

<b>J.V.C. Elec. Co., Inc. v Airmont Woods LLC</b>
2017 NY Slip Op 32832(U)
December 1, 2017
Supreme Court, Rockland County
Docket Number: 031983/2015
Judge: Thomas E. Walsh II
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
J.V.C. ELECTRICAL CO., INC. a/k/a  
J.V.C. ELECTRICAL COMPANY, INC.  
CARMELO SCAFFIDI & SONS BLACKTOPPING,  
INC. d/b/a SCAFFIDI'S PAYING & DRAINAGE , and  
LJC TRUCKING INC.,

*Plaintiffs,*

*-against-*

**DECISION AND ORDER**

Index#031983/2015

AIRMONT WOODS LLC, ABEKEN APARTMENTS LP,  
ABEKEN APARTMENTS II, LLC, ABEKEN LLC,  
ABEKEN MANAGEMENT LLC, CARDINAL DEVELOPMENT,  
LLC, CONGERS APARTMENT RENTALS, LLC, DENTON  
ACRES LLC, GLW DEVELOPERS LLC, K.D.J. REALTY, INC,  
KENABE, LLC, TUTHILL PARC, LCC, VIOLA PARK REALTY,  
LLC, WARWICK COMMONS LLC, KENNETH J. BERGSTOL,  
SUSAN BERGSTOL, JON BERGSTOL, JOHN DOE NO. "3"  
Through JOHN DOE NO. "5", JANE DOE NO."1"  
Through JOHN DOE NO. "5",

Motion # 6 - MG and MD  
DC - N  
Adj: 12/6/17

*Defendant(s)*

-----X  
*Thomas E. Walsh II, J.*

The Court has before it Defendant's Motion for a protective order pursuant to Civil Practice Law and Rules § 3103(a) and/or for an Order Quashing, pursuant to Civil Practice Law and Rules § 2304, a non-party subpoena, directed at Schulman Black & Katz, LLP and for such other, further and different relief as to this Court seems just and proper:

**PAPERS**

**NUMBER**

NOTICE OF MOTION/AFFIRMATION OF JOSEPH J. HASPEL, ESQ./  
EXHIBITS (A-F)

1

AFFIRMATION OF PATRICIA E. HABAS, ESQ. IN OPPOSITION/AFFIDAVIT OF  
JOSEPH V. CACIOPPO, JR/AFFIDAVIT OF WILLIAM SCAFFIDI/AFFIDAVIT OF  
JOSEPH JOHN BERTOLINO/EXHIBITS (1-17)/MEMORANDUM OF LAW IN  
OPPOSITION TO AIRMONT DEFENDANTS' MOTION TO QUASH

2

REPLY AFFIRMATION OF JOSEPH J. HASPEL, ESQ./EXHIBITS (A-D)

3

Upon careful consideration of the foregoing, the Court now rules as follows:

Briefly, this action arises from non-payment for services provided by Plaintiffs to Defendants as part of the building of various homes in a subdivision in Airmont, New York between 2009 and 2012. Originally Plaintiff JVC ELECTRICAL commenced this action on May 5, 2015 against Defendants AIRMONT WOODS and BERGSTOL. The Complaint contains contract causes of action, causes of action pursuant to Article 3-A of the Lien Law ("Trust Fund Claims").

On June 1, 2015 Plaintiff's counsel served Sterling National Bank with a litigation hold letter. Defendant's prior counsel contacted Plaintiff's counsel on June 2015 requesting an extension to answer or appear, which resulted in protracted settlement discussions. The settlement discussions ended unsuccessfully in 2016 and Plaintiffs filed a Subpoena Duces Tecum on February 9, 2016 on Sterling National Bank on notice to Defendants. Prior to the bank's compliance with the subpoena, the issue was joined when Defendants AIRMONT WOODS and BERGSTOL filed a joint Verified Answer to the original Complaint. Subsequently, Defendants filed a motion seeking summary judgment dismissing the fourth and fifth causes of action and to quash the subpoena served on Sterling Bank which was denied by the undersigned from the bench. On March 1, 2016, Plaintiff served a Supplemental Summons and Amended Complaint pursuant to Civil Practice Law and Rules § 3025(a) joining Plaintiffs LJC TRUCKING and SCAFFIDI PAVING. On that date Plaintiffs LJC TRUCKING and SCAFFIDI PAVING also served on Defendant a Trustee Demand. Defendants filed a Verified Answer to the Amended Complaint on March 30, 2016.

In November 2016 the undersigned issued a Decision and Order addressing Defendant Airmont Woods, LLC and Kenneth Bergstol's Motion for partial Summary Judgment dismissing the tenth (Trust Fund), Eleventh (Fraudulent Conveyance) and Twelfth (Fraudulent Conveyance) causes of action and for a protective order and an order quashing the non-party subpoena filed on Sterling National bank and other related relief. That same Order also

considered the Plaintiff's Motion for Summary Judgment on the various causes of action. Within the November 2016 Decision and Order the Court denied Defendant's aforementioned motion for partial summary judgment, a protective order and the motion to quash the Sterling National Bank subpoena and denied Plaintiff's motion for summary judgment. The Court granted plaintiff's motion to compel and the Defendant's were directed to furnish Plaintiffs with a verified statement and provide access to books and records which constituted the lien law trust for the construction project Biret Drive Subdivision Project in Airmont, New York. Additionally, the Court directed the parties to appear for a framed-issue hearing as to the tenth, eleventh and twelfth cause of action in the Complaint two weeks after the Decision and Order. The parties agree that the framed-issue hearing has not occurred and has been adjourned numerous times over the past year.

Pursuant to the above November 2016 Decision and Order, the Defendants forwarded copies of Defendants Airmont Woods, LLC and Kenneth Bergstol's banking records from Sterling Bank. Defendant's filed a timely motion to reargue and Plaintiff's filed a motion for leave to amend the Complaint in December 2016. Subsequent to the November Decision and Order, Defendants exchanged banking documents with Plaintiffs. Defendants further assert that they produced boxes of requested documents to Plaintiff including Defendant Airmont Woods, LLC's general ledger which delineated each and every transaction in its history. The Court issued a Decision and Order on February 14, 2017 denying Defendant's motion to reargue and granting plaintiff's motion to amend the Complaint. Plaintiff e-filed and served the Second Amended Complaint on February 21, 2017, which added the additional defendants and causes of action. The Second Amended Complaint alleged that the newly added defendants were recipients of fraudulent conveyances from Defendant Airmont. Defendants Airmont Woods and Kenneth Bergstol filed a Verified Answer to the Second Amended Complaint on March 13, 2017. Defendants Denton Acres, LLC, KDJ realty Inc., Jon Bergstol and Susan Bergstol filed Verified Answers to the Second Amended Complaint on March 13, 2017.

Plaintiffs issued a non-party Subpoena Duces Tecum for Schulman, Black & Katz, LLP, (hereinafter SB&K), Defendants Certified Public Accountants on June 26, 2017. The subpoena seeks six (6) separate documents: (1) all retainer agreements for accounting, tax preparation, or other services provided by SB&K to any of the Airmont Defendants or Denton Defendants, (2) documents evidencing the financial solvency of Airmont Woods between January 1, 2006 and the present, (3) Federal and New York State tax returns for all Airmont Defendants and Denton Defendants for the years 2006 through the present, (4) checks, receipts or other documents evidencing payments and/or financing received by any of the Airmont Defendants or Denton Defendants from any entity in connection with the Project, (5) all trust fund ledgers or documents that reflect such information maintained by or on behalf of Defendants in connection with the Project, (6) Documents relating to the "winding up" of Airmont Woods. Defendants Airmont Woods, LLC and Kenneth Bergstol filed the instant motion for a Protective Order pursuant to Civil Practice Law and Rules § 3103(a) and/or an Order Quashing (in part), pursuant to Civil Practice Law and Rules § 2304 the non-party subpoena directed at SB&K.

#### **MOTION TO QUASH GENERALLY**

Pursuant to Civil Practice Law and Rules § 2304, "A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable." In determining whether to quash a subpoena duces tecum, the Court must determine, among other things, whether the documents sought by the subpoena are relevant. [*N. v. Novello*, 13 AD3d 631, 632 (2d Dept 2004)]. Once the relevancy of the items sought is challenged, the burden is on the party issuing the subpoena to come forward with a factual basis establishing the relevance of the documents sought. [*Hyatt v. Franchise Tax Bd.*, 105 AD3d 186, 202 (2d Dept 2013); *N. v. Novello*, 13 AD3d 631, 632 (2d Dept 2004)]. The party issuing the subpoena need only establish that the material sought bears a reasonable relation to the issues at hand, and the subpoena will be upheld unless the information sought is utterly irrelevant to any

proper inquiry. [*Hyatt v. Franchise Tax Bd.*, 105 AD3d 186, 202 (2d Dept 2013); *N. v. Novello*, 13 AD3d 631, 632 (2d Dept 2004)].

In terms of discovery, the court is granted wide discretion in determining whether information that is sought is material and necessary to the prosecution or defense of an action. [*Allen v. Crowell-Collier Pub. Co.*, 21 NY2d 402 (1968); *Palermo Mason Const., Inc. v. Aark Holding Corp.*, 300 AD2d 460, 461 (2d Dept 2002)]. The Court of Appeals has defined "material and necessary" liberally for the purpose of requiring disclosure on request "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." [*Id.* at 406; *Kooper v. Kooper*, 74 AD3d 6, 10 (2d Dept 2010)]. *Civil Practice Law and Rules* § 3101(a) states 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." However, unlimited disclosure is not required and the Civil Practice Law and Rules provide that the court may issue a protective order "denying, limiting, conditioning or regulating the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." [*Civil Practice Law and Rules* § 3103(a); *County of Suffolk v. Long Island Power Authority, et al*, 100 AD3d 944, 946 (2d Dept 2012); *Accent Collections, Inc. v. Capelli Enterprises, Inc. et al*, 84 AD3d 1283 (2d Dept 2011)].

Defendants Airmont Woods, LLC and Kenneth Bergstol submit that with the filing of the non-party subpoena on SB&K the Plaintiff is engaging in a "scheme to harass" Defendant Kenneth Bergstol into submission. Specifically, Defendants<sup>1</sup> argue that the documents sought by Plaintiff from SB&K are not relevant to the instant action. The basis of Defendants relevance argument is that the business of a transferee of an alleged fraudulent conveyance is "generally

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<sup>1</sup>Any reference to Defendants in this motion only applies to Defendants Airmont Woods, LLC and Kenneth Bergstol, as the instant motion to quash is brought by their counsel and the other Defendants have failed to oppose the motion, join the motion or seek the same relief by their own motion to quash.

no consequence, since it is only the intent of the transferor which may render a transfer fraudulent under Article 10 of the Debtor and Creditor Law ("DCL") of the State of New York." Defendant further avers that the additional disclosures sought by Plaintiff are directed to the claims made by Plaintiff as to the Trust Fund and the validity of those claims remain in limbo. Specifically, both parties concede that the undersigned ordered a framed issue hearing as to those causes of action in the November 2016 Decision and Order, but that hearing has yet to be commenced. Defendants concedes that there have been numerous discussions at various court conferences discussing the scheduling. During the months since December 2016 the parties have engaged in extensive discovery including Examinations Before Trial (hereinafter EBTs) and paper discovery. Defendants now argue that since the hearing has yet to be scheduled they should not have to engage in "discovery on issues which, but for a meritless tolling argument, are indisputably barred by the applicable statute of limitations." Essentially the Defendants are arguing that the Plaintiffs should accept their rendition of the facts and the finances in the instant matter without the benefit of further discovery since they have already received enough documentation from Defendants.

Defendants first argument to quash the Plaintiff's subpoena for non-party SB&K is that the documents sought are beyond that which would lead to relevant evidence and that the documents sought are also improper. The basis of Defendants argument is that the purpose of the law of fraudulent conveyances, which is controlled by Article 10 of the Debtor Creditor Law, is to provide creditors a method or means in which they can enforce their claims. In determining these cases the Defendants aver that the actions of the debtor-transferor is what is at issue and not the intent of transferee. Defendant further argues that the transferees intent only is relevant where there is an affirmative defense if the defendant is not the initial transferee. Specifically, Defendant argues that there is no independent liability placed on a defendant-transferee except that they have a responsibility to restore assets to the transferor who has the liability to the creditor (plaintiff). According to Defendant, to that end a creditor's

remedy when there is a transfer of debtor's assets is to get the conveyance nullified and if that is not possible due to the assets no longer existing, then a money judgment can be entered in an amount up to the value of the fraudulently transferred assets. Following these arguments and applying the law as stated by Defendants, the Defendants assert that they can have no individual liability except that they could be required to restore assets that were improperly transferred to them by Defendant Airmont.

The second argument raised by the Defendants is that financial records that contain confidential and private information are not subject to discovery unless they are relevant to the issues in the case and are unavailable from other sources. Defendant submits that Plaintiffs have already received Defendant Airmont Woods, LLC's financial records, to wit: statements and cancelled checks from the financial institution and Airmont Woods, LLC's general ledger. As such, Defendants assert since there is no dispute that the transfers occurred, but rather whether the transfers are defined as fraudulent conveyances under the Debtor and Creditor Law that the Plaintiffs have already received the necessary financial documents from two (2) other sources produced by the Defendant and by subpoena. Further, the Defendant avers that since the transferee's conduct is not an issue that can be considered in determination of whether a transfer is a fraudulent conveyance the operations and financial affairs of that transferee in this action are not relevant. Therefore, Defendant submits that the financial documents sought by the Plaintiffs through the subpoena duces tecum served on SB&K is the type for which the law prevents discovery.

In opposition Plaintiffs deny using the current discovery request for the purpose of harassing the Defendants and assert that they have made proper discovery requests for the purpose of supporting their claims as alleged in the Complaint. Plaintiffs also submit that the Defendant's interpretation that the intent of the transferee of fraudulently conveyed assets is irrelevant under New York Debtor & Creditor Law is incorrect. Plaintiffs aver that the documents they are seeking from SB&K are needed to defeat the affirmative defenses asserted in



Defendants Answers along with establishing a pattern and scheme to defraud creditors through an overall pattern of fraudulent loans between entities. Plaintiff asserts that the actions and knowledge of transferees can be enlightening regarding a transferor's intent to defraud or participate in a conspiracy to defraud creditors. Since the documents that are sought would directly demonstrate the consideration, the financial condition of Defendant Airmont Woods, LLC at the time of the alleged fraudulent conveyances Plaintiff argues that they are material and relevant. Specifically, Plaintiff argues that the documents they are seeking from SB&K would expose the internal transactions of Defendant companies, which is directly relevant to a claim of fraudulent conveyance. As to the retainer letters, Plaintiffs assert that they would demonstrate on who's behalf (i.e. which entities) that the accountant was simultaneously working on, which would clarify "adjustments" observed in Defendant Airmont Woods general Ledger.

In application to the instant action, Plaintiffs argue that Defendant Kenneth Bergstol conduct at his deposition, along with that of Defendant Aimront's bookkeeper, Kendyl Malvick, in which they both were unable to provide information about the loans and the consideration for such, makes the instant subpoena to SB&K necessary and the documents sought relevant. According to Plaintiff, Defendant and Kendyl Malvik's EBT testimony and a review of Defendant Airmont Woods, LLC's general ledger revealed that Defendant Kenneth Bergstol was making frequent online transfers of corporate assets which included trust funds, proceeds of house sales, proceeds from loans and real estate for the purpose of avoiding payment to creditors. Kendyl Malick was unable to understand or explain the 'adjustments" made for loans within the Defendant Airmont Woods general Ledger. Further, Plaintiff asserts that the EBT testimony and financial records demonstrate that Defendant Kenneth Bergstol used several corporate entities in a scheme in which he diverted funds from his corporation to his individual and joint accounts held with his wife, Defendant Susan Bergstol. Specifically, Defendant argues that real property was transferred from Defendant Kenneth Bergstol for little or no consideration to

Defendant Denton Acres and Defendant Airmont Woods paid the purchase price and mortgage payments. The Plaintiff states that Defendant Kenneth Bergstol subsequently transferred his interest in Defendant Denton Acres for a loan owed to his son, Defendant Jon Bergstol, but was unable to provide any facts about the loan or produced any promissory notes or documents related to the loans. Plaintiff's argument is that the Defendant's own lack of documentation, lack of memory (at his EBT) and inability to clarify certain transactions within Defendant Airmont Woods, LLC's general ledger have resulted in the Plaintiff needing to obtain clarifying documentation from Defendants accountants. Additionally, Plaintiff submits that all of the documents they are seeking would be indirect evidence of "badges of fraud."

#### **DISCLOSURE OF TAX RETURNS**

"[D]isclosure of income tax returns is disfavored without a strong showing that they contain information unavailable from other sources, particularly germane to the matter in dispute." [*Briand Parenteau, Inc. v. Dean Witter Reynolds, Inc.*, 267 AD2d 576, 577 (3d Dept 1999); *Nanbar Realty Corp. v. Pater Realty Corp.*, 242 AD2d 208, 209-210 (1st Dept 1997); *Altidor v. State Wide Ins. Co.*, 22AD3d 435 (2d Dept 2005)]. Due to tax returns "confidential and private" nature their disclosure is disfavored. [*Roth v. American Colonial Ins. Co.*, 159 AD2d 370 (1st Dept 1990)]. The party seeking tax returns must establish that the information in the tax returns that they seek "is indispensable to this litigation and unavailable from other sources." [*Briton v. Knott Hotels Corp.*, 111 AD2d 62 (1st Dept 1985); *Matthew Indus. Piping Co. v. Mobil Oil Corp.*, 114 AD2d 772 (1st Dept 1985)]. An indicia of fraud is a special circumstances which warrants the disclosure of income tax returns. [*Dore v. Allstate Indem. Co.*, 264 AD2d 804 (2d Dept 1999)].

Turning to the State and Federal tax returns sought by the Plaintiff, Defendant argues that due to the confidential and private nature of tax returns they are generally not the subject of discovery unless the party seeking their discovery has shown that they are relevant to the

issues in the case, indispensable to the claim and unavailable from other sources. Defendant submits that Plaintiff has failed to make the required showing, i.e. that the tax returns are relevant to the issues in the creditors action, that they are indispensable and that the information is not available from other sources. Defendants provide no further specific argument regarding the insufficiency of Plaintiff's application for the Defendants tax returns.

In opposition the Plaintiff concedes that tax returns are considered confidential and private, but asserts that they can be discoverable for the reasons set forth by the Defendant in his motion. The Plaintiff further asserts that in a circumstance in which the party who's tax returns are sought has failed to maintain the financial information needed in any other place but the tax returns, then that information is "unavailable." Additionally, Plaintiff submits that based on the evidence they have already received along with the EBT testimony of Defendant Kenneth Bergstol and Defendant Airmont Woods, LLC's bookkeeper there is an "indicia of fraud," which is a special circumstance which overrides the confidential and private nature of tax returns.

It cannot be said that the documents sought by Plaintiffs from SB&K are utterly irrelevant to the issues presented in this proceeding. The documents contain many facts and clarifications regarding the movement of funds between entities by Defendants while also highlighting whether there was consideration for the conveyances. As the Defendants have failed to provide clarity of these issues through the financial documents already provided and through EBTs of both Defendant Kenneth Bergstol and Defendant Airmont Woods, LLC's bookkeeper it cannot be said that the information sought by Plaintiffs was already made available to them. Further, in the instant circumstance the allegations made by Plaintiff are based in fraud, both in the conveyances, the dissolution of Defendant Airmont Woods, LLC and as to the trust fund claims. The existence or allegation of fraud create an issue as to the intent and knowledge of the transferee based on the Debtor and Creditor Laws and the relevant case law and the discovery to this point provided by Defendants has been vague and insufficient.

**TRUST FUND CLAIMS AND DISCOVERY**

As to the trust fund claims, the Court notes that the parties have engaged in discovery including the Defendant providing financial documents and producing witnesses for EBTs despite the failure of the parties to agree upon a date for the framed-issue hearing. The Court perceives the Defendants objection as to the current subpoena for documents from non-party SB&K on the basis of the pending framed issue hearing meritless. If the true issue was the Defendants desire to not engage in discovery over causes of action they believe are untimely pursuant to the Statute of Limitations, then the framed-issue hearing should have been conducted prior to any discovery being exchanged. Since the Defendants have engaged in discovery for more than nine (9) months<sup>2</sup> since this Court's order directing the parties to schedule a framed-issue hearing, the argument that further discovery should be barred by the failure to conduct the aforementioned hearing is non-sensical. Therefore, the Court has considered the documents sought by Plaintiffs as to the trust fund diversion claim the same as the other causes of action plead by the Plaintiffs.

In arriving at this decision the Court has reviewed, evaluated and considered all of the issues framed by these motion papers and the failure of the Court to specifically mention any particular issue in this Decision and Order does not mean that it has not been considered by the Court in light of the appropriate legal authority.

Accordingly, it is hereby

**ORDERED** that based on the foregoing that Defendant's Motion to Quash (motion #6) is granted solely to th extent that the non-party SB&K is directed to provide Federal and New York State tax returns of the Airmont Defendants and Denton Defendants (as defined in

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<sup>2</sup> The Court notes that the Defendant's motion was submitted in August 2017, which is nine (9) months from this Court's Decision and Order dated November 2016. However, at the time of the current Decision and Order approximately twelve (12) months have elapsed.

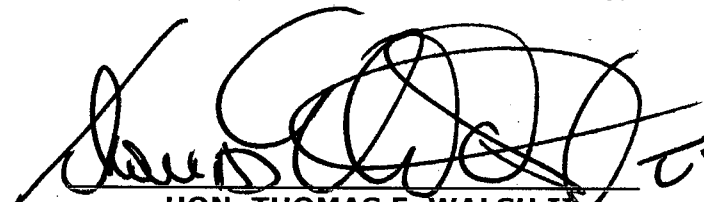
the Subpoena Duces Tecum) for a period of three (3) years before the filing of the lien in the instant action and in all other respects the Defendant's Motion to Quash (Motion #6) is denied; and it is further

**ORDERED** that any disclosure provided for in this Order may not be disseminated to any other party; and it is further

**ORDERED** that the Defendant's Motion for a Protective Order is denied except as herein set forth.

The foregoing constitutes the Decision and Order of this Court on Motion #6.

Dated: New City, New York  
December 1, 2017



HON. THOMAS E. WALSH II  
Justice of the Supreme Court

TO:

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