

**Ninth Space LLC v Goldman**

2023 NY Slip Op 30532(U)

February 21, 2023

Supreme Court, New York County

Docket Number: Index No. 655957/2017

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

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

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NINTH SPACE LLC, TOBACCO ROAD HOLDING LLC,  
  
Plaintiffs,

INDEX NO. 655957/2017

MOTION DATE 02/04/2022,  
10/14/2022

- v -

MOTION SEQ. NO. 014 015

JAMES GOLDMAN, JOSHUA LEBOWITZ, DINING  
ENTERTAINMENT GROUP LLC, ACC BBQ LLC, ACC BBQ  
IP, INC., GOOD TIME BBQ LLC, 8TH AVENUE BBQ,  
LLC, LEXINGTON AVENUE BBQ, LLC, 181 LEXINGTON  
AVENUE BBQ, LLC, ROOSEVELT FIELD BBQ  
LLC, BROTHER, 63 IRONGATE HOLDINGS LLC, THE  
BLUESTONE GROUP, DEG INVESTOR, LLC, ASTOR  
GROUP, LLC, JOHN/JANE DOES 1-10, XYZ COMPANIES  
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 014) 562, 563, 564, 565,  
566, 567, 568, 569, 571, 799, 800, 809

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 817, 818, 819, 820,  
821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840,  
841, 842, 843, 844, 845, 846, 847, 848, 849, 851

were read on this motion to COMPEL DISCOVERY.

Plaintiffs Ninth Space LLC and Tobacco Road Holding LLC's (together, "Plaintiffs")  
motion to compel discovery (Mot. Seq. 015) is GRANTED IN PART. Defendants DEG  
Investor, LLC and The Bluestone Group's (together, "Bluestone") motion for summary  
judgment (Mot. Seq. 014) is DENIED WITHOUT PREJUDICE pending completion of the  
discovery directed in this order.

## BACKGROUND

This case involves the failure of two Brother Jimmy's BBQ restaurants. Plaintiffs' only remaining claim against Bluestone is for fraudulent conveyance (*Ninth Space LLC v Goldman*, 192 AD3d 594 [1st Dept 2021]). The crux of Plaintiffs' claim against Bluestone is that Bluestone engineered a preferential transfer of assets from Defendant Dining Entertainment Group LLC to Bluestone and Defendant James Goldman during the pendency of this case. Plaintiffs assert that (1) Bluestone has failed to provide all relevant documents from September 2017 through November of 2017 when Bluestone allegedly approved the fraudulent conveyances and (2) Bluestone has failed to serve a privilege log concerning documents it is withholding.

Following the First Department's decision reinstating Plaintiff's fraudulent conveyance claim against Bluestone, the parties submitted Rule 14 letters raising multiple discovery issues (NYSCEF 525-541). Approximately a week later, Bluestone (as well as the other defendants) moved for summary judgment (NYSCEF 562). In addition to disputing Bluestone's motion on the merits, Plaintiffs argued that a continuance was warranted pursuant to CPLR 3212(f) based on the Rule 14 correspondence. Following oral argument on September 6, 2022, the Court held that Bluestone's motion for summary judgment would be taken on submission and authorized Plaintiff to make a motion to compel discovery from Bluestone "in a week" (Tr. 68:10-12, 70:15-72:8 [NYSCEF 812]).

Counsel for Plaintiffs submitted a letter (NYSCEF 811) indicating that they were attempting to work out certain discovery disputes with Bluestone and requested that the deadline to file a motion to compel be extended. The letter indicated that Plaintiffs "do not anticipate a delay of more than two weeks" and that a proposed schedule would be filed if a resolution was not accomplished (*Id.*). Counsel for Plaintiffs thereafter advised by letter (NYSCEF 813) that

while approximately two hundred new documents were produced by Bluestone, they believed certain discovery remained outstanding. Plaintiffs filed a motion by order to show cause seeking to compel documents and for related relief (NYSCEF 817).

## DISCUSSION

### A. A Privilege Log is Required from Bluestone

Bluestone is withholding documents on the basis of privilege (Opp. Brief at 10 [NYSCEF 833]). The fact that Bluestone has allegedly worked in good faith to voluntarily produce documents following oral argument is not sufficient to avoid the requirement of serving a privilege log. Commercial Division Rule 11-b provides a mechanism to “reduce the time and costs associated with preparing privilege logs.” Accordingly, Bluestone is directed to serve within 20 days of this decision and order a privilege log that conforms to Rule 11-b encompassing all documents that it is withholding from production (*Herman v Herman* [N.Y. Sup Ct, New York County 2015; *Dantzig v Orix Am Holdings, LLC*, 2019 N.Y. Slip Op. 33030[U], 15 [N.Y. Sup Ct, New York County 2019]).

### B. An Additional Search for Documents from September-November 2017 is Required by Bluestone

The new documents produced by Bluestone, Bluestone representatives’ deposition testimony concerning communications between September-November 2017, and Bluestone’s inability to represent that it has produced all responsive documents suggest that additional responsive documents may not have been produced. Bluestone’s assertion that any unproduced documents are irrelevant in light of their legal positions on summary judgment does not excuse their production in light of the First Department’s ruling.

Additionally, Bluestone's opposition does not detail what efforts were made to search for additional documents created from September-November of 2017 (*Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 1992]). The parties are directed to meet and confer on the specific nature of the search to be employed, including search terms and deadlines for production, and upload to NYSCEF a stipulation for the Court's review and approval within fourteen days of this decision and order.

**C. Bluestone's Motion for Summary Judgment is Denied Without Prejudice**

CPLR 3212(f) provides that if a party opposing summary judgment shows that "facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had. . ."

In light of the resolution of Plaintiffs' motion to compel above, Bluestone's motion for summary judgment is denied without prejudice to renewal upon the completion of discovery (*Berkeley Fed. Bank & Tr. FSB v 229 E. 53rd St. Assoc.*, 242 AD2d 489, 490 [1st Dept 1997] citing CPLR 3212[f]).

\* \* \* \*

Accordingly, it is

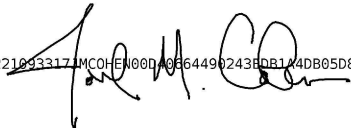
**ORDERED** that Plaintiffs' motion to compel discovery from Bluestone is **GRANTED IN PART**; it is further

**ORDERED** that Bluestone's motion for summary judgment is **DENIED** without prejudice to renewal after the completion of discovery authorized by this order; it is further

**ORDERED** that the branch of Plaintiffs' motion seeking discovery sanctions is **DENIED**; and it is further

**ORDERED** that a compliance conference will be held on **Thursday March 16, 2023**, at 10:30 am and the parties shall circulate dial-in information to [sfc-part3@nycourts.gov](mailto:sfc-part3@nycourts.gov) in advance of the hearing; it is further

The foregoing constitutes the decision and order of the Court.

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2/21/2023  
DATE

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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: