

Bank Leumi USA v GM Diamonds, Inc.
2018 NY Slip Op 33276(U)
December 17, 2018
Supreme Court, New York County
Docket Number: 150474/2015
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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BANK LEUMI USA,

Plaintiff,

Index No 150474/2015

-against-

Motion Seq. No. 007

GM DIAMONDS, INC., GM IDEAL, INC., BARUCH
GILAD MESICA, AMI MESICA, GEULA MESICA,
VERED MESICA, and JEREMY MEDDING,

Defendants.
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Masley, J.:

Defendants GM Ideal, Inc. (GM Ideal) and Jeremy Medding (collectively, Ideal Defendants) move pursuant to CPLR 3104 (d) to review and vacate the July 31, 2018 order of Judicial Hearing Officer Gammernan (JHO) (1) denying the Ideal Defendants' demand to depose Shlomo Mosseri, and (2) ruling that documents shared by plaintiff Bank Leumi USA (Bank) with its jewelry valuation agent, David Bucks, are not discoverable. The Ideal Defendants also move for an order issuing a Letter of Request for submission to the Administrator of Court for the State of Israel, pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial matters, for the Israeli courts to issue an order requiring Mosseri to submit to a deposition.

The Bank commenced this action to recover the balance due on a loan that it extended to GM Diamonds Inc. (GM Diamonds), personally guaranteed by defendants Gilad Mesica (Gilad), Geula Mesica, Vered Mesika, and Ami Mesika (Ami) (collectively, Guarantors), and secured by GM Diamonds' inventory of diamonds, fine gems, and other assets. GM Diamonds and the Guarantors failed to repay a balance in excess of

\$1.8 million to the Bank. Gilad and Medding allegedly transferred the business and assets of GM Diamonds to GM Ideal without fair consideration and with the intent to defraud the Bank. On February 8, 2016, this court (Oing, J.) granted summary judgment to the Bank against GM Diamonds and all of the Guarantors. (NYSCEF Doc. No. 103.) Specifically, Justice Oing granted summary judgment on the Bank's first cause of action for foreclosure of its security interest in GM Diamonds' assets under the Security Agreement and the Forbearance Agreement, its second cause of action for breach of contract against GM Diamonds under the Promissory Note and Forbearance Agreement, and its fourth cause of action against the Guarantors for the total amount owed to the Bank under the Promissory Note and Forbearance Agreement. (*Id.*) Justice Oing found that the Bank's sale of the diamond inventory was commercially reasonable and the Appellate Division, First Department, affirmed. (*Bank Leumi USA v GM Diamonds, Inc.*, 149 AD3d 662 [1st Dept 2017].) The balance of the Bank's claims, including the third cause of action, fifth cause of action for successor liability against GM Ideal and the sixth cause of action for fraudulent conveyance against GM Ideal, Medding, Gilad and Ami, remain.

In an order dated September 13, 2017, this court referred the balance of the action to a Judicial Hearing Officer for the purpose of overseeing all discovery. (NYSCEF Doc. No. 201.) On July 31, 2018¹, the JHO made certain discovery rulings, including those now at issue. (NYSCEF Doc. No. 206.) Specifically, the JHO disallowed the deposition of Mosseri, the retired manager of the Bank's Diamonds and

¹ The order was entered September 26, 2018.

Jewelry Department, and found that discovery concerning David Bucks, the Bank's jewelry valuation agent, is irrelevant.

On a CPLR 3104 (d) application to review and vacate an order issued by a Judicial Hearing Officer, the inquiry is whether the referee's decision or order is clearly erroneous or contrary to law. (*CIT Project Financial v Credit Sussie First Boston LLC*, 7 Misc3d 1002(A) *2 [1st Dept 2005].)

The Ideal Defendants argue that deposing Mosseri is relevant to their defenses, and, therefore, the JHO's ruling disallowing this deposition should be vacated. The Ideal Defendants assert that the JHO misapprehended certain facts in this case because the JHO denied Mosseri's deposition on the ground that this deponent, who is now retired, cannot bind the Bank. However, the Ideal Defendants argue that to defend against the Bank's claim of fraudulent conveyance, they must show their lack of fraudulent intent. To make this showing, they contend that they should be able to elicit Mosseri's testimony because he was present at a November 19, 2014 meeting in his capacity as manager of the Bank's Diamonds and Jewelry Department. At this meeting, Medding allegedly delineated his exact plan for how GM Ideal could use the defaulting borrower's assets to assist in maximizing the recovery of the Bank on the GM Diamonds' loan. Should Mosseri's testimony corroborate that the Ideal Defendants were acting pursuant to this plan when GM Diamonds' assets were transferred to GM Ideal, this testimony will evidence the Ideal Defendants' lack of fraudulent intent. Although the Bank offered the deposition of David Selove, who was also present at the November 19, 2014 meeting, Selove allegedly was not involved in this conversation and did not understand the conversation because it was spoken in Hebrew. Further, the

Ideal Defendants contend that Justice Oing, on February 7, 2017, so ordered a stipulation between the attorney for the Bank and defendants providing for Mosseri's deposition. (NYSCEF Doc. No. 203.)

In opposition, the Bank contends that the production of Mosseri is not material and necessary. Specifically, the Bank asserts that it has provided for Selove's deposition, the witness with the most first-hand knowledge of the facts. The Bank contends that it may not be examined through persons who were not in its employ at the time the order directing such examination was made or notice was served. Additionally, the Bank maintains that Mosseri does not have the power to bind it by way of admissions because he is retired and no longer an employee.

Insofar as the Bank's sixth cause of action for fraudulent conveyance remains, and the Ideal Defendants allege that Medding explained, in Hebrew to Mosseri, his plan for how GM Ideal could use the assets to maximize the Bank's recovery, Mosseri's testimony is relevant. This is especially true because Mosseri was allegedly the manager of the Bank's Diamonds and Jewelry Department at the time. To the extent that Selove is available to be deposed, his testimony is less probative, as he allegedly was not part of the conversation and did not understand the conversation in Hebrew. That Mosseri cannot bind the Bank at this juncture is of no moment because his testimony is not sought for that purpose. "Discovery determinations ... must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure." (*Andon ex rel. Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 747 [2000].) Here, the defendants have shown that Mosseri's deposition is relevant to their

defense. Furthermore, Justice Oing, who previously presided over this case, so ordered the parties' stipulation containing dates to depose Mosseri.

To the extent that GM Ideal and Medding seek a Letter of Request, their application is denied with leave to renew as they failed to include any proposed Letter of Request.

Lastly, the First Department affirmed Justice Oing's grant of summary judgment on the Bank's first cause of action for the foreclosure of its security interest in the assets of GM Diamonds. To the extent that the Bank asserts that all of the assets were not returned, but the Ideal Defendants claim that they were, David Bucks' testimony is relevant. Indeed, even the Bank explicitly stated on the record before the JHO that Bucks "might be a witness" on the issue of "how much ... GM Ideal and Medding returned to the bank or to GM Diamonds in collateral in diamonds that were sold." (NYSCEF Doc. No. 206 at 7-8.) Justice Oing's finding that the Bank disposed of the collateral that was turned over in a commercially reasonable manner is a distinct issue from whether the Ideal Defendants turned over all of the diamond inventory that came into their possession. Accordingly, the law of the case doctrine is inapplicable here. With respect to the documents at issue concerning Bucks, they are relevant insofar as they may contain information about how much GM Ideal and Medding returned in diamonds to the Bank or GM Diamonds. Additionally, they are relevant to the extent they contain information as to Gilad and Medding's alleged transfer of the business and assets of GM Diamonds to GM Ideal.

Accordingly, it is hereby

ORDERED that defendants GM Ideal, Inc. and Jeremy Medding's motion to review and vacate the July 31, 2018 order by the JHO denying the Ideal Defendants' demand to depose Shlomo Mosseri and ruling that documents shared by plaintiff Bank Leumi USA with its jewelry valuation agent, David Bucks, is not discoverable, is granted as to the July 31, 2018 order; and it is further

ORDERED that defendants GM Ideal, Inc. and Jeremy Medding's motion for a Letter of Request is denied with leave to renew with the proper documents; and it is further

ORDERED that the parties appear for a status conference on January 31, 2019 at 11:00 AM in Room 242 at which time the court will address an *in camera* review of the documents concerning David Bucks; and it is further

ORDERED the appearance before the JHO on December 20, 2018 is adjourned.

Dated: 12/17/18

ENTER:

J.S.C.

HON. ANDREA MASLEY