Ipswich Bay Glass Co., Inc. v Champion Aluminum Corp.
2012 NY Slip Op 32487(U)
September 26, 2012
Supreme Court, New York County
Docket Number: 114234/11
Judge: Louis B. York

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ PART 2
Justice

Index Number : 114234/2011
IPSWICH BAY GLASS
vs.
CHAMPION ALUMINUM
SEQUENCE NUMBER : 002
QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
SEP 28 2012
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 9/26/12

_____, J.S.C.
LOUIS B. YORK

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 2

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IPSWICH BAY GLASS COMPANY, INC.,

Plaintiff,

Index No.: 114234/11
DECISION/ORDER

-against-

CHAMPION ALUMINUM CORP., d/b/a
CHAMPION WINDOW AND DOOR,

Defendant.

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HON. LOUIS B. YORK, J.S.C.:

In this action on a judgment, plaintiff Ipswich Bay Glass Company, Inc. (Ipswich) moves to hold defendant Champion Aluminum Corp., d/b/a Champion Window and Door (Champion) in contempt of court for failure to comply with certain subpoenas duces tecum (motion sequence number 001), and Champion moves separately to quash Ipswich's subpoenas and/or for a protective order (motion sequence number 002).

BACKGROUND

On September 20, 2011, the Superior Court for the Commonwealth of Massachusetts, County of Essex, entered a money judgment in favor of Ipswich and against Champion in the amount of $1,149,698.69 in an action that Ipswich had commenced in that court under Docket Number 10-01885 (the Massachusetts judgment and action). On December 19, 2011, Ipswich filed an affidavit of that judgment in this court, pursuant to CPLR 5402. Thereafter, on February 3, 2012, Ipswich also filed a transcript of its CPLR 5402 filing with the Clerk of the Supreme Court, Nassau County - the county in which Champion does business.

On January 9, 2012, counsel for Ipswich served a subpoena duces tecum and a

restraining order on Champion via service on the New York State Secretary of State. Thereafter, on January 17, 2012, Ipswich served similar subpoenas on three of Champion's principals - Robert, Thomas and John Acarti (the Acarti defendants). Finally, one day later on January 18, 2012, Ipswich served similar subpoenas on Champion's attorney and accountant,[1] and on Citiquiet, Inc. (Citiquiet) and Champion Architectural Window and Door, Inc. (Champion Architectural), two New York corporations that had purportedly purchased all of Champion's assets upon Champion's going out of business. All of the foregoing subpoenas required responses within the month of February, 2012. All of the subpoenas also contained a document demand that requested:

> all paper and electronic records, including all versions and drafts, concerning or relating to [Champion], including but not limited to the payment for [legal, accounting, etc.] services provided by you, its operations, its finances, its financial performance and projections, its valuation, its business plan, its sales representatives, independent contractors, agents, employees, directors, shareholders, officers and bookkeepers and/or accountants, its corporate resolutions, its bank accounts, its outstanding loans and other obligations and payment thereof, the payment of its taxes, correspondence with state and federal taxing authorities, the names and addresses of its sales representatives, independent contractors, agents, employees, directors, shareholders, officers and bookkeepers and/or accountants, its payroll, and commissions, dividends, distributions and other disbursements to sales representatives, independent contractors, agents, employees, board members, shareholders and officers, its lease or other occupancy of other real property, its corporate books and records, and the sale of its stock and/or assets, including but not limited to any closing statement, purchase/sale agreement, and all consulting, employment, independent contractor, or other agreements between [Citiquiet] and any independent contractors, agents, employees, directors, shareholders and/or officers of [Champion], the names of any independent contractors, agents, employees, directors, shareholders and/or officers [of Champion] who now work for (or at) [Citiquiet], the distribution of the proceeds of the sale, the nature, amount, terms and obligee of all obligations assumed by [Citiquiet] (or any entity related to

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[1] John R. Lynch, P.C. (Lynch) is Champion's attorney, and BSB Associates., Ltd. (BSB) is Champion's accountant.

> Citiquiet), the assumption of specific obligations of [Champion] by [Citiquiet], all correspondence relating to the sale and negotiations relating to the sale of assets, the names of all persons present at any closing(s) of such sale(s), any persons providing financing for such transaction(s), and any and all documents filed with and/or submitted to the City of New York, State of New York, the United States of America, and/or any other governmental entity.

Ipswich claims that none of the parties named in the subpoenas has complied with them to date, despite Ipswich's willingness to discuss such compliance and Ipswich's having granted several extensions of time in which to comply. Ipswich has presented copies of correspondence between itself and defendants' counsel to support its allegations. Champion responds that the requests set forth in the subpoenas are overly broad and ambiguous, that Ipswich's counsel has placed unreasonable conditions on all of his offers to negotiate, and presents copies of the objections to the subpoenas that it served on Ipswich's counsel. Now before the court are Ipswich's motion for contempt, and Champion's motion to quash and/or for a protective order.

DISCUSSION

In its motion, Ipswich argues that its subpoenas were proper, within the constrictions of CPLR 5223 and 5224, and that their enforcement via contempt order is also proper, pursuant to CPLR 5210. CPLR 5223 provides as follows:

> At any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon, and shall state that false swearing or failure to comply with the subpoena is punishable as a contempt of court.

CPLR 5224 provides, in pertinent part, as follows:

> (a-1) Scope of subpoena duces tecum. A subpoena duces tecum authorized by this rule and served on a judgment debtor, ... shall subject the person or other entity or business served to the full disclosure prescribed by section fifty-two

> hundred twenty-three of this article whether the materials sought are in the possession, custody or control of the subpoenaed person, business or other entity within or without the state. Section fifty-two hundred twenty-nine of this article shall also apply to disclosure under this rule.

Finally, CPLR 5210 provides that:

> Every court in which a special proceeding to enforce a money judgment may be commenced, shall have power to punish a contempt of court committed with respect to an enforcement procedure.

Here, Ipswich contends that judgment debtor Champion's sale of its assets to Citiquiet constituted a fraudulent transfer that was designed to enable Champion to avoid its obligations to Ipswich under the Massachusetts judgment, and asserts that its own subpoena demands are "specifically calculated to allow [Ipswich] to discover information that will enable it to enforce the [Massachusetts judgment]." *See* Plaintiff's Memorandum of Law in Support of Motion (motion sequence number 001), at 6. Ipswich then goes on to respond to each of the objections to its subpoenas that Champion had asserted in its original and amended objections. *Id.* at 7-17. The court will consider the objections shortly.

As an initial matter, however, Champion argues that Ipswich's subpoenas are procedurally defective and, therefore, unenforceable. *See* Defendant's Memorandum of Law in Opposition to Motion (motion sequence number 001), at 5. Champion specifically asserts that Ipswich violated CPLR 5221 (b) by having its subpoenas issued from an improper court. That statute provides as follows:

> (b) Notices, subpoenas and motions. A notice or subpoena authorized by this article may be issued from, and a motion authorized by this article may be made before, any court in which a special proceeding authorized by this article could be commenced if the person served with the notice, subpoena or notice of motion were respondent.

Champion urges that CPLR 5221 (b) should be read in conjunction with the preceding subparagraph CPLR 5221 (a) (4), which provides as follows:

> 4. In any other case, if the judgment sought to be enforced was entered in any court of this state, a special proceeding authorized by this article shall be commenced, either in the supreme court or a county court, in a county in which the respondent resides or is regularly employed or has a place for the regular transaction of business in person or, if there is no such county, in any county in which he may be served or the county in which the judgment was entered.

Champion contends that, because it did business in Nassau County, the statute required Ipswich to have filed the Massachusetts judgment in Nassau County Supreme Court and/or to have sought its subpoenas there, and that Ipswich's failure to do so renders those subpoenas defective. *See* Defendant's Memorandum of Law in Opposition to Motion, at 5-14. Ipswich replies that to enforce the statute in the manner that Champion proposes would render it "a practical nullity." *See* Borg Affirmation in Reply ¶¶ 4-8. Upon review, the court finds for Ipswich for different reasons.

Champion's argument - and Ipswich's - are derived from CPLR Article 52, which governs "enforcement of money judgments," but they ignore CPLR Article 54, which is entitled "enforcement of judgments entitled to full faith and credit." The former statute concerns the enforcement of judgments in New York State courts that were originally issued by other New York State courts, while the latter governs the enforcement of judgments in New York State courts that were originally issued by sister state courts. Clearly, the Massachusetts judgment is of the latter variety. The court notes that CPLR 5402 (a) provides that:

> A copy of any foreign judgment authenticated in accordance with an act of congress or the statutes of this state may be filed within ninety days of the date of authentication *in the office of any county clerk of the state*. The judgment creditor shall file with the judgment an affidavit stating that the judgment was not obtained

> by default in appearance or by confession of judgment, that it is unsatisfied in whole or in part, the amount remaining unpaid, and that its enforcement has not been stayed, and setting forth the name and last known address of the judgment debtor [emphasis added].

Here, Ipswich commenced this proceeding in New York County Supreme Court after it effected service on Champion (a corporation) via service on the New York State Secretary of State. Champion's argument that Ipswich chose the wrong county to file in is derived from the language in CPLR 5221 (a) (4) directing that special proceedings commenced to enforce judgments that were previously entered in the courts of New York State "shall be commenced ... in a county in which the respondent resides or is regularly employed or has a place for the regular transaction of business in person." However, CPLR 5402 (a) contains no such restriction for out-of-state judgments being enforced in New York. Therefore, Champion's argument is inapposite, and the court rejects it. The court also notes in passing that Champion's objection that it was incorporated in Nassau County, and would, thus, be inconvenienced by responding to Ipswich's subpoenas in this county, appears to be of no moment. As Ipswich points out, Citiquiet - the entity against which the subject subpoenas are directed - was incorporated in Queens County, and, thus, deemed to be present in all parts of New York City. CPLR 3110.

The balance of Ipswich's motion argues that Champion's objections to the subpoenas are legally deficient. Champion's amended objections (which incorporate its list of original objections) include claims that the subpoenas: 1) are "oppressive and fail to provide respondents with a reasonable amount of time to respond;" 2) require respondents to testify and produce documents in New York County; 3) are "vague, unintelligible, overly broad and/or unduly burdensome;" 4) are not limited to any specific time period; 5) seek information that is irrelevant

to the satisfaction of the Massachusetts judgment; 6) call for material protected by attorney-client and/or work product privilege; 7) call for material prepared in anticipation of litigation; 8) seek disclosure of "opinions, mental impressions, conclusions or legal theories;" 9) seek material already within Ipswich's "knowledge, possession and/or control;" 10) seek material that is publicly available; 11) seek material not within Champion's own "knowledge, possession and/or control;" 12) seek confidential and sensitive financial information; 13) are subject to redaction; 14) are subject to Champion's right to object to any inadvertent disclosures; and 15) impose obligations in excess of those imposed by the CPLR. *See* Notice of Motion (motion sequence number 001), Exhibits 36, 37. Ipswich raises specific arguments against each objection, however, Champion only raises general arguments in reply. After reviewing each objection in turn, the court finds for Ipswich.

With respect to the claim that Ipswich's subpoenas "fail to provide respondents with a reasonable amount of time to respond," Ipswich correctly notes that CPLR 5224 (c) provides that persons served with subpoenas duces tecum be afforded "not less than ten days' notice" to comply, and that its own subpoenas each provided for 13 days to produce documents and 22 days to appear for deposition. Thus, the subpoenas clearly comply with the statute. Champion argues that its counsel had been newly retained when the subpoenas were issued, and that Ipswich's counsel unreasonably refused to grant extensions of time to comply with the subpoenas. *See* Gabriele Affidavit in Opposition, ¶¶ 60-67. However, this claim is belied both by the correspondence between the parties that indicates that extensive negotiations were conducted, and by the facts that six months have now passed since the subpoenas were issued in February 2012 and that Champion has still not complied with them. Therefore, the court rejects

Champion's argument and denies Champion's objection.

With respect to the claim that Ipswich's subpoenas require respondents to testify and produce documents in New York County, CPLR 3110 (1) provides that when the person to be examined is a party or an officer, director, member of the party "in the county in which he presides ..." or has an office or where the action is pending CPLR 3110(2) states that any other person's deposition shall be held in the county in which he presides, or has an office or any other person, within the county of his residency or if not a resident, then within the county where he was served or of the county of h is employment.

For the purpose of this rule New York city is considered one county.

Here, "the parties to be examined" are Champion, its attorney and accountant, Citiquiet and Champion Architectural (Champion's successors in interest), and those corporations' officers (i.e., the Acarti defendants). The "county in which the action is pending" is New York County. Thus, the statute clearly prescribes this county as the proper one in which to comply with the subject subpoenas. Further, at least one of the subpoenaed corporations (Citiquiet) and its officers (the Acarti defendants) are already deemed to be present in New York County. Finally, counsel for Ipswich avers that he will accommodate Champion, its attorney and accountant and Champion Architectural "to the extent that [they] do not reside in or conduct business in New York City." Under these circumstances, the court finds Champion's objection to be meritless. In any case, Champion raises no argument to support this objection in its opposition papers; therefore, the court deems it to be abandoned.

With respect to the claim that Ipswich's subpoenas are "vague, unintelligible, overly broad and/or unduly burdensome," Ipswich argues that its requests "are calculated to lead to

information which is relevant to permit [Ipswich's] enforcement" of the Massachusetts judgment, and that "the mere requirement ... for the production of a substantial amount of information or documentation does not render the subpoenas 'unduly burdensome.'" *See* Plaintiff's Memorandum of Law in Support of Motion. Champion responds that it has been in business for over 50 years, has had a large number of employees, suppliers and customers, and has realized a great deal of profit over time, all of which renders Ipswich's subpoena requests for "all documents" pertaining to its various activities as seeking "overbroad categories of documents." The court disagrees. In *Rozzo v Rozzo* (274 AD2d 53, 55 [2d Dept 2000]), the Appellate Division, Second Department, observed that "CPLR 5223 provides that 'the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment' by serving a subpoena 'any time before a judgment is satisfied.'" The appellate Court then held that:

> Since the subpoena served upon the defendant sought "matter relevant to the satisfaction of the judgment" against him, the Supreme Court improvidently exercised its discretion in granting the defendant's motion for a protective order striking that subpoena. The plaintiff should be permitted to utilize the post-judgment disclosure authorized by CPLR 5223 to aid her in determining the extent and location of the defendant's property so that the property may be applied to the outstanding judgment. The disclosure authorized by CPLR 5223 is particularly appropriate in this case since it appears that the defendant has not been forthright in disclosing his assets [internal citations omitted].

274 AD2d at 55-56. Here, too, Ipswich contends that Champion fraudulently divested itself of its assets to Citiquiet and Champion Architectural in order to avoid its obligation to pay the Massachusetts judgment. Thus, the court finds that it is reasonable for Ipswich to seek records of Champion's finances, assets and the transaction(s) with Citiquiet and Champion Architectural. Upon reviewing the subpoena language recounted *supra*, the court finds that these are the only three classes of documents that the subpoenas seek. Therefore, the court concludes that

Ipswich's requests are within the purview of what the statute permits, and denies Champion's objection thereto.

With respect to the claim that Ipswich's subpoenas are not limited to any specific time period, Ipswich asserts that it is interested in what is described as the "no consideration transfer" of the ownership of Champion's premises to Champion Architectural in 2000, and its subsequent resale for $3 million. Ipswich also reiterates that it offered to negotiate all document compliance issues with Champion. Champion responds that the transfer of the property did not involve it, since that property was owned by the Arcati defendants. Champion does not present any evidence to conclusively demonstrate that it did not have an interest in, or profit from the transaction, however, or to explain the exact nature of its relationship with the Arcati defendants. Champion is also incorrect when it argues that Ipswich must meet a high burden of proof in order to justify an inquiry into the transaction. *See e.g. Foremost Ins. Co. Grand Rapids, Michigan v Facultative Group, Inc.*, 80 AD2d 598, 599 (2d Dept 1981) (plaintiff's claim was "sufficiently tenable that a full inquiry 'should at least be prosecuted so far as to decide whether the claim was a substantial one [citations omitted].'"). Instead, the court believes that disclosure for the period of time coextensive with Ipswich's and Champion's business relationship is reasonable under CPLR 5223, and that disclosure regarding the 2000 transfer should be included in that disclosure, provided that the parties were doing business at that time. Therefore, the court denies Champion's objection.

With respect to the claim that Ipswich's subpoenas seek "irrelevant" material, Ipswich reiterates its argument that evidence regarding a debtor's acts to fraudulently transfer or hide its assets is relevant to the creditor's attempt to satisfy an outstanding judgment. Champion does

not raise any counter argument in its papers. In any case, the court agrees with Ipswich's argument, on the strength of the Second Department's holding in *Rozzo v Rozzo* (274 AD2d at 55, *supra*.) Therefore, the court denies Champion's objection.

With respect to the claims that Ipswich's subpoenas seek privileged material, trial material and/or opinion evidence, Ipswich argues that the law requires the party seeking to exclude the evidence to bear the burden of proving that the privilege or other exclusionary rule applies. Ipswich's statement of the law is for the most part accurate; although CPLR 3101 makes the foregoing three types of evidence immune from disclosure, it is also true that burden of proof lies with the party asserting the immunity. *See e.g. Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371 (1991). Here, however, instead of raising any specific claims about the attorney-client privilege or other grounds for immunity, Champion merely argues that the court has "broad discretionary power" to regulate the enforcement of a money judgment, and requests that this court simply utilize that power. *See* Gabriele Affidavit in Opposition, ¶ 58. This is clearly an insufficient argument, since it sets forth no grounds for raising any privilege or immunity. Therefore, the court rejects it, and denies Champion's objections.

There are seven more objections set forth in Champion's papers, and Ipswich raises arguments in opposition to each of them. However, Champion's opposition papers do not set forth any arguments to support any of those objections. Therefore, the court deems that Champion has abandoned those objections and denies them.

As was previously mentioned, CPLR 5210 authorizes the court to punish a party's non-compliance with a subpoena duces tecum in an action to enforce a judgment via contempt. Here, Ipswich has demonstrated that its subpoenas were lawfully issued, that they sought permissible

material, and that Champion has not complied with them over a period of six months. Before the court holds the drastic remedy of contempt against the defendants, it first will require them to comply in full with the subpoenas issued by the defendants.

Champion's motion seeks to quash Ipswich's subpoenas. However, the arguments that Champion advances are the same ones that the court considered and rejected for the reasons discussed *supra*. Accordingly, the court finds that Champion's motion should be denied.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that all of the parties who have been subpoenaed to respond to plaintiff's subpoenas ***duces tecum*** shall do so by responding to the information requested within 30 days of th e service of a copy of this order with Notice of Entry; and it is further

ORDERED that Champion's motion for a protective order and to quash is denied except to the extent of limiting the time period that Champion shall furnish information to the period during which the parties transacted business including the year 2000; and it is further

ORDERED that motion costs of $100.00 are awarded to plaintiff against defendant.

Dated: New York, New York
September 26, 2012

ENTER:

Hon. Louis B. York, J.S.C.