

Aegis SMB Fund II, LP v Rosenfeld

2023 NY Slip Op 30840(U)

March 15, 2023

Supreme Court, New York County

Docket Number: Index No. 452123/2018

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

AEGIS SMB FUND II, LP

Plaintiff,

- v -

SHIMON A. ROSENFELD,

Defendant.

-----X

INDEX NO. 452123/2018

MOTION DATE 3-15-23

MOTION SEQ. NO. 006 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 160, 161, 162, 163, 164, 165, 166, 167, 168, 170, 171, 172, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 217, 218, 219, 220

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 224, 225, 226, 227, 228, 229

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR.

In this action to recover upon a 2009 promissory note, the defendant, guarantor on the note, moves pursuant to CPLR 2308 to quash four non-party subpoenas *duces tecum* served upon three banks - Capital One Bank USA N.A., Alma Bank, and Bank of America, N.A. – and the defendant’s accountant, Joseph Furst, CPA, on or about December 16, 2022 (MOT SEQ 006). The plaintiff opposes the motion. The motion is granted in part.

The subpoenas served on the three banks seek, “for the period December 31, 2009, through the present”, “(1) Documents concerning any bank account maintained by Rosenfeld & Arouh or [its sole member] Shimon A. Rosenfeld at [the bank], including all account statements, cancelled checks, and wire transfer confirmations concerning said accounts.” and “(2) Documents sufficient to identify payments made from Rosenfeld & Arouh or Shimon A. Rosenfeld to Aegis SMB Fund II, LLP.” The subpoena served on the accountant seeks “for the period April 1, 2009, through the present, any and all documents and communications

surrounding the loan... including but not limited to financial statements, tax returns and balance sheets.”

The defendant argues that the subpoenas are overbroad, seek irrelevant information, are a fishing expedition, are meant to harass the defendant and are untimely as they were served after the plaintiff filed a Note of Issue and Certificate of Readiness on November 30, 2022. In opposition, the plaintiff argues, *inter alia*, that the information sought is not only relevant, but is material and necessary to the prosecution of this action and that its many attempts to obtain the information from the defendant were unsuccessful. The plaintiff has filed an Order to Show Cause seeking to withdraw its Note of Issue so as to allow for the late subpoenas (MOT SEQ 007).

A motion to quash a subpoena may should be granted when the futility of uncovering anything legitimate is obvious or the information sought is “utterly irrelevant to any proper inquiry.” Kapon v Koch, 23 NY3d at 32 (2014). A subpoena may be challenged if it encompasses materials that are privileged or “clearly irrelevant” or palpably overbroad and in need of pruning. Grotallio v Soft Drink Leasing Corp., 97 AD2d at 383 (1st Dept. 1983). Nor may a subpoena be used as a tool of harassment or for a proverbial “fishing expedition to ascertain the existence of evidence.” Reuters Ltd. v Dow Jones Telerate, Inc., 231 AD2d 337, 342 (1st Dept. 1997); see Law Firm of Ravi Batra, P.C. v Rabinowich, 77 AD3d 532 (1st Dept. 2010). Moreover, “[w]here disclosure is sought against a nonparty, more stringent requirements are imposed on the party seeking disclosure.” Velez v Hunts Point Multi-Serv. Ctr., Inc. 29 AD3d 104, 108 (1st Dept. 2006). However, CPLR 3101 still applies and provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” “The words ‘material and necessary’ as used in CPLR 3101(a) are ‘to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy’ (Allen v Crowell-Collier Pub. Co., 21 NY2d 403, 406 [1968]).” Matter of Steam Pipe Explosion at 41st Street and Lexington Avenue, 127 AD3d 554, 555 (1st Dept. 2015).

Here, the defendant has occasioned much of the delay in discovery, as set forth in several prior orders. In a status conference order dated November 17, 2022, the court noted that the defendant had only recently appeared for a deposition, after completing a prison sentence imposed upon a wire fraud conviction, and, since the defendant claimed that he was unable to locate certain bank records or other proof of payments he claimed to have made to the plaintiff, directed the defendant to provide sufficient information for the plaintiff to draft

proper subpoenas. The defendant provided the names of his banks and his accountant. In response to the defendant's initial complaints about the subpoenas served, the plaintiff consented to modifying the subpoenas but the defendant did not sign on to any stipulation. The defendant then sought, by this motion filed January 4, 2023, to quash the subject subpoenas in their entirety.

Initially, the court notes that it may vacate a Note of Issue where, as here, it appears that a material fact set forth therein, *i.e.*, the representation that discovery is complete, is incorrect. See 22 NYCRR 202.21(e); Rivers v Birnbaum, 102 AD3d 26 (2nd Dept. 2012); Gomes v Valentine Realty LLC, 32 AD3d 699 (1st Dept. 2006); Herbert v Sivaco Wire Corp., 1 AD3d 144 (1st Dept. 2003). The plaintiff sought further discovery after filing the Note of Issue and did not move to extend the Note of Issue deadline. Nor did the subpoenas constitute "unusual or unanticipated circumstances" to warrant post-note discovery. See 22 NYCRR 202.21(d). Therefore, the Note of Issue is stricken. The plaintiff's Order to Show Cause seeking to withdraw its Note of Issue is thereby rendered moot.

The defendant's motion to quash is granted to the extent that the subpoena served on the defendant's accountant, which seeks, *inter alia*, tax returns, is quashed in its entirety, and the subpoenas served on the defendant's banks shall be modified and limited as to time parameters as discussed at oral argument, and the motion is otherwise denied.

It has long been the rule that "[b]ecause of their confidential and private nature, disclosure of tax returns is disfavored." Gordon v Grossman, 183 AD2d 669, 670 (1st Dept. 1992). The plaintiff here has not made the "strong showing of necessity" nor demonstrated that the information sought from the returns "is unavailable from other sources." Id. [internal citations omitted]; compare Currid v Valea, 184 AD3d 511 (1st Dept. 2020); Four Aces Jewelry Corp. v Smith, 256 AD2d 42 (1st Dept. 1998). Indeed, the plaintiff purports to be seeking the same information from the defendant's accountant as it seeks from the defendant's banks, *i.e.* any payments made on the note. As such, a request for 13 years of financial statements and balance sheets for the defendant and his former law firm clearly casts too wide a net.

However, the plaintiff correctly contends that any payment made by the defendant would be relevant not only to the debt owed but also to the defendant's Statute of Limitations defense.

The plaintiff has maintained that the defendant made partial payments or promises to pay on the note and had requested and was granted extensions on the loan as recently as 2017. The plaintiff submitted an affidavit of its President, Todd Roberts, stating the same. Indeed, at his deposition in September 2022, the defendant repeatedly testified that he made payments on the note but could not recall the amounts, dates or any other details, and did not recall whether he requested extensions on the loan, because “it’s been a long time” and his memory was “vague.” He thereafter submitted a *Jackson* affidavit in which he states that he searched his own records and was unable to locate any proof of payment, and most recently submitted an affidavit in which he states that, contrary to his deposition testimony, he actually does not recall making payments and may have been testifying about “an attempt to pay payments to the plaintiff in 2010.” Moreover, in an order dated February 14, 2023, the court, in granting the plaintiff’s motion to amend the complaint to add causes of action for fraud and breach of fiduciary duty and denying the defendant’s cross-motion for summary judgment, observed that the defendant had claimed to have made some payments on the note “but has never substantiated that claim.” In light of these discrepancies and memory gaps, the plaintiff is entitled to seek information from the defendant’s banks. While the court was not inclined to allow further discovery at that time of the February 14, 2023, order, the Note of Issue is now being stricken and the limited discovery sought in the remaining subpoenas, as modified, is appropriate under the circumstances.

The plaintiff’s initial demand for bank records for a 13-year period was excessive and subject to modification, at least as to time parameters. The plaintiff has agreed to limit the subpoenas to the period 2009 to 2018. The plaintiff shall serve the modified subpoenas on or before March 27, 2023, and, upon completion of that discovery, shall file a Note of Issue on or before May 19, 2023, and that date shall not be extended.

Accordingly, upon the foregoing papers and after oral argument, it is hereby

ORDERED that, upon the court’s own motion, the Note of Issue and Certificate of Readiness filed on November 30, 2022, is vacated and the action is stricken from the trial calendar, and it is further

ORDERED that the plaintiff’s motion, brought by Order to Show Cause, to withdraw the Note of Issue and Certificate of Readiness (MOT SEQ 007) is deemed withdrawn as moot, and it is further

ORDERED the defendant's motion pursuant to CPLR 2308 to quash subpoenas served by the plaintiff on or about December 16, 2022 (MOT SEQ 006), is granted to the extent that the subpoena served on the defendant's accountant, Joseph Furst, CPA, is quashed in its entirety, and the subpoenas served on the defendant's banks - Capital One Bank USA N.A., Alma Bank, and Bank of America, N.A. - shall be modified and limited as to the time parameters, not to exceed the period 2009-2018, and the motion is otherwise denied, and it is further

ORDERED that the plaintiff shall serve the modified subpoenas on or before March 27, 2023, and, upon completion of that discovery, shall file a Note of Issue and Certificate of Readiness on or before May 19, 2023, and that date shall not be extended, and it is further

ORDERED that the plaintiff shall serve a copy of this order on the Clerk of the Court, who is directed to strike the Note of Issue and Certificate of Readiness filed November 30, 2022, and strike this action from the trial calendar.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

3/15/2023

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE