

Divine Capital, L.L.C. v Legado Inv. Group, L.L.C.

2020 NY Slip Op 31285(U)

May 5, 2020

Supreme Court, New York County

Docket Number: 650535/2018

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

DIVINE CAPITAL, L.L.C., KB CAPITAL, L.L.C., Plaintiff, - v - LEGADO INVESTMENT GROUP, L.L.C., ROD SIMON, DOES 1-100 XXX Defendant.
INDEX NO. 650535/2018
MOTION DATE 10/23/2019, 12/12/2019
MOTION SEQ. NO. 007 009
DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 009) 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384

were read on this motion to/for AMEND CAPTION/PLEADINGS

Upon the foregoing documents and for the reasons set forth below, (1) the plaintiffs' motion (seq. no. 007), pursuant to CPLR § 3124, to compel (i) Legado Investment Group LLC (LIG) and Rod Simon to produce certain documents and (ii) to compel third party INTL FCStone (FCStone) to comply with a subpoena duces tecum (the Subpoena) dated April 1, 2019, and (2) LIG and Mr. Simon's cross-motion for (i) a protective order and (ii) quashing the Subpoena, are granted in part and denied in part as set forth below, and (3) the plaintiffs' motion (seq. no. 009) to (i) compel Mr. Simon's deposition and (ii) for leave to file a second amended complaint is granted as unopposed.

The facts of this matter are set forth in the court's prior decisions on motion seq. nos. 004 (NYSCEF Doc. No. 258), dated February 21, 2019, and 005 and 006 (NYSCEF Doc. No. 305), dated September 23, 2019, familiarity with which is presumed. In brief, this is a breach of contract action to recover \$4 million that Divine Capital LLC (**Divine**) and KB Capital LLC (**KB Capital**; KB Capital & Divine, together, the **Plaintiffs**) claim they entrusted to LIG as a reserve fund for an investment in a proposed assisted living facility (the **Project**). The court previously denied the Plaintiffs' motions for partial summary judgment (NYSCEF Doc. No. 306 at 4).

Significantly, following the filing of the instant motions, LIG filed a Chapter 7 Bankruptcy Petition on November 18, 2019. Accordingly, pursuant to an Order dated December 16, 2019, the action was stayed as against LIG only (NYSCEF Doc. No. 386).

I. MOTION SEQ. 007

In motion seq. 007, the Plaintiffs move to compel the Defendants to produce all documents responsive to their' First Request for Production of Documents (the **First RFP**) served on July 24, 2018 and their Second Request for Production of Documents (the **Second RFP**), and to compel non-party FCStone to comply with the Subpoena served on it last April. The defendants cross-move for a protective order and to quash the Subpoena, arguing that the information sought by the Plaintiffs is nothing but impermissible prejudgment discovery to which the Plaintiffs are not entitled and, in any event, has nothing to do with the issues of contract interpretation at issue in this action. The Defendants maintain that they have produced all documents responsive to the Plaintiffs' First and Second RFPs except for documents that are either protected by attorney

client privilege or which seek irrelevant financial information about their bank accounts and assets (NYSCEF Doc. No. 332, ¶ 14; NYSCEF Doc. No 333, ¶ 4).

Inasmuch as the motion seeks documents from LIG, the motion is denied as the action against LIG is currently stayed (NYSCEF Doc. No. 386).

With respect to Mr. Simon, the plaintiffs' motion is granted to the extent that Mr. Simon has any documents in his possession concerning any of the following as they are related to the contract interpretation issue raised by the Defendants, based on representations made to the court, and otherwise for impeachment purposes: (i) the CrossFirst Bank Account (requests 5-6, 8, 46-49), (ii) documents related to the New Windsor Project (request 18), (iii) documents related to how Divine's money was used and/or collateralized (requests 10, 25, 42-45 – to the extent such documents are related to Divine's investment only), (iii) any non-privileged communications related to Divine and KB (requests 32-33), (iv) a copy of the most recent version of LIG's website (request 12), (v) communications with third parties, including Michael Zukerman, Thomas Hutchinson, David Wu and/or Merrill Lynch to the extent that they relate to the New Windsor Project or Divine's \$4 million investment only (requests 35 and 37), (vi) documents concerning the PER Account and Line of Credit Account as these documents relate to the Plaintiffs' investment (requests 1-2) (vii) any documents showing payments from KCGI or any other entity controlled by Mr. Simon to Mr. Hutchinson or his company (requests 56-57 and 59-60).

With respect to documents concerning the defendants' experience with commercial real estate (requests 15, 19, and 28), these documents are not relevant to the issues in this action and the Plaintiffs cannot use discovery in this action to belatedly do due diligence on their investment. This should have been done prior to executing the PERA. Likewise, the Plaintiffs are not entitled to documents reflecting the "financial wherewithal and real estate financing experience" of Mr. Simon's other entities (requests 20-24), but they are entitled to know the names of any entities in which he has an interest. Such answer may be provided in the form of an affidavit or interrogatory. Mr. Simon is entitled to a protective order with respect to request 14, which is not relevant.

Inasmuch as the instant motion was filed before the deadline for the documents responsive to the Second RFP were due, the same guidelines apply with respect to the documents that need to be turned over (if those documents have not been turned over already), i.e., the Plaintiffs are entitled to documents concerning the New Windsor Project and their investment, as well to any non-privileged documents concerning the drafting of the agreements at issue here since the defendants have taken the position that the agreements are ambiguous and extrinsic evidence is needed to interpret what the parties intended.

Turning to the Subpoena, the Subpoena seeks documents from FCStone concerning nonparty KCGI, LLC, an LLC of which Mr. Simon was a member, concerning any investment accounts at FCStone in the name of LIG, KCGI, Mr. Simon and Mary Lee Rodgers. The Plaintiffs seek to compel FCStone to respond to the Subpoena by their motion, however it does not appear that the

Plaintiffs ever served FCStone with any notice of their motion as no affidavit of service is provided, and, accordingly, that aspect of their motion is denied with leave to renew.

Mr. Simon also seeks to quash the Subpoena by his cross motion, however he has not demonstrated that he has standing to quash the Subpoena on his own behalf and he has no standing to do so on behalf of any third-party (*Norkin v Hoey*, 181 AD2d 248 [1st Dept 1992]) as the subpoenaed records here are the business records of FCStone (*id.*, citing *United States v Miller*, 425 US 435, 440, 442 [1976]). Accordingly, that branch of the motion and cross-motion relating to the Subpoena are both denied.

I. Motion Seq. 009

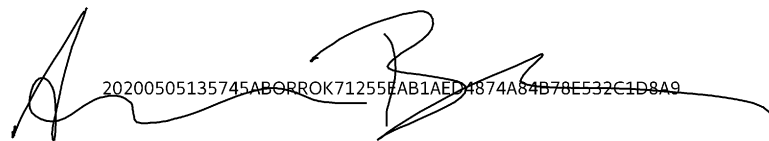
Motion sequence 008 is granted as unopposed. The parties are directed to schedule the deposition of Mr. Simon within the next 90 days or as soon as practicable.

Accordingly, it is

ORDERED that motion seq. no. 007 to compel discovery is granted in part as set forth herein, and Mr. Simon is ordered to produce responsive documents within 45 days of this decision and order, and is otherwise denied, without prejudice to the Plaintiffs moving to compel production of the documents sought from FCStone by Subpoena upon service of a motion to compel on FCStone; and it is further

ORDERED that the defendants' cross motion seq. 007 is granted in part and denied in part as set forth herein, and it is further

ORDERED that the motion (seq. no. 009) to compel and for leave to serve an amended pleading is granted as unopposed, and the Plaintiffs may serve their proposed Second Amended Complaint within 30 days of this Decision and Order in the form attached, except that the action shall remain stayed as against Legado Investment Group, LLC until resolution of its bankruptcy proceedings.


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5/5/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: