

CWCapital Invs. LLC v CWCapital Cobalt Vr Ltd.

2023 NY Slip Op 34245(U)

December 3, 2023

Supreme Court, New York County

Docket Number: Index No. 652092/2018

Judge: Andrea Masley

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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 48

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CWCAPITAL INVESTMENTS LLC,

Plaintiff,

- v -

CWCAPITAL COBALT VR LTD.,

Defendant.

INDEX NO. 652092/2018

MOTION DATE _____

MOTION SEQ. NO. 014

**DECISION + ORDER ON
MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 014) 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 423, 424, 425, 426, 427, 428

were read on this motion to/for REVIEW ORDER REFEREE/DISCLOSURE.

Upon the foregoing documents, it is

In motion 014, nonparties Greystone Servicing Company LLC, KeyBank National Association, LNR Partners, LLC (LNR), Midland Loan Services (Midland), Situs Holdings, LLC, and Torchlight Loan Services, LLC (collectively, Servicers) move pursuant to CPLR 3104(d) for review of the Discovery Referee’s order of August 24, 2023 (Order) (NYSCEF 401) and an order reversing the Order and denying Cobalt’s motion to compel the Servicers’ compliance with Cobalt’s subpoenas. The motion is granted to the extent that the court finds it has no jurisdiction over LNR. Otherwise, the court endorses the Order.

The court’s prior decisions in this action provide a detailed background of the dispute, which will be supplemented as necessary for this motion.¹ Cobalt seeks

¹ The court presumes familiarity with the case and adopts all capitalized terms as used in the court’s prior decisions.

contracts from the Servicers in support of Cobalt's claim that CWCI, Cobalt's collateral manager, breached its agreement with Cobalt by repeatedly engaging CWCA as special servicer which failed to negotiate fee splits. Discovery Referee Gold clearly explained that "if Cobalt prevails in demonstrating that CWCI had an obligation to negotiate agreements with special servicers that served Cobalt's interests to the extent possible under then-current market conditions, evidence of what those market conditions were, and what agreements CWCI could have negotiated had it made the effort, will be highly relevant to the determination of Cobalt's fee-sharing claims." (NYSCEF 401 at 11.) The Servicers have identified 200 such contracts from the relevant period of 2011 to 2017. Clearly, this discovery process is not futile. (*See Kapon v Koch*, 23 NY3d 32, 39 [2014].) Nor have the Servicers established an unreasonable annoyance or expense. (*See Liberty Petroleum Realty, LLC v Gulf Oil, LP* 164 AD3d 401, 403 [1st Dept 2018].) As discussed by Discovery Referee Gold, these contracts are relevant to prove liability by comparing CWCI's practices to the market and damages. The Servicers have not established that Discovery Referee Gold's decision is clearly erroneous by applying the wrong standard.

However, it is undisputed that Cobalt failed to comply with the Uniform Interstate Deposition and Discovery Act (UIDD Act) in serving LNR in Florida. (*See CPLR 3119 and Fla. Stat. Ann. §92.251.*) The subpoena is invalid and thus this court, as well as Discovery Referee Gold too, has no jurisdiction to compel LNR's compliance. (*See Seaport Glob. Holdings LLC v Dusansky*, 76 Misc 3d 1221(A) *2 [Sup Ct, NY County 2022]; *Bordonaro v E.C. Provini Co., Inc.*, 2023 NY Slip Op 30195[U], **2 [Sup Ct, New York County 2023].) The court rejects Cobalt's argument that as long as LNR had

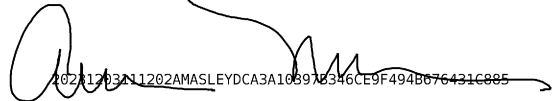
notice, service is sufficient. Cobalt overlooks that it is the UIDD Act that affords the court jurisdiction over foreign citizen witnesses and protects those witnesses from the expense of challenging a subpoena in New York -- a foreign state to them. (*Bordonaro v E.C. Provini Co., Inc.*, 2023 NY Slip Op 30195[U] [Sup Ct, New York County 2023].) By failing to serve the Florida clerk, Cobalt robbed LNR of a local place to object to the subpoena by moving to quash it. This argument was not waived or abandoned as it was raised by LNR at its first opportunity – Cobalt’s motion to compel compliance. (NYSCEF 418, Servicers Opp at 5-6; NYSCEF 419, Servicers Sur Reply at 7.) While LNR did not list this objection in its initial letter response, LNR did reserve its rights to quash the subpoena. (NYSCEF 411, Sept 16, 2022 letter.) LNR’s ten-month delay in raising its procedural objection to the subpoena is troubling. However, the subpoena is invalid and the court is without jurisdiction –no amount of delay can change that. Cobalt’s legal support for its waiver argument, *Aretakis v Tarantino*, 300 AD2d 160 [1st Dept 2002], is inapplicable since it speaks to personal jurisdiction and a statutory deadline to raise it, not the UIDD Act. Since Discovery Referee Gold’s decision is clearly erroneous on this issue, the court is compelled to reverse it. (CPLR 3104(d).)

The Servicers fail to respond to Cobalt’s assertion that its service of the subpoena on Midland at PNC Bank, N.A., Midland’s parent, at its New York office, was good service. Therefore, the court finds the service of the subpoena on Midland was effective and this court has jurisdiction to compel Midland to comply.

The court rejects the Servicers’ assertion that Discovery Referee Gold’s decision should be reversed because it is “unprecedented.” Even if it was unique, which it is not, Discovery Referee Gold’s well-reasoned opinion coupled with the highly negotiated

Order for the Production and Exchange of Confidential Information (NYSCEF 422, Order for the Production and Exchange of Confidential Information), agreed to by four of the six Servicers, addresses the Servicers' confidentiality concerns with use of attorneys' eyes only and providing the contracts to the experts who will aggregate the data. The experts will be subject to the highly negotiated Order for the Production and Exchange of Confidential Information and are already subject to the confidentiality agreement in this case. (NYSCEF 270.)

Accordingly, the motion is granted as to LNR and otherwise denied.



12/3/2023
DATE

ANDREA MASLEY, J.S.C.

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