

Favus Inst. Research LLC v Jefferies Fin. Group Inc.
2022 NY Slip Op 32556(U)
July 27, 2022
Supreme Court, New York County
Docket Number: Index No. 155606/2022
Judge: Arlene Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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FAVUS INSTITUTIONAL RESEARCH LLC

Petitioner,

- v -

JEFFERIES FINANCIAL GROUP INC.,

Respondent.

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INDEX NO. 155606/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1- 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for DISCOVERY - PRE-ACTION.

The petition for pre action discovery is granted in part.

Background

Petitioner contends that it provides equity research consulting services about healthcare-related companies to institutional investors. It maintains that its principal is an expert in the field (a former instructor at Mount Sinai School of Medicine) and that the advice it provides must remain confidential. Petitioner observes that many of its reports contain confidential proprietary information and trade secrets.

It claims in that in December 2018, petitioner produced a report about an entity (“IMMU”) that explored purportedly publicly available materials from the FDA, which disclosed a breach in IMMU’s data integrity. The data integrity breach later made headlines and led to a lawsuit in federal court in New Jersey against IMMU. Petitioner received a subpoena in that case, which it successfully moved to quash. However, in the motion for reconsideration, petitioner alleges that it discovered for the first time that the plaintiffs in the New Jersey action

were already in possession of a copy of the report and that respondent provided the report to those plaintiffs. (The motion for reconsideration was decided in petitioner's favor). Petitioner asserts that respondent is not its client and that it wants to find out where respondent got a copy of the report so it can file a claim for breach of contract. Petitioner maintains that recipients of its reports are not permitted to share these documents.

In opposition, respondent contends that it produced documents in response to a lawful subpoena served in the New Jersey action. It points out that the New Jersey case is a securities class action lawsuit about purported misstatements and omissions made by IMMU. Respondent observes that the complaint in the New Jersey case specifically mentions the report prepared by petitioner as revealing the truth about the data breach to the market and that this report was the precipitating factor in IMMU's marked stock price decline.

Respondent argues that it was never a client of petitioner and therefore does not owe this entity a duty of confidentiality. It argues that the requests in this petition are overbroad and the pre-action discovery sought by petitioner far exceeds what is permissible. Respondent insists that, in the alternative, petitioner should be limited to receiving information about the party that sent the report to it.

The Court acknowledges that petitioner sought leave to file a reply via letter (NYSCEF Doc. No. 20). The Court denies that request; petitioner is not entitled to a reply to an order to show cause and petitioner did not cite a sufficient reason to submit additional papers.

Discussion

"Pre-action discovery is not permissible as a fishing expedition to ascertain whether a cause of action exists and is only available where a petitioner demonstrates that he or she has a meritorious cause of action and that the information sought is material and necessary to the

actionable wrong. Generally, the determination of whether a party has demonstrated merit lies in the sound discretion of the trial court” (*Bishop v Stevenson Commons Assocs., L.P.*, 74 AD3d 640, 641, 905 NYS2d 29 [1st Dept 2010] [internal quotations and citations omitted]). “Pre-action discovery may be appropriate to preserve evidence or to identify potential defendants; however, it cannot be used by a prospective plaintiff to ascertain whether he has a cause of action at all” (*Holzman v Manhattan and Bronx Surface Tr. Operating Auth.*, 271 AD2d 346, 347, 707 NYS2d 159 [1st Dept 2000]).

The Court grants the petition only to the extent that respondent must disclose the identity of the party that sent the report to respondent. As stated above, pre-action disclosure is appropriate to help identify a potential defendant and petitioner established that the disclosure of its report (assuming the disclosure was from one of petitioner’s clients) might breach an agreement between petitioner and that client. That information could reveal a potential defendant. However, the Court makes no finding about whether a breach occurred.

However, the remaining requests are not appropriate for pre-action disclosure. As respondent pointed out, it merely responded to a lawful subpoena and the complaint in the New Jersey action specifically mentioned petitioner’s report. There is no reason to subject respondent to a deposition and force it to produce documents and communications. Pre-action disclosure is not designed to mimic the typical discovery process in a plenary action.

Petitioner’s argument that respondent should have notified petitioner about its possession of the report before disclosing it in response to the New Jersey subpoena is without merit. Respondent is not petitioner’s client and had no duty of confidentiality. Respondent did, however, have a duty to comply with a lawful subpoena.

Accordingly, it is hereby

ADJUDGED that the petition for pre action disclosure is granted ONLY to the extent that respondent must disclose the identity of the party that sent the subject report to it on or before August 17, 2022 and denied with respect to the remaining relief requested and the Clerk is directed to enter judgment accordingly WITHOUT costs or disbursements upon presentation of proper papers therefor.

7/27/2022

DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

☐

NON-FINAL DISPOSITION

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GRANTED IN PART

☐

OTHER

APPLICATION:

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SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE


 ARLENE BLUTH, J.S.C.