

<b>Yunker v GPB Capital Holdings, LLC</b>
2020 NY Slip Op 32121(U)
July 1, 2020
Supreme Court, New York County
Docket Number: 157679/2019
Judge: Andrew Borrok
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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

ADAM YOUNKER, DENNIS SCHNEIDER, CHERYL SCHNEIDER, ELIZABETH PLAZA, PLAZA PROFESSIONAL CENTER INC PFT SHARING,

Plaintiff,

- v -

GPB CAPITAL HOLDINGS, LLC, GPB HOLDINGS, LP, GPB HOLDINGS II, LP, GPB AUTOMOTIVE PORTFOLIO, LP, GPB COLD STORAGE, LP, DAVID GENTILE, MACRINA KGIL, WILLIAM JACOBY, SCOTT NAUGLE, JEFFRY SCHNEIDER, ASCENDANT ALTERNATIVE STRATEGIES, LLC, ASCENDANT CAPITAL, LLC, AXIOM CAPITAL MANAGEMENT, INC.

Defendant.

-----X

INDEX NO. 157679/2019
MOTION DATE 06/29/2020
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 78, 80, 84, 86, 87, 88, 89, 90, 91, 92, 93

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, and for the reasons set forth below, Adam Younker, Dennis Schneider, Cheryl Schneider, Elizabeth Plaza, and Plaza Professional Center Inc. PFT Sharing's (the Limited Partners) motion pursuant to CPLR § 3124 for an order (1) compelling GPB Capital Holdings, LLC (GPB Capital) to permit the Limited Partners to inspect the books and records of GPB Automotive Portfolio, LP, GPB Holdings II, LP, GPB Holdings, LP, GPB Cold Storage, LP, and GPB Waste Management LP (collectively, the GPB Limited Partnerships; GPB Capital together with the GPB Limited Partnerships, collectively, the GPB Parties), (2) compelling GPB Capital to produce certain documents produced by the GPB Limited Partnerships to the SEC, FINRA, the FBI, the Massachusetts Attorney General, and the New

York City Business Integrity Commission in connection with investigations into the sale of the GPB Limited Partnerships (the **Investigations**), and (3) permitting discovery to proceed pursuant to Commercial Division Rule 11(d), is granted in its entirety.

### THE FACTS RELEVANT TO THE MOTION

The Limited Partners are investors in the GPB Limited Partnerships. They filed this putative class action lawsuit (the **Yunker Action**) on behalf of all persons and entities that acquired partnership interests in the GPB Limited Partnerships from GPB Capital, alleging that they were defrauded into purchasing these interests by the GPB Parties, who misappropriated the investors' funds for their own benefit. Subsequently, Peter G. Golder filed a putative class action (the **Golder Action**) in this court under index no. 657232/2019 (NYSCEF Doc. No. 59). Both complaints alleged fraud, breach of fiduciary duty, negligence, breach of contract, and quasi-contractual claims. Pursuant to the Stipulation and Order for Consolidation and Appointment of Lead Plaintiffs and Co-Lead and Liaison Counsel (NYSCEF Doc. No. 61), the Yunker Action and the Golder Action were consolidated and Mr. Yunker, Dennis and Cheryl Schneider, Elizabeth Plaza, Plaza Professional Center Inc. PFT Sharing, and Peter G. Golder were designated as the lead plaintiffs.

Reference is made to a certain Third Amended & Restated Agreement of Limited Partnership (the **LPA**), dated June 30, 2016, by and between GPB Capital, GPB Auto SLP, LLC, and the Limited partners (LPA, NYSCEF Doc. No. 68). Pursuant to Section 6.2 of the LPA, each Limited Partner is given the express right to access the books and records of the GPB Limited Partnerships:

The General Partner will maintain for the Partnership books and records in the form determined by the General Partner. Any Partner may, at its expense and upon providing the General Partner with no less than ten business days' prior written request, have access to such books and records during normal business hours or as designated by the General Partner, all of which the General Partner must keep at the Partnership's principal offices; provided, however, that the Partner exercising such right may not unreasonably interfere with or disrupt Partnership business.

(LPA, NYSCEF Doc. No. 68, § 6.2).

Section 9.5(a) provides:

A Limited Partner's rights to access or receive any information about the Partnership, its assets and the Partnership's affairs . . . are conditioned on such Limited Partner's willingness and ability to assure that the Partnership Information will be used solely by such Limited Partner for purposes reasonably related to such Limited Partner's interest as a Limited Partner, and that such Partnership Information will not become publicly available as a result of such Limited Partner's rights to access or receive such Partnership Information, and each Limited Partner agrees not to use Partnership Information other than for purposes of evaluating, monitoring, or protecting its investment in the Partnership.

(LPA, NYSCEF Doc. No. 64, § 9.5).

Additionally, Section 9.5(d) provides:

Notwithstanding any other provision of this Agreement, with the exception of the tax return information to be provided to each Partner pursuant to this Agreement, the General Partner will have the right not to provide any Limited Partner, *for such period of time as the General Partner in good faith determines to be advisable*, with any Partnership Information that such Limited Partner would otherwise be entitled to receive or to have access to pursuant to this Agreement or the DRULPA if: (i) the Partnership or the General Partner is required by law or by agreement with a third party to keep such Partnership Information confidential; (ii) the General Partner in good faith believes that the disclosure of such Partnership Information to such Limited Partner is not in the best interest of the Partnership or could damage the Partnership or the conduct of the affairs of the Partnership (which may include a determination by the General Partner that such Limited Partner (or any of its equity holders) is disclosing or may disclose such Partnership Information (or may be compelled to disclose such Partnership Information) or has not indicated a willingness to protect Partnership Information from being disclosed (or compelled to be disclosed) and that the potential of such disclosure by such Limited Partner (or any of its equity holders) is not in the best interest of the Partnership or could damage the Partnership or the conduct of the

affairs of the Partnership) or (iii) such Limited Partner has notified the General Partner of its election not to have access to, or to receive, such Partnership Information.

(*id.*, § 9.5 [d]) [emphasis added]).

Further, Section 13.3 provides that Delaware law shall govern the construction of the LPA (LPA, NYSCEF Doc. No. 64, § 13.3).

On December 17, 2019, the Limited Partners made a written request pursuant to Section 6.2 of the LPA for access to the GPB Limited Partnerships' books and records. The GPB Parties denied the request, contending that the Limited Partners had forfeited their rights of inspection by commencing litigation.

### DISCUSSION

The scope of discovery in civil actions is governed by CPLR § 3101 (a), which directs that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” In determining the extent to which matter is material and necessary, courts are to employ a liberal construction to “require disclosure . . . of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). As the Court of Appeals has explained, “[t]he test is one of usefulness and reason” (*id.*). In addition, “discovery determinations are discretionary; each request must be evaluated on a case-by-case basis with due regard for the strong public policy supporting open disclosure” (*Andon v 302-304 Mott Street Assocs.*, 94 NY2d 740, 747 [2000]).

Here, the Limited Partners argue that (i) a stay of discovery is inappropriate in this case because the GPB Parties have not filed motions to dismiss and a stay would needlessly delay the resolution of the claims, (ii) they are contractually entitled to access the books and records of the GPB Limited Partnerships pursuant to Section 6.2 of the LPA, and (iii) the GPB Parties have no legitimate basis for denying the request and withholding the documents previously produced in the Investigations.

The GPB Parties argue that they are not required to provide access because (a) each of the GPB Parties intends to move to dismiss the consolidated complaint and discovery should be stayed pending the outcome of such motions, (b) the Limited Partners are not entitled to access the books and records pursuant to Section 9.5 of the LPA and Delaware law, and (c) the document requests seeking documents produced in connection with the governmental investigations are overly broad and unduly burdensome and the documents sought are not necessarily discoverable in this action. The arguments, however, fail.

Although pursuant to CPLR § 3124(b), “[s]ervice of a notice of motion under rule 3211, 3212, or section 3213 stays disclosure until determination of the motion unless the court orders otherwise”, the Rules of the Commercial Division have the opposite presumption. To wit, Commercial Division Rule 11(d) provides: “[t]he court will determine, upon application of counsel, whether discovery will be stayed, pursuant to CPLR 3214(b), pending the determination of any dispositive motion” (22 NYCRR § 202.70 [11] [d]). Here, a stay of discovery would not serve the interests of judicial economy and would cause significant delay in the resolution of this

matter. In any event, the parties have not yet filed a motion to dismiss. Accordingly, discovery will proceed.

In addition, the Limited Partners are contractually entitled to access the books and records of the GPB Limited Partnerships pursuant to Section 6.2 of the LPA and Section 9.5 does not provide a valid basis for denying access. As discussed above, the express language of Section 6.2 provides that any Limited Partner may access the books and records of the GPB Limited Partnerships upon ten-days' written notice to GPB Capital (LPA, NYSCEF Doc. No. 68, § 6.2) and requires that the Limited Partner seeking access not unreasonably interfere with or disrupt the business of the GPB Limited Partnerships. There is nothing in the LPA that prevents a Limited Partner from accessing the books and records if the Limited Partner has filed a lawsuit on behalf of or against the GPB Limited Partnerships. In addition, any concerns raised by the GPB Parties regarding confidentiality may be addressed by entering into a confidentiality order.

The GPB Parties make the conclusory assertion that the Limited Partners are seeking this disclosure for improper purposes not related to evaluating, monitoring, or protecting their investments, and that allowing the Limited Partners access to the books and records would not be in the best interests of the GPB Limited Partnerships. They argue that their denial of access to the books and records is therefore proper pursuant to Section 9.5(d) of the LPA. This argument, however, is unavailing. The very purpose of this lawsuit and the Limited Partners' request for access to the books and records is to evaluate, monitor, and protect their investments after the GPB Limited Partnerships have been the subject of numerous lawsuits and regulatory investigations, which include allegations of fraud, and the value of the Limited Partners'

investments have plummeted. The GPB Parties' argument that the Limited Partners are seeking access for a purpose other than to protect their investments is unpersuasive.

Similarly, to the extent that the GSB Parties argue denial was proper because pursuant to Section 9.5 of the LPA, the General Partner may limit disclosure if it determines that disclosure would not be in the best interests of the GPB Limited Partnerships and here the GSB Parties limited disclosure as not in the best interests of the GSB Limited Partnership. The argument fails. First, as discussed above, the LPA permits the General Partner to limit disclosure, not to deny access to the books and records wholesale, and only *for such period of time as the General Partner in good faith determines to be advisable*. Here, GPB Capital has not offered any basis for its determination that blocking the Limited Partners from accessing the entire books and records of the GSB Limited Partnerships would be in the GPB Limited Partnerships' best interests or the time in which it has in good faith determined that such limitation is advisable.

To the extent that the GPB Parties rely on *Polak v Continental Hosts, Ltd.* (613 F Supp 153 [SD NY 1985]) for the proposition that the Limited Partners' sole remedy is to bring a demand-denied action in the Delaware Chancery Court, their reliance is also misplaced. In *Polak*, the plaintiff shareholders filed a class action lawsuit alleging violations of Security and Exchange Commission (SEC) Rule 10b-5, as codified at 17 CFR 240.10b-5, promulgated under § 10(b) of the Securities Exchange Act of 1934 (the **1934 Act**) (*id.* at 154) and in that case the court held that there is no right of inspection in the context of Rule 10(b)(5) (*id.* at 157). The court noted that shareholders may make a demand for inspection pursuant to Delaware General Corporation

Law (the **DCL**) § 220, and if the corporation refuses the demand, the sole remedy is to bring a claim in the Delaware Chancery Court (*id.*).

Aside from not being controlling authority, *Polak* has no applicability. First, this is not a 1934 Act case for which this court would not have jurisdiction. Second, the request for inspection in this case was made pursuant to the LPA, not DCL § 220, and nothing submitted to the court at this time indicates that Delaware was contractually designated to be the exclusive forum to adjudicate cases arising from or relating to the LPA.

The GPB Parties' reliance on *Beiser v PMC-SIERRA, Inc.* (2009 Del Ch LEXIS 36 [Del Ch Ct Feb. 26, 2009, No. 3893-VCL]) is similarly misplaced. In *Beiser*, the plaintiff sought the production of the defendant corporation's books and records pursuant to DCL § 220 (*id.* at \*1-2). The plaintiff was also the lead plaintiff in a related federal lawsuit (the **Federal Action**) filed in the United States District Court for the Northern District of California alleging improper stock backdating by the defendant (*id.* at \*2-3). Discovery in the Federal Action had been stayed pursuant to the Private Securities Litigation Reform Act of 1995 (the **PSLRA**) (*id.* at \*1-2). The court denied the request and dismissed the action, reasoning that the plaintiff's sole purpose appeared to be to circumvent the PSLRA's stay of discovery, and the plaintiff therefore failed to meet the "proper purpose" requirement of DCL § 220 (*id.* at \*10-13).

*Beiser* also does not apply to this case. This is not a federal securities action brought under the Securities and Exchange Act of 1933 and inspection is not sought under DCL § 220 as an end

run around the PSLRA (*In re Everquote, Inc. Sec. Litig.*, 65 Misc 3d 226 [Sup Ct NY Cnty 2019]).

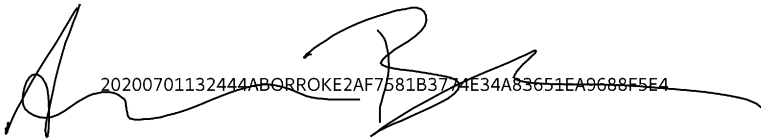
Significantly, irrespective of the Limited Partners' contractual rights set forth in the LPA to access the books and records, disclosure of such books and records is appropriate pursuant to CPLR § 3101 because the disclosure sought is material and necessary to the claims in the consolidated complaint, which include fraud, breach of contract, quasi contractual claims, and breach of fiduciary duty, among other claims. Likewise, the documents previously produced in connection with the Investigations are material and necessary to the claims asserted in the consolidated complaint, and the request cannot be said to be overly broad as it is limited to the documents already produced to regulatory authorities in connection with investigations into the very allegations of fraud and other misconduct that form the basis of the claims in this action.

The GPB Parties also previously argued that they were not required to provide the Limited Partners with access to the books and records until after the consolidated complaint was filed. Putting aside that the argument is entirely without merit, the argument is now moot as the consolidated complaint was filed on June 17, 2020 (NYSCEF Doc. No. 90).

Accordingly, it is

ORDERED that the motion to compel is granted in its entirety, and the defendants shall (i) permit the plaintiffs to inspect the books and records of GPB Automotive Portfolio, LP, GPB Holdings II, LP, GPB Holdings, LP, GPB Cold Storage, LP, and GPB Waste Management LP

within 30 days of the date of this decision and order, and (ii) produce to the plaintiffs all documents produced by the GPB Limited Partnerships to the SEC, FINRA, the FBI, the Massachusetts Attorney General, and the New York City Business Integrity Commission in connection with investigations into the sale of the GPB Limited Partnerships, within 60 days of the date of this decision and order.



20200701132444ABORROKE2AF7581B374E34A83651EA9688F5E4

7/1/2020

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