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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C. PART 1
Justice

Index Number : 600396/2008
FEROLITO, JOHN M.
vs.
VULTAGGIO, DOMENICK J.
SEQUENCE NUMBER : 031
ORDER OF PROTECTION

INDEX NO. 600396/08
MOTION DATE
MOTION SEQ. NO. 031

The following papers, numbered 1 to 3, were read on this motion to/for: Quash Subpoena

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits 1-4 | No(s). 1

Answering Affidavits — Exhibits 1-6 | No(s). 2

Replying Affidavits - Exhibits A-D | No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
DEC 18 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: Sept. 6, 2012

MARTIN SHULMAN J.S.C., 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: PART 1

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JOHN M. FEROLITO, et al.,

Plaintiffs,

Index No. 600396/08

-against-

DOMENICK J. VULTAGGIO, et al.,

Defendants.

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DOMENICK J. VULTAGGIO, et al.,

Index No. 590967/08

Counterclaim and Third Party Plaintiffs,

-against-

JOHN M. FEROLITO, et al.,

Counterclaim and Third Party Defendants.

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In the Matter of the Application of John M. Ferolito,

Index No. 100568/11

Petitioner,

For the Dissolution of Beverage Marketing USA, Inc.,
a Domestic Corporation.

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SHULMAN J.:

This action involves an ownership dispute between two competing groups – the Ferolito parties ("Ferolito") and the Vultaggio parties ("Vultaggio") – who own a beverage business, referred to herein as the AriZona Entities (or "AriZona"), which manufactures and distributes the AriZona iced tea brand of beverages. The various actions now pending include a Business Corporation Law (BCL) § 1118 valuation proceeding to determine the fair value of John M. Ferolito's shares in Beverage Marketing USA, Inc. ("BMU"). In its decision and order dated October

26, 2011 in motion sequences 27 and 29, this court made clear that "[d]iscovery in this action ... relate[s] solely to valuation" of BMU and that everything "unrelated to valuation" has been stayed.[1]

Ferolito now moves for a protective order pursuant to CPLR §§ 3103 and/or 2304 quashing or limiting the subpoena *duces tecum* AriZona/Vultaggio served on non-party State Bank of Long Island ("SBLI") in connection with the valuation proceedings now before this court in these consolidated actions. AriZona/Vultaggio opposes the motion.

In support of this motion, Ferolito alleges that the subpoena improperly seeks his private financial information and that of his related companies. He contends such financial documentation is irrelevant to valuation of his shares in BMU and will cause him annoyance, harassment, disadvantage and other prejudice. Further, Ferolito contends that Vultaggio's subpoena is a ploy to avoid the close of discovery in a related Nassau County action and the subpoena improperly seeks information that can and should be obtained from other sources.

In opposition, Vultaggio argues that the subpoena properly seeks material documents and communications. Specifically, Vultaggio contends that SBLI records are relevant to valuation because: 1) documentation concerning Ferolito's and his agents' interference with AriZona bank accounts maintained at SBLI establish corporate wrongdoing by Ferolito which caused BMU to incur legal fees,

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[1] Merley Aff. dated December 12, 2011 at Exh. 2.

thereby reducing BMU's value[2]; and 2) documents concerning entities Ferolito controls will enable Vultaggio to assess the validity of Ferolito's 2011 offer to buy Vultaggio's shares in BMU,[3] as well as Ferolito's claim that his involvement in BMU's management would have added value thereto. Vultaggio also disputes Ferolito's contention that non-party discovery may be pursued only when the information sought is not otherwise available.

Analysis

The CPLR provides that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof". CPLR §3101 (a); *see also Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 (1998) (pretrial discovery is to be "open and far-reaching"). "The words 'material and necessary', are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 (1968); *see also Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 746 (2000). The broad interpretation of "material and necessary" applies to both parties and

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[2] Vultaggio claims that in 2008 and/or 2009 Ferolito and/or his agents withdrew or attempted to withdraw funds from AriZona bank accounts, prompting SBLI to freeze certain accounts. These alleged actions resulted in BMU commencing a separate action under New York County Index No. 602529/09, which the parties ultimately stipulated to dismiss. See Foote Aff. in Opp. at Exh. 2. Vultaggio claims BMU incurred legal fees in commencing that action, thereby reducing its value.

[3] Ferolito has represented that he will use this offer at the valuation hearing as evidence of BMU's value.

non-parties alike. *Kooper v Kooper*, 74 AD3d 6, 10 (2d Dept 2010) ("material and necessary" means relevant, regardless of whether the request is directed to a party or a nonparty).

When determining whether disclosure is warranted, "the court employs a test of 'usefulness and reason', balancing the importance to the plaintiff's claim of the information sought versus the consequences of disclosure (internal citation omitted)". *Feger v Warwick Animal Shelter*, 59 AD3d 68, 70 (2d Dept 2008). The trial court possesses broad discretion to deny demands that are unduly burdensome or that seek irrelevant or improper information. *See Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531, 531 (2d Dept 2007) (the "supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed [citations omitted]").

CPLR §3103 (a) authorizes the court to "issue a protective order denying, limiting, conditioning or regulating the use of any disclosure devices, in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to the other party". *Spohn-Konen v Town of Brookhaven*, 74 AD3d 1049, 1049 (2d Dept 2010). Protective orders are designed for the "prevention of abuse" (CPLR §3103 [a]), and are entered only in extreme situations where there is clear abuse of the discovery process. *See Tornheim v Blue & White Food Prods. Corp.*, 73 AD3d 745, 745 (2d Dept 2010) (protective order entered on ground that "plaintiff requested the production of any and all documents relating to a transaction which occurred seven years after the events

at issue in this case transpired," and "[t]hose documents were irrelevant to the plaintiff's case"; thus, "the request was both overly broad and unduly burdensome").

The proponent of a motion for a protective order must make an appropriate factual showing to be entitled to such relief. *Willis v Cassia*, 255 AD2d 800, 801 (3d Dept 1998). The moving party bears the burden of proving that the material sought is not discoverable. *Id.; see also Vivitorian Corp. v First Cent. Ins. Co.*, 203 AD2d 452, 453 (2d Dept 1994); *Willis v Cassia*, 255 AD2d 800, 801 (3d Dept 1998).

At the outset, this court disagrees with Ferolito's argument that non-party discovery may be pursued only if a party can demonstrate that information is not otherwise available. This court implicitly rejected this argument in its decision and order dated October 26, 2011.[4] Ferolito himself previously argued that AriZona/Vultaggio "ignore[d] well-established New York law [in] arguing instead that non-party discovery should be prohibited here absent a prior showing by Ferolito that such information could not be obtained from AriZona",[5] and urged this court to rule that discovery can be obtained directly from non-parties without a threshold showing of unavailability. Having been successful in this argument then, Ferolito is now estopped from arguing to the contrary now. *See Shepardson*

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[4] See Merley Aff. dated December 21, 2011 at Exh. 2.

[5] *Id.* at Exh. 3, pp. 20-21.

v Town of Schodack, 195 AD2d 630, 632 (3d Dept 1993), *aff'd* 83 NY2d 894 (1994).

Subpoena Demands 2 and 4

The subpoena's second demand directs SBLI to produce "[a]ll Documents and Communications concerning any entity controlled by, owned by, operated by, or associated with Ferolito . . ." The fourth demand specifically seeks "Documents and Communications concerning Cardinal Family Investments LLC."[6]

Ferolito claims that disclosure of such materials is not only prejudicial to him but also irrelevant to BMU's valuation. In response, Vultaggio offers two justifications for the relevancy of these demands. First, Vultaggio contends that documentation regarding the financial status of non-AriZona entities in which Ferolito has an interest is needed to refute Ferolito's claim that his involvement in BMU's management would have added to its value.

This rationale is rejected as the underlying premise is faulty. The purpose of the valuation hearing is to determine BMU's actual value rather than some hypothetical value based upon speculation that Ferolito's management input might have increased BMU's value. What Ferolito may or may not have been able to contribute is both unquantifiable and irrelevant. Production of the requested documentation is thus unnecessary for this purpose.

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[6] AriZona/Vultaggio alleges that Cardinal Family Investments LLC ("Cardinal") is the entity Ferolito used "in furtherance of his attempt to sell his BMU shares to third parties, including Patriarch Partners LLC . . ." Foote Aff. in Opp., at ¶ 10.

However, Vultaggio also argues that inquiry into Ferolito's assets is necessary to determine his ability to finance his 2011 offer to purchase Vultaggio's shares in BMU. Notably, Ferolito has stated to this court that he intends to use this offer at the valuation hearing to substantiate the value of his own shares. Ferolito responds that the values of his personal bank accounts and those of the various entities in which he holds interests are irrelevant because his offer to purchase Vultaggio's shares was being "backstopped" by Tata Global Beverages.[7]

This court disagrees. First, no evidence has been presented regarding Tata "backstopping" Ferolito's offer to Vultaggio. Further, even with Tata's contribution, Ferolito would still require substantial capital to complete the transaction. The extent of Ferolito's ability to contribute thereto is a relevant indicator of whether or not the offer was made in good faith and can be considered reliable for purposes of valuation. Thus, because Ferolito intended to set a benchmark for the value of his shares via his own offer to purchase Vultaggio's shares, AriZona/Vultaggio should be permitted discovery relating to Ferolito's actual ability to finance it.

Ferolito's motion is granted, however, to the extent of limiting SBLI's production in response to items 2 and 4 of the subpoena. First, the subpoena is overbroad and burdensome to the extent that it demands documents and communications other than bank statements for these entities. Documentation

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[7] See Merley Aff. dated January 17, 2012 at Exh. D, 237:7-10.

other than bank statements showing the account balances are simply not probative of Ferolito's ability to finance his offer.

Second, the subpoena is overbroad and burdensome to the extent that it seeks documentation from the period January 1, 2005 to date. Ferolito's shares in BMU are to be valued as of October 5, 2010. His account balances prior to that date are of no moment. The sole exception to this temporal limitation is with respect to Cardinal's SBLI bank account statements. Vultaggio alleges that Patriarch Partners LLC ("Patriarch") transferred funds to Cardinal's accounts in connection with Ferolito's 2008 attempt to sell his interest in BMU to Patriarch. Third party offers to purchase Ferolito's interest in BMU are relevant to valuation and as such, Cardinal's account statements should be produced from the period 2008 to date.

Subpoena Demands 1, 3, 5, 6, 7, 8 and 9

According to Vultaggio, the subpoena's first, third, fifth, sixth, seventh, eighth and ninth demands[8] all seek documentation pertaining to Ferolito's and/or his agents' alleged attempts in 2008 and 2009 to make unauthorized distributions to Ferolito by withdrawing funds from AriZona bank accounts maintained at SBLI.

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[8] Specifically, the subject demands request documents concerning SBLI's communications with Ferolito (first), David Buss, Esq. of the law firm DLA Piper (third) and Richard Adonailo (fifth), as well as documents and communications concerning: attempts by Adonailo to withdraw funds from AriZona accounts (sixth), funds actually withdrawn by Adonailo (seventh), occasions when AriZona accounts were frozen or funds were inaccessible (eighth) and attempts to unfreeze AriZona accounts or make previously inaccessible funds available (ninth).

As a result of Ferolito's actions, SBLI placed temporary holds on these accounts[9] which in turn prompted AriZona/Vultaggio to commence an action under New York County Index No. 602529/09 seeking, *inter alia*, damages against Ferolito for breach of contract and fiduciary duty, as well as injunctive relief against Ferolito and SBLI.[10] Despite later agreeing to dismiss the complaint in that action, AriZona/Vultaggio claims to have suffered damages in the form of legal fees incurred in preparing and filing that action.

Contrary to Vultaggio's characterization of these seven demands, only demands 6 through 9 are narrowly tailored to request documentation pertaining to unauthorized withdrawals and account freezings. Like demands 2 and 4, all seven demands are temporally overbroad as no justification is given for requesting documentation from 2005 to date. Further, demands 1, 3 and 5 are overbroad on their face, seeking documents and communications between SBLI on one hand, and Ferolito, Buss, the DLA Piper firm and Adonailo on the other hand. No specific bank accounts are delineated nor are the requested documents and communications narrowed by subject matter. Accordingly, demands 1, 3 and 5 are stricken in their entirety.

Turning to demands 6 through 9, as reflected in the May 17, 2011 transcript of proceedings before this court, the parties were permitted to "explore discovery and do whatever you need to do to the extent you believe, quote,

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[9] *See* Foote Aff. in Opp. at Exh. 2, ¶¶ 15-23.

[10] *Id.* at ¶¶ 32-53.

corporate waste, mismanagement, or any of the other alleged bad acts affects valuation..."[11] Further, in its October 26, 2011 decision,[12] this court ordered that Ferolito could "explore anything and everything referable to those issues [of misconduct] that impact on valuation". Vultaggio has the corresponding right to explore in discovery, and raise at the valuation hearing, evidence of Ferolito's improper acts allegedly affecting BMU's value.

This court disagrees with Ferolito's contention that these damages are not pertinent to BMU's value. First, Ferolito argues that BMU's value was not affected because Vultaggio paid the legal fees incurred. However, Ferolito offers no evidentiary support for this speculative statement.

Ferolito also argues that the complaint filed against him was an unauthorized act in violation of the Owners' Agreement in light of the fact that this court found and the Appellate Division, First Department affirmed that no Employment Separation Event ("ESE") had occurred. However, as this court recently noted, "in finding that no ESE had occurred, this court made no declaration regarding Ferolito's management rights." *Ferolito v Vultaggio*, 36 Misc3d 1227(A), 2012 WL 3284776, at *2. Indeed, that decision expanded the First Department's recent decision (*Ferolito v Vultaggio*, 949 NYS2d 356, 2012 WL 3007256) to the extent of finding that Ferolito's petition for BMU's dissolution foreclosed his right, if any, to weigh in on managerial decisions. *Id.* at *3-*4.

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[11] See Foote Aff. in Opp. at Exh. 1, 80:15-17, 81:4-7.

[12] See Merley Aff. dated December 12, 2011 at Exh. 2.

Demands 6 through 9 are appropriately tailored for Vultaggio's stated purpose and are arguably relevant.[13] However, these demands must also be limited to the period 2008 to date.

This court need not address the parties' remaining arguments. For all of the foregoing reasons, it is hereby

ORDERED that Ferolito's motion for a protective order quashing Vultaggio's subpoena *duces tecum* to SBLI is granted to the extent of striking demands 1, 3 and 5 and to the extent of limiting the remaining demands as set forth herein above, and is otherwise denied.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been provided to counsel for the parties.

Dated: New York, New York
September 6, 2012

Hon. Martin Shulman, J.S.C.

[13] Presumably referring to demands 6 through 9, AriZona/Vultaggio contend that they have limited the subpoena to the extent that it seeks production of "account statements for accounts exclusively within the control of the AriZona/Vultaggio Parties." Memo. of Law in Opp. at p. 3.