

**Creditmix Fundo De Investimento Em Direitos
Creditorios Nao Padronizados v Markovits**

2020 NY Slip Op 32976(U)

September 9, 2020

Supreme Court, New York County

Docket Number: 655991/2018

Judge: Andrew Borrok

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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

CREDITMIX FUNDO DE INVESTIMENTO EM DIREITOS
CREDITORIOS NAO PADTRONIZADOS,

Plaintiff,

INDEX NO. 655991/2018

MOTION DATE 09/09/2020

MOTION SEQ. NO. 002

- v -

HERMAN MARKOVITS, NATIONAL OLIMPIA COMERCIO,
IMPORTACAO LTDA.,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for

DISCOVERY.

Upon the foregoing documents, and for the reasons set forth below, Creditmix Fundo De Investimento Em Direitos Creditorios Nao Patronizados' (**Creditmix**) motion to compel Samuel Weisner to comply with Creditmix's discovery demands and to respond to the Information Subpoena served on Mr. Weisner through the Secretary of State on or about September 17, 2019 (the **Information Subpoena**), and the Deposition Notice, dated October 4, 2019 (the **Deposition Notice**) pursuant to CPLR §§ 3124, 3126, 2308, and 5224 is granted in part, and Mr. Weisner's cross-motion for a protective order pursuant to CPLR § 3101 (a) and to quash the Information Subpoena and Deposition Notice pursuant to CPLR § 2304 is granted in part.

I. The Facts Relevant to the Motions

Creditmix is a Brazilian investment fund and the owner of the claims in this action (NYSCEF Doc. No. 3 at 6). Herman Markovits is the controlling partner in co-defendant National Olimpia

Comercio, Importacao Ltda (**National Olimpia**) (NYSCEF Doc. No. 4, ¶ 12). Mr. Wiesner is a nonparty respondent to this proceeding and a current member of nonparty entities 1423 LLC (**1423 LLC**), and 1421-1423 57th Street Corp. (**57th Street Corp.**) (NYSCEF Doc. No. 61, Wiesner Aff., ¶ 1).

In late 1999, Mr. Markovits was convicted of arson in Brazil for burning down a warehouse containing materials he had pledged as collateral for certain loans, purportedly in an attempt to recover on an insurance policy. Following litigation spanning nearly two decades, Mr. Markovits' current creditor, Creditmix, obtained final, enforceable judgments against Mr. Markovits from the Brazilian courts (the **Brazilian Judgments**) (NYSCEF Doc. No. 3 at 5). Mr. Markovits has since fled Brazil. While Mr. Markovits is believed to be residing in Israel (*see* NYSCEF Doc. No. 43), his creditors believe he may still have assets in New York (NYSCEF Doc. No. 4, Verona Aff., ¶ 5).

On December 3, 2018, Creditmix filed a motion for summary judgment in lieu of complaint pursuant to CPLR §§ 3213 and 5304 to domesticate the Brazilian Judgments against Mr. Markovits and National Olimpia. By decision and order, dated June 24, 2019, the court granted Creditmix's motion without opposition (NYSCEF Doc. No. 38). On December 17, 2019, the Clerk of the Court entered judgment in favor of Creditmix and against Mr. Markovits and National Olimpia in the sum of \$8,179,471.52 (NYSCEF Doc. No. 43). Creditmix now seeks discovery in aid of execution of the judgment.

Creditmix engaged a private investigation firm, Exiger, to identify and trace Mr. Markovits' assets (NYSCEF Doc. No. 46, ¶ 3). Exiger identified Mr. Wiesner as a potential source of information, and prepared a report, dated August 30, 2019, explaining his connection to Mr. Markovits (the **Exiger Report**) (NYSCEF Doc. No. 68). Mr. Wiesner denies having any knowledge or information regarding Mr. Markovits (NYSCEF Doc. No. 61).

The Exiger Report, however, indicates that Mr. Wiesner is a member of 1423 LLC and 57th Street Corp. and is also the nephew of Zigmund Brach (NYSCEF Doc. No. 46, Appleton Aff., ¶ 3), who was the director, president, and registered agent for an entity known as 138 Loop, Inc. (**138 Loop**) (NYSCEF Doc. No. 68 at 7). The Exiger Report states that 138 Loop gave Mr. Markovits a mortgage on the property located at 1421 57th Street which was satisfied in 2007 (*id.*). The Exiger Report also indicates that in approximately 1999, pursuant to a certain spreader agreement (the **Spreader Agreement**), Mr. Markovits used the property located at 1421-1423 57th Street as a collateral for a mortgage on a building located at 1714-1716 44th Street (*id.* at 8). 1421-1423 57th Street is owned by 1423 LLC (NYSCEF Doc. No. 69, Brach tr. at 33, 35-37).

Based on this information, Creditmix served the Information Subpoena on Mr. Weisner seeking information about Mr. Markovits's assets, the flow of proceeds from his investments, the sale or transfer of his real estate holdings, and any business dealings that Mr. Weisner may have had with Mr. Markovits (NYSCEF Doc. No. 47). Creditmix also served the Deposition Notice on Mr. Weisner, noticing a deposition for November 11, 2019 and requesting the production of certain documents, including:

Any and all records of the assets of 1423 LLC, whenever held, the disposition of the assets, interests and financial holdings and transactions of this entity, including,

but not limited to, any and all transactions, sales, transfers, purchases, bank accounts, in favor of, in the name of, on behalf of, Herman Markovits and/or National Olimpia company, or any individual, entity, company, limited partnership, or agent acting on Mr. Markovits' behalf;

Any and all records of 1421-1423 57th Street Corporation and any of its holdings, assets, transfers, interests in this entity by, on behalf of, for, or from Mr. Herman Markovits and/or National Olimpia Company, or any company or entity, or individual, acting on Mr. Markovits' behalf, including any counterparties.

(NYSCEF Doc. No. 48).

On January 14, 2020, Creditmix moved pursuant to CPLR §§ 3124, 3126, and 2308 to compel Mr. Wiesner to comply with the Information Subpoena and Deposition Notice and for sanctions (NYSCEF Doc. No. 45). On February 19, 2020, Mr. Wiesner filed a cross-motion to quash the Information Subpoena and Deposition Notice pursuant to CPLR § 2304 and sought a protective order under CPLR § 3103(a) (NYSCEF Doc. No. 59).

II. Discussion

New York law favors broad post-judgment discovery in aid of execution of a judgment (*B & M Kingstone, LLC v Mega Intl. Com. Bank Co., Ltd.*, 131 AD3d 259, 266 [1st Dept 2015]). Pursuant to CPLR § 5223, a judgment creditor “may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving [a subpoena] upon any person.” As the First Department has observed, ‘the public policy is to put no obstacle in the path’ of those seeking to enforce a judgment” (*U.S. Bank Nat. Assoc. v APP Intl. Fin. Co.*, 100 AD3d 179, 183 [1st Dept 2012], quoting *Siemens & Halske GmbH. v Gres*, 77 Misc 2d 745, 745 [Sup Ct, NY County 1973]).

CPLR § 5224 allows a judgment creditor to serve three kinds of subpoenas: (1) a subpoena requiring attendance at a deposition, (2) a subpoena duces tecum, and (3) an information subpoena. A judgment creditor may serve an information subpoena on an individual or entity other than the judgment debtor “only if the judgment creditor or the judgment creditor’s attorney has a reasonable belief that the party receiving the subpoena has in their possession information about the debtor that will assist the creditor in collecting [the] judgment” (CPLR §5224 [3] [i]). An information subpoena served on an individual or entity other than the judgment debtor must contain a certification, signed by the judgment creditor’s attorney, stating:

I HEREBY CERTIFY THAT THIS INFORMATION SUBPOENA COMPLIES WITH RULE 5224 OF THE CIVIL PRACTICE LAW AND RULES AND SECTION 601 OF THE GENERAL BUSINESS LAW THAT I HAVE A REASONABLE BELIEF THAT THE PARTY RECEIVING THIS SUBPOENA HAS IN THEIR POSSESSION INFORMATION ABOUT THE DEBTOR THAT WILL ASSIST THE CREDITOR IN COLLECTING THE JUDGMENT.

(*id.*).

If an information subpoena served by the judgment creditor on an individual or entity other than the judgment debtor does not contain the required certification, it is deemed null and void and the party receiving the subpoena may move to quash the subpoena in the court that made the underlying judgment (*id.*, §§ 5224 [3] [ii], [iii]).

Creditmix argues that its motion to compel should be granted and Mr. Weisner’s cross motion should be denied because it has a good faith basis for seeking discovery from Mr. Weisner based on the possible business relationships between Mr. Markovits, Mr. Weisner, and the entities owned by Mr. Weisner and his family. Creditmix argues that there is evidence that Mr.

Markovits received the proceeds from the sale of real estate from these entities and, pursuant to the Spreader Agreement, used properties owned directly or indirectly by Mr. Weisner as collateral for a mortgage, and it is therefore entitled to seek discovery to trace those proceeds and to obtain additional information concerning the underlying transactions. In addition, Creditmix argues that, pursuant to CPLR § 2214(b), opposition papers and any notices of cross-motions were due on January 27, 2020, seven days prior to February 3, 2020, the return date of motion to compel, and Mr. Markovits' cross-motion and opposition papers were not filed until February 19, 2020. Accordingly, Creditmix argues that court should not consider Mr. Markovits' opposition papers and his cross-motion should be denied as untimely.

In his opposition papers to Creditmix's motion to compel, and in support of his cross-motion, Mr. Weisner argues that Creditmix's Information Subpoena and Deposition Notice amount to nothing more than a "fishing expedition" against a non-party with no relationship to any of the parties and no relevant information. Mr. Weisner argues that Creditmix's demands are overbroad and unduly burdensome, and that they seek documents that are irrelevant and confidential. In addition, Mr. Weisner argues that the Information Subpoena does not contain the required certification pursuant to CPLR § 5224 and his cross-motion to quash should therefore be granted.

As an initial matter, the Information Subpoena fails to include the certification as required under CPLR § 5224. The Information Subpoena is, therefore, null and void and the portion of Mr. Weisner's cross-motion seeking to quash the Information Subpoena is granted (CPLR §§ 5224

[3] [ii], [iii]). Creditmix may re-serve the Information Subpoena with the requisite language within 30 days of the date of this decision and order.

To the extent that Creditmix argues that the cross-motion should be denied as untimely, the court notes that Mr. Weisner's counsel requested an extension of time to oppose Creditmix's motion to compel and to file a cross-motion on February 3, 2020, stating that his office needed additional time due to, among other things, preparing for trial in another matter. Mr. Weisner filed his opposition and cross-motion before the court ruled on his request for an extension of time. Because the delay in filing was a result of law office failure and Mr. Weisner's cross-motion is meritorious because, among other things, the Information Subpoena is facially deficient and null and void as a matter of law, the court grants an extension of time to file the opposition and the cross-motion pursuant to CPLR §§ 2004 and 2005.

However, the information sought by Creditmix in the Deposition Notice is material and necessary to enforcing the judgment (*see* NYSCEF Doc. No. 47). Mr. Wiesner's contentions that the materials sought are irrelevant, pertain only to personal assets, and have no relation to Mr. Markovits are unconvincing (NYSCEF Doc. No. 65 at 4). Based on the information revealed in the Exiger Report, it is likely that Mr. Wiesner may have information regarding Mr. Markovits or his assets. The Exiger Report identifies key financial transactions involving unconventional property transfers between Mr. Markovits, Mr. Wiesner, and Mr. Brach, all of which cannot be explained without information as to the underlying transactions and the ownership structure of 57th Street Corp. (*see* NYSCEF Doc. No. 68).

Mr. Weisner flatly denies any knowledge of Mr. Markovits or his assets. More interesting than what Mr. Weisner says in his opposition papers, however, is what Mr. Weisner does not say. Mr. Weisner does not explain why the Spreader Agreement with Mr. Markovits extended to properties owned by Mr. Weisner's companies if, as Mr. Weisner claims, he has no connection whatsoever with Mr. Markovits. This simply defies logic and, in any event, requires explanation.

Ultimately, the information requested implicates financial transactions that Mr. Markovits may well have used to conceal or transfer his assets to defraud potential creditors—the gravamen of the CPLR's mandate for disclosure of all material relevant to a judgment's enforcement. These requests are not unfairly burdensome to Mr. Wiesner, and Creditmix is entitled to take Mr. Weisner's deposition to ask him about these transactions and any information that he might have regarding Mr. Markovits.

Therefore, Creditmix's motion to compel is granted in part to the extent that Mr. Weisner shall produce documents responsive to Creditmix's document requests set forth in its Deposition Notice and Mr. Weisner shall appear for a deposition within 60 days of the date of this decision and order, and Mr. Weisner's cross-motion for a protective order and to quash the information subpoena and Deposition Notice is granted in part to the extent that the information subpoena is quashed.

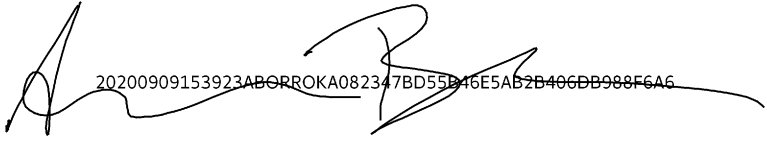
Accordingly, it is

ORDERED that Creditmix’s motion to compel Samuel Weisner to comply with Creditmix’s discovery demands and respond to the Information Subpoena and Deposition Notice is granted in part to the extent that Mr. Weisner shall produce documents responsive to Creditmix’s document requests set forth in its Deposition Notice and shall appear for a deposition within 60 days of the date of this decision and order ; and it is further

ORDERED that Samuel Weisner’s cross-motion for a protective order pursuant to CPLR § 3101 (a) and to quash the Information Subpoena and Deposition Notice pursuant to CPLR § 2304 is granted in part to the extent that the Information Subpoena is quashed; and it is further

ORDERED that Creditmix may re-serve the Information Subpoena with the required certification within 30 days of the date of this decision and order.

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ANDREW BORROK, J.S.C.

09/09/2020
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE