

Moiseenko v AGA Mgt. Corp.
2017 NY Slip Op 30494(U)
March 16, 2017
Supreme Court, New York County
Docket Number: 653454/2015
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48
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ALEXANDR MOISEENKO and ALEKSANDR
KUDINOV,

Plaintiffs,

Index No.: 653454/2015

Mtn Seq. No. 003

-against-

DECISION AND ORDER

AGA MANAGEMENT CORP. and GARY CORTELL,

Defendants.

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JEFFREY K. OING, J.:

Defendants-counterclaim plaintiffs AGA Management Corp. and Gary Cortell move, pursuant to CPLR 3103(a), for a protective order with respect to plaintiffs' supplemental demand for documents; and, pursuant to CPLR 3124, for an order compelling plaintiffs to produce documents responsive to defendants' supplemental document demands. Familiarity with the underlying facts is presumed.

Protective Order

Defendants seek a protective order with respect to plaintiffs' supplemental document demands nos. 1-4, which seek copies of all bank statements, as well as federal and state income tax returns for non-party businesses, Cortell Communications and G Marketing, controlled by defendant Gary Cortell from September 1, 2014 to December 31, 2015 (Sanford Affirm., Exs. A, C). In making this motion, defendants argue

Index No.: 653454/2015
Mtn Seq. No. 003

Page 2 of 5

that the requested documents are not discoverable because, among other things, the documents sought concern sensitive, confidential financial information that is neither material nor necessary to the claims set forth in the complaint. Plaintiffs, in turn, contend that the requested documents will enable them "to compute the amount of revenues stolen from AGA and Plaintiffs' respective share since the bank records produced by AGA do not show payments made by AGA's clients which were deposited to Cortell's other companies' bank accounts" (Ptf. Memo of Law in Opp., p. 7). Based on these allegations, plaintiffs argue that the requested documents are material and necessary to their claim for lost revenue payments.

Plaintiffs' verified complaint asserts five causes of action: 1) breach of contract for unpaid salary; 2) breach of contract for unpaid revenue payments; 3) breach of agreement for equal investment and profits; 4) constructive trust; and 5) accounting. Although plaintiffs claim that the requested documents relate to their second cause of action for lost revenue payments, the allegations supporting that claim only assert that, "[p]laintiffs were not paid distribution payments at the each [sic] of fiscal quarter, which would be equal to twenty (20%) percent of any net funds available after the payment of all expenses, obligations and liabilities due and payable during the

Index No.: 653454/2015

Page 3 of 5

Mtn Seq. No. 003

period with respect to which such distribution is being made within five (5) business days of the end of such applicable fiscal quarter" (Ver. Compl., ¶ 57; ¶¶ 56-60, generally). Rather, as defendants correctly point out, the requested documents appear to relate more broadly to plaintiffs' claim for an accounting, which seeks that Cortell "account[] for his acts relating to the finances of AGA; ... [and] turn[] over to Plaintiffs all records and contracts in Cortell's possession relating to banking, corporate and financial obligations of AGA" (Ver. Compl., ¶ 74; ¶¶ 72-77, generally). In that regard, although the documents sought may be discoverable and relevant at a later date, at this juncture, "[d]iscovery of fiscal matters may not be obtained for causes of action seeking an accounting until the right to an accounting is established (Tsigutkin v Scanlan, 193 AD2d 463, 463 [1st Dept 1993], citing LSY Intl v Kerzner, 140 AD2d 256 [1st Dept 1988]; Kahn v Rodman, 91 AD2d 910 [1st Dept 1983]; Wolther v Samuel, 110 AD2d 506 [1st Dept 1985]). Until then, such disclosure is not appropriate.

To the extent that plaintiffs argue that requiring disclosure would be consistent with this Court's prior order requiring plaintiffs to produce bank statements and tax returns from non-parties CH Media, Inc. ("CH") and Amik Consulting, Inc. ("Amik"), plaintiffs misapprehend the reason the Court required

Index No.: 653454/2015
Mtn Seq. No. 003

Page 4 of 5

such disclosure. The tax returns and bank statements of CH and Amik, two entities formed and controlled by plaintiffs, are relevant to defendants' counterclaim for violation of the parties' non-compete agreement. In contrast, here, the requested documents are not necessary to establish either of plaintiffs' claims for breach of contract. Notwithstanding the above, other documents may be relevant to establishing plaintiffs' claims, e.g., documents pertaining to the Data List sold to G Marketing, and nothing in this decision is intended to prevent disclosure of such documents.

Motion to Compel

Here, defendants seek to compel plaintiffs to produce documents responsive to their supplemental document requests nos. 11, 16, and 17, which seek, inter alia, documents and communications related to commission rates, top offer payouts, brokerage fees per affiliate, cost of operations as well as communications concerning payments, invoices, service agreements and payment confirmations. Document request no. 11, at least at this point, is not material and necessary to the prosecution of defendants' counterclaims. Document requests 16 and 17 are overly broad as written. Although invoices or other client information may be relevant to defendants' non-compete claim, document requests nos. 16 and 17 are far too broad as written.

Index No.: 653454/2015
Mtn Seq. No. 003

Page 5 of 5

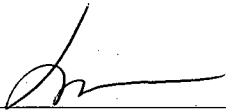
To the extent that plaintiffs argue that requests demanding production of certain information concerning job title and description, employment responsibilities and compensation, and the like are not relevant, this is a moot point because these requests (nos. 8 and 9) are not subject to this motion.

Accordingly, it is

ORDERED that defendants' motion for a protective order is granted as indicated above and defendants' motion to compel is denied to the extent indicated; defendants may narrow their supplemental document requests numbered 16 and 17 in accordance with this Court's decision.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/16/17


HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.