

255 Butler Assoc. LLC v 255 Butler, LLC

2023 NY Slip Op 31913(U)

June 1, 2023

Supreme Court, Kings County

Docket Number: Index No. 511560/2015

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMM. PART 8
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255 BUTLER ASSOCIATES LLC,

Plaintiff,

Decision and order

- against -

Index No. 511560/2015

255 BUTLER, LLC, ARIEL AKKAD, NATHAN
AKKAD, SOLOMON AKKAD and BENJAMIN
AKKAD,

Defendants,

June 1, 2023

-----x
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #37

The defendants Ariel Akkad, Benjamin Akkad, Nathan Akkad, Solomon Akkad and non-parties Idea Nuova Inc., HH246 Fifth LLC, HH Realty Equities LLC, and HH West 20th LLC have moved seeking to quash subpoenas served upon non-party Cathay Bank pursuant to CPLR §2304 and for a protective order. The plaintiff opposes the motion. Papers were submitted by the parties and after reviewing all the arguments, this court now makes the following determination.

The plaintiff seeks to enforce a judgement awarded and have served a subpoena upon Cathay Bank seeking banking information about the movants. The movants have moved seeking to quash that subpoena.

Conclusions of Law

In Kapon v. Koch, 23 NY3d 32, 988 NYS2d 559 [2d Dept., 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)). Further, pursuant to CPLR §5223 a "judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment" (id). Thus, this statute acts as "a broad criterion authorizing investigation through any person shown to have any light to shed on the subject of the judgment debtor's assets or their whereabouts" (see, David D. Siegel, New York Practice §509 [5th ed. 2011]). Indeed, "CPLR 5223 permits a judgment creditor to compel disclosure of all matter relevant to the satisfaction of a judgment. It is a generous standard that allows for a broad range of inquiry through either the judgment debtor or any third person with knowledge of the debtor's property" (see, Dragons 516 Ltd., v. GDC 138 E 50 LLC, 75 Misc3d 1216(A), 169 NYS3d 502 [Supreme Court New York County 2022]). 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]).

Preliminarily, there are questions whether a customer of a bank even maintains standing to challenge subpoenas served upon the bank seeking the customer's banking information (see, Norkin v. Hoey, 181 AD2d 248, 586 NYS2d 926 [1st Dept., 1992]). As the court noted in AQ Asset Management LLC v. Levine, 111 AD3d 245, 974 NYS2d 332 [1st Dept., 2013] "a depositor has no ownership or other interest in a bank's records of his accounts. Thus, he has no standing to object to a subpoena directed at them" and that this "proposition remains true, even more strongly, in the civil context" (id, see, also, Medequa LLC v. O'Neill & Partners LLC, 2022 WL 16852214 [S.D.N.Y. 2022]).

In any event, considering the propriety of the motion, the defendants present a number of reasons why the subpoenas are improper. First, procedurally, the movants argue the subpoenas fail to state the reason the documents are sought and that the subpoena erroneously recorded the wrong county in which the judgement was entered. Second, substantively, the movants argue the plaintiffs fail to present the relevance of such documents and the requests are over broad in their scope. Moreover, the movants argue the plaintiff has instituted a fraudulent conveyance action against the movants here and discovery in that action should govern the production of any discovery and the

discovery sought in this action should be quashed. Lastly, the movants assert that pursuant to the lease entered into between the plaintiff and the defendant no liability can attach to any of the individuals in this action, consequently, the discovery sought is irrelevant.

Procedurally, the notification and certification that accompanied the subpoena states that "a Judgment was entered on March 20, 2023, in favor of Plaintiff/Judgment-Creditor 255 Butler Associates LLC and against Defendant/Judgment-Creditor 255 Butler LLC in the amount of \$36,241,836 plus post-judgment interest at the rate of 9%" and that there is a "A REASONABLE BELIEF THAT THE PARTY RECEIVING THIS SUBPOENA HAS IN THEIR POSSESSION INFORMATION ABOUT THE DEBTOR THAT WILL ASSIST THE CREDITOR IN COLLECTING THE JUDGMENT" (see, Subpoena, pages 1 and 3 [NYSCEF Doc. No. 1198]). Further, the mere fact the caption lists the wrong county, an inadvertent typographical mistake, does not invalidate its legitimacy. Therefore, there are no procedural reasons the subpoena is not proper.

Turning to the substantive grounds to quash the subpoena, the fact a fraudulent conveyance action was commenced necessarily means the information sought here has more relevance, not less. While the specific instances detailing the transfers have been redacted from the amended complaint (see, Amended Complaint in *255 Butler Associates LLC v. 255 Butler LLC et al*, ¶¶79, 93-95,

97-99, 15-156, 160, 167-169, Index Number 511109/2018 [NYSCEF Doc. No. 35]) the allegations are extensive. Most importantly, that action is stayed "pending resolution of the main action" (see, Order dated October 31, 2018 [NYSCEF Doc. No. 63 of Index Number 511109/2018]). Therefore, a request to deny the subpoenas in this main action so their production can be further litigated in a stayed action really violates the order staying that action. Moreover, there is no legal impediment seeking production in this action. To the extent there is any overlap between relief sought in this action and the other action such overlap can be addressed in the action that is stayed in any event.

Next, there is no basis to assert the subpoenas merely seek to ascertain the existence of evidence or as a fishing expedition (Goodstein v. 695 9th Avenue Housing Development Fund Corporation, 60 Misc3d 1227(A), 110 NYS3d 501 [Supreme Court New York County 2018]). Rather, the subpoenas seek broad information based upon substantiated assertions of such improper and fraudulent transfers. Of course, motions to dismiss have not been resolved in that action, however, that does not undermine the utility of the subpoenas sought here. Further, the broad nature of the documents sought pursuant to the subpoenas is proper in efforts to enforce the judgement.

Lastly, Section 37.6 of the lease states that "neither Landlord nor any such Person who has at any time acted as

Landlord hereunder nor any of the members, directors, officers, employees, agents or servants of either shall have any liability (personal or otherwise) hereunder beyond Landlord's interest in the Premises, including, without limitation, the rents and profits therefrom, the proceeds of any insurance policies covering or relating to the Premises, any awards payable in connection with any condemnation of the Premises or any part thereof, and any other rights, privileges, licenses, franchises, claims, causes of action or other interests, sums or receivables appurtenant to the Premises, and no other property or assets of Landlord or any such Person or any of the members, directors, officers, employees, agents or servants of either shall be subject to levy, execution or other enforcement procedure for the satisfaction of Tenant's remedies hereunder" (see, Lease, ¶37.6 [NYSCEF Doc. No. 2]). However, the subpoena seeks information from the movants to enforce the judgement against the landlord, not any of the individuals that may be exempted by the above noted provision. To be sure, the court is not determining the individual movants are definitively exempt from any liability, rather, the documents sought are sought to bolster the plaintiff's efforts to satisfy its judgement against the landlord. In that regard the subpoenas are proper.

Therefore, based on the foregoing the motion seeking to quash the subpoenas is denied.

No party may file any motion or any order to show cause without prior approval from the court.

So ordered.

ENTER:

DATED: June 1, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC