

Commissioner of the State Ins. Fund v Pilku
2014 NY Slip Op 31685(U)
June 27, 2014
Sup Ct, New York County
Docket Number: 450213/2012
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

THE COMMISSIONER OF THE STATE INSURANCE FUND,

INDEX NO. 450213/2012
MOTION DATE 05-21-2014
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

Plaintiff,

-against-

ILBER PILKU, VJOLKA PILKU A/K/A VJOLCA PILKU,
and PILKU CONSTRUCTION SERVICES, INC.,

Defendants.

The following papers, numbered 1 to 6 were read on this motion to compel disclosure

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>3-4</u>
Replying Affidavits _____	<u>5-6</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion to compel disclosure is granted.

Plaintiff obtained a judgment against Billy Contractors, Inc. (herein "Judgment Debtor") in the amount of \$304,707.31. Plaintiff brings the instant action alleging that defendant Ilber Pilku (herein "Husband") was the principal and sole shareholder of Judgment Debtor, and is the husband of defendant Vjolka Pilku a/k/a Vjolca Pilku (herein "Wife"). Wife is the sole shareholder and an officer of defendant Pilku Construction Services, Inc. (herein "PCS"). Husband and Wife created PCS while the litigation between plaintiff and Judgment Debtors was coming to an end and agreed that Wife would be the sole shareholder.

The Amended Complaint alleges that Husband and Wife agreed that after forming PCS Judgment Debtor would transfer certain personal property including construction equipment, money, accounts receivable, office furniture, telephone numbers, office space, corporate opportunities, contract rights, vehicles, essentially Judgment Debtor's entire business operations without any of its liabilities to PCS. The transfers were not made in good faith or for fair consideration. PCS subsequently hired Husband, allowing him to exercise control over PCS's day to day business operations.

The Amended Complaint further alleges that PCS uses substantially the same employees as the Judgment Debtor used prior to ceasing its operations, performs substantially the same type of work, and uses the same offices, equipment and telephone number as had been used by the Judgment Debtor prior ceasing its operations.

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

Plaintiff served an Amended Complaint on December 17, 2012. On May 10, 2013, defendants served an Answer. On October 15, 2013, plaintiffs served their Discovery Demands. In a Compliance Conference order dated November 6, 2013, this court ordered defendants to respond to plaintiff's Discovery and Inspection from October 15, 2013 within 30 days. In defendants' December 6, 2013 response to the Discovery and Inspection, defendants responded to various requests arguing that they were overly broad, unduly burdensome, and irrelevant. The parties could not agree to the responses in the Discovery and Inspection.

The documents sought in the Notice of Discovery and Inspection are all documents evidencing 1) the names of persons rendering services to PCS together with the dates and type of services rendered; 2) the names of persons providing goods or supplies to PCS together with the dates and type of supplies provided; 3) contracts or agreements entered into between PCS and any third-party from its inception to the present; 4) all checks drawn by PCS, source of any deposits, and all bank statements from its inception to the present; 5) all bids or proposals PCS submitted to any third-parties from its inception to the present; 6) monies paid to PCS from its inception to the present; and 7) any agreements between Judgment Debtor or PCS and any third party for each of the projects attached to as Exhibit 1 in the Notice of Discovery and Inspection.

Plaintiff now moves for an Order pursuant to CPLR 3124 and CPLR 3126 compelling Wife and PCS to fully and completely respond to plaintiffs' Notice of Discovery and Inspection dated October 15, 2013. Plaintiff asserts that the Amended Complaint seeks to hold defendants responsible for the judgment by treating them and the judgment debtor as a single person, and to hold PCS liable for the judgment under the theory of successor liability or a defacto merger. As such, Plaintiff argues, the documents requested are material and necessary for the prosecution of this action, and are not overly broad and burdensome.

Defendants oppose the motion arguing the demands are not specific and are part of a fishing expedition against defendants. Defendants assert that plaintiff has been unable to set a proper basis for the relief requested in this motion under successor liability/defacto merger.

CPLR 3101(a) allows for the "full disclosure of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." Pursuant to CPLR §3124, the Court may compel compliance upon failure of a party to provide discovery. It is within the Court's discretion to determine whether the materials sought are "material and necessary" as legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (see *Roman Catholic Church of the Good Shepard v. Tempco Systems*, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [1st Dept., 1994]; 148 *Magnolia, LLC v. Merrimack Mutual Fire Insurance Company*, 62 A.D. 2d 486, 878 N.Y.S. 2d 727 [1st Dept., 2009]). "The words 'material and necessary' as used in section 3101 must 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” (Kapon v. Koch, --- N.E.3d ----, 23 N.Y.3d 32, 2014 N.Y. Slip Op. 02327 [2014] citing to, Allen v. Crowell–Collier Publishing Co., 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 452, 235 N.E.2d 430, 432 [1968]).

The test concerning discovery is one of “usefulness and reason” and as such should lead to disclosure of admissible proof. Parties to an action are entitled to reasonable discovery of any relevant facts to the action (Allen v. Crowell-Collier Publ.Co., 21 N.Y. 2d 403, 288 N.Y.S. 2d 449, 235 N.E. 2d 430 [1968]; Spectrum Systems International Corporation v. Chemical Bank, 78 N.Y. 3d 371, 581 N.E. 2d 1055, 575 N.Y.S. 2d 809 [1991]).

Plaintiff’s First and Third causes of action seek to hold all defendants liable for the judgment entered against the Judgment Debtor; the Second cause of action seeks to hold PCS liable for the judgment as a successor to the Judgment Debtor; the Fourth and Fifth causes of action seek judgment against PCS because of fraudulent transfers the Judgment Debtor made to PCS in violation of section 273-a of the Debtor and Creditor Law; and the Sixth cause of action seeks judgment against Husband for the repayment of certain shareholder loans repaid to him by the Judgment Debtor in violation of DCL 283-a.

The documents plaintiff seeks are material and necessary for the prosecution of its case. The documents are useful and relevant to plaintiffs’ causes of action. As such, plaintiff has established a proper basis for the documents and the Discovery and Inspection requests at issue are not overboard.

The second issue in the instant motion deals with business ledgers. On January 22, 2012, the deposition of Dennis Ferrier was taken. Ferrier is the accountant for Judgment Debtor and PCS. At the deposition, Ferrier produced PCS’s ledger for plaintiff’s attorney, who claims defendants’ attorney asked to borrow the ledgers in order to review them, but never returned the ledgers. Plaintiff seeks to compel defendants to return Judgment Debtor’s business ledgers that were presented at the deposition of Ferrier.

Communications with accountants are not afforded special protections under New York law and are subject to full disclosure. (See First Interstate Credit Alliance, Inc. v. Arthur Andersen & Co., 150 A.D.2d 291, 292, 541 N.Y.S.2d 433 [1st Dept., 1989]). “The party challenging disclosure bears the burden of establishing that the information sought is immune from disclosure (Ambac Assur. Corp. v. DLJ Mortg. Capital, Inc., 92 A.D.3d 451, 452, 939 N.Y.S.2d 333, 335 [1st Dept., 2012] citing to, Spectrum Sys. Intl. Corp. v. Chemical Bank, 78 N.Y.2d 371, 376–377, 575 N.Y.S.2d 809, 581 N.E.2d 1055 [1991]).

Defendants fail to establish that the ledgers are immune from disclosure.

Accordingly, it is ORDERED that plaintiff's motion to compel defendants to fully and completely respond to plaintiff's Notice of Discovery and Inspection dated October 15, 2013 is granted, and it is further,

ORDERED, that defendants are to provide plaintiff with the responses and accompanying documents, including the ledgers, within 20 days from the date of this Order.

MANUEL J. MENDEZ
J.S.C.

ENTER:

Dated: June 27, 2014



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE