

**Concept Home Care, Inc. v Citibank**

2015 NY Slip Op 33002(U)

August 10, 2015

Supreme Court, Bronx County

Docket Number: Index No. 23509/13E

Judge: Betty Owen Stinson

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 11B

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CONCEPT HOME CARE, INC., d/b/a  
GOLDEN APPLE HOMECARE,

Plaintiff(s),

Index No. 23509/13E  
**DECISION AND ORDER**

-against-

Present:  
HON. BETTY OWEN STINSON

CITIBANK, CITICORP and ANSANO  
CONSTRUCTION CORP.

Defendant(s)

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STINSON, J:

The motions by defendants to strike plaintiff's complaint for failure to comply with discovery demands and the plaintiff's cross-motion for a Protective Order are combined for disposition and decided as follows:

Defendants Citibank and Citicorp move to dismiss the plaintiff's complaint for the failure of its owners Charles Mayers and Maria Etim to provide documents of the corporation and more particularly their personal bank records to the defendants. The plaintiff corporation's office was in the basement of a building located at 3924 East Tremont Avenue, Bronx, New York. On January 19, 2013, a hot water heater or furnace pipe burst located in the offices occupied by Citibank and Citicorp causing water to flood into the plaintiff's leased space. Plaintiff corporation has commenced an action against defendants for damage to its property and business because of the flood. In addition to the property damage claim, plaintiff alleges it was permanently put out

of business due to the flooding causing a loss of income and profits. It is the claim of defendant movants that they are entitled to the private banking records of the owners of the corporation in order to defend against the claim for loss of business and lost profits. In the interim, the owners Mayers and Etim were indicted by the New York State Attorney General's Office (Indictment No. 3865-13). The criminal charges allege misappropriation of wages allegedly owed to their employees by Mr. Mayers and Ms. Etim and the indictment remains open.

In response to a Notice to Produce served upon the plaintiff by co-defendant Ansano Construction Corp. dated September 8, 2014, objection was made to Paragraph 2 requesting that Maria Etim and Charles Mayers as non-parties produce the personal banking records demanded on the grounds that they may incriminate them in the pending criminal action. The same non-party witnesses have objected to Paragraphs 1, 3 and 4 of the Notice to Produce because they claim it would also impact the Fifth Amendment privileges of the individuals who are the principals of Concept Home Care, Inc. The Notice to Produce objected to are for bank records maintained by the corporation for any and all checking accounts, savings accounts or any other bank accounts for the period of 2012-present; all bank records associated with the personal banking accounts maintained by Maria Etim and Charles Mayers from the period of 2011-2013; all records pertaining to Concept Home Care, Inc.'s yearly profits and losses for the period of 2011-2013 and all payroll records maintained by the corporation for the period of 2011-2013. However, after consultation with the owners criminal defense attorney, no claim of Fifth Amendment privilege regarding the production of records of the plaintiff corporation will be made. The objection however remains as to the personal banking records of the individual owners. Additionally, the corporation's records to be produced are "records that are relevant,

available and not discarded or destroyed in the flooding incident.” To the extent that records are withheld based on plaintiff’s determination of relevancy, availability and existence, they must be identified and a specific objection made to them by the plaintiff. As a result of the non-production of the records, depositions have not been held despite orders to do so.

In this action, plaintiff seeks damages claiming the flood of January 20, 2013 caused a loss of business income and profits and eventually closing of the business. Plaintiff is a corporation. The non-parties from whom discovery is sought are Charles Mayers and Maria Etim, principals of the corporation. The corporate banking records are material and necessary to the claims and defenses and must be disclosed. To the extent that money was distributed from the plaintiff corporation to Mayers and Etim, the personal banking records of the non-parties are also material and necessary to the defenses of the claims against all defendants. In *Batista v. City of New York*, 15 AD 3d 304 (2005), the Appellate Division, 1<sup>st</sup> Department held on a claim by plaintiff for violation of civil rights and intentional infliction of emotional distress, where plaintiff was awaiting trial of charges relating to drug selling, held that plaintiff could not maintain the civil rights action while denying the City information material and necessary to their defense by invoking the Fifth Amendment privilege against self-incrimination. Since the non-parties are in effect, the sole principals of the corporate plaintiff, the fact that they are under indictment for alleged crimes committed by/through, the corporation does not does not allow them to invoke the Fifth Amendment as to documents material and necessary to the defense of the action by the corporation against defendants.

The court held in *Batista*, supra, p. 306, that should plaintiff continue to invoke his Fifth Amendment right against self-incrimination, he does so at the risk of having his complaint

dismissed (citation omitted). Therefore, defendants' motion to dismiss all claims, cross-claims and counter-claims for failure to have plaintiff and non-party corporate principals, Mayers and Etim, to produce the business and personal banking records is granted to the extent that they are directed to provide the documents demanded in defendant Ansano's Notice to Produce dated September 8, 2013 to all defendants within forty-five (45) days of service of a copy of this Order on the plaintiff. Failure to comply with this Order shall be grounds to strike plaintiff's complaint.

Plaintiff's motion and cross-motion for a protective order is denied to the extent set forth above.

This is the decision and Order of the court.

August 10, 2015  
Bronx, New York

  
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BETTY OWEN STINSON, J.S.C.