Fairwood Peninsula Energy Corp. v CC Strategies Fund, L.P.
2022 NY Slip Op 32019(U)
June 27, 2022
Supreme Court, New York County
Docket Number: Index No. 653084/2019
Judge: Arlene Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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FAIRWOOD PENINSULA ENERGY CORPORATION

Plaintiff,

- v -

CC STRATEGIES FUND, L.P.,

Defendant.

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INDEX NO. 653084/2019

MOTION DATE 06/22/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 120, 121, 122, 123, 124, 125

were read on this motion to/for DISCOVERY.

The motion by plaintiff to vacate the notices of depositions for two of plaintiff's board members (Jason Kalisman and Kevin McNiel) is granted and the cross-motion to compel these depositions is denied.

Background

This action arises out of a share purchase agreement between plaintiff and defendant. In this agreement, defendant purchased shares of plaintiff for a purchase price of $75,500 subject to certain conditions in the agreement. Plaintiff alleges that defendant asserted it had the shares on various documents but never paid the purchase price for the shares.

Defendant argues that the agreement contains many false representations. Defendant points out that the agreement has various representations and warranties in its schedules as well as exhibits that must be accurate before defendant has an obligation to purchase the shares. For instance, defendant insists that certain entities listed as shareholders of plaintiff were not, in fact,

shareholders. Defendant alleges that the inaccuracy of the schedule containing a list of shareholders constitutes a breach of a condition precedent, which relieves it of its obligation to purchase the shares. It also argues that plaintiff breached a representation by asserting that no other preemptive rights existed when another share purchase agreement with a different entity (Lennilenape) contained preemptive rights in favor of that entity.

In this motion, plaintiff moves to vacate certain notices of depositions served by defendant on two of plaintiff's board members. Plaintiff points out that it already produced its CEO (Mr. Jones) for a deposition across four sessions and that this witness provided over 300 pages of testimony. Plaintiff questions why defendant needs to depose two board members on the very same issues and that it places an undue burden on plaintiff.

In opposition and in support of its cross-motion, defendant focuses on paragraph 8 of the complaint which contends that plaintiff's board did not learn that defendant failed to pay for the shares until 2018. Defendant claims that makes issues about the statute of limitations and potential tolling legitimate topics to discuss with the board members. Defendant argues that it wants to explore the exact time and manner in which each and every board member learned that defendant had not paid for the shares.

Defendant also argues that the information provided by plaintiff's CEO is insufficient. It insists it wants to investigate whether certain shares held by other shareholders in connection with an affirmative defense that the agreement itself contained inaccuracies.

In reply, plaintiff argues that defendant has not pointed to any document that shows that Mr. Kalisman or Mr. McNiel possesses personal knowledge about the information defendant seeks. It claims that these two individuals did not author any documents that could justify their depositions.

Discussion

"For purposes of depositions, a corporate entity has the right to designate, in the first instance, the representative who shall be examined. To show that additional depositions are warranted, the moving party must demonstrate that the representatives already deposed had insufficient knowledge, or were otherwise inadequate, and that there is a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case" (*Giordano v New Rochelle Mun. Hous. Auth.*, 84 AD3d 729, 731, 922 NYS2d 518 [2d Dept 2011] [internal quotations and citations omitted]).

The Court grants the motion by plaintiff and denies the cross-motion. As an initial matter, the Court questions the utility of questioning individual board members about actions of the board as a whole especially when plaintiff's CEO was thoroughly questioned about a broad swath of topics. Defendant does not explain what special or specific role these two board members may have had that compels the Court to order plaintiff to produce additional witnesses. As indicated above, plaintiff has the right to pick its witness to testify on its behalf and the deposition transcript for its CEO suggests that he was adequately prepared. Moreover, the Court observes that defendant did not cite a single document that suggests why these specific board members need to be deposed.

Also critical is the straightforward nature of the claim at issue here. Plaintiff alleges a single cause of action for breach of contract for failure to pay for the shares. While facts remain in dispute about the conditions precedent to require defendant to pay, the Court views the request for additional depositions as a fishing expedition. This is not a situation, such as the case discussed by the parties, *Alexopoulos v Metro. Transp. Auth.*, (37 AD3d 232, 233, 829 NYS2d 502 [1st Dept 2007]), where a party was ordered to produce additional witnesses for a deposition

because documents showed they might have personal knowledge about material issues. Here, defendant's argument is that it wants additional depositions because plaintiff's CEO was unable to answer every question.

But a few, isolated responses from a witness indicating that he did not recall does not mean defendant can depose any witness it wants. The purpose of discovery is not to question every person who might have some knowledge about the case. There must be a specific reason to force plaintiff to produce more witnesses and defendant failed to raise a legitimate justification. And the Court disagrees with defendant's characterization of Mr. Jones' deposition testimony as inadequate. For instance, when asked how plaintiff's board became aware of the fact that defendant never paid for the shares (the statute of limitations issue), he testified that " I honestly don't remember. My recollection is this issue came up through an audit, and so I would have thought one way or the other that the auditors flagged it. But, like, again, we'd have to sort of dig into the records to see what the communication was. But I think that's probably how it was—came up" (NYSCEF Doc. No. 117 at 296). The Court is satisfied that Mr. Jones answered the question to the best of his knowledge and there is no basis to find that the two board members would have more information.

With respect to the issue concerning alleged wrongdoing by Mr. Weil (defendant's managing partner and who was also plaintiff's CFO as well as plaintiff's board member during much of the relevant time period), the Court observes that defendant has access to all of Mr. Weil's information because he is defendant's managing partner. If there was a board communication regarding the shares, Mr. Weil would have it and could have produced it in support of the cross-motion. Defendant has failed to show that there is any reason to think that

the two board members whom defendant seeks to depose will have any additional knowledge that plaintiff's CEO lacked.

Finally, defendant's argument about preemptive rights does not compel a different outcome. Defendant's argument here is that Mr. Jones could not answer questions about whether another entity Lennilenape, LLC waived its preemptive rights. Apparently, plaintiff entered into a share purchase agreement with Lennilenape in March 2015 that contained preemptive rights in favor of Lennilenape and so if these rights were not waived it could constitute another defense about misrepresentations in the agreement between plaintiff and defendant. But Mr. Jones responded that Lennilenape had not waived these preemptive rights to best of his knowledge (NYSCEF Doc. No. 116 at 51).

Summary

The Court recognizes that some of Mr. Jones' responses at his deposition included answers stating he did not recall or that he was answering to the best of his knowledge. But that does not provide a reason for why defendant should be able to depose two additional witness to see if they might have more knowledge. Defendant's attempt to portray Mr. Jones' testimony as insufficient is belied by the deposition transcript and the fact that defendant did not adequately explain what the two board members would offer, other than that they are board members. Defendant did not point to any part in Jones' testimony where he stated he lacked knowledge about an issue but that those other two witnesses possessed personal knowledge.

Based on the most recent discovery stipulation dated February 15, 2022 (NYSCEF Doc. No. 76), which indicates that discovery is nearly completed, the Court orders that a note of issue shall be filed on or before July 13, 2022.

Accordingly, it is hereby

ORDERED that the motion by plaintiff to vacate the notices of deposition on Jason Kalisman and Kevin McNiel is granted; and it is further

ORDERED that the cross-motion by defendant to compel these depositions is denied.

6/27/2022
DATE

ARLENE BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE