

Union Mut. Fire Ins. Co. v Gain Dev. LLC
2021 NY Slip Op 32063(U)
July 30, 2021
Supreme Court, Nassau County
Docket Number: 607220/2016
Judge: Helen Voutsinas
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
COUNTY OF NASSAU - IAS/TRIAL PART 19
Present: Hon. Helen Voutsinas, J.S.C.**

-----X
**UNION MUTUAL FIRE INSURANCE COMPANY
a/s/o 1312 PUTNAM, LLC,**

Plaintiff,

Index No.: 607220/2016
Motion Seq. No.: 004 & 005

-against-

GAIN DEVELOPMENT LLC,

Short Form Order

Defendant.

-----X

The following papers were read on these motions:

Notice of Motion, Affidavit and Affirmation in Support, Exhibits	1
Notice of Cross Motion, Affirmation in Support, Exhibits and Memorandum of Law	2
Affidavit in Reply and in Opposition to Cross Motion.....	3
Affidavit in Reply on Cross Motion, Exhibits.....	4

Defendant Gain Development LLC (“Gain”) moves for an Order, pursuant to CPLR §2304, to quash a subpoena issued by plaintiff Union Mutual Fire Insurance Company a/s/o 1312 Putnam, LLC (“Union Mutual”) to defendant and for a protective order pursuant to CPLR §3103 for all discovery requested by plaintiff relating to defendant. Plaintiff cross moves for an Order, pursuant to CPLR §§5240 and 3104[a]: (i) compelling defendant to fully comply with plaintiff’s subpoena duces tecum and (ii) directing defendant to provide a detailed written explanation as to what happened to and the location of any documents not in its custody and/or control. The motion and cross motion are decided as hereinafter provided.

A judgment was entered in this subrogation action in favor of plaintiff and against defendant on May 2, 2019, in the amount of \$66,181.31 (the “Judgment”). The action stems from an incident which occurred on or about August 24, 2014, when defendant’s contractors, while performing work on defendant’s building, damaged the adjacent building, which was owned by plaintiff’s insured.

On November 6, 2019, plaintiff served upon Shahram Delafraz, as officer of defendant Gain, a subpoena duces tecum in enforcement proceedings, returnable December 13, 2019. The subpoena demanded many types of financial information and documents from defendant for the purpose of locating assets to collect on the Judgment, including, but not limited to, defendants’ bank account records and tax returns and documents related to any real property owned by defendant, from January 1, 2014 to the present time. The subpoena enumerated a list of twenty-six

(26) separate categories of items. Plaintiff also served upon Mr. Delafraz a separate subpoena testificandum returnable on January 3, 2020.

Defendant moves to quash the subpoena and for a protective order. Defendant asserts that that it has provided responses which included all documents in its possession relevant to plaintiff's requests. On November 25, 2020, defendant provided documents related to the purchase and sale of real property known as 1310 Putnam Avenue, Brooklyn, New York. On December 23, 2020 defendant provided statements related to one (1) checking account maintained with Capital One Bank ending in 718. On January 27, 2021, defendant provided profit and loss statements for defendant for 2016, 2017, 2018 and 2019. The items provided respond, partially, to items enumerated as nos. 4, 9 and 18 of the subpoena duces tecum.

Defendant argues that the remaining demands in the subpoena are inappropriate burdensome, improper and damaging to Mr. Delafraz' personal reputation, privacy and business and should be quashed by the Court. Defendant contends further that plaintiff is improperly seeking Mr. Delafraz' personal tax returns.

Plaintiff opposes the motion and cross moves to compel defendant to fully comply with its subpoena duces tecum. Plaintiff argues that defendant has only partially responded to a few of the requests set forth in the subpoena, and wholly failed to respond to most of the requests. Plaintiff further argues that defendant's motion to quash is untimely.

Plaintiff states that defendant produced statements regarding only one (1) checking account, but that plaintiff has obtained bank records directly from Capital One showing that defendant maintained at least seven (7) other accounts with Capital One Bank during the relevant time period. Plaintiff provides copies of several statements pertaining to these other accounts, ending in 090, 104, 131, 328, 336, 479 and 769, which appear to be saving accounts and which show substantial deposits and withdrawals amounting to hundreds of thousands of dollars during the relevant time period.

With regard to requested tax returns, defendant did not provide complete tax returns but only provided Schedule C (Form 1040) "Profit or Loss from Business (Sole Proprietorship)" forms for 2016 through 2019 (which defendant refers to as profit and loss statements in its motion papers), with no related schedules or statements. Plaintiff asserts that the statements produced show that defendant is in the business of "Real Estate Developments and Sales" and that Shahram Delafraz is the "sole proprietor" of defendant. Plaintiff also states that according to the statements, defendant had revenues of \$2,769,990 in 2016, and \$2,656,099 in 2017, and zero revenues for 2018 and 2019. The statements also show "costs of goods sold" of \$2,656,099 in 2016 and \$2,282,047 in 2017.

Plaintiff contends that defendant Gain is a one member limited liability company ("LLC"), with Mr. Delafraz being the sole member. Plaintiff states that, according to IRS Publication 3402 - Taxation of Limited Liability Companies, one member LLC's are classified "as an entity disregarded from its owner, its income, deductions, gains, losses, and credits are reported on the owner's income tax return. For example, if the owner of the LLC is an individual, the LLC's income and expenses would be reported . . . with the owner's Form 1040" on Schedule C, Profit

or Loss from Business and Schedule E, Supplemental Income and Loss. Accordingly, plaintiff argues, defendant Gain's tax returns would be Mr. Delafraz' returns by virtue of the single member LLC status of defendant.

In opposition to the cross motion, defendant does not deny that Gain is a one member LLC owned by Mr. Delafraz, and in fact its counsel acknowledges this to be the case. Neither defendant nor Mr. Delafraz deny that he files a single tax return which is defendant's and his combined returns. Defendant again asserts that it has complied with the subpoena with a "plethora of documents". Yet, defendant fails to address the seven (7) other Capital One accounts in the name of defendant identified by plaintiff, for which defendant has failed to provide any records.

In reply, plaintiff states also that it has received records from Capital One showing that defendant made credit card payments to multiple credit card vendors during the period covered by the subpoena, 2014 through the present, including CitiCard Services, Capital One, Discovery and others. This, despite defendant attesting that it had no credit cards in response to item 16 of the subpoena. Plaintiff provides copies of several cancelled checks drawn on defendant's checking account ending in 718, as examples, including a check payable to Discover dated August 23, 2016 and a check payable to Citi Card dated December 21, 2016 in the amount of \$1,583. in the amount of \$1,650. Also submitted by plaintiff are copies of a check to Chrysler Capital dated August 12, 2017, in the amount of \$1,096.50 with Sharam Delafraz in the memo line.

CPLR §5223 provides, in pertinent part, that "[a]t any time before a judgment is satisfied or vacated, a judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment by serving upon any person a subpoena"

The scope of discovery for judgment creditors is broad and "an application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious . . . or where the information sought is utterly irrelevant to any proper inquiry (citations and internal quotes omitted)." *Technology Multi Sources, S.A. v. Stack Global Holdings, Inc.*, 44 AD3d 931, 932 [2d Dept 2007]. "CPLR §5223 compels disclosure of all matter relevant to the satisfaction of the judgment. A judgment creditor is entitled to discovery from either the judgment debtor or a third party in order to determine whether the judgment debtor concealed any assets or transferred any assets so as to defraud the judgment creditor or improperly prevented the collection of the underlying judgment (citations and internal quotes omitted). (*Id.*)

Defendant's motion to quash the subpoena was filed on March 3, 2021, well over a year after its December 13, 2019 return date. Defendant argues that the motion is timely, citing *Brunswick Hosp. Ctr., Inc. v Hynes*, 52 NY2d 333 [1981], However, in *Brunswick* the Court of Appeals held that such a motion must be made promptly, generally before the return date of the subpoena, and "[o]nce there has been compliance with the subpoena, however, a motion to quash or vacate no longer is available (citations omitted). Quite simply, having complied with the process the subpoenaed party no longer possesses the option of challenging its validity or the jurisdiction of its issuer. Any other rule would open the door to never-ending challenges to the validity of subpoenas, perhaps even years after initial issuance and compliance. At some point, litigation must

terminate.” (52 NY2d at 339). Here, defendant has responded to the subpoena, at least in part, before moving to quash.

Defendant also argues that the Covid-19 pandemic was a factor in any delay in making the motion. However, the pandemic took hold in March, 2020, months after the subpoena’s return date.

Although the motion is made well over a year after the subpoena’s return date, and after defendant responded to the subpoena, the Court has nevertheless considered defendant’s motion on its merits. The Court has reviewed the subpoena, defendant’s partial response thereto, and the parties’ respective submissions on the motions, and finds that defendant’s motion to quash lacks merit.

It is apparent that defendant has failed to produce records pertaining to at least seven (7) bank accounts, and only partially produced records pertaining to one (1) bank account. Defendant has also failed to produce its tax returns.

Defendant cites to *666 Lexington Ave. Assoc., L.P. v Women's Med. Assoc., PLLC*, 32 Misc 3d 141(A) [App Term 2011] in support of its argument that the subpoena improperly seeks Mr. Delafraz’ personal tax returns. The Court finds the cited case to be inapplicable. *666 Lexington Ave. Assoc., L.P.* was a holdover proceeding, where a final judgment was entered against tenant Women's Medical Associates, PLLC in the sum of \$57,107.05. In post-judgment proceedings, subpoenas duces tecum were served upon Annette Maffei and Ruth A. Tessler, individually and as officers of tenant/judgment debtor. (It is not mentioned whether the individuals were also members or principals of the defendant.) The landlord/judgment creditor sought documents from Maffei and Tessler which included their individual tax returns and other personal financial information. The Appellate Term held that the landlord/judgment creditor “failed to make a sufficient showing of necessity for the production of the personal documents requested” in the subpoenas and granted the motion to quash.

In *666 Lexington Ave. Assoc., L.P.*, however, it does not appear that the judgment debtor was a single member LLC, which did not file its own tax returns. Here, in contrast, it is undisputed that defendant is a single member LLC, which does not file a separate tax return. In these circumstances, this Court finds that plaintiff has made a sufficient showing of necessity for production of the tax returns. If the tax returns for the LLC are in fact the tax returns for Mr. Delafraz, they must be produced.

In addition to the tax returns and bank accounts, each of the other financial documents demanded in the subpoena, covering the period from the rise of the Plaintiff’s claim, in 2014 through the present, would also provide information regarding the Defendant’s finances and as to whether the Defendant has hidden assets or transferred those assets to Mr. Delafraz. Plaintiff has demonstrated that the documents demanded in the subpoena duces tecum are “not utterly irrelevant to the proper inquiry of the defendant’s assets” and in fact the financials that have been produced

reflect that said demands are extremely likely to lead to information regarding the defendant's assets.

Accordingly, defendant's motion to quash and for a protective order is **DENIED**. Plaintiff's cross motion to compel compliance is **GRANTED** as follows.

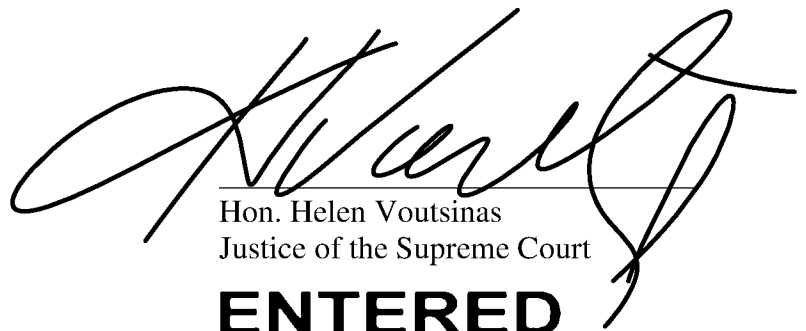
Defendant is **ORDERED** to provide plaintiff, within thirty (30) days of the date of entry of this Order, a supplemental response to the subpoena duces tecum dated October 28, 2019 with complete copies of documents organized and labelled to correspond to the categories in the request, and detailing which documents have been produced and which documents are not in its possession, custody, or control, in the form of a sworn statement.

Plaintiff's request that defendant provide a detailed written explanation as to what happened to and the location of any documents not in its custody and/or control is denied. This information is more appropriately obtained by a deposition of Mr. Delafraz. The parties both discuss the subpoena testificandum which was previously served on Mr. Delafraz. However, it appears from the parties' submissions that the deposition was never held, but no relief is sought in connection therewith. Plaintiff may serve a new subpoena ad testificandum upon Mr. Delafraz should it choose to do so.

Any relief requested and not specifically granted is denied.

This constitutes the Decision and Order of the Court.

Dated: July 30, 2021
Mineola, NY



Hon. Helen Voutsinas
Justice of the Supreme Court

ENTERED

Aug 05 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE