SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

CHANA VASHOVSKY, individually and derivatively on behalf of HUDSON VALLEY NY HOLDINGS LLC,

Plaintiffs, Decision and Order

-against-

Index No. 507373/2021

YOSEF ZABLOCKI and NATIONAL JEWISH CONVENTION CENTER,

Defendants,

And January 16, 2024

HUDSON VALLEY NY HOLDINGS LLC,

Nominal Defendant,

YOSEF ZABLOCKI and NATIONAL JEWISH CONVENTION CENTER,

Counterclaim Plaintiffs,

-against-

CHANA VASHOVSKY and EPHRAIM VASHOVSKY,

Counterclaim-Defendants,

PRESENT: HON. LEON RUCHELSMAN Motion Seq. #30, 31, 32, 33

The plaintiff has moved pursuant to CPLR §2304 seeking to quash subpoenas served upon third parties Samuel Kanerek, Vasco Ventures, LLC, Jack Milstein, Moshe Pillar and ZVG@Palisades LLC. Further, the plaintiff seeks a protective order. The defendants have moved seeking to quash a subpoena served upon Valley Ridge Retreats LLC. Further, the defendants move seeking to dismiss portions of the plaintiff's fifth amended complaint. The plaintiff has moved seeking sanctions. The motions have all been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in prior orders, on April 8, 2019 the plaintiff Chana Vashovsky formed an entity called HVNY which purchased the Hudson Valley Resort, a hotel located in Ulster County in New York State. An agreement was reached with defendant Yosef Zablocki whereby he was given a fifty percent interest in HVNY and became the managing member. Disputes arose between the parties concerning the running of the business. The plaintiff asserted various claims against the defendant and the defendant has asserted various counterclaims. These motions have now been filed.

Conclusions of Law

In Kapon v. Koch, 23 NY3d 32, 988 NYS2d 559 [2d Dept., 2014] the court held that third party subpoenas may be served whenever the information sought is 'material and necessary' "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (id). The court noted that "so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty" (id). Thus, "disclosure from a nonparty requires no more than a showing that the requested information is relevant to the prosecution or defense of the action" (see, Bianchi v. Galster Management Corp., 131 AD3d 558, 15 NYS3d 189 [2d Dept., 2015], CPLR §3103(a)). A party seeking to vacate or quash a third party subpoena has a burden

establishing the information is "utterly irrelevant" or "the futility of the process to uncover anything legitimate is inevitable or obvious" (Anheuser-Busch Inc., v. Abrams, 71 NY2d 327, 525 NYS2d 816 [1988]). Further, where a discovery demand is deemed overbroad then the appropriate remedy is to vacate the entire demand rather than to prune it (Fox v. Roman Catholic Archdiocese of New York, 202 AD3d 1061, 159 NYS3d 874 [2d Dept., 2022]).

The defendant asserts the subpoena issued to Samuel Kanarek is proper because Kanarek "has information pertaining to, among other things...the inception of the partnership at issue and his role in the inception, the funding and financing of HVR, and his communications before and after the consummation of the transactions with regard to HVNY" (see, Affirmation in Opposition, ¶8 [NYSCEF Doc. No. 679]). The defendant further asserts that "Mr. Kanarek is a mortgage broker involved in the refinance of HVR at Plaintiffs' request. An e mail dated May 23, 2021 from Kanarek to Ephraim Vashovsky, which attributed certain alleged statements about HVR's solvency and operations to Zablocki, was submitted to the Court in connection with Plaintiffs' motion to remove Zablocki as the manager of HVR, along with an invoice purportedly for Kanarek's/Northstar Financing's services, showing an alleged partial payment to Northstar in the amount of $7000.00. Plaintiffs have alleged

that the $7000.00 payment was made by them, an allegation that Zablocki has denied. At a bare minimum, Defendants are entitled to obtain documents and question Kanarek as to documents he generated. These documents were utilized by Plaintiffs as alleged support for a motion they filed to remove Zablocki from his manager position at HVR, and furthermore, they have a bearing on allegations of misconduct that the Plaintiffs have levelled [sic] against Zablocki" (see, Affirmation in Opposition, ¶¶8, 9 [NYSCEF Doc. No. 679]).

However, the defendant himself factually disputed all the reasons they now seek Kanarek's information. The defendant furnished an affirmation where he stated that the plaintiff never paid Kanarek and his company, Northstar, $7,000 for a commission regarding a refinance of the hotel. The defendant stated that "nor was there any payment by Mr. Vashovsky or anyone else to Northstar for $7000 ever" (see, Affirmation of Yoseph Zablocki, ¶34 [NYSCEF Doc. No. 45]). Thus, there can be no basis to seek information from Kanarek about documents the defendant insists do not exist. Zablocki further denied the contents of the e-mail Kanarek sent to Vashovsky about the hotel's solvency. Most significantly, Zablocki asserted that Ephraim Vashovsky and Kanarek decided upon a scheme to defraud the bank at a closing for a refinance of the hotel. However, Zablocki noted that the bank "caught the mistake and make [sic] Mr. Vashovsky sign all

new mortgage documents at the last second, only giving HVR a 3.5 million dollar mortgage instead of the 3.6 million dollar mortgage that I had signed for earlier that day" (see, Affirmation of Yoseph Zablocki, ¶47 [NYSCEF Doc. No. 45]). Further, the request to remove Zablocki which ultimately resulted in the appointment of a receiver was not based upon any specific information pertaining to Kanarek. It was based upon generalized allegations, by both parties, that demanded independent management of the hotel. Therefore, there really is no information maintained by Kanarek that could possibly be helpful to the defendants in this lawsuit. The defendants cannot deny the impact or existence of documents and then seek subpoenas to examine those very documents. Therefore, the motion seeking to quash the subpoena regarding Kanarek is granted.

Next, the defendant seeks information from third party Vasco Ventures and third party ZVG@Palisades LLC. The court already dismissed third party claims against these two entities on the grounds no facts supporting any allegations were contained in the third party complaint (see, Decision and Order, dated November 7, 2022 [NYSCEF Doc. No. 322]). To the extent these subpoenas are designed to rectify earlier pleading infirmities they are improper. In any event the subpoena served upon Vasco Ventures seeks "any document relating to contracts entered into by either You and any of your affiliate companies of employees

concerning the operation, renovation, repair refurbishment or ownership of any, motel, spa or resort hotel" (see, Subpoena on Vasco Ventures: Document Demands, ¶6 [NYSCEF Doc. No. 647]). Whether Vasco Ventures or an affiliate of Vasco Ventures entered into contracts to renovate other motels or hotels is completely irrelevant to this lawsuit. Likewise, the subpoena seeks "documents related to Elliot Zemel's attorney representation of either You or any entity in which either counterclaim Defendant had any ownership interest" (see, Subpoena: Document Demands, ¶35 [NYSCEF Doc. No. 647]). That information is likewise irrelevant to this lawsuit. This lawsuit is about discrete issues and involve the relationship between the Vashovskys and Zablocki and the claims against each other. These requests are way beyond any of the issues involved in this litigation. Since these requests are improper the court need not consider any of the remaining requests (U.S. Bank Trust N.A., v. Carter, 204 AD3d 727, 166 NYS3d 650 [2d Dept., 2022]).

Likewise, the subpoena served upon ZVG@Palisades LLC seeks "documents relating to any contract or other business relationship between either counterclaim defendant and ZVG" (see, Subpoena on ZVG@Palisades LLC: Document Demands, ¶3 [NYSCEF Doc. No. 647]). That information is entirely irrelevant and therefore the motion seeking to quash these subpoenas is granted.

Next, concerning the subpoena served upon Jack Milstein, the

defendant explains that Mr. Milstein "describes himself as the 'resort manager'" of the Hudson Valley Resort (see, Affirmation in Opposition, ¶20 [NYSCEF Doc. No. 679]). However, the defendant asserted that "Jack Milstein was never, for even the briefest period of time, the HVR resort manager" and that "no one on property would give Jack Milstein the time of day" (see, Affirmation of Yoseph Zablocki, ¶51 [NYSCEF Doc. No. 45]). Rather, Zablocki insisted that Milstein was an employee of Ephraim Vashovski, his "right hand man" (id). Thus, it is not necessary to serve subpoenas upon any and every individual who made claims of mismanagement against Zablocki. Thus, a mere employee of Vashovski who stated that Zablocki mismanaged the property need not be served with a subpoena to further inquire about those statements made. Moreover, the subpoena requests every communication, whether or not relevant to this case, between Milstein and Ephraim Vashovsky (see, Subpoena on Jack Milstein: Document Demands, ¶3 [NYSCEF Doc. No. 647]). That is overbroad and irrelevant. Therefore, the motion seeking to quash the subpoena served on Jack Milstein is granted.

The next subpoena served is upon Moshe Pillar who is the individual who allegedly gave a mortgage to the Vashovskys. The subpoena seeks "documents relating to any business relationship between wither Counterclaim Defendants and Moshe Pillar" (see, Subpoena on Moshe Pillar: Document Demands, ¶1 [NYSCEF Doc. No.

647]). That is overbroad and irrelevant. Therefore, the motion seeking to quash the subpoena served on Moshe Pillar is granted.

Turning to the request seeking a protective order, it must be noted that while some of the subpoenas were quashed on substantive grounds many of them were quashed because they were not properly narrow and specific. Thus, a more tailored subpoena will demand a more thorough analysis. Thus, while all the subpoenas are quashed at the time the request for a protective order is denied.

Turning to the defendant's motion seeking to quash the subpoena served upon Valley Ridge Retreats LLC, even if the defendant Zablocki was not personally served with the subpoena, a matter that is beyond the purview of the court to investigate, there really is no dispute the entity was served via the secretary of state. Thus, the substantive arguments regarding this subpoena will now be explored.

Even though the court has granted the motion dismissing some of the new causes of action the subpoena is proper. The causes of action were dismissed upon technical grounds related to the specific elements of those causes of action. The decision notes that notwithstanding the dismissal of those causes of action the issue of whether an assignment took place is relevant and material. It goes directly to plaintiff's claims seeking damages, specifically, her arguments she is entitled to any

proceeds from any assignment that may have occurred. While that contention will, of course, require further litigation, at this juncture such claims are proper. Therefore, the motion seeking to quash the subpoena served upon Valley Ridge Retreats LLC is denied.

The court will now address the motion to dismiss the fifth amended complaint and the cross-motion seeking sanctions for the misrepresentations contained within that motion. On October 13, 2023 the plaintiff served a fifth amended complaint which contains twenty-two causes of action. The defendants have now moved seeking first to strike portions of the complaint that they assert are scandalous. The paragraphs 18-26 of the fifth amended complaint are the same paragraphs that appear in the second amended verified complaint (NYSCEF Doc. No. 210), the third verified amended complaint (NYSCEF Doc. No. 279) and the fourth amended verified complaint (NYSCEF Doc. No. 382). Moreover, in a decision dated December 8, 2022 pertaining to the third amended complaint the court specifically held that "Paragraphs 18-26 do not involve fraud at all but rather involve allegations of other improper conduct which can support breach of contract as well as breach of fiduciary duty claims and other claims" (see, Decision and Order, page 3 [NYSCEF Doc. No. 378]). Thus, the defendant's motion seeking to strike those paragraphs is denied. Indeed, although this case has seen many motions filed and many decisions

rendered the parties are indisputably charged with familiarity of all the court's determinations. The defendant asserts that the plaintiff's inclusion of language in the fifth amended complaint "despite the Court's clear directives otherwise is a serious abuse of litigation that should not be tolerated" (see, Affirmation in Support, page 6 [NYSCEF Doc. No. 657]). Of course, the court never directed otherwise, thus, the only abuse of litigation that should not be tolerated is the cavalier treatment of the court's decisions in this case.

Next, the request to remove paragraphs 75-77 regarding the tax exempt status of NJCC is denied. While the plaintiff will bear the burden of demonstrating how the tax status of NJCC contributed to the usurpation of corporate opportunity, it is surely not scandalous requiring dismissal at this juncture.

Further, the motion to dismiss any allegations or language that existed in previous complaints is denied. The defendant had an opportunity to dismiss, in prior motions, any language it deemed objectionable. The failure to do so bars such requests at this juncture. Thus, the motion seeking to dismiss the causes of action for unjust enrichment and conversion is denied.

Next, the plaintiff has withdrawn the second cause of action which asserted a violation of New York Business Corporation Law §720(a)(1)(b). Thus, the motion seeking to dismiss that cause of action is granted upon withdrawal by the plaintiff.

The nineteenth cause of action alleges tortious interference with contract. The elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages (Anethsia Associates of Mount Kisco, LLP v. Northern Westchester Hospital Center, 59 AD3d 473, 873 NYS2d 679 [2d Dept., 2009]). Further, the plaintiff must specifically allege that 'but for' the defendant's conduct there would have been no breach of the contract (White Knight of Flatbush, LLC v. Deacons of Dutch Congregations of Flatbush, 159 AD3d 939, 72 NYS3d 551 [2d Dept., 2018]). Thus, to succeed upon these allegations the complaint must allege sufficient facts. Vague or conclusory assertions are insufficient (Washington Ave. Associates Inc., v. Euclid Equipment Inc., 229 AD2d 486, 645 NYS2d 511 [2d Dept., 1996]).

The twentieth cause of action alleges the intentional interference with the same contract. Thus, Zablocki entered into a contract with the court appointed receiver to purchase the property. Further, Vashovsky entered into a contract with the receiver to purchase the property in the event Zablocki failed to close. The plaintiff alleges Zablocki interfered with Vashovski's contract with the receiver by assigning the contract

to another entity whereby that entity purchased the hotel. The plaintiff asserts that transfer violated the no assignment provision of the contract and made it impossible for Vashovsky to then purchase the property.

However, Vashovsky's contract with the receiver was only contingent upon Zablocki's failure to close. Thus, Vashovsky's contract contained an implicit condition precedent, namely it was only operative on condition Zablocki failed to close. Consequently, Vashovski did not maintain "a contract" but rather a potential contract that was only triggered upon the happening, or more precisely, the non-happening of a specific event. Therefore, Vashovsky's contract was never breached and consequently there can be no tortious interference without a breach (Ford v. Village of Sidney, 139 AD2d 848, 527 NYS2d 582 [3rd Dept., 1988]). Rather, Zablocki's conduct merely frustrated the condition precedent and thus no breach of contract occurred (id). Therefore, the motion seeking to dismiss the nineteenth and twentieth causes of action is granted.

The twenty-first and twenty-second causes of action allege tortious and intentional interference with a prospective economic advantage based upon the same facts as the interference with contract causes of action.

To establish the tort of tortious interference with prospective contractual relations the plaintiff must demonstrate

the defendant engaged in culpable conduct which interfered with a prospective contractual relationship between the plaintiff and a third party (see, Lyons v. Menoudakos & Menoudakos P.C., 63 AD3d 801, 880 NYS2d 509 [2d Dept., 2009]). Culpable conduct has been defined as conduct that is a crime or an independent tort and includes physical violence, fraud, misrepresentation and economic pressure (Guard-Life Corp., v. Parker Hardware Manufacturing Corp., 50 NY2d 183, 428 NYS2d 628 [1980]).

The plaintiff asserts that the independent tort which can give rise to this claim is the tort of a breach of a fiduciary duty. This tort can serve as the predicate wrongful conduct to support a cause of action for the tortious interference with prospective contractual relations (see, Out of the Box Promotions LLC v. Koschitzki, 55 AD3d 575, 866 NYS2d 677 [2d Dept., 2008]). Thus, the plaintiff must demonstrate that if not for Zablocki's tortious conduct the plaintiff would entered into the contract.

At this stage of the litigation there are surely questions of fact whether Zablocki breached any fiduciary duty by assigning the contract to a third party, if an assignment even occurred. While the corporation had been dissolved, the corporation continues to exist during the winding up of its affairs (see, Cava Construction Company Inc., 58 AD3d 660, 871 NYS2d 654 [2d Dept., 2009]). Further, a reasonable amount of time is afforded for such winding up of the affairs of the corporation (see, Next

Millenium Realty LLC v. Adchem Corp., 2017 WL 1958696 [2d Cir 2017]). The alleged assignment occurred in such close proximity to the actual sale of the hotel that it was surely within a reasonable time period. Whether the precise elements of the tort have been satisfied are factual questions which cannot be resolved on a motion to dismiss. Therefore, the motion seeking to dismiss the twenty-first and twenty-second causes of action is denied.

Further, any motion filed by defendant seeking sanctions is denied.

Lastly, the plaintiff has moved seeking sanctions for the filing of a frivolous motion. As noted, portions of the motion were already resolved in prior motions and requests that have already been explicitly decided should not be litigated again. In this regard, the defendants are admonished for not considering explicit prior decisions in this case that resolved some of the relief requested. To be sure, a large portion of the motion was not frivolous. The requests were validly argued and required judicial analysis that was not already decided. Therefore, the motion seeking sanctions is denied.

So ordered.

ENTER:

DATED: January 16, 2024
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC