

Icon Octavian Ctr. LLC v Center Nav. Ltd.
2019 NY Slip Op 32071(U)
June 28, 2019
Supreme Court, New York County
Docket Number: 656164/2016
Judge: Andrew Borrok
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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ICON OCTAVIAN CENTER, LLC,

INDEX NO. 655154/2016

Plaintiff,

MOTION DATE 03/25/2019

- v -

MOTION SEQ. NO. 003

CENTER NAVIGATION, LTD., GEDEN HOLDINGS, LTD.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 183, 184, 185, 186

were read on this motion to/for DISCOVERY

Upon the foregoing documents and for the reasons set forth on the record (6/25/2019), Icon Octavian Center, LLC's (Icon) motion is granted solely to the extent that Geden Holdings, Ltd. (Geden) and Center Navigation, Ltd. (Center) are ordered to produce the communications listed below by September 16, 2019 given the voluminous nature of the request and certain scheduling conflicts.

This action arises from the defendants' alleged breach of an agreement and guaranty concerning the charter of a certain cargo vessel. Icon now brings this motion against the defendants to compel the production of documents from and related to non-parties Geden Lines, Future Holdings and Advantage Tankers LLC. Icon argues that the defendants should produce documents from the non-parties because Geden's relationship with the non-parties provides it the practical ability to obtain the documents in question. In opposition, the defendants argue that

discovery from the foreign non-parties should be conducted pursuant to the Hague Convention and that Icon has not successfully pierced the corporate veil as to enable production from the non-parties.

Under CPLR § 3120 (1)(i), a party may serve a notice on other party "to produce and permit the party seeking discovery ... any designated documents or any things which are in the possession, custody or control of the party or person served." The Court of Appeals has explained that "possession, custody or control" means constructive possession (*Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 63 [2013]). In particular, documents "are under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action" (*id.*, citing *Bank of New York v Meridien BIAO Bank Tanzania Ltd.*, 171 FRD 135, 146 [SD NY 1997]).

In its moving papers, Icon has adduced sufficient evidence to demonstrate that the documents sought are within the possession, custody or control of the defendants. The relationship between Geden and the non-parties is illustrated in a structure chart, included in the Project Hermitage Restructuring Report, dated March 6, 2013, prepared by Alix Partners (NYSCEF Doc. No. 104, pg 16). At his deposition, Mehmet Mat testified that Geden and Geden Lines shared the same officers, namely that Mr. Mat was the Chief Financial Officer for both entities and Tugrul Tokgoz was the Chief Executive Officer of both entities (Deposition Transcript of Mehmet Mat, NYSCEF Doc. No. 122, pg 12-13). Further, Mr. Mat stated that he held the title of Chief Financial Officer with Advantage Tankers in connection with certain financing negotiations (*id.*,

pg 44). Mr. Mat also confirmed that Geden, Geden Lines and Advantage Tankers shared the same principal place of business in Turkey (*id.*, pgs 44-45).

Moreover, there is evidence that Geden acted for Advantage Tankers on at least one occasion (see NYSCEF Doc. No. 108). In two letters dated, November 18, 2014, CIT Finance LLC addressed said letters to Advantage Tankers LLC, courtesy of Geden, and to the attention of Mr. Tokgoz. One of the letters further stated that:

Geden Holdings Ltd. (the "Commitment Guarantor" or "you"), acting on behalf of a new investment and operating company in the process of being formed, called Advantage Tankers LLC ("Guarantor"), has advised CIT Finance LLC (together with its affiliates "Agent" or the "Commitment Party", sometimes also referred to herein as "CIT", "we" or "us") that it is seeking senior secured term debt to finance a portion of the price of Guarantor's planned acquisition from affiliates of the Commitment Guarantor (the "Transaction") of two Suezmax crude tankers (*id.*).

Although the documents sought by Icon are not in the physical possession of the defendants, the record shows that Geden's relationship with the non-parties affords Geden the ability to obtain the documents that Icon has requested. Accordingly, the defendants are to produce documents from the non-parties because such documents are in the possession, custody and control of the defendants. To find otherwise would be to put form over substances. To the extent that the defendants argue that Icon is required to pierce the corporate veil to compel production of documents, such a finding is not necessary at the discovery stage of the proceedings.

At oral argument, Icon withdrew that branch of its motion addressing spoliation and reserved their right to preserve this argument on the representation of defendants' counsel that deleted emails were available because the server was backed up.

Accordingly, it is

ORDERED that plaintiff's motion to compel is granted solely to the extent that defendants are to produce the items listed below by September 16, 2019:

From the letter, dated July 6, 2017, from Thomas Johnston to Neil Quartaro:

1. End of year financial reports and records for Geden Holdings, Ltd. ("Geden") and Center Navigation, Ltd. for 2011 through 2016, including income statements, balance sheets and statement of cash flows;
2. All management agreements between Geden and Genel Denizcilik from 2011 through the current date;
3. All management agreements between Genel Denizcilik and Advantage Tankers from 2011 through the current date;
4. All records regarding the sale of assets of Geden to Advantage Tankers from 2011 through the current date;
5. All records regarding the ownership of Geden from 2011 through the current date;
6. All bylaws, articles of incorporation and any other corporation governance and formation records, including amendments, of Advantage Tankers from 2011 through the current date;
7. All bylaws, articles of incorporation and any other corporation governance and formation records, including amendments, of Geden from 2011 through the current date;
8. All records regarding the transfer to other parties of vessels owned, operated or controlled by Geden by any means, from 2011 through the current date; and
9. All records on file in the dissolution proceedings in Malta regarding Geden.

From Icon's First Requests for E-Discovery and Litigation Hold, dated October 16, 2017:

10. All relevant electronically stored e-mails, letters, notes, memoranda and calendar entries from personal computer(s), laptop computer(s), home desktop computer(s), tablet(s), smart phone(s), cellular telephone(s), personal digital assistant(s), or any other device with such storage capabilities;
11. All relevant instant message (IM) logs, transcripts, data (.dat) files stored on hard drive(s), including, but not limited to: personal computer(s), laptop computer(s), home desktop computer(s), tablet(s), smart phone(s), cellular telephone(s), personal digital assistant(s), and computer(s);
12. All relevant text messages from and received which are stored on tablet(s), smart phone(s), cellular telephone(s), personal digital assistant(s), or any other similar device(s) which the capability of sending and receiving text messages;
13. All relevant voicemail messages stored on tablet(s), smart phone(s), cellular telephone(s), home telephone(s), work telephone(s), personal digital assistant(s) or any other device(s) with the capability of receiving and saving voice messages;
14. Data map(s) and/or detailed representation(s) of the type(s) and location(s) or all electronically stored information (ESI), including, but not limited to, the following electronic systems:
 - a. Servers and other active and dynamic data including but not limited to file servers, email and voicemail servers;
 - b. Data management systems including but not limited to backup tapes, financial systems and disaster recovery systems;

- c. Endpoints including but not limited to desktops, laptops, tablets, personal digital assistants, smart phones and cellular telephones;
 - d. Portable media including but not limited to flash drives, hard drives, CD's and DVDs; and
 - e. Data hosted by third-party vendors including but not limited to payroll systems and junk mail filtering systems; and
15. All electronically stored information (ESI) regarding the transfer of assets, tangible and intangible, including vessels, from Center to third parties, including but not limited to representatives of Advantage Tankers and Nezli Karamehmet Williams, from January 1, 2011 to present.

From Icon's Second Requests for Production of Documents, dated October 15, 2017:

16. Any and all documents that refer, relate or pertain to any and all non-privileged communications between Center and any third party regarding the events leading to the termination of the Bareboat Charter;
17. Any and all documents that refer, relate or pertain to any and all non-privileged communications between Center and any of its employees, agents or representatives regarding the events leading to the termination of the Bareboat Charter;
18. Any and all documents that refer, relate or pertain to any and all non-privileged communications between Center and any of its employees, agents or representatives regarding their failure to perform under the terms of the Guarantee; and
19. Any and all documents that refer, relate or pertain to any and all non-privileged communications between Center and any third party regarding their failure to perform under the terms of the Guarantee.

From the letter, dated April 25, 2018, from Thomas O. Johnston to Neil Quartaro:

20. Geden's consolidated financial statements and independent auditor reports for 2015 and 2016;
21. Center's detailed balance sheets and income statements for 2016;
22. Any and all communications between any director, officer, employee or agent of Defendants and any director, officer, employee or agent of Genel Denizcilik regarding the *Center, Amazing, Fantastic*;
23. Any and all communications between any director, officer, employee or agent of Defendants and any director officer, employee or agent of Genel Denizcilik regarding the vessel *Blank, Blue, Bravo, Pink, Power, Profit, Royal, Target, True, Value, Reef* (hereinafter **Advantage Vessels**);
24. Any and all communications between any director, officer, employee or agent of Defendants and Gulsun Nazli Karamehmet Williams;
25. Any and all communications between any director, officer, employee or agent of Defendants and any director, officer, employee or agent of Advantage Tankers, LLC or its holding company, subsidiaries or assigns (hereinafter **Advantage Tankers**), from 2011 to 2016;
26. Any and all payment records for the purchase price of any vessel that Defendants sold to Advantage Tankers from 2011 to 2016;
27. Any and all agreements showing that any rights and/or obligations under the loan agreements, guarantees or charter agreements regarding the Advantage Vessels have been assigned to a third party;

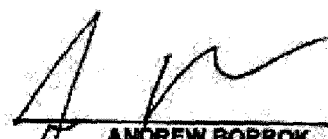
- 28. Any and all notices received by Mehmet Mat or by finance@gedenlines.com regarding the loan agreements and or guarantees for the Advantage Vessels from 2011 to 2016;
- 29. Any and all memorandums or agreement, certificates of incumbency, board resolutions or correspondence between any director, officer, employee or agent of Genel Denizcilik and any director, officer, employee or agent of Defendants relating to the ship management agreement dated June 10, 2011 for the *Center*;
- 30. Any and all correspondence between Mehmet Mat and Orhan Karademir relating to the ship management agreements, dated June 10, 2011, for the *Center*; and
- 31. Any and all notices sent to Defendants pursuant to the ship management agreement, dated June 10, 2011, for the *Center*.

6/28/2019
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SETTLE ORDER GRANTED IN PART OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE


ANDREW BORROK, J.S.C.