

Crestview SPV, LLC v Crestview Fin., L.L.C.

2023 NY Slip Op 33947(U)

November 4, 2023

Supreme Court, New York County

Docket Number: Index No. 651277/2020

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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CRESTVIEW SPV, LLC,

Plaintiff,

- v -

CRESTVIEW FINANCIAL, L.L.C., KEITH NASON,
SHALOM AUERBACH, and CHRISTOPHER GRAVAGNA,

Defendants.

INDEX NO. 651277/2020

MOTION DATE

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 128, 129, 130, 132, 141, 142, 143, 144, 145, 146, 148, 151, 167

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 007) 133, 134, 135, 136, 137, 138, 139, 140, 147, 149, 150, 152, 153, 154, 155, 160, 168, 169, 170, 171, 172

were read on this motion to/for CONTEMPT

Upon the foregoing documents, it is

In motion 06, defendant Crestview Financial, LLC (CF LLC),¹ moves pursuant to CPLR 3212 for summary judgment on the sole cause of action for an accounting and pursuant to CPLR 2201 to stay production of documents pending resolution of the Order to Show Cause.² CF LLC argues that because an equitable accounting requires a fiduciary duty, but here there is no fiduciary duty under the LLC Agreement's exculpation clause, the action must be dismissed. The motion is denied because plaintiff Crestview SPV, LLC (SPV) does not seek an equitable accounting, but a right to

¹ The only remaining defendant is Crestview Financial LLC. (NYSCEF Doc. No. [NYSCEF] 50, November 10, 2020 Decision and Order; NYSCEF 101, April 22, 2022 Decision and Order.)

² The court declined to sign the TRO staying production of documents. However, Crestview failed to produce any documents. (NYSCEF 132, OSC.)

books and records and certain reports as provided by the agreements. Likewise, the court rejects CF LLC's argument that SPV is not entitled to equitable relief because it had an adequate remedy at law; again, SPV does not seek an equitable accounting. While SPV did not address the merits of CF LLC's summary judgment motion, since CF LLC failed to sustain its burden, the burden never shifted to SPV. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

In motion 07, SPV moves by OSC for (i) "a finding of contempt against [CF LLC] and its principal, Shalom Auerbach,³ pursuant to Jud. Law [§§]756⁴ and 770⁵ and to punish defendants for their willful disobedience of court orders designed to defeat, impair, impede or prejudice [SPV]'s rights and remedies,⁶" (ii) "the imposition of sanctions for nondisclosure under CPLR 3126 including striking defendant's answer and rendering a judgment by default against this recalcitrant defendant," (iii) "the imposition of a fine as well as incarceration of [CF LLC]'s principal," (iv) "legal fees in the amount of \$7,500 to compensate [SPV] for legal fees incurred in the making of this motion," and (v) "an order that the issues involving Auerbach setting up at least one and possibly more companies as conduits in which to funnel money from Crestview Financial LLP⁷ to personally benefit himself be resolved against [CF LLC] and Auerbach."⁸ (NYSCEF

³ Since Auerbach was dismissed from the case and SPV fails to explain how the court is to find this dismissed party in contempt, the requested relief against Auerbach is not addressed and that part of the OSC is denied.

⁴ Judiciary Law § 756 explains how to initiate a civil contempt proceeding: timing; order to show cause; and content for notice.

⁵ Judiciary Law § 770 is entitled Final Order Directing Punishment.

⁶ In the motion papers, SPV seeks relief pursuant to Rule 130. Since SPV failed to mention Rule 130 in the order to show cause, the court does not address this requested relief.

⁷ Crestview Financial LLP is not a party to this action.

⁸ The court does not address this request for relief because it is based solely on the affirmation of attorney Kyong P. Choe upon information and belief.

133, SPV's OSC.) In addition to attorney fees (NYSCEF 169, Kyu O. Kim, Esq. aff; NYSCEF 170, Kiyoun P. Choe, Esq. aff), SPV seeks sanctions in the amount of \$1,029,825.55. (NYSCEF 153, Russell A. Flaming, CPA aff.) This sanction calculation assumes a breach of contract claim, but there is no such claim in this action anymore (NYSCEF 82, Second Amended Complaint) and there has been no request to restore it.

On March 20, 2017, SPV was formed by Inmost Partners LLC and CF LLC which established SPV to purchase merchant receivables from CF LLC. (NYSCEF 76, Unverified Second Amended Complaint ¶¶2, 4.) CF LLC has reporting requirements under the Asset Purchase Agreement which provides:

“SECTION 6.03. Records. (a) The Seller shall, at the Purchaser's request and at the Seller's expense, assemble all Records relating to any Purchased Asset and deliver, on the date of any Purchase hereunder, the originals of such Records to the Purchaser. (b) Prior to delivery to the Purchaser, the Seller shall hold all Records relating to any Purchased Asset in trust for the Purchaser.” (NYSCEF 3, Asset Purchase Agreement between SPV and CF LLC §6.03.)

The Servicing Agreement between SPV and CF LLC provides:

“(i) Reporting. The Servicer shall provide to the Owner and its agent or designee, including the Administrative Agent, each of the following: (i) Real-time access to the Servicer's electronic portal for purposes of providing current information concerning the Purchased Assets and access to Records (the “Servicer Portal”). The Servicer shall not make any change to the Servicer Portal, the effect of which would be to reduce the availability of or access to the information or Records on the Servicer Portal without the prior written consent of the Owner, which shall not be unreasonably withheld or delayed; (ii) On the 15th day of each calendar month after the Effective Date, a report (the “Asset Report”), substantially in the form attached hereto as Schedule B, with such modifications as may be agreed to by the Servicer and the Owner, for each Purchased Asset as of close of business on the last day of the calendar month immediately preceding the delivery of such report. (iii) The Servicer shall keep the Owner generally informed with respect to any Purchased Asset which is in collection, including, at the Owner's request, access to all Records relating to such collection activity and access to attorneys involved in such efforts. (j) The Servicer shall further provide to the Owner (or its designee) and the Administrative Agent such additional reports on the dates, with the frequency and in a format as may be reasonably requested by the Owner (and/or the Administrative Agent) from time to time. (k) Response Time. The Owner shall

endeavor to provide its response or approval, as the case may be, as promptly as possible, following the receipt of any request from the Servicer or its agent or designee, including the Administrative Agent.”

(NYSCEF 4, Servicing Agreement ¶3.01.) Section 5.02 of the Asset Purchase Agreement also requires CF LLC to provide documents to SPV. (NYSCEF 76, Unverified Second Amended Complaint ¶32.) On April 28, 2017, CF LLC established Advance Services Group LLC, allegedly to take over SPV’s assets and leave SPV with liabilities. (*Id.* ¶66.) By March 2018, SPV was allegedly insolvent. (*Id.* ¶65.) In June 2018, CF LLC stopped sending the required reports. (*Id.* ¶31.) SPV demanded documents and explanations to no avail. (*Id.* ¶¶32-52.) On February 6, 2019, CF LLC admitted that it had not made payments to SPV. (*Id.* ¶53.) On February 22, 2019, SPV terminated the Servicing Agreement. (*Id.* ¶58.) CF LLC has not responded to SPV since March 2019. (*Id.* ¶64.) SPV initiated this action on February 26, 2020. (NYSCEF 1, Summons and Complaint.)

SPV moves for contempt because Crestview has failed to produce any documents in violation of court orders. The preliminary conference order directed CF LLC to produce documents by April 30, 2021. (NYSCEF 58, Preliminary Conference Order.) On April 22, 2022, the court noted that “under the Servicing Agreement, [SPV] shall have access to Crestview Financial LLC’s books and records” and directed defendants “to provide [SPV] with copies and reasonable access to all books and records of Crestview Financial, LLC, by May 6, 2022.” (NYSCEF 101, Decision and Order at 4-5.) On November 7, 2022, the court directed that “[SPV] shall inspect Crestview’s books and records by November 30, 2022, and defendant shall take any and all steps necessary to make those electronic records accessible to [SPV]. . . . Failure to comply with this order shall result in penalties in this 2020 action.” (NYSCEF

123, Case Management Order.) At a pre-trial conference, the court issued yet another order on December 2, 2022 (NYSCEF 127, Case Management Order), which provides: “Defendants have admittedly failed to produce requested documents. Defendants have until 5 pm on December 9, 2022, to produce the requested documents. Otherwise they will be penalized. . . .”

Instead of producing the documents on December 9, 2022, defendant filed the Order to Show Cause on December 9. (NYSCEF 128, December 9, 2022 OSC.) The January 13, 2023 affirmation of Steven W. Wells, Esq., counsel to CF LLC, is woefully insufficient to counter this record: “My office made numerous attempts to contact the former bookkeeper through phone, email, and text, but received no response.” (NYSCEF 147, Wells aff ¶¶6.) Wells fails to identify the bookkeeper. Wells also stated that “I was specifically advised that the documents and information are maintained electronically on a third-party, cloud-based software system to which Defendant no longer has access,” but he fails to state to whom he spoke. (*Id.* ¶¶4.) The absence of an affidavit from a principal of defendant explaining why all of defendants’ documents are missing speaks volumes. There is no explanation for why the documents are no longer accessible to CF LLC except for attorney speculation that CF LLC has failed to pay its bookkeeper and cloud service bills. (NYSCEF 168, tr 30:25-31:8; NYSCEF 172, tr 10:4-8.)

As promised in the November 2022 and December 2022 orders, defendant is sanctioned for failing to comply with this court’s order to produce documents. SPV has satisfied the requirements for a finding of contempt: (1) there are unequivocal and lawful orders; (2) defendant disobeyed the orders; (3) defendant had knowledge of the orders; and (4) plaintiff’s rights were prejudiced. (*McCormack v Axelrod*, 59 NY2d 574, 583

[1983].) CF LLC's production of a profit and loss statement from April 28, 2023, which was not shared with the court,⁹ is insufficient to purge the contempt in light of the breath of documents CF LLC was required to keep and make available to SPV and the months of missing documents beginning in June 2018.

The purpose of the contempt penalty is to coerce or compensate or both. (*Matter of Dept. of Env'tl. Protection of City of New York v Dept. of Env'tl. Conservation of State of N.Y.*, 70 NY2d 233, 239 [1987].) Here, there is no reason to issue a coercive penalty as there is no hope of CF LLC ever producing the documents. Accordingly, the sanction is to pay SPV's attorneys' fees for this action in its entirety. SPV's attorney affidavits do not address attorneys' fees prior to the contempt motion. SPV shall submit an affirmation of services 10 days from the date of this order. CF LLC may submit opposition 10 days from receipt of SPV's affirmation of services. The court will advise the parties if a hearing is necessary.

The court declines to award contract damages as a penalty for disobeying this court's orders. SPV was invited to address the issue of "[w]hat is the remedy for failing to produce books and records as required by the agreement and or as ordered multiple times by the Court" and respond to a new issue raised in CF LLC's reply. (NYSCEF 168, tr 29:5-30:12.) Since SPV withdrew its contract claim, it is unclear how to measure the damages caused by failing to produce the books and records. In its current configuration, were the court to award SPV summary judgment or grant SPV's request under CPLR 3126, it would get yet another order directing CF LLC to produce its books

⁹ On May 1, 2023, SPV informed the court via email that on April 28, 2023, it received the profit and loss statement from CF LLC via email. The parties shall file on NYSCEF these two email messages, as well as the profit and loss statement attached to the April 28, 2023 message.

and records. (See *Atlantis Mgt. Group II LLC v Nabe*, 177 AD3d 542 [1st Dept 2019].)

However, SPV failed to accept that invitation; repeating the law without addressing the problem identified by the court is useless. (See NYSCEF 152, Memo of Law.)

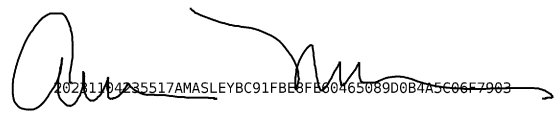
This decision is supplemented by decisions on the record on January 23, 2023, and April 21, 2023. (NYSCEF 168, tr; NYSCEF 172, tr.)

Accordingly, it is

ORDERD that defendant’s motion for summary judgment is denied; and it is further

ORDERED that plaintiff’s motion is granted to the extent that the court finds defendant Crestview Financial LLC in contempt for their willful disobedience of this court’s orders which is designed to defeat, impair, impede or prejudice SPV’s rights and remedies, and did in fact damage SPV; and it is further

ORDERED that plaintiff shall have judgment on its remaining claim for an accounting.



11/4/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE