Celia v Celia
2023 NY Slip Op 30995(U)
March 31, 2023
Supreme Court, Saratoga County
Docket Number: Index No. EF20202282
Judge: Richard A. Kupferman

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

ERIC CELIA, individually and derivatively on behalf of Celia Construction, Inc. and Trackside L.P.,

Plaintiff,

-against-

SAMUEL A. CELIA, DOMINICK S. CELIA, CELIA CONSTRUCTION, INC., TRACKSIDE L.P, and TRACKSIDE APARTMENTS, LLC,

Defendants.

-and-

CELIA CONSTRUCTION, INC. and TRACKSIDE L.P.,

Nominal Defendants.

DECISION & ORDER

Index No.: EF20202282

KUPFERMAN, J.,

Plaintiff (Eric Celia) is a minority owner and former director of a family construction business, Celia Construction, Inc. ("Celia"). He is also a partner of Trackside L.P., another family business. He alleges that his two brothers (Samuel and Dominick), as corporate managers and majority owners, spent years stealing millions of dollars from the family construction business and that they hid their illegal conduct from him by refusing to provide him with the corporate books and records. Plaintiff asserts individual and derivative claims for breach of fiduciary duty, as well as claims for dissolution, conversion, breach of contract, fraud, oppression, unjust enrichment, and fraudulent conveyance, among other things.

The parties' current dispute centers around whether certain communications and documents are protected by the attorney-client and work-product privileges. The first part of the dispute (motion no. 5) concerns the depositions of Celia and Trackside L.P.'s corporate counsel (David Evans), accountant (Victoria Celia), and corporate manager/majority owner (Samuel Celia). Plaintiff asks this Court to direct these witnesses to answer specific questions that defense counsel objected to during their depositions as privileged. The questions have been marked for a ruling and both sides have submitted extensive briefing on the issue.

The second part of the dispute (motion no. 6) concerns defense counsel's alleged inadvertent disclosure of numerous emails that they contend are privileged communications. Defendants seek a protective order precluding Plaintiff from relying on them, among other things.

The Marked Deposition Questions

During the deposition of Samuel Celia, seven questions, or series of questions, were marked for a ruling. The questions generally concern inquiry into Samuel's communications with Celia's general counsel, David Evans, including discussions in 2018 and 2019 regarding what, if anything, Samuel and Mr. Evans discussed in connection with Plaintiff's requests to review the corporate books and records and whether Mr. Evans ever advised him not to provide them to Plaintiff. Samuel was also asked whether he had any discussions with Mr. Evans about removing Plaintiff as a director or creating new bylaws for the purpose of removing him as a director.

During the deposition of David Evans, thirteen questions were marked for a ruling. Some of the questions concern Mr. Evans' discussions in 2018 and 2019 with Samuel and Dominick regarding what, if anything, he advised them in connection with Plaintiff's requests to review the corporate books and records. One of the questions concerns why he sent Celia's accountant (Victoria Celia) a copy of shareholder minutes. Other questions concern Mr. Evans' understanding

of certain communications and his opinions regarding the bylaws and Plaintiff's right to review the corporate books and records. He was also asked about the reason for drafting the new bylaws which allegedly had the effect of removing the Plaintiff as a director.

Defense counsel further objected to Mr. Evans' disclosure of his communications regarding Trackside L.P., a limited partnership with connections to Celia, Samuel, and Dominick. This includes Mr. Evans' communications with Peter Karl regarding Plaintiff's claim as it related to Trackside L.P.; his communications with Samuel and Dominick regarding Trackside L.P.'s dissolution and the formation of a new entity, Trackside Apartments, LLC; and whether he advised Samuel and Dominick to transfer the assets out of Trackside L.P. to thwart Plaintiff's claim against Trackside L.P.

During the deposition of Victoria Celia, nine questions were marked for a ruling. The marked questions concern a variety of issues, including whether Mr. Evans asked her to transfer assets out of Trackside L.P.; why she thought management fees were incorrect; whether Mr. Evans implied that certain assets had not yet been transferred from Trackside L.P. prior to a certain date; what she understood Mr. Evans to mean by "allocation of income to father's K-1"; what she discussed with Mr. Evans about Trackside L.P.'s tax return and the reporting of assets being liquidated; why she differentiated between the K-1's for herself, Plaintiff, Samuel, and Dominick; her opinion regarding the Trackside L.P. tax return and the showing of the distribution of assets when the assets had not yet been fully liquidated; what she meant in her emails by certain comments she made to Mr. Evans; and why she did not include a K-1 for Plaintiff in the final 2019 tax return.

Analysis

Business organizations "may avail themselves of the attorney-client privilege for confidential communications with attorneys relating to their legal matters" (Rossi v Blue Cross & Blue Shield, 73 NY2d 588, 592 [1989]). However, "where a shareholder ... [sues] corporate management for breach of fiduciary duty or similar wrongdoing, courts have carved out a 'fiduciary exception' to the privilege that otherwise attaches to communications between management and corporate counsel" (NAMA Holdings, LLC v Greenberg Traurig LLP, 133 AD3d 46, 52 [1st Dept 2015]; see also Hoopes v Carota, 142 AD2d 906, 909-910 [3d Dept 1988], affd 74 NY2d 716 [1989]).

The application of this exception serves to prevent corporate management from hiding "behind an ironclad veil of secrecy" to the prejudice of the interests of the shareholders, as well as those of the corporation and of the public (see Garner v Wolfinbarger, 430 F2d 1093, 1101 [5th Cir 1970]; see also Hoopes, 142 AD2d at 909-910 [holding that the defendant, a trustee and a corporate officer and director, "was not entitled to shield absolutely from his beneficiaries the communications between him and his attorneys regarding pertinent affairs of the trust and of the corporation"]).

To invoke the exception, the courts require "a showing of good cause from those seeking disclosure from the fiduciary on a balancing of the competing factors for and against the privilege present in the individual case" (Hoopes, 142 AD2d at 910). This requires a "case-by-case analysis, weighing the individual circumstances presented to determine whether or not the privilege should apply" (id.). Relevant factors to consider include the following:

> "(1) the number of shareholders and the percentage of stock they represent, (2) the bona fides of the shareholders, (3) the nature of the shareholders' claim and whether it is obviously colorable, (4) the apparent necessity or desirability of the shareholders having the

> information and the availability of it from other sources, (5) whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality, (6) whether the communication related to past or to prospective actions, (7) whether the communication is of advice concerning the litigation itself, (8) the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing, and (9) the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons" (NAMA Holdings, LLC, 133 AD3d at 55 n 6 [internal quotation marks and citation omitted]; see also Hoopes, 142 AD2d at 910-911; Beard v Ames, 96 AD2d 119, 121-122 [4th Dept 1983]; Restatement [Third] of Law Governing Lawyers § 85 and Comment c [2000]).

Here, Celia is a closely held corporation with only three current shareholders. Plaintiff (a 16% shareholder) alleges that his brothers (the only other shareholders) controlled the entity and acted in their own self-interest by wrongfully diverting and wasting corporate assets. He further alleges that he was denied access to books and records as a director and that his brothers removed him (after decades of service) "just at a time when he was about to undertake an investigation [into the wrongdoing] in his capacity as director" (Cohen v Cocoline Prod., 309 NY 119, 124 [1955]).

Plaintiff further alleges that he was a partner in Trackside L.P. (with at least a 10% interest in the profits). He alleges that after his father passed away, his brothers breached an agreement to make him an equal owner of Trackside L.P. and, furthermore, they instead liquidated Trackside L.P. without his consent and fraudulently transferred the assets to a new entity that they created for their own benefit.

These are serious allegations of wrongdoing, involving alleged shareholder oppression and the corporate diversion of millions of dollars. Moreover, although Plaintiff has only a minority interest, there are no disinterested shareholders or corporate managers that can protect his interest or inquire into the attorney-client communications. His fellow shareholders and the management are certainly not the appropriate parties to investigate his claims of wrongdoing.

Further, the Court does not agree with Defendants that Samuel and Dominick did not owe Plaintiff any fiduciary duties in connection with Trackside L.P. Plaintiff allegedly contributed substantial services to Trackside L.P. and was entitled to share in at least 10% of the profits. He is named in the partnership agreement and received K-1s for several years.

The information sought is highly relevant. Mr. Evans was corporate counsel to these family-owned businesses. He allegedly communicated with Samuel and Dominick and advised them about several of the transactions that form the basis of this lawsuit, including their decisions to withhold the corporate books and records, terminate Plaintiff's position as a director, and eliminate Plaintiff's interest in Trackside L.P. Plaintiff alleges that this advice, as well as his brothers' exercise of their corporate control, adversely affected his interests as well as the interests of these entities. Moreover, there is no allegation that Mr. Evans advised Samuel and Dominick in their individual capacities. Rather, Samuel and Dominick discussed these matters in their capacity as shareholders and corporate managers with Mr. Evans, and the advice and the ultimate corporate decisions affected Plaintiff's interests.

In addition to Mr. Evans advising Samuel and Dominick on their fiduciary duties, he also played an active role in the liquidation of Trackside L.P. and the transfer of its assets. In fact, he allegedly created Trackside Apartments on behalf of Samuel on Dominick and instructed Victoria Celia to transfer over Trackside LP's bank accounts to Trackside Apartments. He further allegedly discussed Trackside L.P. with Peter Karl (a former attorney for these entities, as well as an attorney for the estate of Santo Celia) and Victoria Celia (the accountant for these entities), and he may have used the information to further the liquidation and transfer which affected Plaintiff's interests.

Not only does the disclosure sought provide necessary background facts, but it also concerns the claims/defenses at issue, including Plaintiff's claims of breach of fiduciary duty,

oppression, and fraudulent transfers, as well as Defendants' defense of good faith, among other things. The information may provide relevant details and events regarding Samuel and Dominick's withholding of the corporate books and records, their termination of Plaintiff's services as a director, their liquidation of Trackside L.P., and their transfer of Trackside L.P.'s assets to a new entity, among other things. Like in Hoopes, this may be the only evidence available on whether Samuel and Dominick's actions respecting the relevant transactions were in furtherance of the interests of the entities and the minority owner or primarily for their own interests and benefit (Hoopes, 142 AD2d at 910; see also Stenovich v Wachtell, Lipton, Rosen & Katz, 195 Misc2d 99, 111-115 [Sup Ct, New York County 2003]).

In addition, the communications apparently related to prospective actions by Defendants, not advice on past actions. Plaintiff's claims of self-dealing and conflict of interest are at least colorable, and the information sought is specific. In addition, none of the questions seek to intrude on communications regarding advice concerning this litigation itself. Moreover, while Defendants contend that Plaintiff was hostile and acting against the interests of the entities at the time of the communications, the only allegations of adversity and hostility concern Plaintiff's demands (as a director and shareholder) to inspect the corporate books and records, which is insufficient by itself to mitigate against disclosure.

Further, Defendants have failed to demonstrate that any of the questions concern work product (see Salzer v Farm Family Life Ins. Co., 280 AD2d 844, 846 [3d Dept 2001] ["counsel's conclusory assertion that such statements constitute attorney work product is insufficient to discharge plaintiffs' burden of establishing that the statements are immune from disclosure"]). True, Mr. Evans should not be required to disclose his "mental impressions, conclusions, opinions

or legal theories ... concerning the litigation" (CPLR 3101[d][2]; see NAMA Holdings, LLC, 133 AD3d at 60 n 13). However, the questions at issue do not seek to elicit such information.

To the contrary, the questions seek information and facts regarding Defendants' corporate governance and business transactions, events and transactions in which Mr. Evans personally participated, e.g., when he provided advice and/or opinions regarding the other shareholders' fiduciary duties and allegedly arranged for the liquidation and transfer of the assets of Trackside L.P. The advice, opinions, and/or directions that he provided to Samuel, Dominick, and Victoria on these issues is therefore not privileged work product, as Defendants contend, but is rather factual information subject to discovery (see Hoopes, 142 AD2d at 906-911 [finding that good cause existed to compel disclosure after defendant refused to answer questions regarding legal advice sought and provided]; see also Finn v Riley, 202 AD2d 880 [3d Dept 1994]; Graf v Aldrich, 94 AD2d 823 [3d Dept 1983]).

There is however one communication in the documents provided with these motions that weighs more heavily in favor of protection, specifically Exhibit 73 and questioning about that email, which was sent by Mr. Evans to Samuel and Dominick after Plaintiff served a demand to review the corporate books and records. The email itself was marked as attorney client privilege and work product. While normally the Court would consider the email as privileged and preclude its disclosure, it has already been disclosed and the content is brief and largely insignificant. One could also read the email as being an overreaction to the demand and/or another effort to stonewall Plaintiff's efforts to obtain books and records. Based on the circumstances, the Court will allow Plaintiff to inquire about the email and the request for books and records (which concerns the claims), although Plaintiff should avoid asking questions about attorney-client communications

regarding this litigation, Mr. Evans' preparation of Samuel and Dominick for this litigation, and Defendants' litigation strategy (see NAMA Holdings, LLC, 133 AD3d at 57-60).

In sum, Plaintiff has established the requisite good cause for the disclosure of these communications regarding the facts and the decisions to (i) withhold information about Celia from Plaintiff, (ii) engage in related party transactions; (iii) remove Plaintiff as a director of Celia; (iv) create Trackside Apartments; and (v) transfer or attempt to transfer Trackside L.P.'s assets to Trackside Apartments. This information should not be withheld from Plaintiff. Accordingly, Plaintiff's motion to compel is granted and Samuel Celia, David Evans, and Victoria Celia are directed to answer the subject questions.[1]

Further, Defendants' cross motion for a protective order is denied based on Defendants' failure to satisfy their "burden of bringing the information sought within the privilege" (Hoopes, 142 AD2d at 909). As discussed above, the fiduciary exception applies to the communications already discussed, as well as similar communications. While additional emails may involve additional considerations to balance, Defendants have failed to provide the inadvertently disclosed emails to the Court to review (see NAMA Holdings, LLC, 133 AD3d at 58-59). Nor have they discussed them in sufficient detail for this Court to intelligently consider the matter and grant a protective order. The generalized allegations of privilege are similarly insufficient to grant the relief requested (see e.g. Salzer, 280 AD2d at 846; United States v Adlman, 68 F3d 1495 [2d Cir 1995]). Accordingly, the Court denies Defendants' request for a protective order.

It is therefore,

[1] Although Plaintiff has advanced several additional contentions for the relief he seeks on his motion, and the Court finds them meritorious in many respects, those issues have been rendered academic given the application of the fiduciary exception to the deposition questions challenged.

ORDERED, that Plaintiff's motion seeking to compel is **GRANTED** and Samuel Celia, Victoria Celia, and David Evans are directed to answer the deposition questions marked; and it is further

ORDERED, that Defendants' motion seeking a protective order is **DENIED**.

This shall constitute the Decision & Order of the Court. No costs are awarded to any party. The Court is hereby uploading the original Decision & Order into the NYSCEF system for filing and entry by the County Clerk. Counsel is still responsible for serving notice of entry of this Decision and Order in accordance with the Local Protocols for Electronic Filing for Saratoga County.

Dated: March 31, 2023
at Ballston Spa, New York

HON. RICHARD A. KUPFERMAN
Justice Supreme Court