

<b>Bykov v United Elite Group Inc.</b>
2021 NY Slip Op 30220(U)
January 15, 2021
Supreme Court, New York County
Docket Number: 655469/2017
Judge: Margaret A. Chan
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. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

-----X

ILYA BYKOV,

Plaintiffs,

- v -

UNITED ELITE GROUP INC., PREMIUM CONCEPT DESIGN CORP., TOLIB MANSUROV, ALISHER FAHRI, DSD GROUP D/B/A DSD CONSTRUCTION CO. INC., XYZ CORP., ABC INC., JOHN DOE, JANE DOE

Defendants.

-----X

INDEX NO. 655469/2017
MOTION DATE 09/29/2020
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 69, 70, 71, 72, 73, 74, 75, 76, 80, 85, 86, 87, 88

were read on this motion to VACATE.

Defendants United Elite Group, Inc. ("United"), Tolib Mansurov, and Alisher Fahri (collectively, "the United defendants") move pursuant to CPLR 2222(1) to vacate this court's discovery orders dated July 24, 2020 and September 17, 2020. Plaintiff oppose the motion, which is granted in part and denied in part.

BACKGROUND

This action arises out of an agreement dated April 13, 2015 ("the Agreement"), between plaintiff and the United defendants to uninstall, store, and re-install certain closet doors in connection with renovation work at plaintiff's residence. United is a New York corporation performing construction and design services, and Mansurov and Fahri are officers and shareholders of United. Defendant Premium Concept Design Corp ("Premium") allegedly agreed, in exchange for \$3,600, to uninstall the closet doors, store the doors, and reinstall them after completion of the renovations, and allegedly subleased the unit where the closet doors were stored from defendant DSD Group d/b/a DSD Construction Co, Inc. ("DSD").

After the closet doors were destroyed in a fire on February 20, 2017, at the facility where they were stored, plaintiff commenced this action asserting claims for breach of contract, negligence, unjust enrichment, and fraud and seeking damages in the amount of \$34,888.30.

1 By decision and order dated December 1, 2020, the court granted plaintiff's motion for a default judgment against Premium as to liability on the breach of contract claim against it.

The discovery at issue on this motion relates to plaintiff's allegations seeking to pierce the corporate veil to hold each of the United defendants liable for the wrongdoing of the other. Specifically, the United defendants seek to vacate orders requiring them to respond to following requests in the plaintiff's notice of discovery and inspection dated January 14, 2020, which seek for the period from January 1, 2009 through the date of the response:

"14) Copies of all certificates of incorporation, share certificates, resolutions, shareholder agreements corporate minutes, and by-laws pertaining to Defendant United, 15) Copies of all documents evidencing the shareholders, officers, owners, and directors of Defendant United, 16) Copies of all certificates of incorporation, share certificates, resolutions, corporate minutes, and by-laws pertaining to Defendant Premium. 17) Copies of all documents evidencing the shareholders, officers, owners, and directors of Defendant Premium. 18) With respect to each account to which Defendant United is a title holder, produce i) all bank statements; ii) all cancelled checks; iii) all records of deposit; iv) all records of withdrawals; v) all loan agreements; and vi) and any and all wire transfer receipts; 19) With respect to each account to which Defendant Premium is a title holder, produce i) all bank statements; ii) all cancelled checks; iii) all records of deposit; iv) all records of withdrawals; v) all loan agreements; and vi) and any all wire transfer receipts. 20) With respect to each account to which Defendant Mansurov is a title holder, produce i) all bank statements; ii) all cancelled checks; iii) all records of deposit; iv) all records of withdrawals; v) all loan agreements; and vi) and any all wire transfer receipts. 21) With respect to each account to which Defendant Fahri is a title holder, produce i) all bank statements; ii) all cancelled checks; iii) all records of deposit; iv) all records of withdrawals; v) all loan agreements; and vi) and any all wire transfer receipts. 22) Copies of all federal, state, and city tax returns pertaining to i) Defendant United; ii) Defendant Premium; iii) Defendant Mansurov; and iv) Defendant Fahri.

(NYSCEF # 72).

The United defendants also challenge the orders directing them to respond to interrogatory 12 which requests that the United defendants:

"12) Identify each and every bank account in which i) Defendant Mansurov; ii) Defendant United; iii) Defendant Premium; and/or iii) Defendant Fahri held title during the Applicable Time Period (i.e. from January 1, 2009 through the date of the response). As to each, set forth i) the name of the bank; ii) the account number; iii) the dates when such account was held; and iv) all title holders to the account. Provide the names, physical addresses, email addresses, and telephone numbers of each."

(NYSCEF # 73).

The United defendants object to these requests for documents and interrogatories as, inter alia, "overbroad, vague, overly burdensome, ...irrelevant, immaterial or

inadmissible...” As to the tax returns sought by plaintiff, the United defendants contend that the returns are not discoverable as plaintiff has not shown that the information in the returns cannot be obtained from other sources.

On January 15, 2020, the parties appeared for a status conference, wherein the United defendants were directed to respond to plaintiff’s January 14, 2020 demand for discovery and inspection and interrogatories within thirty days (NYSCEF # 51). On March 4, 2020, defendants were further directed to serve “responses and responsive documents to plaintiff’s [discovery and inspection] and interrogatories dated [January 14, 2020]” (NYSCEF # 53). At a telephone conference on May 13, 2020, defendants were again directed to respond to plaintiff’s January 14, 2020 demands (NYSCEF # 56).

At a conference on June 17, 2020, the United defendants were directed to serve “verified responses to plaintiff’s January 14, 2020 Notice of Discovery and Inspection (NYSCEF # 48) and Interrogatories of the same date (NYSCEF # 62), within thirty days.” On June 22, 2020, the United defendants provided responses to demands and interrogatories, but failed to provide the verification by the individual defendants.

On July 22, 2020, the parties appeared for a telephone conference with the court to address the United defendants’ responses to plaintiff’s January 14, 2020 demand for discovery and inspection and interrogatories, and the court directed the United defendants’ to:

“ [2.] [s]upplement their responses to plaintiff’s January 14, 2020 Notice for Discovery and Inspection and Interrogatories, to comply with CPLR 3120, including to indicate whether those defendants are in “possession, custody or control” of the demanded items and responses, within thirty days

....

[3.] [f]urnish a verification of their responses to plaintiff’s January 14, 2020 Notice for Discovery and Inspection and Interrogatories, by the parties, not attorneys, before a notary public, within thirty days;

....

[4.] [p]roduce documents responsive to paragraphs 4, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, and 25, within thirty days. The court has determined that the discovery sought by the aforementioned paragraphs are relevant to the prosecution of this action;

....

[5.] [f]urnish responses responsive to the Interrogatories dated January 14, 2020, paragraphs 2, 3, 7, 11, and 12, within thirty days. As for paragraph 2, United Defendants shall include the identity, including names and addresses, of any and all the witnesses who described the conditions discussed in paragraphs 8 and 9. As for paragraph 7, the United Defendants shall provide the full name and address of “Mr. Abdul” and what work he performed. As for paragraph 3, the United Defendants shall indicate the relevant time frames”

(NYSCEF # 66, July 22, 2020 order).

At the September 17, 2020 telephone conference, the court determined that the United defendants failed to furnish the documents and responses as ordered in the court's July 24, 2020 order, and ordered that the United defendants to "[f]urnish documents responsive to paragraphs 2, 3, 4, and 5 of the court's July 24, 2020 order (NYSCEF # 66), within fourteen days" (NYSCEF # 76, September 17, 2020 order). The court further held that "[i]n the event the United defendants fail to furnish the aforesaid documents, the court may, upon written notice to the court, strike the United defendants' pleadings, including their answer."

On October 5, 2020, plaintiff notified the court that the United defendants failed to produce documents to paragraphs 2, 3, 4, and 5 of the July order (NYSCEF # 78). On the same day, the court, by e-mail, requested that counsel for the United defendants respond to plaintiff's letter, to which counsel for the United defendants responded, and requested, among other things, that the court postpone its decision to sanction the United defendants until after the instant motion is decided (NYSCEF # 79).

The United defendants now move to vacate the July 24, 2020 and September 17, 2020 orders, asserting that the conditional order to strike their pleading was improper as it was issued without such relief being sought by a motion on notice. Moreover, they assert that as plaintiff failed to challenge their objections to discovery, the sanctions were not appropriately imposed. The United defendants also argue that the conditional order striking their answer was unwarranted as their conduct was not willful, contumacious or in bad faith.

Plaintiff opposes the motion, asserting that the discovery objected to by the United defendants is relevant to proving his allegations related to piercing the corporate veil, and note that the motion does not address the United defendants' failure to respond to certain other discovery requests not related to piercing the corporate veil.

After the submission of the motion, the court held a further status conference on January 15, 2021 at which the United defendants' objections to discovery were addressed.

## DISCUSSION

As a discovery order is not appealable as of right, the proper vehicle for challenging such an order is a motion to vacate pursuant to CPLR 2221(a) (*see Tangalin v MTA Long Island Bus*, 92 AD3d 766, 767 [2d Dept 2012]; *Santoli v 475 Ninth Ave. Assocs., LLC*, 38 AD3d 411, 416 [1st Dept 2007]; *Levine v St. Luke's Hosp. Ctr.*, 109 AD2d 694, 695 [1st Dept 1985]).

At the outset, contrary to the United defendants' argument, it is well established that the court has authority to order discovery and/or issue discovery sanctions in the absence a motion for such relief. (*see e.g. S.R. Garden City LLC v Magnacare LLC*, 114 AD3d 925 [2d Dept 2014] [a court may strike a party's pleadings as a sanction for failing to comply with discovery without a motion for such sanction]; *Bear, Stearns & Co. v Enviropower, LLC*, 21 AD3d 855, 856 [1st Dept 2005] [upholding trial court's conference order striking defendant's answer]). At the same time, however, the drastic remedy of striking a pleading pursuant to CPLR 3126 for failure to comply with court-ordered disclosure should be granted only where the conduct of the

resisting party is shown to be willful, contumacious, or in bad faith (*Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492, 492 [1st Dept 2010]; *Goldstein v CIBC World Markets Corp.*, 30 AD3d 217 [1st Dept 2006])

Next, as to the United defendants' assertion that the issuance of these orders in the absence of a motion violated their due process rights, such assertion is unavailing. In support of this argument, the United defendants cite *Eggleston v Gloria N.* (55 AD3d 309 [1st Dept 2008]) in which the First Department held that trial court violated respondent's due process rights when it, *sua sponte*, issued an order giving respondent's guardian authority to place respondent in a nursing facility without giving the respondent the opportunity to be heard on the issue. The factual circumstances of *Eggleston* are inapposite to those here, including because counsel for the United defendants and plaintiff were present and given the right to be heard prior to the issuance of the challenged orders.

The United defendants also contend that plaintiff has failed to meet the heightened standard needed for discovery of the United defendants' tax returns. This contention has merit. It is well established that "[b]ecause of their confidential and private nature, disclosure of tax returns is disfavored. The party seeking disclosure must make 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]). While plaintiff asserts that the tax documents are definitive proof of comingling of assets among the United defendants, such assertion does not warrant the production of tax returns, particularly as information as to the alleged comingling of assets may be ascertained from other source including bank accounts and other financial documents sought by plaintiff. Accordingly, the United defendants' motion is granted to the extent that the portion of the July 22, 2020 and September 17, 2020 orders requiring defendants to furnish their tax returns is vacated.

As to the remainder of the discovery sought by plaintiff, the court notes that CPLR 3101(a) provides that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action." The words "material and necessary" are "liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial." (*see Roman Catholic Church of Good Shepherd v. Tempco Systems*, 202 AD2d 257, 258 [1st Dept 1994]). Disclosure is thus not limited to "evidence directly related to the issues in the pleadings." *Allen v. Crowell-Collier Publishing Co.*, 21 NY2d 403, 408 [1968]. At the same time, however, "a party is not entitled to unlimited, uncontrolled or unfettered disclosure." (*Gutierrez v. Trillium, USA*, 111 AD3d 669 [2d Dept 2013][internal citation and quotations omitted]). In this connection, "competing interest must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party" (*Kavanagh v. Ogden Allied Maint. Corp.*, 92 NY2d 952, 954 [1998]).

To establish that piercing the corporate veil is warranted such as to impose liability on the corporate owners, it must be shown that (1) the owners exercised complete domination of the corporation, and (2) the owner's domination of the corporation was used to commit a fraud or wrong against plaintiff that injured plaintiff. (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 73 NYS3d 95, 96 [2018]). Factors to be considered in determining whether the corporation's owners have abused the privilege of doing business in the corporate form include

(1) a failure to adhere to corporate formalities, (2) inadequate capitalization, (3) a commingling of assets, and (4) application of corporate funds for personal use. *East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122 [2d Dept 2009], *aff'd*, 16 NY3d 775 [2011]; *see also, Colbalt Partners, L.P. v. GSC Capital Corp.*, 97 AD3d 35 [1<sup>st</sup> Dept 2012]).

Under this standard, plaintiff is entitled to obtain the majority of the discovery at issue as it is material and necessary to support his theory as to piercing the corporate veil. Specifically, the court finds that plaintiff is entitled to all documents evidencing the shareholders, officers, owners, and directors of United defendants and Premium,<sup>2</sup> including all certificates of incorporation, share certificates, resolutions, shareholder agreements, and all by-laws pertaining to United, and corporate minutes. Plaintiff is also entitled to United defendants' and Premium's bank statements, cancelled checks, wire transfers, records of deposits, withdrawal receipts, and wire transfer receipts, and any loan agreements. However, the time period for the request from January 2009 to present is overly broad and shall be limited to the period between April 13, 2013 (two years before the Agreement) to February 20, 2018 (i.e. a year after the fire). To the extent the United defendants do not have custody, possession or control of the above ordered documents, they shall provide an affidavit from a person(s) with knowledge of the search conducted and the documents ordered to be produced which delineates the nature and extent of the search. The United defendants shall also respond to interrogatory 12, for the period between April 13, 2013 to February 20, 2018.

The remainder of the discovery directed by the July 22, 2020 order is not challenged by the United defendants in their motion to vacate. At the January 15, 2021 conference, plaintiff maintained that the order has not been complied with, and although the United defendants asserted that they had complied with the order, the record contains no proof of such compliance. That said, however, as certain of the discovery ordered was overly broad, it would not be appropriate to enforce the conditional sanction of striking the United defendants' answer.

Accordingly, it is hereby

ORDERED that the United defendants' motion is granted to the extent of (i) vacating that part of the court's July 22, 2020 and September 17, 2020 orders directing the United defendants to respond to plaintiff's request no. 22 seeking tax returns, and that part of the September 17, 2020 order conditionally striking the United defendants' answer based on the failure to furnish certain documents, (ii) modifying the July 22, 2020 and September 17, 2020 orders to limit the time period of the required response to plaintiff's requests nos. 14, 15, 16, 17, 18, 19, 20, & 21, and to interrogatory 12, to the period from April 13, 2013 to February 20, 2018; and is otherwise denied; it is further

ORDERED that within 30 days of e-filing this order, the United defendants shall comply with the July 22, 2020 and September 17, 2020 orders to the extent not vacated or modified by the immediately preceding paragraph; it is further

---

<sup>2</sup> Although Premium has defaulted, the United defendants are required to produce discovery pertaining to Premium based on allegations that the corporate defendants are interrelated such that the United defendants would be in possession of documents pertaining to Premium.

ORDERED that to the extent the United defendants respond that the documents responsive to plaintiff's requests nos. 14, 15, 16, 17, 18, 19, 20, & 21 are not in their possession, custody, or control, they shall provide an affidavit from a person(s) with knowledge of the search conducted and the documents ordered to be produced, delineating the nature and extent of the search, and that the search did not locate the documents at issue; it is further

ORDERED that the note of issue date is extended to May 28, 2021; it is further

ORDERED that the United defendants' failure to comply with the ordered discovery may result in the imposition of sanctions at the conference directed below; and it is further

ORDERED that a status conference shall be held by telephone on February 24, 2021 at 11 am, using the same call in information as provided for the January 15, 2021 conference.

1/15/2021

DATE

  
MARGARET A. CHAN, J.S.C.

MARGARET A. CHAN, 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