

Matter of Icahn Partners LP v Alliancebernstein L.P.

2025 NY Slip Op 31252(U)

March 31, 2025

Supreme Court, New York County

Docket Number: Index No. 155879/2024

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

During respondent's deposition, respondent's counsel instructed its corporate designee, Eric Goldstein (hereinafter, "Goldstein"), not to answer questions about Cannae Advisors — the winning bidder for the Crossgates Mall in the summer of 2023 — on grounds of confidentiality, proprietary information concerning a live or current transaction. Next, petitioners contend that the instruction not to answer questions was inappropriate because the questions involved neither topics wherein privilege had been preserved nor did respondent secure a court order limiting the scope of questioning. Also, petitioners posit that respondent's counsel's conduct during the deposition is sanctionable because though the attorney was aware of the deposition topics, he did not attempt to object to or narrow the deposition topics, and thereby waived the objections made at said deposition. Further, petitioners insist that respondent's counsel never articulated a valid basis for his objections and instructions, even after being advised that the Nevada protective order adequately addresses any concerns over disclosure of confidential, proprietary, or sensitive information. In addition, petitioners assert that Rialto's counsel asked Icahn several questions about the Crossgates Mall in a deposition (NYSCEF Doc. No. 3, *petitioners' memo of law*). As relevant to this application, petitioners furnish, *inter alia*, a copy of the deposition subpoena, the Nevada Action complaint, and Nevada Action protective order (NYSCEF Doc. Nos. 5; 6; 13).

In opposition, respondent asserts that the CR-2 Trust is an entirely separate trust from the CR-4 Trust, and it is not the subject of the Nevada litigation. According to respondent, the instant motion should be denied because Rialto is not the servicer of the CR-2 Trust; is not alleged to have been involved with the CR-2 Trust; and any losses petitioners suffered in the CR-2 Trust are not at issue in the Nevada litigation. Further, respondent argues that contrary to petitioners' contentions, all of the events linked to Rialto's alleged misconduct in the Nevada Action occurred in 2018 and 2019, four years before the Crossgates transactions. Respondent notes that while it furnished petitioners with documents about its investments in the CR-2 Trust, the transactions for which petitioners now seek testimony were separate transactions from respondent's investments in CR-2. Moreover, since the Crossgates Mall transactions took place one year after the Nevada Action commenced, respondent argues that the transactions are irrelevant to the Nevada Action and petitioners cannot seek discovery about same. Also, respondent maintains that inasmuch as the subpoena makes no mention of the Crossgates Mall, it did not produce any documents relating to any Crossgates transactions and hence, it was appropriate for its counsel to raise confidentiality concerns about disclosure that would involve proprietary and competitively sensitive information.

Next, respondent posits that to the extent petitioners' counsel suggests that the protective order in the Nevada Action would protect any confidential information from wrongful dissemination, that suggestion in of itself concedes that communications about the Crossgate Mall transactions are confidential and should not be disclosed. In any case, claims respondent, the protective order in the Nevada Action would not prevent unauthorized individuals in petitioners' investment business from accessing proprietary and sensitive information belonging to respondent. With respect to relevance, respondent contends that the Crossgates transaction questions Rialto's counsel asked Icahn (of which respondent was not a participant), are immaterial and irrelevant to the instant action because Rialto was not the special servicer for the Crossgates Mall loan. Also, respondent contends that petitioners are seeking information about the Crossgates Mall transactions as a basis to file another lawsuit to recover losses from their CMBX.6 investment. According to respondent, the three topics in the subpoena that mention

CR-2 and CMBX.6 should not be considered as broadly covering information about the Crossgate Mall transactions.

Respondent further contends that its counsel's instructions to Goldstein not to answer questions about the Crossgates Mall transaction is appropriate and permitted by 22 NYCRR 221.2, which allows a party to object to preserve a "right of confidentiality" or "when the question is plainly improper and would, if answered, cause significant prejudice to any person". According to respondent, the information sought is not merely private, but is proprietary, has material economic value, and is competitively sensitive. Even were it not confidential, the information sought is utterly irrelevant to the Nevada litigation, maintains respondent.

Lastly, respondent articulates that the branch of the motion seeking sanctions or costs should be denied as its conduct during the deposition was not frivolous. It asserts that its counsel's instruction to Goldstein to not answer certain deposition questions has merit in law, was not undertaken to delay or prolong the litigation, and deponent did not make materially false factual statements. Rather, claims respondent, it produced a witness who sat for a full day of examination, and its counsel did not object to a majority of the questions posed (NYSCEF Doc. No. 28, *opposition memo of law*).

In reply, petitioners assert that since the subpoena mentions Crossgates, respondent's contention that it did not anticipate questions on Crossgates is not credible. Petitioners insist Goldstein acknowledged that Crossgates was an asset held by the CR-2 Trust, served as collateral for three CMBX.6 deals, and would trigger a credit event if the sale price for Crossgates Mall dropped below a threshold level. Petitioners maintain that the Nevada Court has held that the CMBX.6 Index is relevant to the claims therein, and the parties are entitled to explore whether respondents influenced a CMBX.6 credit event with respect to the Crossgates Mall transactions. Next, petitioners posit the legal standard in New York: the "right" of confidentiality under 22 NYCRR 221.2 is limited to protecting legal interests that are "akin to privileges" in that they are recognized as weighty and entitled to special consideration from the courts. Petitioners insist that respondent fails to explain how factual questions about the Crossgates Mall sale consummated in August 2023 implicates respondent's trading strategy, valuation models, and the assumptions it uses to assess transactions, such that disclosure would put it at a competitive disadvantage. Petitioners maintain that Goldstein voluntarily answered questions about influencing the timing of CMBX.6 credit events that did not include Crossgates but refused to answer analogous questions involving Crossgates. Inasmuch as the protective order in the Nevada Action would restrict the disclosure and improper use of any Crossgates-related information that qualifies as confidential or highly confidential, petitioners argue that any claims of competitive harm that respondent would experience are unfounded. Lastly, petitioners urge the court to award them costs, including fees incurred in bringing the instant motion and taking a second deposition (NYSCEF Doc. No. 36, *reply*). Petitioners attach a copy of a correspondence with respondents in which Crossgate was indicated as a search term (NYSCEF Doc. No. 38).

CPLR 3101 provides that "[there] shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof." This provision is liberally construed to require disclosure "of any facts bearing on the controversy

which will assist preparation for trial by sharpening issues and reducing delay and prolixity.” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968].) 22 NYCRR 221.2 provides that “[a] deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person.”

Here, petitioners have established their entitlement to an order compelling respondents to appear for a second deposition to answer questions about the bidding process on the Crossgates Mall. Petitioner has demonstrated that answers to questions about said bidding process on the Crossgates Mall are relevant to their allegations in the Nevada Action complaint that there existed potential interference/improper influence with the servicing decisions concerning the Crossgates Mall sale, as same purportedly occurred with recognizing losses connected to Prizm Outlets. Respondent’s counsel also acknowledged at oral argument that petitioners were deposed about the Crossgates Mall in relation to the Nevada Action. Contrary to respondent’s averments, the subpoena in fact mentions Crossgates and the correspondence in advance of the deposition evinces that Crossgates was a topic that petitioners could inquire about. Since it was established during oral argument that respondent has sold its interest in the CMBX index that holds Crossgates Mall, any issues about Crossgates Mall being a live transaction or trade secret are moot (*proceedings transcript*, pg. 27).¹ Nonetheless, to the extent that answers about the Crossgates Mall would involve disclosure of confidential or proprietary information, respondent has the opportunity to use the protective order in place in the Nevada Action to protect the disclosure and use of such information.

Next, that branch of petitioners’ application seeking sanctions is denied. The Court declines to impose sanctions at this juncture because respondent counsel’s conduct does not rise to the level of a “continuous pattern of conduct” such that financial sanctions are necessary to deter future frivolous conduct (see *Grayson v New York City Dep’t of Parks & Recreation*, 99 AD3d 418, 419 [1st Dept 2012]). All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

ORDERED that the application is granted in part; and it is further

ORDERED that the branch of the application seeking to compel respondent ALLIANCEBERNSTEIN L.P to be deposed concerning the Crossgates Mall bidding is granted; and it is further

ORDERED that the branch of the application seeking sanctions against respondent ALLIANCEBERNSTEIN L.P is denied; and it is further

ORDERED that within forty-five (45) days after this decision and order is uploaded to NYSCEF, a witness from respondent ALLIANCEBERNSTEIN L.P shall appear for a second deposition of no more than two (2) hours with petitioners; and it is further

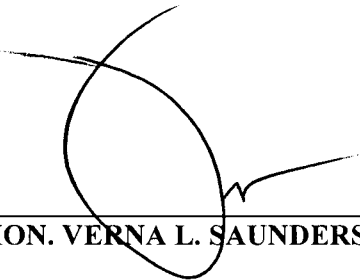
¹ The court was furnished a copy of the transcript from oral argument of the instant petition via e-mail, though the parties did not file a copy of the transcript on NYSCEF.

ORDERED that the scope of the second deposition shall be limited to questions concerning bids for the Crossgates Mall; and it is further

ORDERED that within fifteen (15) days after this decision and order is uploaded to NYSCEF, counsel for petitioners shall serve a copy of this decision and order, with a notice of entry, upon respondent.

This constitutes the decision and order of this court.

March 31, 2025



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE