

CVL Real Estate Holding Co. LLC v Weinstein

2012 NY Slip Op 31030(U)

February 24, 2012

Supreme Court, New York County

Docket Number: 602868/2007

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 602868/2007
CVL REAL ESTATE HOLDING
 vs.
WEINSTEIN, ELI
 SEQUENCE NUMBER : 009
 PREL INJUNCT / TEMP REST ORDER

Justice

PART 3

INDEX NO. 602868/07
 MOTION DATE 8/2/11
 MOTION SEQ. NO. 4

his motion to/for _____

notice of motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 1
 Answering Affidavits — Exhibits _____ No(s) 2
 Replying Affidavits _____ No(s) 3

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

IS DECIDED
 IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
 APR 11 2012
 CLERK'S OFFICE
 NEW YORK

Dated: 2-24-12

Eileen Bransten
 EILEEN BRANSTEN J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

-----X

CVL REAL ESTATE HOLDING CO. LLC,

Plaintiff,

-against-

ELI WEINSTEIN,

Defendant.

-----X

Index No. 602868/07
Motion Date: 8/12/2011
Motion Seq. Nos.: 009

BRANSTEN, J.

Defendant Eli Weinstein (“Defendant”) moves to vacate the contempt order and arrest warrant that this court issued on March 26, 2009 and April 30, 2009, respectively. In the alternative, Defendant moves to stay the contempt order and arrest warrant until the conclusion of a criminal action against him that is currently pending in federal court.

Plaintiff opposes the motion.

I. Background

On April 11, 2008, Plaintiff obtained a judgment against Defendant for \$5,750,000 plus interest. Defendant’s Memorandum of Law in Support of Order to Show Cause (“Defendant’s Memo”), p. 3. Defendant did not perfect an appeal of the judgment. Affirmation of David Carlbach in Support of Order to Show Cause (“Carlbach Affirm.”), Ex. R, p. 21. On February 4, 2009, Plaintiff attempted to serve upon Defendant a Subpoena Duces Tecum, Subpoena Ad Testificandum, Restraining Notice, Notice of Judgment Debtor and Information Subpoena to ascertain the location and amount of Defendant’s assets.

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Defendant's Memo, p. 3. Defendant contested the validity of the subpoenas and refused to provide the information requested therein. *Id.*

On February 26, 2009, Plaintiff moved for an order holding Defendant in contempt of court for failing to comply with the subpoenas. *Carlbach Affirm.*, Ex. E, p. 2. On March 18, 2009, Plaintiff's and Defendant's attorneys appeared in court for oral argument on Plaintiff's motion. *Carlbach Affirm.*, Ex. F, p. 1. Mr. Weinstein did not attend the hearing. *Id.* at p. 14. The court warned Defendant's counsel that if Defendant did not appear in court the following day, he would be in contempt of court. *Id.* at p. 19. Defendant failed to appear.

On March 26, 2009, the court granted Plaintiff's contempt motion. *Carlbach Affirm.*, Ex. I, p. 1. On April 30, 2009, the court issued an additional order holding Defendant in contempt of court for failing to respond to Plaintiff's subpoenas and for failing to appear at the hearings on March 18 and 19. *Carlbach Affirm.*, Ex. J, p. 2. The court ordered the Clerk of the Court to issue a warrant for Defendant's arrest. *Id.*

On August 25, 2009, Defendant moved to vacate the contempt order and arrest warrant. *Carlbach Affirm.*, p. 5. The court denied the motion on the grounds that Defendant had done nothing to cure the contempt. *Carlbach Affirm.*, Ex. M, p. 1.

On October 28, 2009, Defendant responded to the Information Subpoena, providing answers to questions and over 5,000 documents. *Id.* Defendant subsequently made over 50,000 additional documents available for inspection at Defendant's counsel's office. *Id.* at p. 7.

On December 1, 2009, Defendant moved to vacate the contempt order and arrest warrant, asserting that he had cured his contempt. In opposition, Plaintiff claimed that, despite Defendant's voluminous document production, Defendant had not produced several key records. Carlbach Affirm., Ex. T, p. 6. Plaintiff asserted that Defendant had failed to produce information about Defendant's personal bank accounts and records for a number of Defendant's Limited Liability Companies ("LLCs"). *Id.* Defendant also did not respond to the Subpoena Ad Testificandum. *Id.* On February 4, 2010, the court denied Defendant's motion to vacate the contempt order. The court held that Defendant had not fully complied with the Subpoena Duces Tecum or the Subpoena Ad Testificandum. Carlbach Affirm., Ex. M, p. 1.

On August 11, 2010, the Federal Government filed criminal charges against Defendant. Defendant is alleged to have induced a number of individuals and banks to invest over \$200,000,000 in fraudulent real estate projects between 2003 and 2011. Carlbach Affirm., Ex. V, pp. 2-6. On August 12, 2010, the Federal Bureau of Investigation ("FBI") executed a search upon Defendant's home and office. Carlbach Affirm., Ex. W, pp. 3-18. The FBI seized computers, documents, jewelry and other valuables. *Id.*

Defendant now once again moves to vacate this court's contempt order and arrest warrant. Defendant claims that he cannot comply with the Subpoena Duces Tecum because federal agents seized his personal and business records. Defendant's Memo, p. 14. Defendant further claims that compelling him to comply with the Subpoena Ad Testificandum and to produce the documents requested in the Subpoena Duces Tecum

would violate his rights against self-incrimination under the Fifth Amendment to the United States Constitution. *Id.* at 14-15. Finally, Defendant argues that the contempt order should be vacated because it impedes Defendant's ability to pursue a lawsuit against his former business partner, Michael Gandi. Emergency Affirmation of David Carlbach ("Carlbach Emergency Affirm."), p. 2.

Plaintiff maintains that Defendant's motion must be denied because the only way to ensure that Defendant fully complies with the Subpoena Duces Tecum and the Subpoena Ad Testificandum is to leave the contempt order and arrest warrant in place. Plaintiff/Judgment Creditor's Memorandum of Law in Opposition to Defendant's Third Order to Show Cause to Vacate Arrest Warrant ("Plaintiff's Memo"), pp. 8-9. Plaintiff asserts that the arguments Defendant sets forth are a merely a ploy to hamper Plaintiff's ability to collect on its judgment. *Id.*

II. Analysis

A. Personal Banking Records

Defendant stated in his answers to the Information Subpoena that he currently has no personal bank accounts. Affirmation of Wallace Neel in Opposition to Defendant's Third Order to Show Cause to Vacate Arrest Warrant ("Wallace Affirm."), Ex. 3, p. 8. However, Plaintiff asserts that it found evidence of several personal bank accounts amongst the documents that Defendant produced. Carlbach Affirm., Ex. T, p. 6. This evidence consists of cancelled checks from a number of personal accounts. *Id.* Plaintiff seeks the complete bank records for each of these accounts.

Defendant claims that, “[i]n light of the Criminal Proceeding, it is now impossible for Defendant to cure his contempt, since Defendant must waive his Fifth Amendment right against Self-incrimination by testifying about and producing the subpoenaed documents.” Defendant’s Memo, p. 14. Plaintiff contends that producing the requested documents would not violate Defendant’s rights because Fifth Amendment protection does not apply to financial records. Plaintiff’s Memo, p. 10, n. 4.

In *United States v. Doe*, 465 U.S. 605 (1984), the United States Supreme Court held that “the Fifth Amendment protects the person asserting the privilege only from *compelled* self-incrimination. Where the preparation of business records is voluntary, no compulsion is present.” *Id.* at 610-11 (emphasis in original). The Supreme Court went on to apply this reasoning to records of personal finances such as tax returns and to the financial records of sole proprietorships. *Id.* at 611-12.

Similarly, Defendant here “does not contend that he prepared the [requested] documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. The fact that the records are in respondent’s possession is irrelevant to the determination of whether the creation of the records was compelled.” *Id.* The contents of Defendant’s personal bank records are therefore not protected from disclosure under the Fifth Amendment.

“Although the contents of a document may not be privileged, the act of producing the document may be.” *Id.* at 612-13. The act of producing documents can be a “testimonial act” because “[c]ompliance with the subpoena tacitly concedes the existence of the papers

demanded and their possession or control by the” person producing the documents. *Id.* at 613. “It also would indicate the . . . belief that the papers are those described in the subpoena.” *Id.*

Consequently, while the contents of Defendant’s personal financial records are not privileged, the act of producing those records may be. “To establish a fifth amendment violation, [Defendant] must . . . demonstrate the existence of three elements: 1) compulsion, 2) a testimonial communication, and 3) the incriminating nature of that communication.” *In Re Grand Jury Subpoena*, 826 F.2d 1166, 1168 (2d Cir. 1987). The element of compulsion is met here as Defendant is subject to a subpoena and a contempt order.

Next, the court must consider whether the production of Defendant’s financial records is testimonial. “Under the Fifth Amendment, evidence is deemed testimonial when it reveals defendant’s subjective knowledge or thought processes – when it expresses the contents of defendant’s mind.” *People v. Havrish*, 8 N.Y.3d 389, 395 (2007) (citing *Doe v. United States*, 465 U.S. 201, 211 (1988)). “The surrender of evidence can be testimonial if, by doing so, defendant tacitly concedes that the item demanded exists or is in defendant’s possession or control when these facts are unknown to the authorities and would not have been discovered through independent means.” *Id.* In other words, “the inquiry is whether the existence of the item sought, or defendant’s possession of it, was a ‘foregone conclusion and the [defendant] adds little or nothing to the sum total of the Government’s information by conceding that he in fact has the [item].’” *Id.* (quoting *Fisher v. United States*, 425 U.S. 391, 411 (1976)).

The existence of records detailing the location and amount of Defendant's personal assets is not a foregone conclusion. The production of those records would be a tacit concession of their existence and an admission that those records were in Defendant's possession or control. Production of Defendant's personal financial records would therefore be testimonial unless the FBI has already independently obtained those records.

Finally, the court must determine whether the production of evidence is incriminating. In doing so, the court must look to whether "either the fact of existence of the papers or of their possession by the [Defendant] poses any realistic threat of incrimination," *Fisher*, 425 U.S. at 412, or "merely trifling or imaginary[] hazards of incrimination." *Doe*, 465 U.S. at 614, n. 13. Defendant has not shown that the existence of his personal bank records or the fact that he possessed them would incriminate him. The mere fact that he faces prosecution for a crime does not necessarily mean that the records Plaintiff seeks will be inculpatory. Although it is conceivable that the existence of Defendant's bank records could incriminate him in the unrelated criminal action, Defendant has not alleged this to be the case, let alone shown it to be so.

Furthermore, Defendant cannot make a blanket Fifth Amendment objection to the production of all of his financial records. He must assert the privilege on a document-by-document basis. See *Rogers v. United States*, 340 U.S. 367, 374 (1951) ("[a]s to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a real danger of . . .

incrimination.”) Defendant must demonstrate why the act of producing each requested record, not the contents of the record itself, would incriminate him in violation of his Fifth Amendment rights. Because Defendant made no such showing, nor even attempted to do so, Defendant’s motion to vacate or stay the contempt order as to Defendant’s personal bank records is denied.

B. Records of LLCs

Plaintiff also claims that Defendant provided Plaintiff with an incomplete list of the LLCs in which Defendant holds an interest. Carlbach Affirm., Ex. T, p. 3. Plaintiff seeks the records for each LLC in which Defendant holds an interest, including financial statements and tax returns. *Id.* Defendant also asserts that compelling the production of these documents violates his Fifth Amendment rights.

The act of producing corporate records, unlike personal records, is not privileged.

Braswell v. United States, 487 U.S. 99, 109-10 (1988).

[T]he Court has consistently recognized that the custodian of corporate or entity records holds those documents in a representative rather than a personal capacity. Artificial entities such as corporations may act only through their agents, and a custodian’s assumption of this representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand. . . . Under those circumstances, the custodian’s act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation – which of course possesses no such privilege.

Id. at 109. Defendant must, therefore, produce the documents requested in the Subpoena Duces Tecum that pertain to the LLCs in which Defendant holds an

interest. Defendant's motion to stay or vacate the contempt order as to the documents related to his LLCs is thus denied.

C. Impossibility

Defendant claims that, even if some of the documents requested in the Subpoena Duces Tecum are not privileged, he cannot produce them because the FBI confiscated his records. Defendant's Memo, p. 15.

“[W]here a party alleges an excuse for disobedience to a judgment or order of a court or alleges matters in mitigation, the burden of proof is upon him to establish the same. Such burden must be met by a factual showing.” *In re Hildreth*, 28 A.D.2d 290, 294 (1st Dep't 1967).

Defendant has conclusively shown that the FBI is in possession of some of his records. Defendant provides the FBI's list of the items it seized from Defendant's home and office (the “FBI list”). *See* Carlbach Affirm., Ex. W. However, Defendant has not demonstrated that the specific records requested by Plaintiff are now inaccessible. The FBI list is vague and provides little useful information. For example, the list includes several references to “computers” or “thumb drives,” but it is unclear whether those devices contain the records Plaintiff seeks. Rather than a wholesale declaration that Defendant cannot possibly comply with the Subpoena Duces Tecum, Defendant must make a factual showing of impossibility as to the specific documents Plaintiff seeks to obtain. Because Defendant makes no such showing, the motion to stay or vacate the order of contempt is denied.

D. The Subpoena Ad Testificandum

Defendant asserts that the court cannot compel him to comply with the Subpoena Ad Testificandum because to do so would violate his Fifth Amendment rights. While the contents of business records are not privileged, oral testimony concerning the contents or location of those records may be privileged under the Fifth Amendment. *Curcio v. United States*, 354 U.S. 118, 123-24 (1957). “A custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian. . . . But he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony.” *Id.*

Consequently, Defendant may be able to claim privilege as to any of Plaintiff’s deposition questions, whether they concern his personal records or the records of LLCs. Defendant cannot, however, assert a blanket claim of privilege. Defendant must instead show as to “each question to which a claim of privilege is directed . . . whether the answer to that particular question would subject [Defendant] to a real danger of . . . incrimination.” *Rogers* 340 U.S. at 374. If a defendant makes such a showing, then the court must grant a stay of the contempt order as to those questions that would violate the defendant’s Fifth Amendment rights. Defendant made only a wholesale claim of privilege. He did not state which of Plaintiff’s deposition question he finds objectionable or why the answers to those questions would subject him to a danger of incrimination. The motion to stay or vacate the order of contempt as it relates to the Subpoena Ad Testificandum is therefore denied.

E. Defendant's Lawsuit against Michael Gandi

Defendant's final argument is that the contempt order should be vacated because it impedes Defendant's lawsuit against his former business partner, Michael Gandi. Emergency Affirmation of David Carlbach, p. 2. The court considered and rejected this argument in its February 4, 2010 Order denying Defendant's second motion to vacate the contempt order. Order of February 4, 2010, p. 1. Defendant provides no reason why the court should depart from its prior decision. Defendant's motion to vacate the contempt order and arrest warrant to facilitate his lawsuit against his business partner is denied.

III. Conclusion

Accordingly, it is hereby

ORDERED that Defendant's motion to vacate or stay the contempt order and arrest warrant is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
February 24, 2012

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NEW YORK

ENTER:



Hon. Eileen Bransten, J.S.C.

HON. EILEEN BRANSTEN