

Kamal v Hashmat

2021 NY Slip Op 31738(U)

May 20, 2021

Supreme Court, New York County

Docket Number: 652710/2017

Judge: Shawn T. Kelly

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

-----X

IMAN KAMAL,

Plaintiff,

- v -

BILAL HASHMAT, ALI HASHMAT, MARIAN HASHMAT,
AIZID HASHMAT, HASHMAT FAMILY TRUST, HOWARD
GILL, ESTATE OF HILDA GILL, ANDREW GILL, MARK
GILL, BABU EASOW, V SANDERSON, BABAR RAO,
JOHN MUNNEY, TIMOTHY PATCHETT, ESTATE OF
ROBERT C. FRITTS, KABOT PARTNERS,
CUREMD.COM, INC.,

Defendant.

-----X

CUREMD.COM, INC.

Plaintiff,

-against-

IMAN KAMAL

Defendant.

-----X

INDEX NO. 652710/2017

MOTION DATE 01/06/2021

MOTION SEQ. NO. 009

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595628/2018

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 302, 303, 304, 305, 306, 307, 308, 309, 310, 312, 313, 314, 315, 316, 317, 318, 320, 321, 322, 323, 324, 325

were read on this motion to/for

DISCOVERY

Plaintiff Iman Kamal, as Administratrix of the Estate of Kamal Hashmat, brought this underlying action to recover on an outstanding promissory note issued by defendant and counterclaim plaintiff/third-party plaintiff CureMD.com, Inc. (CureMD) to the Estate of Kamal Hashmat c/o Iman Hashmat, as Executrix.

In motion sequence number 009, plaintiff moves, pursuant to CPLR §3124, to compel CureMD to comply with plaintiff's second demand for discovery and inspection dated October

29, 2020 to produce the documents specified therein. Plaintiff also moves to compel CureMD to furnish plaintiff with the appropriate authorizations to permit plaintiff to obtain the United States and New York State income tax returns, K-1s and 1099-Divs or equivalent of CureMD for the years 1999 to date. Motion sequence number 009 is denied in its entirety, in accordance with the decision rendered on motion sequence 013 in companion matter, Index No. 651956/2017 on identical motion papers.

BACKGROUND AND FACTUAL ALLEGATIONS

On March 1, 2014, CureMD signed a non-negotiable promissory note, promising to pay to the order of the Estate of Kamal Hashmat c/o Iman Hashmat, as Executrix (Estate), \$352,000.00.¹ The complaint states that CureMD made payments pursuant to the promissory note totaling \$160,000, but that the remainder of the payments, plus interest, is still outstanding and due.

In the companion matter, Index No. 651956/2017, CureMD asserted eleven counterclaims against both Iman and the Estate, grounded in breach of fiduciary duty and fraud, among others. In brief, CureMD alleged that, from the time CureMD was founded in 1999, Kamal Hashmat (Kamal), as cofounder, served as its President and CEO and as a member of its board of directors. When Kamal died in 2014, he did not have a life insurance policy. CureMD alleges that, “[i]n order to assist his family economically, following Kamal’s death CureMD.com made his widow, Iman, an officer and director of the company, and arranged for her to receive an annual salary of \$215,000 despite the fact that Iman had no college education and had never been

¹ On April 15, 2014, Iman Kamal, the wife of Kamal Hashmat, who is now deceased, was granted administration of goods, chattel rights and credits of Kamal Hashmat.

in the workforce.” (Index No. 651956/2017, NYSCEF Doc. No. 336, verified answer, counterclaims and third-party complaint, ¶ 13).

After CureMD hired an accounting firm in 2016, “[a] review of CureMD.com’s financial records following Kamal’s death revealed that, prior to his death, Kamal regularly diverted corporate funds for his own personal use.” (*Id.*, ¶ 16). CureMD alleges that Kamal used corporate funds to pay his mortgage and also made “false journal entries in CureMD.com’s accounting system, reflecting purported capital contributions made by Kamal that were never actually made.” (*Id.*, ¶ 20). CureMD also alleges that, following Kamal’s death, Iman “abused her position as an officer and director of the company to continue her late husband’s wrongful conduct.” (*Id.*, ¶ 15). For instance, CureMD alleges that Iman “used her control over CureMD.com’s finance department to conceal the improper diversion to company funds, by disguising illicit withdrawals as valid payments to CureMD.com contractors.” (*Id.*, ¶ 38). Iman also allegedly engaged in a fraudulent bonus payment scheme whereby she, or someone on her behalf, altered the records to state that she was an employee since 1999, not 2014, and she received a greater bonus than she was entitled to.

In the present action, Iman has commenced an action against CureMD and numerous CureMD shareholders alleging that the Estate is the sole shareholder of CureMD. (*See* Index No. 652710/2017 [“Shareholders Action”]).

Motion Sequence 009

Plaintiff is seeking to compel CureMD and the Hashmat Family members who currently control the corporation to produce the corporation’s income tax returns filed in the United States and New York from 1999 to the present, together with, among other things, the K-1’s and 1099-Divs that it gave to its shareholders. Plaintiff maintains both the instant action and the

Shareholders Action seek to resolve the identity of CureMD's shareholders. Plaintiff claims that the documents requested are relevant in this action because Iman, "in her reply to the Corporation's counterclaims and her answer to the third-party complaint, asserted as her Sixth and Seventh Affirmative Defenses that the counterclaims and third-party complaint were unauthorized because Iman is the Corporation's sole shareholder." (NYSCEF Doc. No. 304, Levine affirmation in support, ¶ 9).

Levine is also requesting that the court direct CureMD to execute and deliver authorizations for Iman herself to obtain the documents. If the Corporation does not have copies of its tax documents, Iman should be permitted to obtain the records from the IRS or the New York State Department of Taxation and Finance. Levine alleges that, regardless of the confidential nature of the documents, as a shareholder and director, Iman is entitled to them.

CureMD's Opposition

Plaintiff served her second demand for discovery and inspection on October 29, 2020. As set forth in the record, on November 30, 2020, CureMD's counsel apprised Levine that "[a]s we state in the responses, we are prepared to meet and confer in good faith as to any and all of the objections asserted." (NYSCEF Doc. No. 313 at 1). On December 13, 2020, Levine responded with the following, in relevant part:

"Your formal responses stated that you undertook a search for responsive documents. That search should have been completed by now. I insist that that the documents should be turned over forthwith, but not later than by noon on Tuesday, December 15, 2020, failing which, a motion will be made to compel their disclosure and to compel CureMD to execute and deliver the appropriate authorizations."

(NYSCEF Doc. No. 308 at 2).

On December 14, 2020, Colbath responded with the following, in pertinent part:

"Ira: We will review your letter with our clients and respond to your letter, hopefully in writing, as soon as possible. We appreciate the press of other business as we too have

numerous commitments this week and next (I will be out of the office starting on Wednesday for the remainder of this week). Perhaps it would make sense for us to schedule a telephonic meet and confer for next week, so that in the event we are unable to respond to your letter by way of one of our own this week, we have a date on the calendar to discuss the numerous issues raised in your letter.”

(NYSCEF Doc. No. 314 at 1).

On December 18, 2020, Levine submitted an affirmation of good faith pursuant to 22 NYCRR § 202.7. Levine stated that he received CureMD’s formal response on November 30, 2020 “inviting me to reach out to defense counsel to confer with respect to [plaintiff’s Second Demand for Discovery and Inspection].” (NYSCEF Doc. No. 303, good faith affirmation, ¶ 2).

In Levine’s good faith affirmation, he states that, “[o]n December 13, 2020, I wrote to defense counsel setting forth my position. A copy of the letter is attached to my affirmation dated December 18, 2020 in support of the motion. Defense counsel responded that she would address my letter before December 23, 2020.” (*Id.*, ¶ 3). Levine continues that, “[p]ursuant to the Court’s July 20, 2020 Order, the Note of Issue must be filed by December 18, 2020. Out of a concern that the filing of the Note of Issue may prejudice the plaintiff’s rights to seek relief from the Court after the Note of Issue filing, I have submitted this motion.” (*Id.*, ¶ 4).

CureMD argues that plaintiff’s motion should be denied as counsel failed to follow the rules set forth in this court’s practices and procedures. Justice Reed’s “Part 43-Practices and Procedures” set forth the following, in pertinent part:

“Discovery motions are discouraged. If a dispute cannot be resolved after good faith efforts to meet and confer, the parties should proceed in accordance with Commercial Division Rule 14. The parties shall coordinate to make a single Rule 14 submission to Chambers, at sfcpart43@nycourts.gov, containing both the initial letter and any responsive letter(s).”

Commercial Division Rule 14 indicates, in relevant part:

“Discovery disputes are preferred to be resolved through court conference as opposed to motion practice. Counsel must consult with one another in a good faith effort to resolve

all disputes about disclosure. *See* section 202.7. If counsel are unable to resolve any disclosure dispute in this fashion, counsel for the moving party shall submit a letter to the court not exceeding three single-spaced pages outlining the nature of the dispute and requesting a telephone conference.”

Specifically, although plaintiff’s counsel filed an affirmation of good faith, there has never been a meet and confer with CureMD’s counsel. Colbath states that “Levine never had a meet and confer with the undersigned counsel with regard to Plaintiff’s Demand, despite my specific offer to him to do so before the filing of this Motion.” (NYSCEF Doc. No. 312, Colbath affirmation, ¶ 5). CureMD maintains that it has now had to incur additional costs because plaintiff did not attempt to first resolve the discovery dispute at a meet and confer. It is seeking an order directing plaintiff to pay for the legal fees and expenses incurred by CureMD as a result of responding to this motion. CureMD further argues that this motion is defective as plaintiff has already filed the note of issue and a certificate of readiness for trial. “If Plaintiff seeks additional discovery (which she does), then she should not have filed the Note of Issue and required Certificate of Readiness for Trial.” (*Id.*, ¶ 11).

In addition to any procedural deficiencies, among other things, CureMD maintains that the discovery requested has either been produced or is irrelevant to the promissory note action.

In reply, plaintiff claims that “[a]lthough this Court has recently been reassigned to the Commercial Division, we did not understand that these cases are now Commercial Division cases and subject to its rules.” (NYSCEF Doc. No. 320, Levine reply affirmation, ¶ 15). According to plaintiff, courts have excused the compliance with 202 NYCRR § 202.7 where, like here, the effort to resolve the discovery dispute would be futile.

DISCUSSION

“Disclosure in civil actions is generally governed by CPLR §3101 (a), which directs: [t]here shall be full disclosure of all matter material and necessary to the prosecution or defense

of an action, regardless of the burden of proof. . . . The test is one of usefulness and reason.” (*Forman v Henkin*, 30 NY3d 656, 661 [2018] [internal quotation marks and citations omitted]). CPLR §3101 (a) “embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise.” (*Id.* at 661 [internal quotation marks and citation omitted]). “The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court” (*Montalvo v CVS Pharm, Inc.*, 102 AD3d 842, 843 [2d Dept 2013] [internal quotation marks and citations omitted]).

Pursuant to CPLR §3124, “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response.” On a motion brought pursuant to CPLR §3124, the burden is on the party seeking the disclosure to establish a basis for the production sought. (*Rodriguez v Goodman, M.D.*, 2015 NY Slip Op 31412 (U), *5 [Sup Ct, NY County 2015]). “[T]he party challenging disclosure bears the burden of establishing that the information sought is immune from disclosure.” (*Ambac Assurance Corp. v DLJ Mortg. Capital, Inc.*, 92 AD2d 451, 452 [1st Dept 2012]). Courts have found that a party is not required to respond to a discovery demand that is “palpably improper . . . [in that it is seeking] irrelevant information, or [is] overbroad and burdensome.” (*Montalvo v CVS Pharm, Inc.*, 102 AD3d at 843).

Plaintiff’s motion seeking to compel CureMD to comply with plaintiff’s second demand for discovery and inspection, among other things, is denied. Pursuant to 22 NYCRR § 202.7 (a), a motion relating to disclosure must be filed with “an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.”

The affirmation of good faith must set forth “the time, place and nature of the consultation and the issues discussed and any resolutions or shall indicate good cause why no such conferral with counsel for opposing parties was held.” (22 NYCRR § 202.7 (c)).

The record indicates that CureMD twice offered to meet and confer in good faith as to any and all of the asserted objections. Counsel for plaintiff did not attempt to set up a meeting, but objected to CureMD’s formal responses, attempted to justify why the documents were necessary and informed CureMD that he would be filing a motion to compel. Accordingly, the affirmation of good faith is deficient as plaintiff’s counsel failed to indicate that he conferred or discussed the issues raised in the motion as required by 22 NYCRR § 207.7 (a), (c). (*See e.g. 241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 472 [1st Dept 2013] [internal quotation marks and citation omitted] [“affirmation of its good faith effort to resolve the dispute . . . did not substantively comply with the requirements of 22 NYCRR § 202.7. . . . There is nothing in the letter, which was written before the continued deposition date, indicating that GSY’s counsel actually conferred with Shavolian’s lawyer in a good faith attempt to resolve the dispute”]).

Counsel further states that he was prompted to file the motion, in response to counsel’s unsatisfactory responses and the obvious discovery dispute. However, as noted, CureMD’s counsel offered twice to meet and confer. (*Cashbamba v 1056 Bedford LLC*, 172 AD3d 415, 416 [1st Dept 2019]) [“[T]he record does not support defendants’ contention that the parties have historically been unable to resolve discovery disputes without court intervention”]).

Moreover, this motion is procedurally defective. Counsel claims that he had to engage in motion practice to resolve this discovery dispute because the note of issue was coming due shortly. Under either this court’s or the Commercial Division’s Rules, discovery motions are

discouraged. If the dispute could not be resolved after good faith efforts to meet and confer, plaintiff should have sent a letter to chambers.

The court, exercising its discretion, declines to award CureMD the legal fees and expenses associated with having to make this motion.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion (motion sequence 009) seeking to compel CureMD to comply with plaintiff's second demand for discovery and inspection and to produce CureMD's tax returns and provide plaintiff with appropriate authorization to obtain the federal and New York State income tax returns is denied; and it is further

ORDERED that such service upon the Clerk of the Trial Support Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

5/20/2021

DATE

SHAWN TIMOTHY KELLY, 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