

**Fulton v Kelly**

2013 NY Slip Op 34227(U)

October 8, 2013

Supreme Court, Queens County

Docket Number: 20501/2010

Judge: Orin R. Kitzes

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**ORIGINAL**

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY  
COMMERCIAL DIVISION

Present: HONORABLE ORIN R. KITZES IA Part 17  
Justice

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TIMOTHY FULTON, Number 20501/ 2010

Plaintiff,

-against-

Motion  
Date July 31, 2013

JOHN KELLY, MICHAEL CHOLOWSKY, MATTHEW  
CRESCIMANNI and EMJAY ENVIRONMENTAL  
RECYCLING, LTD.,

Motion Seq. No. 14

Defendants.  
-----x

**FILED**  
OCT 18 2013  
COUNTY CLERK  
QUEENS COUNTY

The following papers numbered 1 to 11 read on this motion by defendant Matthew Crescimanni (Crescimanni) to compel the deposition of non-party witness Louis C. Grassi, CPA pursuant to CPLR 3124; and cross motion by non-party Grassi & Co, CPA's, P.C. (Grassi & Co) and non-party Antoinette Trovato aka Antoinette Grasso, individually and as executor for the Estate of Salvatore Trovato (the Estate), for a protective order vacating the subpoena duces tecum served on non-party Grassi & Co on May 22, 2013 pursuant to CPLR 3103.

Papers  
Numbered

Notice of Motion - Affidavits - Exhibits..... 1-4  
Notice of Cross Motion - Affidavits - Exhibits... 5-8  
Answering Affidavits - Exhibits..... 9-11

Upon the foregoing papers it is ordered that the motion and the cross motion are determined as follows:

Defendant Crescimanni served a subpoena on Grassi & Co seeking pre-trial testimony and the production of financial statements and supporting documentation for Salvatore Trovato, Antoinette Trovato, and the Estate; federal tax returns for Salvatore Trovato,

Antoinette Trovato, and the Estate relating to valuation of Emjay Environmental Recycling, Ltd. (Emjay) shares and/or interest or dividends and/or compensation received by Salvatore Trovato, Antoinette Trovato, and the Estate; documents relating to the valuation of Emjay; and documents relating to the purchase and sale of shares of Emjay stock. The subpoena is limited to the period of February 1, 2010 to December 2012.

Defendant Crescimanni asserts that the documents demanded are material, relevant and necessary in order to establish his cross-claims for fraud and unjust enrichment, that the documents focus on the valuation of Emjay stock and the purchase and sale of Emjay stock, and that defendants John Kelly and Michael Cholowsky (Cholowsky) have testified that they do not have possession of relevant documents or lack personal knowledge of certain facts. Thus, it is claimed that it is necessary to obtain the documents from another source, the non-party accounting firm.

In opposition of the motion and in support of the cross motion for a protective order, non-party Grassi & Co maintains that the documents and information sought in the subpoena are private and confidential, irrelevant to this action, and pertain to a newly-commenced action by defendant Crescimanni against Antoinette Trovato in her capacity as administrator of the Estate.

In opposition to the cross-motion, defendant Crescimanni provides a joint financial statement for the 2010 tax year prepared by non-party Grassi & Co for Salvatore and Antoinette Trovato that shows a 50% ownership interest in Emjay, a personal financial statement from defendant Cholowsky that shows his 50% interest in Emjay, a limited good guy guaranty, dated February 3, 2010, executed by defendants Cholowsky and Crescimanni and plaintiff, and Emjay stock certificates, dated February 3, 2010, issued to defendants Cholowsky and Crescimanni.

CPLR 3101 requires full disclosure of all evidence material and necessary to the prosecution or defense of an action. A party is required to produce those items which are in his possession, custody or control and which have been identified with sufficient specificity so as to permit the party to find, identify and produce the items sought. (CPLR 3120[a][1][i].)

In order to obtain discovery from a non-party pursuant to CPLR 3101(a)(4), the party seeking discovery must establish the presence of adequate special circumstances. (see *Cirale v 80 Pine Street Corp.*, 35 NY2d 113, 116-117 [1974].) Special circumstances may be found if it can be established that the information sought to be discovered cannot be obtained from other sources (*O'Neill v*

*Oakgrove Constr.*, 71 NY2d 521, 526 [1988]; *Anderson v Kamalian*, 231 AD2d 659 [2d Dept 1996]), but not merely by showing that the information sought might be relevant (*Cirale v 80 Pine Street Corp.*, *supra*; *Anderson v Kamalian*, *supra*).

A party's entitlement to discovery of material and necessary materials, is "tempered by the trial court's authority to impose, in its discretion, appropriate restrictions on demands which are unduly burdensome, and to prevent abuse by issuing a protective order where the discovery request may cause unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (*Kooper v Kooper*, 74 AD3d 6, 10 [2d Dept 2010]); *see Tannenbaum v City of New York*, 30 AD3d 357, 358-59 [1st Dept 2006]). In keeping with these principles, when discovery is sought from a non-party, the court considers whether the disclosure is warranted by examining whether the proponent of disclosure can obtain the evidence from sources other than the non-party (*Reich v Reich*, 36 AD3d 506, 507 [1st Dept 2007]; *Tannenbaum*, 30 AD3d at 358-59; *see Kooper*, 74 AD3d at 18; *but see Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 112 [1st Dept 2006]).

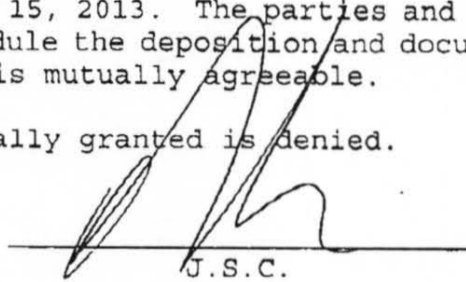
Accordingly, the cross motion for a protective order is granted to the extent that the portion of the subpoena duces tecum which seeks tax returns is stricken at this time. In addition, production of the financial statements and supporting documents shall be limited to the shares and/or interest in Emjay. Due to the "confidential and private nature" (*Roth v American Colonial Ins. Co.*, 159 AD2d 370 [1st Dept 1990]), disclosure of tax returns is disfavored, and defendant is required to establish that the information contained in the returns "is indispensable to the litigation and unavailable from other sources" (*Briton v Knott Hotels Corp.*, 111 AD2d 62, 63 [1st Dept 1985]; *see also Haenel v November & November*, 172 AD2d 182 [1st Dept 1991]). Here, defendant Crescimanni has failed to specify the particular information the returns will contain and its relevance, and has failed to explain why other sources of the information sought are inaccessible or likely to be unproductive.

The motion to compel the deposition of non-party witness Louis C. Grassi, CPA is granted. Defendant Crescimanni has sustained his burden of establishing the existence of special circumstances excluding those documents subject of the protective order and has submitted evidence tending to show that other documents exist that are not obtainable from sources other than non-party accountants.

The subpoena duces tecum, as limited by this order, shall be complied with on or before November 15, 2013. The parties and non-party witness shall confer and schedule the deposition and document production on a day and time that is mutually agreeable.

Any other relief not specifically granted is denied.

Dated: October 8, 2013



J.S.C.

**FILED**  
OCT 18 2013  
COUNTY CLERK  
QUEENS COUNTY