

M.E. Zukerman & Co., Inc. v Rashid

2017 NY Slip Op 32667(U)

December 20, 2017

Supreme Court, New York County

Docket Number: 652713/2012

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**

----- X
**M.E. ZUKERMAN & CO., INC. and SAN YSIDRO
CORP.,**

Plaintiffs,

-against-

TAHIR RASHID

Defendant.
----- X

**Index No. 652713/2012
Motion Seq: 003**

DECISION & ORDER

HON. ARLENE P. BLUTH

Defendant's motion to *inter alia* dismiss this action due to plaintiff's failure to disclose information and for a protective order preventing the deposition of defendant is denied.

Background

This action arises out of defendant's employment for both plaintiffs as a financial controller and as a vice-president. Defendant was responsible for managing plaintiffs' tax and financial reporting as well as overseeing payables and receivables.

Plaintiffs allege that in April 2012, they discovered that defendant had been creating false financial records, forging documents and lying to plaintiff's chairman since at least 2008. Defendant purportedly made unauthorized transfers of funds from plaintiffs' accounts to his own personal bank accounts. Plaintiffs argue that at least \$95,000 was taken and plaintiffs also incurred fines and penalties from taxing authorities.

On April 4, 2017, the parties entered into a so-ordered stipulation that required Morris Zukerman (plaintiff's chairman) to appear for a deposition on or before May 18, 2017 or an appropriate remedy would be fashioned (NYSCEF Doc. No. 59). This was the third time that

Zukerman's deposition was scheduled. Defendant's counsel claims that he sent a deposition notice to plaintiffs' counsel who responded that Josh Cender would be produced as a corporate representative for both plaintiffs instead of Zukerman. The deposition of Cender took place on September 19, 2017.

Defendant's counsel was also advised that Zukerman intended to assert his Fifth Amendment privilege against self-incrimination if deposed (Zukerman pleaded guilty to tax crimes in 2016 and is currently serving a sentence of 70 months). The parties agreed to conduct Zukerman's deposition with written questions and Zukerman asserted the Fifth Amendment privilege in response to nearly every question.

Defendant claims that Cender lacks personal knowledge of the allegations in the complaint, particularly with respect to the purported interactions between Zukerman and defendant.

In opposition, plaintiffs claim that Cender conducted an internal investigation into defendant's conduct and questioned defendant about his actions. Plaintiffs insist that Cender has personal knowledge of defendant's alleged fraudulent acts. Plaintiffs contend that Zukerman was never a party to this litigation and has resigned his positions for both plaintiffs.

Discussion

CPLR 3126 provides that:

"If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. a order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.”

“A party may not use a Fifth Amendment privilege as a shield to resist discovery while simultaneously pressing claims against the party seeking discovery. This prohibition applies with equal force where the privilege is asserted by the principal of a corporate plaintiff” (*Fed. Chandros v Silverite Constr. Co.*, 167 AD2d 315, 316, 562 NYS2d 53 [1st Dept 1990]).

The question for this Court is whether Zukerman’s refusal to answer substantive questions about the instant action justifies dismissing this case. Therefore, the Court must look to the seven causes of action asserted in the complaint to determine whether the invocation of the Fifth Amendment privilege supports defendant’s requested relief. The first two claims, fraud claims asserted by each plaintiff, involve allegations that defendant made material misrepresentations to Zukerman (NYSCEF Doc. No. 1 at 7-8). However, the remaining causes of action for breach of fiduciary duties to plaintiffs, conversion, breach of duty of good faith and loyalty, unjust enrichment and money had and received do not rely exclusively on conversations with Zukerman. Therefore, this motion must be denied.

Further, the deposition of Cender reveals that he had personal knowledge of at least *some* of defendant’s purported wrongdoing (*see e.g.*, NYSCEF Doc. No. 68 at 79-80, 103-105). Cender testified, for instance, that he was present during a conversation with defendant and

Zukerman where defendant allegedly retrieved a draft tax return that was seven months late (*id.* at 80). Cender also asserted that defendant changed his story about this tax return— first defendant said it had been filed and then he acknowledged it was never filed (*id.*). Cender further testified that there were numerous inconsistencies with defendant's answers about tax issues and outstanding payments, which led to Cender's internal investigation of defendant (*id.* at 87).

This is not a case, such as *Federal Chandros* (cited above), where a corporate plaintiff refuses to produce a representative with any knowledge. Although Cender likely did not have as many conversations with defendant as Zukerman, Cender clearly spoke with defendant about the allegations in the instant complaint and he conducted plaintiffs' internal investigation into defendant's acts. Defendant's claim that Cender had no personal knowledge fails.

Summary

The Court recognizes that the Fifth Amendment privilege against self-incrimination should not be used both as a shield and a sword. But, here, the corporate plaintiffs' claims do not rely exclusively on the testimony of a witness invoking the Fifth Amendment privilege. Plaintiffs offered a witness with personal knowledge of some of defendant's allegedly wrongful acts. This is enough to avoid the drastic remedy of dismissing an action pursuant to CPLR 3126. Obviously, if this case were to proceed to trial, then plaintiffs would have to meet their burden to establish the elements for each cause of action. That may be difficult without the testimony of Zukerman, but it does not justify dismissal of this action on these papers.

Because plaintiff has produced Cender, a witness with knowledge, defendant must be produced for a deposition on or before February 27, 2018 and the parties are directed to appear


for a further status conference on April 17, 2018 at 2:15 p.m.

Accordingly, it is hereby

ORDERED that the motion to dismiss pursuant to CPLR 3126 and for a protective order pursuant to CPLR 3103 is denied.

This is the Decision and Order of the Court.

Dated: December²⁰, 2017
New York, New York



ARLENE P. BLUTH, JSC