

Azrak v Carter Enters. LLC

2020 NY Slip Op 34036(U)

December 7, 2020

Supreme Court, Kings County

Docket Number: 510149/15

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of December, 2020.

PRESENT:

HON. LAWRENCE KNIPEL,

Justice.

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DIANA AZRAK, individually, and on behalf of,
CARTER INDUSTRIES, INC.,

Plaintiff,

- against -

Index No. 510149/15

CARTER ENTERPRISES LLC, SAUL WOLF, CARTER INDUSTRIES, INC., CHAIM WOLF, THE ETZ CHAIM CHARITABLE TRUST, and ETZ CHAIM FOUNDATION,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>468-487</u> <u>495-512</u>
Opposing Affidavit (Affirmation) _____	<u>496-514</u> <u>515-518</u>
Reply Affidavit (Affirmation) _____	<u>515-518</u> <u>519</u>

Upon the foregoing papers in this shareholder derivative action, plaintiff Diana Azrak, individually and on behalf of Carter Industries, Inc. (Azrak) moves (in motion sequence [mot. seq.] 22) for an order: (1) compelling defendants Saul Wolf, Carter Industries, Inc. (Carter Industries), Carter Enterprises LLC (Carter Enterprises) and Chaim Wolf (collectively, defendants) to produce all responsive documents pursuant to this court's March

13, 2020 discovery order (Discovery Order) within 14 days, pursuant to CPLR 3124, and (2) if defendants fail to produce all responsive documents pursuant to the Discovery Order within 14 days, compelling defendants to produce their hard drives and other data sources for forensic imaging, pursuant to CPLR 3124.

Defendant Carter Industries cross-moves (in mot. seq. 23) for an order: dismissing plaintiff's complaint for non-compliance with the Discovery Order, pursuant to CPLR 3126, and (2) compelling plaintiff to provide all outstanding discovery in accordance with the Discovery Order, pursuant to CPLR 3124.

Background

This Shareholder Derivative Action

As described in greater detail in the court's (Rothenberg, J.) July 12, 2018 Order, Azrak commenced this shareholder derivative action seeking to obtain an interest in Carter Industries and damages because defendants allegedly misappropriated business opportunities from Carter Industries. Carter Industries was allegedly formed in 1995 by Saul Wolf and Marvin Azrak, plaintiff's late husband. Azrak alleges that Saul Wolf and her husband each held 50% of the issued shares of Carter Industries, and that, after her husband passed away on January 22, 2008, she then became the owner of her late husband's 50% share in Carter Industries. In their verified answer, defendants explicitly "deny that Diana Azrak is an owner of Fifty Percent of the issued and outstanding shares of [Carter] Industries . . ." and asserted an affirmative defense challenging Azrak's standing to prosecute this action.

By orders dated July 12, 2018 and March 6, 2019, this action was bifurcated, and the issue of Azrak's alleged ownership interest in Carter Industries is to be decided first.

On October 10, 2019, Azrak moved to amend the complaint to add Marvin Azrak's estate as a party, to modify the court's prior orders that bifurcated the action and to compel defendants to produce documents responsive to her discovery requests.

The Discovery Order

On March 13, 2020, this court issued the Discovery Order, which required the parties to produce certain categories of documents regarding the preliminary issue of Azrak's alleged ownership of Carter Industries. The Discovery Order required defendants to produce certain documents in response to Azrak's Fourth Set of Requests for Production of Documents.

The Discovery Order directed Carter Enterprises to produce: (1) communications regarding Marvin Azrak, Diana Azrak, Raymond Azrak or Albert Azrak; (2) documents regarding the 2017 sale of Saul Wolf's ownership interest in Carter Industries; and (3) documents and communications that Carter Enterprises intends to introduce as evidence in this litigation.

The Discovery Order directed Saul Wolf to produce: (1) documents regarding the 2017 sale of his ownership interest in Carter Industries to Ephraim, Adler, Abraham Backenroth; (2) documents regarding any person's or entity's ownership interest in Carter Industries; (3) communications regarding Marvin Azrak, Diana Azrak, Raymond Azrak or Albert Azrak; and (4) documents and communications that Saul Wolf intends to introduce

as evidence in this litigation.

The Discovery Order directed Chaim Wolf to produce: (1) communications regarding Marvin Azrak, Diana Azrak, Raymond Azrak or Albert Azrak, and (2) documents and communications that Chaim Wolf intends to introduce as evidence in this litigation.

The Discovery Order required Carter Industries to produce: (1) its tax returns since 2007; (2) documents regarding the 2017 sale of Saul Wolf's ownership interest in Carter Industries to Ephraim, Adler, Abraham Backenroth; (3) documents regarding any person's or entity's ownership interest in Carter Industries since 2006; (4) all form K-1s issued by Carter Industries since 2006; (5) documents that identify all current and former officers, employees and/or shareholders of Carter Industries from 2007 to the present; (6) communications regarding Marvin Azrak, Diana Azrak, Raymond Azrak or Albert Azrak; and (7) documents and communications that Carter Industries intends to introduce as evidence in this litigation.

The Discovery Order required Azrak to produce documents in response to certain requests in Carter Industries' May 28, 2019 Good Faith Letter and Notice of Discovery and Inspection. Specifically, Azrak was directed to produce: (1) documents regarding shares of stock and ownership of Carter Industries; (2) documents regarding Marvin and Diana Azrak's acquisition and ownership of shares in Carter Industries; (3) documents regarding the appraisal of Carter Industries; (4) documents filed in Kings County Surrogate's Court regarding Marvin Azrak's estate; and (5) Marvin Azrak's will and Diana Azrak's will. Azrak was also directed to "re-review, in good faith, all previously produced redacted

documents and produce unredacted versions of any information related to [her] claimed ownership of Carter Industries, or produce unredacted documents to Justice Knipel for an in-camera review.

The Discovery Order provides that “[a]ll of the aforementioned requests and responses thereto shall be limited to the issue of the claimed ownership of Plaintiff, Diana Azrak, of Carter Industries.”

Azrak’s Instant Motion to Compel

Azrak now moves for an order compelling defendants to produce all responsive documents pursuant to the Discovery Order, and if defendants fail to produce such responsive documents, compelling defendants to produce their hard drives and other data sources for forensic imaging.

Azrak’s counsel asserts that “[a]lthough Plaintiff has produced to Defendants all documents required by the Discovery Order, Defendants have failed to do the same.” According to Azrak’s counsel, defendants Saul Wolf, Chaim Wolf and Carter Enterprises “have not produced a single document.”

Regarding Saul Wolf, Azrak’s counsel asserts that:

“Saul Wolf admits that he possesses documents which the Discovery Order requires him to produce – including documents concerning the purported sale of his interest in Carter Industries in March 2017 and correspondence with Plaintiff’s late husband, Marvin Azrak – but asserts that he is exempt from complying with the Discover Order because he does not possess any documents beyond those that Carter Industries has produced or that he believes Carter Industries will produce – a legally baseless claim which Saul Wolf has asserted throughout this litigation to avoid producing a single document in discovery.”

Azrak submits copies of correspondence between Saul Wolf and Marvin Azrak, her late husband, regarding Marvin Azrak's ownership interest in Carter Industries, and asserts that "[t]he Discovery Order required Saul Wolf to produce the foregoing letters to Marvin Azrak, along with other responsive correspondence, but he never did."

Regarding Carter Industries, Azrak's counsel asserts that:

"Carter Industries produced its tax returns and 21 pages of other documents, but failed to produce entire categories of documents required by the Discovery Order, including any of its communications with Plaintiff, whom Carter Industries has treated as a shareholder since 2007, or any documents shared in due diligence with the purported purchasers of Saul Wolf's share of Carter Industries, who after the purported sale reached out to Plaintiff calling her their 'partner,' indicating that they had learned during the sale process that Plaintiff was a Carter Industries shareholder."

In addition, Azrak contends that Carter Industries failed to produce documents regarding her ownership interest in Carter Industries and documents identifying all current and former shareholders of Carter Industries.

Azrak contends that "[g]iven that Defendants have once again demonstrated that they cannot be trusted to cull and produce responsive documents, Defendants should also be compelled to produce their hard drives and other data sources for forensic imaging." Azrak notes that "[n]either Saul Wolf nor Carter Industries have produced any electronically stored information from Saul Wolf's company email account . . ." and "Saul Wolf has not produced any personal emails or other correspondence with Marvin Azrak, his former partner in Carter Industries and Plaintiff's deceased husband."

Defendants' Opposition and Carter Industries' Cross Motion to Compel

Carter Industries opposes Azrak's motion to compel and cross-moves to dismiss the complaint for Azrak's noncompliance with the Discovery Order, or, alternatively, for an order compelling Azrak to provide all outstanding discovery in accordance with the Discovery Order.

Carter Industries' counsel argues that Azrak "has failed to meaningfully respond to Defendant's discovery demands" and that Azrak "attempts to use this motion as a mechanism to compel discovery from [Carter] Industries that far exceeds the limited scope of discovery that was ordered . . . in the March Discovery Order." Specifically, Carter Industries argues that Azrak "focuses on" documents regarding the negotiations and due diligence conducted in connection with the 2017 sale of Saul Wolf's ownership interest in Carter Industries, which is "a category of documents that are completely unresponsive and irrelevant to the directives outlined in the March Discovery Order." Defense counsel asserts that Azrak "disregards" this court's "explicit limitations of the supplemental production to any additional documents in the parties' possession, custody or control that were responsive and limited to Plaintiff's claimed ownership of [Carter] Industries." Carter Industries also argues that Azrak is not entitled to an order requiring defendants to produce their hard drives and other data sources for forensic imaging since there is "no evidence that documents were being intentionally withheld or destroyed."

Regarding its cross motion, Carter Industries argues that Azrak failed to produce any documents regarding Marvin Azrak's estate, including court filings related to Marvin

Azrak's estate. Carter Industries asserts that "this would include documents reflecting or related to Plaintiff's alleged ownership of [Carter] Industries, or whether or not Marvin Azrak ever transferred, or purported to transfer, any ownership interest in or any shares of Carter Industries, Inc. to Plaintiff." In addition, Carter Industries claims that Azrak "failed to produce unredacted versions of the few records concerning the estate that she has produced[.]" "[t]o date, a completely unredacted version of the will has not been produced, despite a confidentiality order governing the discovery in this case" and "Plaintiff also failed to produce unredacted versions of the federal or state tax returns for the Estate of Marvin Azrak and related tax payment records."

Carter Enterprises and Chaim Wolf, in opposition to Azrak's motion to compel, adopt the arguments set forth by Carter Industries and assert that they "are not in possession of any discovery materials that would be responsive to the plaintiff's demands as they relate to the issue of plaintiff's alleged ownership interest in Carter Industries . . ."

Saul Wolf, in opposition to Azrak's motion to compel, submits an attorney affirmation arguing that "Mr. Wolf has no responsive documents other than what Carter Industries already produced." Notably, defense counsel asserts that "Mr. Wolf admitted only that there are documents within his custody, possession, or control that are the *same* as the documents that Carter Industries has *already* produced to Plaintiff in this action" and "Plaintiff has failed to identify a single legitimate reason why Mr. Wolf should have to go through the exercise of re-producing [those] documents . . ."

Azrak's Opposition to the Cross Motion and Reply

Azrak, in reply, asserts that “[d]efendants’ respective oppositions fail to meaningfully address their failure to comply with the Discovery Order.” Azrak argues that “Sam Wolf doubles down on the novel position that he is exempt from producing relevant, responsive documents in his possession, custody or control . . . because Carter Industries has purportedly already produced them[,]” which is contrary to the law.

Azrak contends that Carter Industries attempts to justify its deficient document production by relying on its past production of documents, however, “[w]hat Carter Industries fails to mention is that its prior productions were actually haphazard document dumps consisting largely of invoices from suppliers and other documents having nothing whatsoever to do with the issue of Plaintiff’s ownership of Carter Industries.” Azrak asserts that Carter Industries has offered no excuse for its failure to produce the following categories of documents: (1) documents regarding the negotiation and due diligence conducted in connection with the 2017 sale of Saul Wolf’s ownership interest in Carter Industries; (2) documents concerning Azrak’s ownership interest in Carter Industries; (3) documents identifying all current and former shareholders of Carter Industries; and (4) communications with Azrak and/or members of her family, including communications from Saul Wolf’s Carter Industries email account.

Azrak asserts that Carter Enterprises and Chaim Wolf requested and obtained lengthy (49-day) extensions of time to comply with the Discovery Order, “but now claim, with no explanation whatsoever, to have no responsive documents.” Azrak requests an order

“compelling Carter Enterprises and Chaim Wolf to produce all documents required by the Discovery Order and to certify under oath that they have conducted a diligent, good faith search of their records.”

Azrak also challenges defendants’ claim that certain categories of documents do not exist or are irrelevant to the issue of her ownership interest in Carter Industries. Azrak argues that defendants’ assertion that no responsive documents exist regarding the negotiations and due diligence conducted in connection with the 2017 sale of Saul Wolf’s ownership interest in Carter Industries is incredible, since the purported purchasers of Saul Wolf’s shares subsequently communicated with Azrak as their new “partner.” Azrak asserts that documents concerning the negotiations and due diligence process “indisputably would mention Plaintiff, the owner of the other half of the company.”

Azrak also argues that correspondence regarding Marvin Azrak, her late husband, are relevant to the issue of her ownership interest in Carter Industries since she inherited her Carter Industries shares from him. Azrak asserts that “given that Marvin’s interest in the company was transferred to [her], his ownership of the company is foundational to the issue of [her] ownership.” Azrak further argues that “in negotiating the scope of the Discovery Order, Defendants insisted that it include those requests related to Marvin’s ownership.” Azrak notes that defendants previously requested, and she produced, all documents regarding Marvin Azrak’s ownership interest in Carter Industries, and therefore, defendants “cannot now disclaim their relevance.”

Azrak, in opposition to Carter Industries’ cross motion to compel, notes that “Carter

Industries has continued its pattern of responding to Plaintiff's motions to compel with pro forma cross-motions" and asserts that the instant cross motion is "frivolous." Azrak asserts that Carter Industries' cross motion "boils down to two meritless gripes": (1) that Azrak's document production was deficient because it included relatively few documents, but ignores the fact that in 2018 Azrak already produced more than 1,000 pages of documents regarding her alleged status as a Carter Industries shareholder, and (2) that Azrak produced certain redacted documents and has not yet submitted unredacted documents to the court for an in camera inspection. Azrak asserts that she redacted all information that is unrelated to the issue of her ownership of Carter Industries, as authorized by the Discovery Order, and that she is "ready and willing to submit these documents for *in camera* review as soon as the Court provides directions concerning how to do so in light of Covid-19 concerns and related court closures."

Discussion

CPLR 3124 provides that "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response." "In general, the supervision of disclosure is left to the broad discretion of the trial court, which must balance the parties' competing interests" (*JPMorgan Chase Bank, Nat. Ass'n v Levenson*, 149 AD3d 1053, 1054 [2017] [internal quotation marks omitted]).

Here, Saul Wolf admits that there are documents in his possession, custody or control that are responsive to the Discovery Order, yet he refuses to produce such documents because

he claims that they have already been produced by Carter Industries. To the extent Saul Wolf is in possession, custody or control of any documents subject to production under the Discovery Order, he is directed to produce such documents, regardless of the production previously made by Carter Industries.

Defendants attempt to avoid disclosure by narrowly interpreting this court's Discovery Order to exclude certain categories of responsive documents is rejected. Defendants are directed to produce all documents regarding the negotiations and due diligence conducted in connection with the 2017 sale of Saul Wolf's ownership interest in Carter Industries, since such documents undoubtably would reference the owner of the remaining shares in Carter Industries. Furthermore, defendants must produce all communications regarding Azrak's late husband, Marvin Azrak, since Diana Azrak allegedly inherited her Carter Industries shares from Marvin Azrak.

In addition, Carter Industries has inexplicably failed to produce documents concerning Azrak's ownership interest in Carter Industries, documents identifying all current and former shareholders of Carter Industries and communications with Azrak and/or members of her family, including communications from Saul Wolf's Carter Industries email account. Carter Industries is compelled to produce the foregoing categories of documents, as previously required under the Discovery Order.

Carter Industries' cross motion is only granted to the extent that Azrak is compelled to submit all previously produced, redacted documents to the court for an in camera inspection, as previously directed in the Discovery Order. Accordingly, it is

ORDERED that Azrak's motion (in mot. seq. 22) is only granted to the extent that:

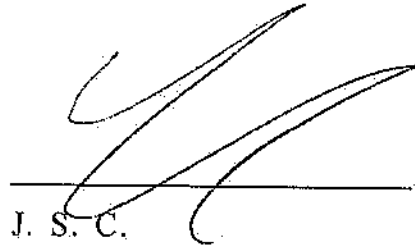
(1) Saul Wolf is hereby compelled to produce within 14 days after service of this order with notice of entry thereof: (a) all documents regarding the 2017 sale of his ownership interest in Carter Industries to Ephraim, Adler, Abraham Backenroth; (b) all documents regarding any person's or entity's ownership interest in Carter Industries; and (c) all communications regarding Marvin Azrak, Diana Azrak, Raymond Azrak or Albert Azrak, including communications from his Carter Industries email account; (2) Carter Industries is hereby compelled to produce within 14 days after service of this order with notice of entry thereof: (a) all documents regarding the negotiations and due diligence conducted in connection with the 2017 sale of Saul Wolf's ownership interest in Carter Industries; (b) all communications regarding Marvin Azrak; (c) all documents concerning Azrak's ownership interest in Carter Industries, (d) all documents identifying current and former shareholders of Carter Industries; and (e) all communications with Azrak and/or members of her family, including communications from Saul Wolf's Carter Industries email account; and (3) Carter Enterprises and Chaim Wolf are hereby compelled to produce within 14 days after service of this order with notice of entry thereof all documents required by the Discovery Order and to certify under oath that they have conducted a diligent, good faith search of their records. Azrak's motion is otherwise denied; and it is further

ORDERED that Carter Industries' cross-motion (in mot. seq. 23) is only granted to the extent that Azrak is hereby directed to submit unredacted copies of all documents previously produced by Azrak in redacted form to this court for an in camera review within

14 days after service of this order with notice of entry thereof. Carter Industries' cross motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,



A handwritten signature in black ink, appearing to read 'L. Knipel', is written over a horizontal line.

J. S. C.

Justice Lawrence Knipel