

241 Fifth a Ve. Hotel, LLC v GSY Corp.

2014 NY Slip Op 33789(U)

November 24, 2014

Supreme Court, New York County

Docket Number: 110513/2010

Judge: Arthur F. Engoron

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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 37

-----X
241 FIFTH AVE. HOTEL, LLC,

Plaintiff,

- against -

GSY CORP. and JACK HAZAN,

Defendants.

-----X
GSY CORP.,

Defendant/Cross-claimant,

- against -

BEEKMAN PARTNERS GROUP, LLC, BEEKMAN
CONDUIT LLC, BEEKMAN DEVELOPMENT
ASSOCIATES LLC, NASSAU BEEKMAN LLC,
HAZAK ASSOCIATES LLC, GLENN MCDERMOTT,
and DAN SHAVOLIAN,

Cross-claim Defendants.

-----X
Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 7, were used on defendant/cross-claimant GSY Corp.'s motion, pursuant to CPLR 3012(d) and/or 3126, to strike the answer of cross-claim defendant Dan Shavolian and, pursuant to CPLR 3124, to compel Dan Shavolian to answer deposition questions, and cross-claim defendant Dan Shavolian's cross-motion, pursuant to CPLR 3124 and 3126, to compel defendant GSY Corp. to appear for its deposition:

Papers Numbered:

| | |
|----------------------------------------------------------------------------------|---|
| Notice of Motion - Affirmation - Exhibits | 1 |
| Notice of Cross-Motion - Affirmation - Exhibits | 2 |
| Affirmation in Opposition to Cross-Motion and in Further Support of Motion | 3 |
| Reply Affirmation in Further Support of Cross-Motion | 4 |
| Supplemental Affirmation of Israel Goldberg dated April 24, 2014 | 5 |
| Letter of Claude Castro, Esq. dated August 1, 2014 with Exhibits | 6 |
| Affirmation of Israel Goldberg dated August 1, 2014 | 7 |

Index Number: 110513/2010
Sequence Number: 005

Decision and Order

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NEW YORK

Upon the foregoing papers, the motion and cross-motion are each granted in part.

Overview

This is a fairly complicated case about the consequences of a default in the repayment of a Promissory Note given in exchange for a million dollar loan to a limited liability company. In the main, at issue is whether the individual guarantor of the Promissory Note had authority to pledge a different company's property as collateral for repayment of the Note and/or whether the individual guarantor of the Note collaborated with others to set up "shell companies" to avoid repayment of the Note. Thus, the scope of "material and necessary" discovery includes documents and information from two different companies and two commercial real estate purchases each of which cost tens of millions of dollars and had several investors and lenders. The case is made more difficult by the hostility that the parties, and counsel, have towards each other. Indeed, during the most recent deposition of cross-claim defendant Dan Shavolian, defendant GSY Corp.'s attorney accused Mr. Shavolian and his attorney of collaborating in a fraud against GSY. Needless to say, the parties have not attempted in "good faith" to resolve any of their discovery disputes and instead resort to "knee jerk" motions to strike each other's pleadings, this being the second and third such motion. This Court finds such conduct to be inappropriate and bordering on sanctionable, and encourages both counsel to amend their conduct going forward.

Brief Background

Plaintiff 241 Fifth Avenue Hotel, LLC ("241 Hotel") is owned equally (50/50) by its two members, Hazak Associates LLC ("Hazak") and Beshmada LLC (Notice of Cross-Motion, Exhibit "A"). Hazak itself has two members, 241 Partners, LLC and 241 Advisors, LLC (Notice of Motion, Exhibit "H" at page 145). Cross-claim defendant Dan Shavolian ("Shavolian"), Robert Sadian and Abraham Shaez own 241 Partners, and 241 Advisors is owned by defendant/cross-claim defendant Jack Hazan ("Hazan") and Al Cohen (Notice of Motion, Exhibit "H," November 11, 2013 Deposition Transcript ["Dep. Tran."] at 145-146).

On July 18, 2007, 241 Hotel purchased the building located at 241 Fifth Avenue, New York, New York ("the Building") (Affirmation of Israel Goldberg dated August 1, 2014 ["Goldberg Aug. Aff."], Exhibit "B"). Inland Mortgage Capital issued a \$23 million mortgage loan to 241 Hotel ("the Inland mortgage"), the proceeds of which financed, in part, the purchase of the Building (Dep. Tran. at 201, 207-208).

Around the same time, Shavolian and Hazan worked together on another deal to purchase properties on Nassau Street in Manhattan (Dep. Tran. at 154-174). In connection with that deal, and pursuant to a Promissory Note dated October 22, 2007 ("the Note"), defendant GSY Corp. loaned \$1,100,000 to cross-claim defendant Beekman Development Associates LLC ("Beekman Development"). Hazan and cross-claim defendant Glenn McDermott personally guaranteed the Note (August 1, 2014 Letter of Claude Castro, Esq. ["Castro Letter"], October 22, 2007 Promissory Note and Guarantee). Beekman Development used the \$1,100,000 loan to fund the purchase of properties on Nassau Street in lower Manhattan (Castro Letter, February 26, 2008 Agreement).

Neither 241 Hotel nor Shavolian is an obligor under the Note. Beekman Development, Hazan and McDermott are the sole obligors under the Note, and defaulted thereunder. Beekman Development and McDermott have no interest in 241 Hotel. Hazan's interest in 241 Hotel is that of a 50% member of one of the two LLCs which owns 50% of Hazak, which itself owns only 50% of 241 Hotel.

Nevertheless, on July 3, 2008, Hazan entered into a "Pledge Agreement" with GSY in which he "pledged" as security for the loan 100% of his purported 50% interest in Hazak (Goldberg Aug. Aff., Exhibit "D"). The Pledge Agreement identifies, and is signed by, Hazan as "Debtor," no other person or entity is identified as "Debtor" therein. The Pledge Agreement states that Hazan owns 50% of Hazak, that Hazak owns 50% of 241 Hotel, and that 241 Hotel owns the Building. On July 10, 2008, ostensibly pursuant to the Pledge Agreement, GSY filed a UCC Financing Statement against the Building, naming 241 Hotel as "Debtor" (Notice of Cross-Motion, Exhibit "B").

In or about 2009, 241 Hotel defaulted in paying the Inland mortgage (Dep. Tran. at 206). The UCC Financing Statement filed against the Building allegedly prevented 241 Hotel from refinancing the Inland Mortgage after the default (Notice of Motion, Exhibit "A", Complaint). Therefore, 241 Equities LLC, an unrelated company, by Shavolian as nominee, agreed to purchase the loan and the Building from Inland pursuant to a limited forbearance agreement (Notice of Cross-Motion, Exhibit "D", December 2011 Deposition Transcript at 92). Thereafter, another company, Terrace RE, agreed to purchase 241 Equities' interest in the limited forbearance agreement and the Building (*Ibid.*; Supplemental Affirmation of Israel Goldberg dated April 24, 2014 ["Goldberg Supp. Aff."], Exhibit "B").

By summons and complaint dated August 5, 2010, plaintiff commenced this action against GSY and Hazan to recover damages it sustained by reason of the "improper filing" of the UCC Financing Statement, which prevented it from "extending or refinancing" the Inland mortgage on the Building. The complaint alleges, *inter alia*, that 241 Hotel "never borrowed or received any funds from GSY," did not "execute any security agreement and/or pledge agreement authoring GSY to file any financing statement naming [it] as debtor," and that Hazan was "never authorized to sign any Financing Statement on behalf of [241 Hotel]" (Notice of Motion, Exhibit "A", Complaint).

GSY denied the material allegations of the complaint, asserted several affirmative defenses, and alleged two counter-claims against 241 Hotel and five cross-claims to recover on the Note against Hazan, Beekman Development and the other cross-claim defendants Beekman Partners Group, LLC, Beekman Conduit, LLC, Nassau Beekman, LLC, Hazak and McDermott (Notice of Motion, Exhibits "B" and "C"). GSY alleges that Hazan had authority to encumber 241 Hotel's assets and that Hazan and Shavolian "acted together" to defeat GSY's right to recover on its loan and security interest in 241 Hotel's assets.

Cross-claim defendants Shavolian, Beekman Conduit, LLC, Nassau Beekman, LLC, and Hazak replied to the cross-claims, and 241 Hotel replied to the counter-claims (Notice of Motion, Exhibit "D"). Hazan defaulted in answering the complaint, but plaintiff has not moved for a

default judgment against him. Hazan, Beekman Development and Beekman Partners Group, LLC, defaulted in responding to GSY's cross-claims, and GSY obtained a default against them (Notice of Motion, Exhibit "E," October 27, 2011 Order).

On December 12, 2011, Shavolian testified at deposition on behalf of plaintiff 241 Hotel and himself as a cross-claim defendant (Notice of Cross-Motion, Exhibit "D"). After approximately four (4) hours of testimony the parties agreed to adjourn the deposition and continue it at a later time. During a January 26, 2012 status conference, Shavolian's continued deposition was set for the end of March 2012 (Notice of Motion, Exhibit "E," January 26, 2012 Order).

Shavolian did not appear for his continued deposition for what appears to be health related reasons. GSY moved to strike Shavolian's answer to the cross-claims for failure to appear for his continued deposition and for alleged failure to produce documents. The court (Kenney, J.) granted GSY's motion (Notice of Motion, Exhibit "F," August 9, 2012 Order). The Appellate Division First Department reversed, finding that GSY failed to make a "good faith" effort to resolve the discovery dispute and to show any "bad faith" on the part of Shavolian, and directed Shavolian to appear for his continued deposition within thirty days of entry of its order (Notice of Motion, Exhibit "G," October 8, 2013 Order).

On November 11, 2013, Shavolian appeared for his continued deposition (Notice of Motion, Exhibit "H").

Discussion

CPLR 3101(a) provides, in pertinent part, that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." Trial courts have wide discretion to determine whether the information sought is "material and necessary," and the phrase is "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) ("The test is one of usefulness and reason"); CMRC Corp., Ltd. v State, 270 AD2d 27, 31 (1st Dep't 2000); U.S. Ice Cream Corp. v Carvel Corp., 190 AD2d 788, 788 (2nd Dep't 1993) ("Restricted only by a test for materiality of 'usefulness' and 'reason', pretrial discovery is to be encouraged").

Here, GSY has failed to demonstrate the "material and necessary" information which 241 Hotel and Shavolian allegedly refused to provide at Shavolian's November 11, 2013 continued deposition. GSY has not identified a single, specific question which Shavolian failed to answer and for which it now seeks an order to compel. GSY's assertion that Shavolian "stonewalled" at his continued deposition is vague, unsupported and, indeed, flatly contradicted by the deposition transcript, which reveals that Shavolian testified for approximately four (4) hours, to the best of his recollection, and virtually without objection or interruption, about "material and necessary" information such as: Beekman Development; Beekman Development's deals to purchase the Nassau Street properties; financing for the purchase of the Nassau Street properties; litigation

regarding the Nassau Street property deals; 241 Hotel's corporate structure; 241 Hotel's deal to purchase the Building; financing for the purchase of the Building; Hazan's authority with respect to 241 Hotel; 241 Hotel's default on the Inland Mortgage and resulting forbearance agreement; and Terrace RE's purchase of the forbearance agreement. By this Court's count, Shavolian's attorney objected to 27 questions as to form only, which Shavolian then answered, often at length.

GSY has not asked for, and therefore has waived a request for, a ruling on the one question marked at Shavolian's continued deposition: what is the amount of money Terrace RE paid to purchase 241 Equities' interest in the limited forbearance agreement and the Building (Dep. Tran. at 310). In any event, and without passing upon the whether the question seeks "material and necessary" information, GSY is in possession of that information as it is contained in the August 2010 "Loan Purchase Agreement" between Terrace RE and 241 Equities, a copy of which was provided to GSY by counsel for Beshmada (Goldberg Aug. Aff., Exhibit "B"). In view of the foregoing, GSY's motion to strike Shavolian's answer for failing to answer deposition questions and/or to compel answers to deposition questions is denied, and Shavolian is not required to appear for a further deposition.

Shavolian's cross-motion to strike GSY's answer, counter-claims and cross-claims for its alleged refusal to appear at deposition, is also denied. In this Court's considered view, GSY's attorney did not refuse to produce GSY for deposition at any time, he merely declined to set GSY's deposition until completion of Shavolian's deposition. However, now that this Court has determined that Shavolian's deposition is complete, GSY is directed to appear for its deposition within twenty (20) days of the date of service of a copy of this Decision and Order with notice of entry.

GSY's motion to strike Shavolian's answer for failure to produce documents requested at the November 11, 2013 continued deposition, is also denied. GSY made no "good faith" attempt to resolve its purported discovery dispute prior to making the instant motion. Indeed, GSY did not even make a written request for the documents called for at the continued deposition, despite its attorney's representation that he would do so (Dep. Tran. at 222-223). Under these circumstances, Shavolian's purported refusal to produce documents was not willful, contumacious or in bad faith and the drastic sanction of striking his answer is not warranted. See Banner v NYC Hous. Auth., 73 AD3d 502 (1st Dep't 2010).

On the merits, this Court finds that GSY is entitled to some, but not all, of the documents requested at Shavolian's continued deposition. The documents itemized below are "material and necessary" to 241 Hotel's claims, GSY's defenses thereto, as well as to GSY's cross-claims and counter-claims, because they bear upon and will be useful to "sharpening the issues" about Hazan's purported authority to pledge 241 Hotel's property and whether Hazan and others formed "shell companies" to avoid payment of the Note.

Accordingly, this Court directs 241 Hotel and Shavolian to produce the following documents within thirty (30) days of the date of service of a copy of this Decision Order with notice of entry:

1. All documents, including but not limited to letters, e-mails, faxes, and notes, between Shavolian and Hazan pertaining to Hazan's authority to act on behalf of 241 Hotel, including as a "project manager" (Dep. Tran. at 222);
2. A signed copy of Hazak Associates' Operating Agreement (Dep. Tran. at 194);
3. The closing statement for 241 Hotel's purchase of the Building (Dep. Tran. at 143) and a copy of the closing statement for the Inland mortgage (to the extent it is not incorporated in the closing statement for the purchase of the Building) (Dep. Tran. at 204);
4. Copies of 241 Hotel's tax returns for the period from 2007 through 2012 (Dep. Tran. at 152);
5. All documents showing when 241 Hotel defaulted on the Inland Mortgage (Dep. Tran. at 207);
6. All documents regarding any forbearance agreement between "241 Fifth Ave. Hotel, LLC" and Inland Mortgage (Dep. Tran. at 228);
7. A copy of the title search records which revealed the UCC Financing Statement GSY filed against the Building (Dep. Tran. at 287) and copies of all e-mails requesting or authorizing the title search (Dep. Tran. at 288);
8. The "spreadsheet" prepared by Shavolian which itemizes the allocation of all "monies" contributed by Shavolian and by Hazan, including GSY's million dollar loan, towards the purchase of the Nassau Street properties (Dep. Tran. at 163);
9. All documents and spreadsheets related to the funding of the Beekman Development property deals and purchases (Dep. Tran. at 166); and
10. Beekman Development's tax returns for the period from 2007 through 2012 (Dep. Tran. at 170).

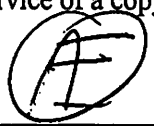
This Court finds that the following documents are neither "material" nor "necessary" to this action and therefore declines to direct their production: (a) documentation reflecting the name of the attorney for Terrace RE (Dep. Tran. at 235); (b) retainer agreement(s) between Claude Castro, Esq. and plaintiff, Dan Shavolian and any of the other cross-claim defendants herein (Dep. Tran. at 267); and (c) Shavolian's individual tax returns (Dep. Tran. at 298). Finally, this Court declines to direct the production of a copy of the contract between 241 Hotel and Perkins Eastman, the architect, as GSY is already in possession of copy of such contract (Goldberg Supp. Aff., Exhibit "D").

Conclusion

For the reasons set forth herein, GSY's motion to strike Shavolian's answer to the cross-claims and/or to compel a further deposition of Shavolian, is denied; GYS's motion to compel the

production of documents is granted in part, and 241 Hotel and Shavolian are directed to produce the documents set forth herein (paragraphs numbered 1 through 10, supra) within thirty (30) days of the date of service of a copy of this Decision Order with notice of entry. Shavolian's cross-motion to compel and/or strike is granted to the extent of directing GSY to appear for its deposition within twenty (20) days of the date of service of a copy of this Decision Order with notice of entry.

Dated: November 24, 2014



Arthur F. Engoron, J.S.C.

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