Matter of Rialto Capital Advisors, LLC v Tilden Park Capital Mgt. L.P.

2023 NY Slip Op 33020(U)

August 29, 2023

Supreme Court, New York County

Docket Number: Index No. 153499/2023

Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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In the Matter of

RIALTO CAPITAL ADVISORS, LLC,

Petitioner,

- v -

TILDEN PARK CAPITAL MANAGEMENT L.P.,

Respondent.

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INDEX NO. 153499/2023

MOTION DATE 05/02/2023

MOTION SEQ. NO. 001

DECISION, ORDER + JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for SUBPOENA DUCES TECUM.

In this proceeding pursuant to CPLR 3119 and 2308(b), the petitioner, Rialto Capital Advisors, LLC (Rialto), seeks to compel the respondent, Tilden Park Capital Management, L.P. (Tilden), to comply with an out-of-state subpoena duces tecum issued by Rialto, and apply a particular search protocol to locate, identify, and produce the documents requested to be produced. Rialto also requests this court to retain jurisdiction to resolve any future dispute arising from the subpoena duces tecum. Tilden opposes the petition. The petition is granted to the extent that Tilden shall comply with the subpoena, as limited by Rialto's revised search protocol, and the petition is otherwise denied, and provide all documents responsive thereto within 30 days of the entry of this order.

This proceeding stems from an underlying Nevada action concerning a securitization trust. In 2012, the COMM 2012-CCRE4 Commercial Mortgage Pass-Through Certificates Trust (Trust) was created to hold a pool of loans secured by mortgages on commercial and multifamily properties. Investors, referred to as "certificateholders," could purchase different

classes of certificates issued by the Trust, based on the level of risk they cared to take. The Trust was governed by a Pooling and Servicing Agreement (PSA), which provided that certificateholders were to be repaid the principal in their order of seniority (Class A, B, C, etc.), while losses on the loans applied in reverse order (Class G, F, E, etc.). To provide the most junior class of certificateholders with an incentive to invest on those terms, the PSA gave those certificateholders certain control rights, including the right to appoint a controlling class representative (CCR) to advise the Trust's special servicer on business decisions related to the Trust's assets. The special servicer was responsible for servicing non-performing loans held by the Trust, and was subject to the standard of conduct that was defined in the PSA. In this case, Rialto was the special servicer of the Trust.

In 2017, one of the Trust's assets, a mortgage held on Nevada shopping mall Prizm Outlets, which secured a $73 million mortgage loan, was transferred to Rialto, as the Trust's special servicer and, in 2018, the Trust took title to Prizm Outlets by way of foreclosure. Thereafter, Rialto developed a business plan to aid in maximizing the proceeds of the sale of Prizm Outlets, and the CCR, which at the time was a certificateholder junior to Tilden, approved the plan. In April and October of 2019, Rialto obtained third-party appraisals of Prizm Outlets, which valued the mall at $28.8 million and $29.9 million, respectively. In March 2020, however, COVID-19 related shutdown orders went into place. In April 2021, Prizm Outlets was sold for only $400,000. In November 2021, Tilden sold its Class E certificates to Icahn Partners, L.P., and Icahn Partners Master Fund, L.P. (together Icahn).

In June 2022, Icahn filed a lawsuit against Rialto in the District Court of Clark County, Nevada (the Nevada action), entitled *Icahn Partners, L.P., et ano. v Rialto Capital Advisors, LLC,* under case number A-22-854147-B. In its complaint, Icahn alleged that Rialto placed its own interest ahead of the Trust's investors, which contravened the PSA's defined standard of conduct. Icahn also alleged that Rialto prevented the Class E certificateholder, i.e., Tilden, from becoming the controlling certificateholder, and that if Tilden had been in control, it would have

demanded a much earlier sale of Prizm Outlets and/or replaced Rialto as special servicer of the Trust. Icahn further asserted breach of contract and fraud claims against Rialto. On July 20, 2022, Rialto moved dismiss the complaint in the Nevada action, asserting a lack of subject matter jurisdiction and failure to state a cause of action. In an order dated October 17, 2022, the motion was denied in its entirety, without prejudice. On December 21, 2022, a discovery scheduling order was issued in the Nevada action, directing that all discovery was to be completed on or before October 13, 2023. On February 13, 2023, after receiving a commission from the Nevada District Court to issue the subpoena duces tecum, Rialto's New York counsel served the 37-item subpoena on Tilden in New York (*see* CPLR 3119[b][4]). On March 10, 2023, Tilden responded and objected to the entirety of the subpoena on the grounds of relevance, scope, and burdensomeness.

CPLR 3119(e) provides in pertinent part that,

> "[a]n application to the court ... to enforce ... a subpoena issued under this section must comply with the rules or statutes of this state and be submitted to the court in the county in which discovery is to be conducted."

As relevant here, CPLR 3101(a)(4) provides that, with respect to nonparties, "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . . upon notice stating the circumstances or reasons such disclosure is sought or required." As the Court of Appeals has clearly explained,

> "[t]he 'circumstances or reasons' language replaced former CPLR 3101(a)(4)'s 'adequate special circumstances' requirement. It is noteworthy, however, that the appellate departments, even before the 1984 amendment, liberally interpreted the 'special circumstances' requirement as favoring disclosure so long as the party seeking it met the low threshold of demonstrating a need for the disclosure in order to prepare for trial. . . We conclude that the 'material and necessary' standard adopted by the First and Fourth Departments is the appropriate one and is in keeping with this state's policy of liberal discovery. The words 'material and necessary' as used in section 3101 must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. Section 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty

(*Matter of Kapon v Koch*, 23 NY3d 32, 37-38 [2014] [citation and some internal quotation marks omitted]).

The subpoena seeks, inter alia, Tilden's agreements concerning Prizm Outlets, the mortgage loan referable to the mortgage held on Prizm outlets, the Trust, documents in Tilden's possession, including written communications, concerning Tilden's certificates and Icahn's purchase of Tilden's certificates, and communications with third parties concerning Prizm Outlets and the loan, the Trust, and the Nevada action. Rialto argues that the information sought by the subpoena is relevant to the claims and defenses it had asserted in the Nevada action. In particular, Rialto argues that Tilden is a material witness since it held the Class E Certificates at times relevant to the complaint in the Nevada action, and because Tilden sought to become the controlling class certificateholder with the right to make certain strategic decisions about Prizm Outlets. In opposition, Tilden argues that the subpoena is irrelevant, inasmuch as it has not been involved with the Trust or the certificates since it sold its certificates to Icahn in 2021. Tilden also asserts that, while it was one of many certificateholders during the times at issue, that fact has no bearing on its involvement in the claims in the Nevada action. It asserts that, in fact, it was not a party or witness to any of the events giving rise to the claims asserted in the Nevada action.

This court disagrees with Tilden's contentions. The complaint in the Nevada action specifically alleges that, in 2019, control of the Trust should have shifted to Class E certificateholders, who had "made clear that they intended to minimize losses and maximize recoveries for Certificateholders on the whole by seeking to immediately sell Prizm Outlets and (if necessary) replace Rialto as Special Servicer in order to do so." The complaint in that action further alleged that Rialto deprived the Class E certificateholders of the opportunity to gain control of the Trust. Notably, Tilden held 83% of the Class E certificates in 2019, which would have made it the controlling certificateholder in the event of any shift to Class E. Moreover, the

complaint alleged that Rialto's deliberate misconduct directly damaged the Class E ceritificateholders once Prizm Outlets was sold in 2020. While Tilden may not have been involved with the Trust from the time that it sold its certificates to Icahn in 2021, the basis of many of Icahn's allegations in the Nevada action directly involved Tilden's status and conduct during the time when it did in fact hold certificates, thus making it a material witness in the prosecution of the Nevada action. Lastly, the subpoena also seeks documents relevant to Rialto's defenses in the Nevada action, which include, inter alia, bad faith, ratification, estoppel, and waiver. Hence, the petition is granted to the extent that Tilden shall respond to the subpoena, as narrowed by Rialto's revised search protocol that Rialto submitted to the court on May 1, 2023 via the New York State Court Electronic Filing System as Document Number 26, and subject to any attorney-client, attorney work-product, or other recognized privilege. No other objections to production shall be recognized.

The branch of the petition requesting this court to retain jurisdiction over any future dispute arising from the subpoena is denied (*see generally Solkav Solartechnik, G.m.b.H. v Besicorp Group Inc.*, 91 NY2d 482, 486-487 [1998]; CPLR 411). Since this instant proceeding will not be left lingering pending future disputes arising from the subpoena, which may or may not occur, a new special proceeding can be commenced should it become necessary (*see Miller v Ives*, 79 Misc 2d 184, 185-186 [Sup Ct, N.Y. County 1974]).

In light of the foregoing, it is

ORDERED and ADJUDGED that the petition is granted to the extent that Tilden Park Capital Management, L.P., shall comply with the subpoena duces tecum served upon it on February 13, 2023, as limited by the petitioner's revised search protocol, and the petition is otherwise denied; and it is further,

ORDERED that Tilden Park Capital Management, L.P., shall comply with the subpoena and provide responses thereto within 30 days of the entry of this order.

This constitutes the Decision, Order, and Judgment of the court.

8/29/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE