New York State Dept. of Fin. Servs. v Vision Prop. Mgt., LLC
2018 NY Slip Op 31609(U)
July 12, 2018
Supreme Court, New York County
Docket Number: 450562/2018
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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New York State Department of Financial Services,

Petitioner,

- against -

Vision Property Management, LLC, Kaja Holdings 2, LLC, and RVFM 11 Series, LLC,

Respondents.

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Index No. 450562/2018

Decision and ORDER

Motion Seq. 1

HON. EILEEN A. RAKOWER, J.S.C.

The New York State Department of Financial Services ("DFS") moves by Order to Show Cause ("OSC") under CPLR §§403(d) and 2308(b)(1) compelling Vision Property Management, Kaja Holdings 2, LLC and RVFM 11 Series, LLC (collectively "Vision") to comply with the Superintendent of DFS's subpoenas duces tecum dated January 23, 2017, as supplemented in subsequent correspondence to Vision ("Subpoena"). Specifically, DFS seeks the production of emails that contain the words "loan," "mortgage" and "financing" from custodians Alex Szkaradek ("Szkaradek") and Jonathan Buerkert ("Buerkert") from March 2010 through December 2013. Szkaradek is the co-founder and chief executive officer of Vision. Buerkert is the current chief business development officer of Vision. Vision cross moves for an Order pursuant to CPLR §2304 to modify or limit the Subpoena. Vision contends that "the emails requested bear no resemblance to an appropriate investigative purpose," and would impose a substantial burden that is not justified by any such purpose. (Vision's Memorandum of Law, pages 9-10).

By order dated May 22, 2018, the parties were directed to supplement their briefs and appear for follow-up argument on July 10, 2018. Specifically, the parties

were directed to submit further briefing regarding: (1) the factual basis underlying the investigation; (2) relevancy of the requested emails to DFS' investigation and (3) whether there is any basis for cost-shifting from Vision to DFS for production of the requested emails. The parties thereafter submitted supplemental briefs.

Oral argument was held on July 10, 2018.

Factual Background

The Financial Services Law ("FSL") consolidated the former departments of insurance and banking, and provides for the enforcement of the insurance, banking and financial services laws, under the auspices of DFS. FSL §102. DFS was created by the New York State Legislature "[i]n the wake of the financial crisis … to implement a comprehensive approach to the regulation of financial products and services in New York." (Affirmation of Cynthia M. Reed ("Reed"), Supervising Attorney in the Real Estate Finance Division of DFS, ¶4).

The DFS has commenced an investigation into "whether Vision is engaged in consumer fraud and/or predatory lending in New York." (Ver. Petition ¶ 5). The DFS' investigation was "prompted by reports of Vision offering severely dilapidated homes through a lease to own agreement that acted as an alternative form of financing for people who could not qualify for traditional home purchase financing." (page 2 of DFS' Supplemental Memorandum [Suppl. Memo]).

From 2009 to 2012, Vision "engaged on a form of seller financing through a model agreement it called a contract for deed ('CFD')." (Ver. Petition ¶ 7) The "CFD agreements include a sales agreement by which the owner agreed to transfer ownership of the subject property if the consumer paid the agreed upon purchase price after a typically 30-year term." (*Id.*). Vision "retained title … of the property until the consumer paid off the balance of the property's purchase price." (*Id.*). Vision "also required consumers to sign a promissory note by which consumers agreed to pay principal and interest on the loan, typically at a rate between 7% and 9%." (*Id.*). In 2012, after changes in federal and state law concerning mortgages, Vision "shifted its pay-over-time business model from CFD to rent to own, through Lease with Option to Purchase agreements also referred to as a 'triple net bondable lease' ('Lease' or 'Lease Agreements')." (*Id.* ¶ 8; Affirmation of Valerie Hletco ["Hletko"] ¶6). The DFS states that its investigation is focused "on the time period surrounding Vision's switch from its CFD model agreement to its Lease Agreement model." (*Id.* ¶ 12).

DFS claims, "Despite the change in the terminology, the Department believes that Vision's so-called Lease Agreements were a continuation of the company's seller financing business under a different name to avoid the regulatory requirements that apply to mortgage agreements." (Ver. Petition ¶ 9). DFS states that its investigation has revealed evidence that shows that while Vision changed the form of its agreement, the substance of the agreements did not change. As one example, DFS contends that Vision leased a home in Madison county that it knew was unsafe due to mold and asbestos to a disabled woman living on fixed income. (Supplemental Reed Affirmation ¶ 4, Ex. B). This individual/consumer signed a seven-year lease agreement with an option to purchase the property in December 2014. (*Id.* ¶ 5, Ex. C). Under the agreement, the consumer could purchase the leased property for $39,000 at any time up until the end of the lease term. (*Id.*). At the beginning of the lease, the consumer made a payment of $1,000 "option consideration," and every month thereafter, a $295.00 "lease payment." (*Id.*). The agreement states that the option consideration plus $30.78 monthly payment would be credited towards the purchase price. (*Id.*). DFS states that although the agreement is entitled a lease, Vision's accounting recordings show that Vision booked it as a mortgage. (*Id.* ¶ 6, Ex. D). Specifically, DFS states that the option consideration of $1,000 was booked as a "Down Payment;" the records show that the consumer was paying interest at the rate of 8.604% although interest was not mentioned in the lease; and Vision recorded the transaction as having a "full term" of 360 months even though the actual term was 84 months (the same length as a traditional mortgage. (DFS' Suppl. Memo pages 3-4). DFS further contends:

> "Vision's records show that the company priced and structured its lease agreements as if the consumer was borrowing $38,000 - the $39,000 purchase price minus the $1,000 "option consideration" paid at inception - at a rate of 8.604% over 30 years. Inputting the basic terms of the lease agreement into a mortgage calculator reveals that the monthly payment on the lease agreement is the same as it would be under a seller financing agreement. Moreover, this consumer would, at the end of the seven-year lease term, be in the exact same position as a consumer who signed one of Vision's seller financing agreements after seven years . . ."
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> (Suppl. Memo pages 4-5).

Vision maintains that the Lease Agreements "are not mortgages because of the irreducible fact that there is no extension of credit." (Vision Memorandum of Law, pages 8-14).

On January 23, 2017, the Superintendent of DFS issued the Subpoena to Vision in connection with the DFS' investigation. (Exhibit A to Ver. Petition) The Subpoena sought the production of various categories of documents and information. (*Id.*). On March 7, 2017, DFS and Vision conferred regarding the Subpoena. (Hletko Affirmation ¶3). On March 31, April 14, and April 17, 2017, Vision produced documents and information responsive to the Subpoena. (Hletko Affirmation ¶4). From May 2017 through November 2017, DFS made subsequent follow up and supplemental requests for production and Vision produced responsive information including emails. (*Id.* at 9-20).

By email dated November 1, 2017, DFS advised Vision that it wanted to schedule the depositions of Szkaradek and Buerkert in December 2017, and requested the production of their emails in advance of the depositions. (Ver. Petition, ¶21; Exhibit D). By email dated November 10, 2017, Vision responded that a search and production of the requested emails would require a review of "over 30,000 documents . . . at a cost to Vision of over $100,000." (*Id.* ¶ 24). Vision also stated that it did not believe "further email review or depositions will tell the Department anything further about [the] legal question" of "whether Agreements for Deed and LOPs may be construed as mortgages under New York law." (*Id.*) By email dated November 13, 2017, DFS responded:

> "The email search tries to get at your client's thought process at the time of the change to test some of our hypotheses. While I don't see the production changing our assessment of the conduct (although I suppose it could), it certainly could shed light on your client's thought process around the switch from the [Agreement for Deed] to LOP model." (*Id.* ¶25)

In subsequent emails, Vision proposed producing Szkaradek for an in-person discussion with the DFS pending further determination regarding the need for the email production. (Ver. Petition ¶ 26-29). DFS responded that it would not accept a meeting "as a substitute for the email production from both custodians." (*Id.* ¶32). DFS filed the instant Petition on April 13, 2018 to compel the production of those

emails. In Vision's supplemental memorandum, Vision estimates a total cost of $100,159.00 to review and produce documents responsive to DFS's requests for Buerkert's data. Vision contends, "Even assuming that the cost to review and produce responsive emails from Mr. Szkaradek's data are identical to the estimates outlined above for Mr. Buerkert, the result would be more than $200,000 in costs to the Company to comply with the Department's requests." (Vision's Supplemental Memorandum, pages 9-10).

Legal Standards

DFS' Authority Under FSL and Other Statutes

As stated above, DFS was created by the New York State Legislature "[i]n the wake of the financial crisis … to implement a comprehensive approach to the regulation of financial products and services in New York." (Reed Affirmation ¶4).

Section 301(b) of FSL empowers the Superintendent of DFS "to conduct investigations, research, studies and analyses of matters affecting the interests of consumers of financial products and services, including tracking and monitoring complaints." FSL § 301(a). Section 104(a)(2) defines a "financial product or service" as "any financial product or financial service offered or provided by any person regulated or required to be regulated by the superintendent or financial service offered or provided by any person regulated or required to be regulated by the superintendent pursuant to the banking law or the insurance law or any financial product or service offered or sold to consumers," subject to certain exceptions. FSL§ 104(a)(2). Section 598 of the Banking Law provides for civil, and criminal, penalties on entities who violate the law, including by engaging in unlicensed mortgage lending.

Section 306(a) authorizes the Superintendent with power to compel testimony and document production as follows:

> "The superintendent or the person authorized by the superintendent to conduct a hearing or investigation shall have power to subpoena witnesses, compel the attendance of witnesses, administer oaths, examine any person under oath, and to compel any person to subscribe

> to his or her testimony after it has been correctly reduced to writing, and in connection therewith to require the production of any books, papers, records, correspondence or other documents which the superintendent deems relevant to the inquiry. A subpoena issued under this section shall be regulated by the civil practice law and rules."
>
> FSL § 306(a).

Similarly, Banking Law § 38 confers the authority to subpoena on DFS.

Section 403 of the FSL empowers the Superintendent to "establish a financial frauds and consumer protection unit in the department of financial services." FSL 403(a). Section 403(d) empowers the Superintendent "to establish within the financial frauds and consumer protection unit one or more units designated for the purpose of investigating and preventing fraud and other criminal activity in certain specified areas of the banking, finance and insurance industries."

Investigatory Subpoenas

"An administrative subpoena *duces tecum* … is commonly referred to as a nonjudicial or office subpoena." (*New York City Dept. of Investigation v. Passannante*, 148 A.D.2d 101, 104 [1989]). Generally, in order "[t]o justify a nonjudicial investigatory subpoena *duces tecum,* there must be a threshold showing that the underlying complaint is authentic, that it is of sufficient substance to warrant investigation and that the documents sought are relevant to that investigation." (*Passannante*, 148 A.D. 2d at 104-05) (citing to *Matter of Levin v. Murawski*, 59 N.Y. 2d 35 [1983]). "As for the complaint's authenticity, that may be found in the substance of the complaint itself or it may be independently supplied." (*id.* at 105). The agency "seeking court enforcement of the nonjudicial subpoena must show the records bear a reasonable relation to the subject matter under investigation and the public purpose to be served." (*Myerson v. Lentini Bros. Moving & Storage Co., Inc.*, 33 N.Y.2d 250, 256 [1973]). "The courts have consistently held that unless the subpoena calls for 'documents which are utterly irrelevant to any proper inquiry' or its 'futility to uncover anything legitimate is inevitable or obvious,' the courts will be slow to strike it down." (*Abrams v.*

Thruway Food Market and Shopping Center, Inc., 147 A.D.2d 143, 147 [2d Dep't 1989] [internal citations omitted]). "[A] witness subject to a 'non-judicial' subpoena duces tecum may always challenge the subpoena in court on the ground it calls for irrelevant or immaterial documents or subjects the witness to harassment ..." (*Passanante*, 148 A.D. 2d at 104-05[citing to *Murawski*, 59 N.Y. 2d at 42]).

Cost Shifting

Turning to the issue of cost shifting, in civil litigation, courts may order cost-shifting during discovery disputes based on "(1) [t]he extent to which the request is specifically tailored to discover relevant information; (2) [t]he availability of such information from other sources; (3) [t]he total cost of production, compared to the amount in controversy; (4) [t]he total cost of production, compared to the resources available to each party; (5) [t]he relative ability of each party to control costs and its incentive to do so; (6) [t]he importance of the issues at stake in the litigation; and, (7) [t]he relative benefits to the parties of obtaining the information." (*U.S. Bank Nat. Ass'n v. GreenPoint Mortg. Funding, Inc.*, 94 A.D.3d 58, 64, 939 N.Y.S.2d 395, 399 [2012] [*citing Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 322 [S.D.N.Y.2003)]). These are factors and courts "should not follow these factors as a checklist, but rather, should use them as a guide to the exercise of their discretion in determining whether or not the request constitutes an undue burden or expense on the responding party." *Id.*

Vision argues, "Just as in civil discovery, there are intuitive limits on the burdens the government may impose." (Vision's Suppl. Memo, page 10). DFS argues that Vision has failed to demonstrate an undue burden that would justify such cost sharing or that there is a basis to do so in the context of a government investigation. (DFS' Suppl. Memo, pages 11-14). DFS cites to *Scara-Mix, Inc. v. Abrams*, 1985 WL 15452 at *4 [New York Cty. Sup. Ct. February 14, 1985], which involved an investigation under General Business Law, Section 343. The court held that the Attorney General was entitled to possession of subpoenaed books and records for a reasonable period of time and to incur the cost of reproducing those materials, but it was the subpoenaed entity's responsibility to pay for the "expenses for compiling and supplying the requested information." *Id.*

Discussion

At issue is DFS' request for emails of Vision executives Szkaradek and Buerkert, from March 2010 to December 2013, which contain the words "loan," "mortgage" and "financing." The emails are being requested in connection with DFS' ongoing investigation into Vision's lending practices.

DFS is statutorily authorized to license and regulate entities that are engaged in mortgage lending in the State of New York and to conduct the instant investigation into whether Vision is engaged in unlicensed lending activity in New York under, *inter alia*, Banking Law 38 and 598. Furthermore, DFS has demonstrated that the information sought is reasonably related to the subject of inquiry concerning whether Vision's "leased agreements are disguised mortgages subject to regulation by the Department" (DFS' Suppl. Memo, page 9) and that there is a factual basis warranting the investigation in light of reports concerning Vision's mortgage lending practices and its financial records documenting the purported lease agreements. (*See Passannante*, 148 A.D. 2d at 104-05).

While courts may order cost-shifting in civil litigation in certain limited situations, the pending matter does not involve a civil litigation but rather a subpoena issued in connection with an ongoing investigation. Additionally, Vision has failed to demonstrate an undue burden that would justify shifting the costs of its internal review process of the subject emails onto the DFS to comply with the ongoing investigation. Furthermore, contrary to Vision's contention, DFS has not shown that it is over-reaching in its investigation of Vision's mortgage lending process that would justify cost-shifting.

Accordingly, DFS' motion is granted and Vision is directed to produce the requested emails and bear the costs of the production. Vision's cross motion for a protective order is denied.

Wherefore, it is hereby

ORDERED that the DFS' motion is granted and Vision is directed to produce emails of the custodians Alex Szkaradek and Jonathan Buerkert, from March 2010 to December 2013 which are responsive to DFS' requests pursuant to the Subpoena within 45 days from the date of this Order. To the extent that any documents are withheld or redacted, Vision shall provide a privilege log to DFS.;

ORDERED that Vision's cross motion for a protective order is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: July 12, 2018

Eileen A. Rakower, J.S.C.