

Park Premium Enter. Inc. v Kahan

2024 NY Slip Op 30842(U)

March 7, 2024

Supreme Court, Kings County

Docket Number: Index No. 504991/2020

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: CCP

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PARK PREMIUM ENTERPRISE INC.
D/B/A PARK DEVELOPERS & BUILDERS,

Plaintiff,

Decision and order

- against -

Index No. 504991/2020

JOSEPH KAHAN,

Defendant,

March 7, 2024

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #7 & #8

The plaintiff and defendant have moved and cross-moved, essentially, seeking discovery. The motions have been opposed respectively. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

According to the complaint, the plaintiff, a general construction contractor, asserts the defendant has told lies about the plaintiff and its principal Aaron Leibovits. Specifically, the complaint alleges the defendant told others that Leibovits is a thief and that no one in their close community should hire the plaintiff. The complaint alleges causes of action for libel, prima facie tort, tortious interference with business and contractual relations and an injunction.

These discovery motions have been filed. The plaintiff seeks a sanction due to the defendant's failure to appear for a deposition. The defendant seeks a sanction due to the

plaintiff's failure to provide tax returns.

Conclusions of Law

It is well settled that the trial court maintains broad discretion concerning the discovery process and any sanction for any violation (Bouri v. Jackson, 177 AD3d 947, 113 NYS3d 232 [2d Dept., 2019]). The severe sanction of striking a pleading is appropriate where it can be demonstrated that the failure to comply with discovery was the result of wilful and contumacious conduct (Rosenblatt v. Franklin Hospital Medical Center, 165 AD3d 862, 85 NYS3d 488 [2d Dept., 2018]). Such conduct may be inferred from a party's actions, specifically a long period of time passing without complying with the discovery coupled with the absence of any reasonable excuse to explain such failure to comply (Morson v. 5899 Realty LLC, 171 AD3d 916, 98 NYS3d 127 [2d Dept., 2019]). Generally, the failure of either party to provide sought after discovery and to follow the express order of the court demonstrates a pattern of wilful default and neglect concerning the outstanding discovery (Espinal v. New York City Health and Hospitals Corp., 115 AD3d 641, 981 NYS2d 569 [2d Dept., 2014]).

Although the defendant appeared for a deposition in a related action that does not foreclose the plaintiff's right to depose the defendant in this action. Thus, a deposition of the

defendant shall be scheduled within thirty days of the date this order is received. There shall be no adjournment of this date unless by consent of all parties.

Turning to the tax records sought, the basis for such request is to evaluate the plaintiff's claim for damages. The plaintiff claims at least \$50,000,000 for each of the first four causes of action contained in the complaint. Thus, the plaintiff must establish such damages by reasonable certainty (see, Baba-Ali v. State, 19 NY3d 627, 951 NYS2d 94 [2012]). Indeed, a party cannot assert claims "while resisting material and necessary disclosure that would enable such allegations to be tested" (see, JFK Family Ltd., Partnership v. Millbrae Natural Gas Development Fund 2005 L.P., 132 AD3d 731, 17 NYS3d 765 [2d Dept., 2015]). Generally, tax returns are not discoverable in the absence of a strong showing the contents are indispensable and the information cannot be obtained from other sources (Latture v. Smith, 304 AD2d 534, 758 NYS2d 135 [2d Dept., 2003]). The discovery demand served on August 25, 2023 sought the tax returns of plaintiff, the general ledger of plaintiff and the bank accounts of plaintiff (see, Defendant's Third Set of Document Demands [NYSCEF Doc. No. 102]). The plaintiff objected to all such requests on the grounds the requests were irrelevant, overbroad and unduly burdensome. In opposition to this motion the plaintiff asserts the defendant has failed to seek the information from alternative

sources and that "the majority of damages in the instant action come from opportunity lost, given that Defendant's defamatory practices was conducted to prevent additional opportunities. Such damages would therefore not be found in tax returns, or the financial information sought" (see, Affirmation in Further Support, ¶16 [NYSCEF Doc. No. 121]). First, alternative sources consist of other documents that can substantiate the information that would be contained within private tax returns (see, Cyngiel v. Krigsman, _AD3d_, _NYS3d_ 2024 WL 820817 [2d Dept.m 2024]). Thus, heightened requirements to protect the confidential nature of tax returns and other private information (see, DIV-COM Inc., v. Tousignant, 116 AD3d 1118, 984 NYS2d 182 [3rd Dept., 2014]) cannot apply to all corporate documents (Lee v. Chun Ka Luk, 132 AD3d 515, 19 NYS3d 39 [1st Dept., 2015]). In Lee, the court ordered the production of general ledgers so that profits claimed could be examined. Thus, any alternative sources, other than tax returns, are only in the possession of the plaintiff.

Furthermore, the fact the damages are the result of alleged lost opportunities, such losses will surely be reflected in corporate documents that demonstrate a loss of income compared with the time periods before the defendant's conduct. Of course, the plaintiff will be required to demonstrate not just losses suffered but that such losses were the result of defendant's conduct. Thus, it is difficult to comprehend how the actions of

defendant which allegedly caused such significant losses would not appear on tax returns or other financial information sought. Moreover, it is not the defendant's burden to think of other alternative methods, if others even exist, whereby the losses sustained, if any, are only in the possession of the plaintiff.


Therefore, the defendant's motion seeking financial information sought within the discovery demand (NYSCEF Doc. No. 102) is granted to the extent the plaintiff must provide its general ledger for the last ten years. The request for the tax returns and bank statements may be renewed upon a showing that the general ledger is insufficient and that the information contained in any tax documents cannot be obtained from other sources.

All requests seeking sanctions are denied.

So ordered.

ENTER:

DATED: March 7, 2024
Brooklyn, N.Y.



Hon. Leon Ruchelsman
JSC