

Interventure 77 Hudson LLC v Halengren
2018 NY Slip Op 31217(U)
June 15, 2018
Supreme Court, New York County
Docket Number: 653913/2013
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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INTERVENTURE 77 HUDSON LLC, et al.,

Plaintiffs,

-against-

DECISION AND ORDER

Index No.: 653913/2013

Mot. Seq. Nos.: 020, 024, 025, & 027

HOWARD E. HALENGREN, et al.,

Defendants.

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O. PETER SHERWOOD, J.:

Motion sequence numbers 020, 024, 025 and 027 are consolidated for disposition.

Motion Sequence Number 20

Frustrated “due to plaintiffs’ continued noncompliance with [court ordered] Falcon Defendants’ disclosure requests, . . . and in the interest of obtaining documents that are material and necessary to this litigation, the Falcon Defendants served a subpoena on [non-party Price Waterhouse Coopers]” (Falcon Memorandum of Law in Opposition to Motion to Quash, NYSCEF Doc. No. 1200, at 3). Generally, the court discourages use of subpoenas to obtain documents from non-parties where the information needed for the litigation can be obtained from a party. This is especially so when the court has already determined that a party has the relevant information and directed that it be produced. Such is the case here.

The motion to quash is granted without prejudice to the Falcon Defendants applying to the court for non-party discovery and appropriate sanctions upon failure of plaintiffs to produce the ICG investigation report by the date directed at the June 11, 2018, hearing.

Because plaintiffs failed to produce the ICG report that is the principal subject of Motion Sequence Number 020, despite the orders of Justice Singh directing production of the report in his April 22, 2016, and December 15, 2016, orders, the court hereby grants the Falcon Defendants’

request for sanctions. Plaintiffs shall reimburse defendants for the cost of enforcing the April 22, 2016, order relating to the ICG report (*i.e.* fees and expenses relating to this Motion Sequence Number 020). To this end, within fourteen (14) days of the date of this Decision and Order counsel for the Falcon Defendants may prepare and delivery to counsel for plaintiffs a detailed statement of fees and expenses incurred. Payment shall be made within ten (10) days of receipt, except, if counsel for plaintiffs dispute the reasonableness of the amounts billed, plaintiffs' counsel shall communicate with defendants' counsel within five (5) business days of said receipt, giving the specific items disputed. Within five (5) business days of receipt of said communication, counsel for the parties shall meet and confer in a good faith effort to reach a compromise. If, after good faith efforts, the parties are unable to reach agreement, the unresolved issues may be brought to the attention of the court by letter, which shall be no more that four (4) pages in length, single spaced. The parties are reminded that this exercise, which is intended to enforce compliance with a specific discovery order, should not be turned into a mini-litigation onto itself.

Motion Sequence Number 024

In motion sequence number 024, plaintiffs seek to “penalize” defendants for less than full compliance with various requests for production of financial records of defendants, among other matters (*see* NYSCEF Doc. Nos. 911, 913 & 1058).

Having reviewed the briefs submitted by the parties, it appears defendants have complied with court orders directing disclosure, although not completely, and often late. Further, as a result of failure to take steps to preserve relevant information and refusals to adequately respond to plaintiffs' discovery requests, certain bank records are no longer available (*see, e.g.* NYSCEF Doc. No. 1316, ¶ 14). Among the items not provided are:

1. Hill's affidavit of completeness, per the order of December 15, 2016 (*see* Plaintiffs Reply, NYSCEF Doc. No. 1409, at 3);
2. IRES bank records reflecting receipt of \$1,159,027.60 from Stream Realty in July 2008 and \$450,539.34 relating to the Aker lease in August 2008 (*see id.*);
3. Bank records of Institutional Real Estate Services, Whitney Investment Advisors and DA Associates. All are alleged to be entities controlled by Hill (*see id.* at 5);
4. An affidavit attested to by Hill that complies with the Order of December 15, 2016 (*see id.*, at 4);
5. Hallengren Chase Bank account statements for 2006 and 2007 (apparently not preserved) (*see id.*, at 6); and
6. Miller BMO Harris Bank account statements for 2006 through 2009 (also not preserved) (*see id.*, at 7).

For the violations alleged, plaintiffs request the court impose penalties and deem Hill, Hallengren and Miller "jointly and severally liable for the illicit kickback payments and unauthorized fees . . ." (NYSCEF Doc. No. 1259, at 16). The requested sanctions are disproportionate to the scope of the violations indicated and will not be imposed. Defendants shall provide proper responses regarding items 1 through 4, above, within fourteen (14) days of the date of this Decision and Order. The request for sanctions for spoliation of the records identified in items 5 and 6 is denied without prejudice to renewal at the time of trial.

Motion Sequence Number 025

In motion sequence number 025, the Falcon Defendants seek sanctions for plaintiffs' failures to provide disclosure ordered by Justice Singh in his April 22, 2016, decision. The Hill defendants have joined in support (*see* NYSCEF Doc. No. 1500).

Although the motions seek disclosure of “ownership,” “corporate,” and “privileged” documents (*see* NYSCEF Doc. No. 1362), it appears that only the last is of concern at this point. As to the former two categories of documents, plaintiffs appear to have cured the violation, including presenting an affidavit attesting the requested documents were produced, a diligent search had been conducted, and no additional relevant documents were found (*see* NYSCEF Doc. No. 1359, ¶ 4). In a reply letter, the Hill Defendants took no issue with plaintiffs’ representations, but challenged plaintiffs’ refusal to provide the “privileged” documents (*see* NYSCEF Doc. No. 1588). The court has already resolved this issue, having directed prompt disclosure of the ICG internal investigation report (*see* Motion Sequence Number 020, *supra*).

Defendants’ request for sanctions, specifically to dismiss the complaint, is denied.

Motion Sequence Number 027

In Motion Sequence Number 27, dated August 22, 2017, the Falcon Defendants seek sanctions regarding the repeated failure of plaintiffs to schedule Andreas Limburg for deposition (NYSCEF Doc. No. 1133). Not to be outdone, plaintiffs cross-move for sanctions based on defendants’ “frivolous conduct” (NYSCEF Doc. No. 1521). In a decision dated January 27, 2018, this court granted plaintiffs’ motion to vacate an order dated May 30, 2017, directing the deposition of Mr. Limburg (*see* NYSCEF Doc. No. 1597), thereby rendering this motion and the cross-motion moot.

By letter dated February 5, 2018, counsel for the Falcon Defendants advised the court of their continued desire to depose Mr. Limburg. Plaintiffs responded by seeking deferral until after the court decided the then pending (and now decided) motions for summary judgment. At this point, it is appropriate to set a schedule for completion of discovery, including the deposition of Mr. Limburg. The parties are directed to meet and confer on or before July 6, 2018, regarding a

schedule and to appear at a compliance conference on July 11, 2018, at noon at Part 49, Room 252, 60 Centre Street, New York, New York 10007.

This constitutes the decision and order of the court.

Dated: June 15, 2018

ENTER:


O. PETER SHERWOOD, J.S.C.