

Riemer & Braunstein LLP v Sutton
2020 NY Slip Op 33501(U)
October 19, 2020
Supreme Court, New York County
Docket Number: 653339/2017
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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RIEMER & BRAUNSTEIN LLP,

Plaintiff,

- v -

ISAAC SUTTON, BLUCO ENERGY LLC, TARSIER LTD,
TARSIER ENERGY LTD, GOCOM CORPORATION,

Defendants.

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INDEX NO. 653339/2017

MOTION DATE 10/25/2019

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 94, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106 were read on this motion to/for DISCOVERY.

Plaintiff law firm served subpoenas to defendants in an attempt to enforce a judgment for unpaid legal fees and costs arising from its representation of defendants BluCo Energy LLC and GoCom Corp. in an unrelated matter. Defendants ignored the subpoenas. Plaintiff moves pursuant to CPLR 3124 to compel defendants to produce documents responsive to plaintiff's demands for documents and to provide information requested in plaintiff's interrogatories. Defendants opposes plaintiff's motion.

BACKGROUND

On March 30, 2015, plaintiff represented BluCo Energy, LLC (BluCo) and GoCom Corp. (GoCom) in a litigation against non-party Vantage Commodities Financial Services, LLC and related entities (collectively, Vantage) with respect to Vantage's actions to enforce a loan made to BluCo (NYSCEF # 1, complaint at ¶¶ 18-20, 22). Defendant Isaac Sutton was the Chief Executive Officer of BluCo, GoCom, Tarsier Ltd. (Tarsier), and Tarsier Energy Ltd. (collectively, the corporation defendants). According to the complaint, Vantage issued BluCo a loan in exchange for 100% of the membership interest in BluCo as collateral for the loan (*id.* at ¶ 19).

On October 19, 2015, BluCo, GoCom and Vantage settled and entered into the Settlement Agreement, which plaintiff helped negotiate (*id.* at ¶23). According to the terms of the Settlement Agreement, Vantage was to transfer 100% of its membership interest in BluCo to GoCom. In September 2015, prior to finalizing the Settlement Agreement, GoCom and Huayue Electronics Inc. (later renamed Tarsier)

entered into the Interest Purchase Agreement, wherein GoCom agreed to transfer 100% of the membership interest in BluCo to Tarsier in exchange for stock in Tarsier (the BluCo transfer). According to plaintiff, Tarsier's stock has no marketable value.

Plaintiff claims that despite performing its obligations under its agreement to represent BluCo and GoCom against Vantage, BluCo and GoCom failed to pay plaintiff's legal fees and cost in the amount of \$120,225.75. To collect its fees against BluCo and GoCom, plaintiff commenced an action in the Supreme Court, New York County, entitled *Riemer & Braunstein LLP v GoCom Corp.*, Index No. 654299/16. On February 2, 2017, a default judgment was entered against GoCom in plaintiff's favor in the amount of \$121,474.18, plus interest. Plaintiff commenced this action to enforce the judgment against Sutton and the corporation defendants alleging that defendants fraudulently conveyed GoCom's assets thereby frustrating plaintiff's attempt to enforce the judgment.

Plaintiff seeks documents responsive to request nos. 1-6, 9-10, 12-14, 16-19, 23-26, 29-44, 46-55, and 59-71 contained in plaintiff's First Request for the Production of Documents to the Corporation defendants, dated November 15, 2019, and full responses to interrogatory nos. 11, 12, 15, 17-22, 27-34, and 37-40 contained in plaintiff's First Set of Interrogatories to the Corporation defendants, dated November 18, 2018. Plaintiff also moves to compel Sutton to produce all documents responsive to plaintiff's First Request for the Production of Documents to Sutton, dated November 15, 2019, and to fully respond to plaintiff's First Set of Interrogatories to Sutton, dated November 18, 2018. Plaintiff indicates that except for the request for Sutton's tax returns, the two document demands are identical in substance.

Plaintiff contends that the discovery sought is relevant to its claims under the New York's Debtor and Creditor Law (DCL) §§ 271, 273, and 276. Specifically, plaintiff contends that the document demands and interrogatories relate to plaintiff's claims that: GoCom did not receive fair consideration from Tarsier for the transfer of BluCo (DCL § 273); the salable value of GoCom's assets after the transfer to Tarsier was and continues to be less than the amount to pay GoCom's liability on its then existing debts (DCL § 271); and the transfer was made with the intent to hinder and/or delay creditors such as plaintiff (DCL § 276). Plaintiff also contends that the discovery is relevant to his claim that Sutton aided and abetted the alleged fraudulent conveyance and that the corporation defendants are alter-egos of each other and/or Sutton.

In opposition, defendants submit Sutton's affidavit attesting that he is not in possession of any documents responsive to request nos. 1-2, 5-6, 9-10, 14, 16, 19, 23, 25-24, 46, 48-58, and 60-68. Defendants add that request nos. 29-39, 48-58 and 60-68 are overbroad. Defendants argue that interrogatory nos. 15, 17, 18-19, 27-30, 32-

34, and 37-40, and request nos. 66-71 concern non-party companies and that documents related to those companies are overbroad and irrelevant to plaintiff's claims. Defendants assert that Sutton has produced all documents in his possession that are responsive to interrogatory nos. 11-12 and 20-22.

DISCUSSION

CPLR § 3101(a) requires that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” The term “material and necessary” is to be given a liberal interpretation in favor of the disclosure of “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity,” and that “[t]he test is one of usefulness and reason” (*Allen v Cromwell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]).

Request nos. 1-2 seek documents and communication by defendants concerning the Interest Purchase Agreement and the sale of any asset and/or the acquisition of any asset. These requests are relevant to whether the GoCom received fair consideration for the BluCo transfer; whether BluCo was left insolvent as a result of the transfer; and the location of the corporation defendants' assets.

Request nos. 3-6 seek documents and communications regarding GoCom's creditors, and its assets and liabilities before and after the BluCo transfer. Request no. 14 seeks all documents and communication concerning defendants' answer that “GoCom was insolvent before the sale,” which is clearly relevant to plaintiff's insolvency claim. Document requests 16-19 and 46 seek the corporation defendants' financial statements, banking related documents, and tax returns. Request nos. 47-53, 58-62, and 64-65 seek documents and communications involving the corporation defendants' assets and liabilities, including any promissory note held by and debt owed to them; all the property and securities they own or previously owned; employment contracts and related documents; compensation; obligations and operating expenses; and any lawsuit in which they were a party. These requests are relevant to plaintiff's claim that GoCom was left insolvent as a result of the BluCo transfer and the location of the corporation defendants' assets. Notably, defendants had agreed to produce the corporation defendants' tax returns, GoCom's financial statements, and documents concerning GoCom's solvency but have yet to produce those documents (NYSCEF # 88, plaintiff's request for the production of documents, 14, 16-18).

Request nos. 12-13 seek documents and communications concerning paragraph 48 of the answer that states “GoCom received a considerable amount of valuable marketable Tarsier stock as compensation” for the BluCo transfer. These requests are relevant to plaintiff's claim that there was no fair consideration for the BluCo transfer; plaintiff's alter-ego claim; and whether BluCo was left insolvent as

a result of the transfer.

Request nos. 23-26 seek documents and communications concerning the corporation defendants' formation; they include the corporation filing documents with any government body and the identity of the corporation defendants' past and present shareholders and officers. These requests are relevant to plaintiff's insolvency and alter-ego claims.

Request nos. 9-10 seek documents and communications concerning the approval of the Interest Purchase Agreement and the BluCo transfer by GoCom's board of directors and/or Huayue's board of directors, and documents concerning communications of the approval of those transfers. These requests seek documents relevant to plaintiff's alter-ego claim. Although defendants have already agreed to produce documents concerning the Interest Purchase Agreement and documents concerning the formation of the corporation defendants, they have failed to furnish those documents (*id.* at 10, 24).

Request nos. 29-39 seek documents and communications between and among the corporation defendants and Sutton concerning the sale and purchase of assets; the transfer of ownership of assets; the agreements to transfer assets; the management of corporation defendants; the installation of officers/directors of the corporation defendants; and the agreements between the corporation defendants and past or present officers. These requests are relevant to plaintiff's fraudulent conveyance claim, alter-ego claim, and the location of defendant's assets. Defendants have agreed to produce documents concerning the transfer of assets by the corporation defendants (*id.* at ¶30)

Plaintiff's Request nos. 67-71, which seek, among other things, documents, communications, and agreements concerning non-parties VALO Smart City, Starinvest Group and Savwatt USA, is denied as overbroad and irrelevant. Plaintiff fails to demonstrate how requests seeking documents exclusively regarding those companies will be useful in the instant litigation. Also overbroad is plaintiff's request no. 44 which seeks all documents or communications concerning disbursements received or paid by any of the corporation defendants from 2011-2018.

As to requests nos. 1-2, 5-6, 9-10, 12-14, 16, 19, 23, 25-26, and 46, Sutton claims that he does not have these document in his possession. Sutton's assertion fails to describe the search performed to locate the documents or whether the corporation defendants are in possession of the documents. Defendants also claims they do not have any records responsive to request no. 24, which seeks any filings with any local, state or federal government concerning the corporation defendants.

In the event that defendants are unable to locate the documents concerning the requests in the preceding paragraph and any other documents defendants are ordered to produce pursuant to this order, defendants shall provide:

“[a]n affidavit from the custodian of records setting forth, at a minimum (1) the qualifications of the affiant; (2) a description of the diligent and reasonable efforts made to locate and produce such records; (3) a meaningful explanation as to why such records are not now available; (4) the identity of the person generating the records and persons in the authorized chain of custody, and if unknown, an explanation should be provided; (5) the identity of the last known possessor of the records, and, if unknown, an explanation should be provided; (6) the locations where such records were kept; and (7) copies of any applicable document retention policies.”

(*Roland's Elec., Inc. v USA Illumination, Inc.*, 90 AD3d 483, 485 [1st Dept 2011])c

As for plaintiff's request for Sutton's personal tax returns, plaintiff fails to “[m]ake a strong showing of necessity and demonstrate that the information contained in the returns is unavailable from other sources” (*Williams v New York City Hous. Auth.*, 22 AD3d 315, 316 [1st Dept 2005]). Plaintiff does not demonstrate that the information sought – documents concerning payments made to Sutton or his family, and profits and losses of the corporation defendants – are not obtainable from any other source.

The branch of plaintiff's motion to compel full responses to paragraphs numbered 11-12, 20-22, 31, and 40 contained in plaintiff's First Set of Interrogatories to the corporation defendants, dated November 18, 2018, is granted. Here, plaintiff seeks banking information related to the corporation defendants; documents concerning loans made to non-party companies; documents concerning assets transferred to other companies and/or between the corporation defendants; and the addresses of the corporation defendants. These interrogatories are relevant to plaintiff's claims regarding fair consideration, insolvency, and the location of assets.

Interrogatory nos. 15, 17-19, 29-30, 33-34, and 37-39 are overbroad to the extent they seek information from the non-party companies. At this stage, plaintiff has not presented sufficient basis to seek the information. Thus, defendants are required to furnish responses to these interrogatories (nos.15, 17-19, 29-30, 33-34, and 37-39) only to the extent they seek documents concerning defendants only.

In response to document request nos. 50, 54-57, 63, and 66 and interrogatory nos. 27, 28, and 32, defendants indicate that there are no responsive documents. Other than stating that defendants should be in possession of responsive


documents, plaintiff does not assert a basis for further action on these items at this time. Thus, this branch of plaintiff's request is denied.

Accordingly, it is hereby ORDERED that the branch of plaintiff's motion to compel responses to plaintiff's First Request for the Production of Documents to the corporation defendants dated November 15, 2019, is granted to the extent that defendants shall furnish supplemental responses to request nos. 1-2, 3-6, 9-10, 12-14, 16-19, 23-26, 29-39, 46-53, 58-62, and 64-65, and responses to the corresponding requests contained in plaintiff's First Request for the Production of Documents to Sutton, dated November 15, 2019, within forty-five days (45); it is further

ORDERED that the branch of plaintiff's motion to compel responses to plaintiff's First Set of Interrogatories to the Corporation defendants, dated November 18, 2018, is granted to the extent that defendant shall provide the information requested in interrogatory nos. 11-12, 20-22, 31, and 40, and fully respond to the corresponding interrogatories contained in plaintiff's First Set of Interrogatories to Sutton, dated November 18, 2018, within forty-five (45) days; it is further

ORDERED that a conference shall take place on December 16, 2020 at 10:30 a.m.; and it is further

ORDERED that plaintiff shall serve a copy of this order upon all parties with notice of entry within fourteen (14) days of entry.

<u>10/19/2020</u> DATE	 MARGARET A. CHAN, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE