, New York County

Docket Number: 654206/18

Judge: Barry Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

-----X

JOHN F. SCHUTTY, Plaintiff,

- v -

DR. CHARLES DUFFY, THOMAS BONADIO, DR. JEAN JOSEPH, RICHARD KAPLAN, DAVID KLEIN and DAVID LESSEN,

Defendants. -----X

Table with 2 columns: INDEX NO. (654206/18), MOTION DATE, MOTION SEQ. NO. (003)

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

Plaintiff John F. Schutty commenced this action claiming defendants unfairly deprived him of the true value of his investment in Cerebral Assessment System, Inc. ("CAS")...

In addition to opposition from Dr. Duffy, the Court has received a cross-motion from defendant David Lessen and CAS for a protective order in connection with the Duffy subpoena...

herein and otherwise denied without prejudice to renewal, if appropriate, after depositions should specific relevant documents be identified during the course of party and non-party examinations, as discussed more fully below.

In the initial notice portion of the subpoena, Schutty asserts his belief that Dr. Duffy, as the former CEO of CAS, is in possession of documents related to “Schutty’s investment in CAS, and the sale of CAS, all of which is material and necessary to the prosecution of this action.” The subpoena itself broadly demands production of 15 categories of “all documents, including communications” related to CAS and Dr. Duffy. The topics include not only the finances, operation and sale of CAS, but also topics addressed more directly to Dr. Duffy, such as his duties and compensation as CEO of CAS and any involvement he had in the successor company. The CAS subpoena similarly consists of broadly worded demands for 16 categories of “all documents, including communications” related to the finances, operation and sale of CAS. Information related to investments by, and distributions to, Schutty and the various originally named defendants is also requested.

Plaintiff’s motion is only directed to the Duffy subpoena. Counsel claims that Dr. Duffy’s counsel originally agreed to provide responsive, non-privileged documents, notwithstanding formal objections asserted to the subpoena, but then failed to do so, claiming that the volume of documents responsive to the broad demands was far greater than anticipated. Efforts to resolve the dispute between counsel and with the assistance of the Court at a conference all failed, and leave was granted to file this motion.

Dr. Duffy’s counsel affirms in opposition that he has collected some responsive documents, but production was held in abeyance pending an agreement among counsel as to which of the documents should be produced by CAS, rather than Duffy, and the terms of a

confidentiality order requested by CAS. Counsel vigorously disputes that sanctions are appropriate under the circumstances and maintains his initial objection to the subpoena as overly broad and duplicative in large part of the CAS subpoena. He further asks the Court to award legal fees and vendor costs should Dr. Duffy be compelled to compile and produce the large quantity of documents demanded in the subpoena.

As indicated earlier, defendant Lessen and CAS, represented by the same counsel, have cross-moved for a protective order denying plaintiff's motion to compel. Counsel asserts that both the Duffy and the CAS subpoenas seek confidential and sensitive financial and sales information related to CAS and other information not relevant to the remaining individual claim of fraud against Lessen. Moreover, about half the demands in the two subpoenas are identical, and the remaining demands seek substantially the same information. Meet and confer efforts failed to resolve the dispute, even if the confidentiality agreement had been finalized.

Plaintiff's counsel in reply emphasizes that counsel for Dr. Duffy had agreed to produce documents and then reneged on that agreement. In opposition to the cross-motion by defendant Lessen and CAS, plaintiff's counsel argues that Lessen and CAS have no standing to oppose the motion by plaintiff to compel directed to Dr. Duffy and his subpoena. Counsel further disputes that Lessen and CAS made multiple attempts to resolve document production issues, and she claims the dispute regarding the confidentiality order is a red herring.

The Court finds that all parties are in the wrong here, as the dispute cries out for resolution by counsel with in-depth knowledge of the real issues in the case, and not by court order, as this is not a case of willful noncompliance with narrowly tailored document demands. On the one hand, plaintiff is entitled to documents reasonably related to Schutty's investment in CAS and whether those monies were used for the intended purpose, and counsel for Dr. Duffy

has effectively agreed in principle to that point. On the other hand, Dr. Duffy, defendant Lessen, and CAS are also correct that the Duffy subpoena is overbroad, that the documents demanded are largely duplicative of the CAS subpoena and more properly demanded from CAS (which gives CAS standing on the motion), and that the subpoena demands information not truly relevant to the single remaining fraud claim against Lessen. Therefore, the subpoena cannot be enforced as written, despite the policy favoring broad discovery. And counsel cannot expect the Court in circumstances such as these to parse through a blunderbuss subpoena and blue pencil it.

Accordingly, it is hereby

ORDERED that the motion to compel and the cross-motion for a protective order are granted to the extent of directing counsel for the parties and counsel for Dr. Duffy to proceed as follows. First, within the next ten calendar days, all counsel shall agree on the terms of a confidentiality order. Should counsel be unable to reach agreement, the terms of the standard form Commercial Division Confidentiality Order shall be deemed to be in full force and effect. Second, counsel for Dr. Duffy and counsel for CAS shall agree between themselves as to which of the two parties shall produce the relevant non-privileged information sought by plaintiff. That information shall be limited in time to the period at issue in this case and shall not include at this point in the litigation any information following the sale of CAS, but counsel shall otherwise act in good faith to produce as much information relevant to plaintiff's claims as possible.

Rolling document production shall commence no later than April 30 and be complete by May 29, 2020. Thereafter, assuming some documents are produced, counsel shall proceed with party and non-party depositions. Should any additional responsive non-privileged documents be identified at the depositions, counsel may call for the production of those specific documents. All requests for sanctions, attorney's fees and vendor costs are denied without prejudice to renewal

should circumstances indicate that any party has failed to act in good faith in connection with either of the two subpoenas or related discovery demands.

As this Court has previously indicated, the cost of this litigation is quickly outpacing the value of the case itself. As depositions will more likely than not be delayed by the present health crisis in New York and the world, counsel are urged to continue efforts to amicably resolve this monetary dispute without further expense. A status conference is scheduled for June 16, 2020 at 9:30 a.m. for an update on discovery and settlement and the confirmation of a trial date.

Date: March 31, 2020

*Barry Ostrager*  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION  OTHER

APPLICATION:  GRANTED  SETTLE ORDER  GRANTED IN PART  SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE