

Pala Assets Holdings Ltd v Rolta, LLC
2022 NY Slip Op 33357(U)
October 4, 2022
Supreme Court, New York County
Docket Number: Index No. 652798/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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PALA ASSETS HOLDINGS LTD, PINPOINT MULTI-STRATEGY FUND, VALUE PARTNERS FIXED INCOME SPC - VALUE PARTNERS CREDIT OPPORTUNITIES FUND, and VALUE PARTNERS GREATER CHINA HIGH YIELD INCOME FUND,

Plaintiffs,

- v -

ROLTA, LLC, ROLTA INDIA LTD, ROLTA INTERNATIONAL INC., ROLTA UK LTD, ROLTA MIDDLE EAST FZ-LLC, ROLTA AMERICAS LLC, and ROLTA GOLBAL B.V.,

Defendants.

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INDEX NO. 652798/2018
MOTION DATE N/A
MOTION SEQ. NO. 030 031

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 030) 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1033, 1059, 1060, 1061, 1065, 1067, 1068, 1069

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 031) 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1034, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1062, 1063, 1064

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

In motion sequence number 030, plaintiffs Pala Assets Holdings Ltd, Pinpoint Multi-Strategy Fund, Value Partners Fixed Income SPC - Value Partners Credit Opportunities Fund, and Value Partners Greater China High Yield Income Fund move, pursuant to CPLR 5223, to compel the deposition of nonparty Thompson Hine LLP (TH) and sanction TH, pursuant to the Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1(a), for failure to appear at the May 10, 2022 deposition of John C.

Allerding¹ (Allerding Deposition). In motion sequence number 031, TH seeks a protective order and to quash the subpoena for Allerding's deposition.²

For the reasons stated on the record on July 1, 2022, plaintiffs' motion to compel TH's deposition was granted to the extent that plaintiffs may depose TH and inquire about its financial arrangements with defendants and with nonparties Rolta Overseas Private Limited (ROPL) and Rolta Private Limited (RPL).³ (See NYSCEF 1069, tr at 50:2-11, 13:21-14:6; see also *In re Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003*, 4 NY3d 665, 679 [2005], citing *Priest v Hennessy*, 51 NY2d 62, 69 [1980] [holding that the attorney-client privilege does not generally protect "communications regarding the payment of legal fees by a third person."]) Plaintiffs may also inquire about the Engagement Letter and changes to the Engagement Letter. (NYSCEF 1069, tr at 50:17-25.)

¹ Allerding is a partner at Thompson Hine and counsel of record to defendants Rolta India Ltd., Rolta International, Inc., Rolta U.K. Ltd., Rolta Middle East FZ-LLC, and Rolta Global B.V. (NYSCEF Doc. No. [NYSCEF] 1020, Allerding aff ¶ 1 [May 10, 2022].)

² Thompson Hine's motion to quash is untimely; it moved after it failed to appear at the deposition. (NYSCEF 1019, Order to Show Cause [mot. seq. no. 031].)

³ Plaintiffs argued that Thompson Hine has knowledge of ROPL or RPL's financial well-being sufficient to aid plaintiffs in enforcing the judgments in this action. It was uncontradicted, on the record that nonparties ROPL and/or RPL served as a guarantor of Thompson Hine's legal fees (NYSCEF 1069, tr at 10:8-21) and that Thompson Hine never represented ROPL or RPL (*id.* at 11:7-10). The court also notes that one of Thompson Hine's main arguments, that the deposition of Kamal K. Singh remains open, is moot. At the time of writing this decision, Singh's deposition is complete. His deposition proceeded on August 2 and August 9, 2022. (See Report of Special Master Richard P. Swanson [Aug. 17, 2022].) Swanson's report stated that Singh refused to answer questions relating to RPL and ROPL despite Swanson's directives to answer the questions. (*Id.*)

The issue of whether plaintiffs can depose TH and inquire about the March 31, 2021 settlement agreement entered into between defendants Rolta International Inc. (Rolta International) and Rolta India Ltd (Rolta India) (Settlement Agreement) (see NYSCEF 1041, Settlement Agreement) was not decided on the record and the court requested further briefings. (*Id.* at 49:21-25.)

With respect to plaintiffs' request for sanctions, the court granted plaintiff the cost of the court reporter for the Allering Deposition and for the time that plaintiffs spent waiting for TH to appear at the deposition. (*Id.* at 59:13-17.)

Background

Although these motions concern information that TH may possess regarding satisfaction of the judgment, the court's decision and order dated March 25, 2022 provides context concerning the Settlement Agreement. (See NYSCEF 944, Decision and Order [mot. seq. no. 027].)

On April 19, 2022, plaintiffs served a subpoena on TH to appear for a deposition on May 10, 2022. (NYSCEF 1006, Subpoena for Deposition; NYSCEF 1007, Aff of Service [Apr. 19, 2022].) Generally, plaintiffs seek information from TH regarding the judgment and defendants' alleged attempts to evade enforcement of the judgments in this action. (See NYSCEF 350, Judgment Order [Sept. 2, 2020]; NYSCEF 388, Turnover Order [mot. seq. no. 011]; NYSCEF 395, Amended Judgment Order.) Specifically, plaintiffs intend to ask TH about its involvement in the preparation of the Settlement Agreement, which although it was later unwound, purportedly to set off a \$187 million receivable that Rolta India owed to Rolta International. Plaintiffs contend that Allering independently decided which claims of Rolta International should be

assigned to Rolta India under the Settlement Agreement. Plaintiffs also claim that TH has knowledge that could potentially form the basis for claims against defendants and/or TH for violating a restraining notice, fraudulent transfer, and/or tortious interference with the enforcement of a judgment.⁴

Legal Standards

CPLR 5223 is a post-judgment discovery device that aids in disclosing “all matter relevant to the satisfaction of the judgment.” The standard, “all matter relevant,” is generous and “permits the creditor a broad range of inquiry through either the judgment debtor or any third person with knowledge of the debtor’s property.” (*Gryphon Dom. VI, LLC v GBR Info. Services, Inc.*, 29 AD3d 392, 393 [1st Dept], citing *ICD Group v Israel Foreign Trade Co. [USA]*, 224 AD2d 293, 294 [1996].)

In *Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, the First Department articulated the test to depose opposing counsel. (164 AD3d 401 [1st Dept 2018].) The party seeking the deposition of opposing counsel must show that the information is material and necessary, there is good cause to “rule out the possibility that the deposition is sought as a tactic intended solely to disqualify counsel or for some other illegitimate purpose,” and, “due to the unusual situation where a party seeks to depose opposing counsel,” that the deposition is necessary because the information is not available from

⁴ The court asked how plaintiffs can seek discovery for another action, or in this case, where there may be a potential action against defendants and/or Thompson Hine. (NYSCEF 1069, tr at 7:18-19.) Plaintiffs explained “this is under CPLR 5223, which permits discovery of any matter relevant to the enforcement of a judgment, and claims – investigating potential claims for fraudulent transfer falls within CPLR 5223.” (*Id.* at 7:20-8:5.) Plaintiffs cited *Young v Torelli*, 135 AD2d 813 [2d Dept 1987] for that proposition is inapposite to the facts of this case because it concerned a bank involved in a settlement with the judgment debtor, not an attorney.

another source. (164 AD3d at 406.) The court in *Liberty Petroleum* also stated that, consistent with CPLR 3103(a) and state law, the party moving for a protective order “bears the initial burden to show either that the discovery sought is irrelevant or that it is obvious the process will not lead to legitimate discovery.” (*Id.* at 403; *see id.* at 406.) The burden then shifts to the party seeking the discovery to establish the elements above. (*Id.* at 403.)

Discussion

At the outset, plaintiffs contend that *Liberty Petroleum* does not apply because they are seeking information from TH not in their capacity as counsel to defendants, but in their capacity as a third party that may have wrongfully assisted a judgment debtor in avoiding enforcement of a judgment. The court disagrees and finds that the standard to compel the deposition of opposing counsel applies to this case. There was no indication in *Liberty Petroleum* that the standard only applied if the subpoenaing party was seeking information from opposing counsel in their capacity as legal counsel. (See *Liberty Petroleum*, 164 AD3d 401, 402 [1st Dept 2018].)

TH objects to Allerding’s deposition for several reasons, but primarily argues that plaintiffs seek information irrelevant to the satisfaction of the judgment because, *inter alia*, the Settlement Agreement was unwound and the set off was between two judgment debtors. TH also submits that the information, *i.e.*, strategy and communications between defendants and TH related to the Settlement Agreement, is protected from disclosure by attorney-client privilege and/or the attorney-work product doctrine.

These motions present two issues and neither issue is squarely addressed by *Liberty Petroleum* or by CPLR 5223: (i) whether a party may depose opposing counsel and (ii) whether counsel may be questioned as to all matters relevant to the satisfaction of a court's prior judgments pursuant to CPLR 5223. While CPLR 5223 compels the disclosure of all matter relevant to the satisfaction of the judgment from any person (see CPLR 5223 [emphasis added]), there are serious considerations as to whether opposing counsel may be subject to disclosing information it has gained in the course of its representation of its client. (See *Astraea NYC LLC v Rivada Networks, Inc.*, 2022 WL 845652, 2022 U.S. Dist. LEXIS 51287 [SD NY, Mar. 22, 2022, No. 21 Civ. 10493, Stanton, J.])

As articulated in *Liberty Petroleum*, TH bears the burden of establishing that the information sought by plaintiffs is irrelevant or that deposing Allerding will not lead to legitimate discovery. Here, TH has satisfied its burden in showing that the information TH learned during the course of its representation of Rolta India and Rolta International in the execution of the Settlement Agreement is irrelevant. It is unclear how the information TH acquired at that time would assist plaintiffs in discovering assets that could satisfy the judgment. As in *Liberty Petroleum*, part of that opaqueness is due to the vague and broad categories of information plaintiffs intend to elicit from TH. (164 AD3d at 407 [“Counsel has met his prima facie burden to show that the information sought is not relevant, particularly since the subpoena . . . [is] somewhat vague about what information they intend to elicit from counsel.”].) In particular, the topics plaintiffs seek to question Allerding about are too broad and plaintiffs fail to explain a link between the information requested and how the information sought could assist in

satisfying the outstanding judgments in this action. (See NYSCEF 1006, Schedule A to Subpoena at 7-9; see also *Berisha v Tosca Café, Inc.*, 2020 AD3d 531, 532 [1st Dept 2022] [finding that the information subpoenas issued pursuant to CPLR 5223 were “narrowly tailored to solicit information that is directly relevant,” and also “targeted at the individuals and entities that are likely to have this information, and there is no indication that the information would be unduly burdensome to collect.”].) For example, plaintiffs sought information relating to the “Settlement Agreement, including Communications, discussions, and negotiations Concerning the Settlement Agreement” and “Your advice Concerning the Settlement Agreement, including any advice Concerning how the Settlement Agreement might affect the Plaintiffs’ judgment-enforcement efforts against Defendants (including through the Court-appointed receiver).” (*Id.* at 7.)

Further, TH argues that plaintiffs conceded their true intentions when plaintiffs admitted that information gained from the Allerdin’s deposition may form the basis for claims against defendants and/or TH. While the appellate court in *Liberty Petroleum* made clear that the “invocation of privilege should ‘not be used as a device to shield discoverable information,’” TH’s assertion that the information sought is privileged, may be relevant in determining whether TH has demonstrated that the information sought “is not calculated to lead to legitimate discovery.” (See *id.* at 408; *Adams v Electrolux Home Products*, 2019 NY Slip Op 33191[U], *6 [Sup Ct, NY County 2019].) Therefore, TH has established its prima facie case that the information sought from opposing counsel is not relevant and may not lead to legitimate discovery.

The First Department found that post-judgment disclosure by judgment debtors was permissible under CPLR 5223 where the judgment creditors included a detailed list

of documentary information related to the enforcement of the judgment. (*In re Cave Creek Investments, Inc. v Urban FT Group, Inc.*, 176 AD3d 573, 573-574 [1st Dept 2019].) *Cave Creek* did not involve disclosure from opposing counsel, but rather from the judgment debtors. It is nevertheless helpful as *Cave Creek* demonstrates the court's need to ensure that CPLR 5223 is not utilized for illegitimate reasons. The First Department reasoned that "[t]his clarification and narrowing of the request in the subpoenas will ensure that each is tailored to aid petitioners in enforcing the judgment, rather than for some other purpose." (*Id.* at 574; *see also Adams*, 2019 NY Slip Op 33191[U], *8 ["Pruned to a material and necessary scope focussed (sic) on the only available witness knowledgeable about information within that scope, the deposition and related documents sought are not a fishing expedition."].)

On the other hand, plaintiffs have not met their burden to establish that the information they seek from TH is material and necessary, that they have a good faith basis for seeking it, and that the information is not available from another source. (See *Liberty Petroleum*, 164 AD3d at 408.) However, as discussed above, plaintiffs critically fail to explain how the broad categories of information sought are material and necessary to discovering assets sufficient to satisfy the judgments in this action. Instead, plaintiffs summarize the timeline of events relating to TH's involvement in the Settlement Agreement and make conclusory claims that, based on the timeline of events, the information sought from TH is material and necessary. As to plaintiffs' inability to obtain this information from anyone other than Allerding (as a result of Allerding allegedly being the person who selected the claims to be offset by the Settlement Agreement), plaintiffs' arguments in support of compelling Allerding's

deposition is tethered closely to their arguments demonstrating materiality and necessity, which the court rejects.

For the reasons stated above, plaintiffs' motion to compel Allerdig's deposition to seek information regarding his and his firm's involvement in the Settlement Agreement is denied without prejudice and TH's motion for a protective order and to quash the subpoena is granted in accordance with this decision. However, consistent with this decision and CPLR 5223's goal to discover assets to satisfy outstanding judgments, plaintiffs may modify their questions to focus on the issue at hand: (1) which assets did Allerdig consider, if any, before selecting the \$187 million intercompany receivable; (2) what is the \$187 million intercompany receivable; (3) are there other intercompany assets about which Allerdig is aware?⁵ Should plaintiffs elect to modify the scope of their inquiry of Allerdig in accordance with the reasons set forth in this decision, plaintiffs' counsel shall submit an affirmation affirming, under penalty of perjury, that counsel understands the limitations set forth under CPLR 5223 and that questions for Allerdig shall be limited to facts and tailored to discovering assets.

Accordingly, it is

ORDERED that motion sequence number 030 is granted in part and denied without prejudice in part to the extent that plaintiffs may not inquire about nonparty Thompson Hine LLP's involvement in the Settlement Agreement; and it is further

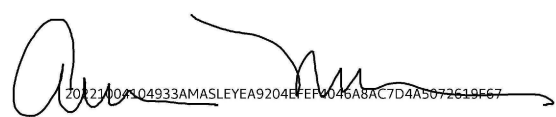
⁵ These questions are not exhaustive but are only meant to exemplify the types of non-leading questions permitted at Allerdig's deposition.

ORDERED that motion sequence number 031 is granted in part and denied in part to the extent that the subpoena is quashed as to inquiries into Thompson Hine LLP's involvement in the Settlement Agreement; and it is further

ORDERED that plaintiffs shall electronically file to NYSCEF an affirmation from their attorney who will be conducting the deposition of Allerding, and email to SFC-Part48@nycourts.gov, in accordance with the directives described above within 14 days of this order, if so desired or else waived; and it is further

ORDERED that nonparty Thompson Hine LLP shall, without any charge to its client, pay to plaintiffs the cost to compensate plaintiffs for the attorneys' fees they incurred by reason of their attorneys' attendance at the deposition. Thompson Hine LLP shall pay plaintiffs within 10 days of receipt of plaintiffs' affirmation of services. If the parties cannot agree to an amount, then plaintiffs shall submit the affirmation to the court for determination of the amount to be paid; and it is further

ORDERED that nonparty Thompson Hine LLP shall, without any charge to its client, pay to plaintiffs the cost of the court reporter who attended the deposition within 10 days of receipt of the invoice.



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10/4/2022
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
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<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

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