

Surace v Misseri

2022 NY Slip Op 32128(U)

July 6, 2022

Supreme Court, New York County

Docket Number: Index No. 652525/2017

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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JOHN SURACE,	INDEX NO.	<u>652525/2017</u>
Plaintiff,	MOTION DATE	<u>05/13/2022</u>
- v -	MOTION SEQ. NO.	<u>007</u>
PHILIP MISSERI, CAMBRIDGE CATERING INC.,SODIENET BAKE CORP., EVENTS & EVERYDAY CORP., 212 EVERYDAY, INC.,ABC LLC 1 - 10, XYZ CORP. 1 - 10	DECISION + ORDER ON MOTION	
Defendants.		

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 175, 176, 177, 178 were read on this motion for LEAVE TO CONDUCT POST-NOTE DISCOVERY.

This is a case between business partners in which Plaintiff John Surace (“Surace” or “Plaintiff”), a minority owner of Defendants Sodienet Bake Corp. (“Sodienet”) and Events & Everyday Corp. (“E&E”), contends that the majority owner, Defendant Philip Misseri (“Misseri”), wrongfully dissolved Sodienet and E&E and transferred their business operations to Defendant Cambridge Catering, Inc. (“CCI”) (NYSCEF 82 [Second Amended Complaint]). Plaintiff moves for leave to serve post-Note of Issue (“NOI”) subpoenas on non-parties East Coast Stores LLC (“East Coast Stores”) and B.A. Silver & Co., Inc. (“B.A. Silver”) pursuant to 22 NYCRR 202.21(d). For the following reasons, Plaintiff’s motion is DENIED.

BACKGROUND

During discovery, Defendants produced a Combined Business Valuation of multiple entities, including Sodienet and E&E, dated August 28, 2017, by Henry Galasso of East Coast Stores LLC (“East Coast Report”) (NYSCEF 152 at Ex. A). The East Coast Report was a

subject of Defendant Misseri's June 28, 2021 deposition. (NYSCEF 130 [Tr. 73-76]). Similarly, Misseri identified Bradley J. Cooper ("Cooper") of B.A. Silver as the accountant for CCI, Sodienet, and E&E during his deposition and was questioned concerning, as relevant here, the shareholders of CCI as well as the location of relevant tax returns. (NYSCEF 130 [Tr. 14-15, 49-5, 88-89]). Plaintiff did not identify Mr. Cooper as an expert witness and has not tendered the East Coast Report as an expert report.

Plaintiff filed a Note of Issue on October 12, 2021 (NYSCEF 117) stating that discovery known to be necessary was completed. On November 10, 2021, Defendants moved for summary judgment (NYSCEF 118). The motion was supported, in part, by the Affidavit of Mr. Cooper (NYSCEF 120), whose testimony was limited to an assertion that Plaintiff was not a partner in CCI because Cooper did not prepare a K-1 for Plaintiff. The East Coast Report was not included with Defendants' moving papers. (*See* Mot. Seq. No. 5).

The next day, on November 11, 2021, Plaintiff's counsel provided e-mail notice to Defendants' counsel (NYSCEF 155) of service of non-party subpoenas (the "Subpoenas") on B.A. Silver (NYSCEF 151) and East Coast Stores (NYSCEF 152). Plaintiff did not move for post-NOI discovery before serving the Subpoenas. (*See* NYSCEF Docket).

On November 19, 2021, Defendants moved by Order to Show Case to quash the Subpoenas (NYSCEF 149). On December 6, 2021, the Court granted Defendants' motion to quash the Subpoenas with leave for Plaintiff to seek "post-Note of Issue discovery limited to those remaining claims or issues" within fourteen days of any decision on Defendants' then pending motion for summary judgment. (NYSCEF 165 [Mot. Seq. No. 6]). On April 22, 2022, the Court denied Defendants' motion for summary judgment (NYSCEF 174).

Plaintiff timely filed its motion for post-NOI discovery on May 5, 2022 (NYSCEF 175).

Plaintiff argues that the East Coast Report “bears all of the markers of an expert report. . .,” that the back-up information for the East Coast Report was requested but not produced, and that Cooper was not identified by Defendants as a pre-trial witness (NYSCEF 178 [Birnbaum Affirmation ¶¶5-14]). Defendants oppose on the grounds that Plaintiff has failed to demonstrate “unusual or unanticipated circumstances” and that Plaintiff has failed to demonstrate prejudice (NYSCEF 178 [McCallion Affirmation ¶2]).

DISCUSSION

22 NYCRR 202.21(d) provides, in relevant part:

Where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.

A movant must demonstrate “unusual or unanticipated circumstances,” as well as “substantial prejudice” in order to demonstrate an entitlement to post-NOI discovery. (*Hartnett v City of New York*, 139 AD3d 506 [1st Dept 2016]). In *Hartnett*, “service of an expert disclosure statement after the filing of the note of issue presented new and unanticipated claims” warranting relief. [*Id.*]. By contrast, relief was not warranted where the movant had “ample notice” of the potential need for discovery before filing the NOI. (*Prevost v One City Block LLC*, 155 AD3d 531, 537 [1st Dept 2017] [*citing id.*]).

Plaintiff’s motion fails to demonstrate either “unusual or unanticipated circumstances” or “substantial prejudice.” *First*, Plaintiff had actual knowledge of both the East Coast Report and the role of Mr. Cooper at B.A. Silver before discovery closed but did not seek additional party discovery or third-party discovery until after it filed the NOI, which militates against any finding of changed circumstances or prejudice. *Second*, unlike in *Hartnett*, Defendants have not

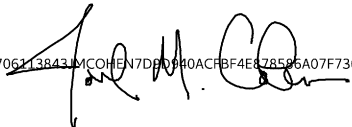
identified Mr. Cooper as an expert and have not tendered the East Coast Report as an expert report. *Third*, Plaintiff fails to identify any discovery requests that were not responded to and, even if Plaintiff did, Plaintiff failed to seek relief before it confirmed the close of discovery by filing the NOI. *Fourth*, Defendants' motion for summary judgment was denied and Plaintiff has failed to demonstrate substantial prejudice. To the extent that Defendants seek to rely at trial on any evidence not exchanged during discovery, those disputes may be adjudicated at trial.

* * * *

Accordingly, it is

ORDERED that Plaintiff's motion for leave to conduct post-Note of Issue discovery is **DENIED**.

This constitutes the Decision and Order of the Court.


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JOEL M. COHEN, J.S.C.

	<u>7/6/2022</u> DATE	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE