

Baldwin, LLC v O'Neill
2022 NY Slip Op 32503(U)
July 26, 2022
Supreme Court, Kings County
Docket Number: Index No. 502766/2016
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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THE BALDWIN, LLC, individually and
derivatively as a member of ZONE OIL
AND GAS, LLC,

Plaintiffs, Decision and order

- against -

Index No. 502766/2016

THOMAS O'NEILL,

Defendant,

July 26, 2022

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PRESENT: HON. LEON RUCHELSMAN

Nancy Naples, a non-party, has filed three motions seeking protective orders on the grounds the information sought pursuant to subpoenas served is protected. Specifically, subpoenas were served upon Ms. Naples, her banking institutions, namely M&T Bank, KeyBank, and Bank of America and upon her counsel, namely Lippes Mathias Wexler Friedman, LLP. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the complaint, Zone Oil and Gas LLC [hereinafter 'Zone'] was formed in 2008 by defendant Thomas O'Neill and two non-parties, William Ziegler and Robert Brook. Zone was formed to acquire oil and gas leases from a previously organized lease pool. The Baldwin invested funds and became a member of Zone during 2008. The complaint alleges that defendant O'Neill took money that had been invested in Zone for his own personal benefit and that between September 2008 and August 2009

withdrew over \$660,000 for his personal use. The complaint in this action alleges claims for breach of contract, breach of fiduciary duty, abuse of control, conversion, unjust enrichment, an accounting, constructive trust and fraud. It should be noted that two other lawsuits have been filed, one entitled *Paul Atanasio, individually and derivatively as a member of Now Ventures, LLC, v. O'Neill*, Index Number 502767/2016 and the other *Paul Atanasio, individually and derivatively as a member of Somerset Production Company LLC v. O'Neill*, Index Number 502769/2016. The Now Ventures lawsuit alleges that O'Neill used funds invested by Now Ventures for his own personal benefit. The Somerset lawsuit alleges that Somerset amended its operating agreement to add a company half owned by O'Neill called Berea Oil and Gas Corp., which effectively allowed O'Neill to dominate Somerset. That complaint alleges O'Neill diverted Somerset's funds for his own personal use. The present motions are all filed by Ms. Naples, the wife of Thomas O'Neill. The same subpoenas have been served in the other two lawsuits as well and the same motions have been filed. Specifically, in this lawsuit she asserts the subpoenas served upon her are untimely, irrelevant and over broad and a protective order is appropriate. The plaintiff in this action (and the other actions as well) counters the subpoenas are essential and the motions should be denied.

Conclusions of Law

In Kapon v. Koch, 23 NY3d 32, 988 NYS2d 559 [2014] the court held that third party subpoenas may be served whenever the information sought is 'material and necessary' "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (id). The court noted that "so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty" (id). Thus, "disclosure from a nonparty requires no more than a showing that the requested information is relevant to the prosecution or defense of the action" (see, Bianchi v. Galster Management Corp., 131 AD3d 558, 15 NYS3d 189 [2d Dept., 2015], CPLR §3103(a)). A party seeking to vacate or quash a third party subpoena has a burden establishing the information is "utterly irrelevant" or "the futility of the process to uncover anything legitimate is inevitable or obvious" (Anheuser-Busch Inc., v. Abrams, 71 NY2d 327, 525 NYS2d 816 [1988]).

First, the subpoenas served are timely and there is no basis to quash them for any service irregularities. Concerning the time-frame contained in the subpoenas, the plaintiff asserts that "O'Neill began removing funds from the Plaintiff entities in or around 2006" (Memorandum of Law in Opposition, page 9 [NYSCEF #119]). However, the complaint states that Zone was formed in

2008 and The Baldwin became a member of the Zone on May 23, 2008. Further, the complaint states that "beginning in September of 2008, defendant O'Neill began taking money from Zone's bank account and using it for personal expenses unrelated to the business or affairs of Zone" (Complaint, ¶ 23). Thus, there really can be no basis seeking bank statements or any information of Ms. Naples prior to September 2008. The earlier date of 2006 noted in the subpoenas and argued in opposition to this motion relate to allegations that appear in the Somerset action (Index Number 502769/2016) not this action.

In any event, considering the propriety of the motion, Ms. Naples argues the subpoenas are improper. She argues that "the material inquiry is whether Defendant O'Neill improperly withdrew funds and whether those funds were repaid, not what Defendant O'Neill did with the funds prior to repayment. Accordingly, a review of Ms. Naples's [sic] financial records from the last 16 years will have absolutely no bearing on Plaintiffs' claims" (see, Memorandum of Law in Support, page 5 [NYSCEF #99]). However, one of the affirmative defenses presented by O'Neill is that he has "repaid all advances taken, constituting payment in full" (see, Answer, ¶ 102). The plaintiff counters and disputes the contention any funds were ever returned. The plaintiff repeatedly disputes that any such funds were returned and insists the defendant's assertions he paid all the funds back with loans

he received from his wife permit discovery of Ms. Naples' bank statements and Ms. Naples herself. Thus, the court does generally agree the existence of questions whether the defendant utilized loans from his wife to pay back funds improperly taken would allow subpoenas of Ms. Naples and her bank accounts to verify these claims.

However, there is an overarching reason such subpoenas are patently improper in this case. Paragraph 30 of the Complaint concedes that "while it appears most of the money taken by O'Neill has been repaid, Zone was never paid any return for O'Neill's use of its money. Zone was not only unable to invest in potentially lucrative oil and gas opportunities, but was also not earning any investment return on that money it would have had but for O'Neill's conduct" (id). Thus, the Complaint itself admits the defendant repaid most of the money. That statement in the complaint is difficult to reconcile with the numerous assertions in the affirmations in support of the motion and in the memorandum of law that argue otherwise. Thus, in truth, the claims against O'Neill are really based upon the loss of business opportunities and the harm caused by an improper use of the funds, but not by a continued misappropriation of such funds. Those claims, of course, may be pursued but they have nothing whatsoever to do with the accounts of Ms. Naples. It should be noted that a similar paragraph appears in the Somerset action

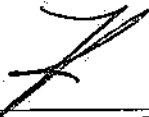
complaint (see, Complaint, Index Number 502769/2016, ¶28) but no such statement appears in the Now Ventures action complaint (Index Number 502767/2016). Further, the deposition testimony submitted in the Somerset action whereby the defendant mentions loans between him and his wife have no bearing on this action when the complaint concedes the funds taken were paid back. It is true the complaint asserts that "most" of the funds have been paid back and thus some funds remain unpaid and hence misappropriated. However, it is improper to subpoena the banking records of Ms. Naples for fifteen years regarding loans she made to the defendant to substantiate vague and imprecise claims that only "some" of the money has not been paid back. The subpoenas in this regard are too overbroad. The court will permit the plaintiff to again seek further information from Ms. Naples when the nature and amount of money they allege has not been paid back is more substantiated.

Therefore, based on the foregoing, the motion seeking protective orders regarding the three subpoenas served is granted.

So ordered.

ENTER:

DATED: July 26, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC