

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 3  
NASSAU COUNTY

\_\_\_\_\_  
EDUARD GITLIN, individually, and in the  
right and on behalf of KEW APARTMENT  
HOLDINGS, LLC,

INDEX No. 012131/07

Plaintiffs,

MOTION DATE: March 18, 2009  
Motion Sequence # 003, 004

-against-

ALEX CHIRINKIN, NELLIE CHIRINKIN,  
ARKADY PAVLOV, ALEX CHIRINKIN, LLC,  
ALEX CHIRINKIN ENTERPRISES, LLC,

Defendants.

\_\_\_\_\_  
The following papers read on this motion:

Notice of Motion.....	X
Cross-Motion.....	X
Affidavit in Support .....	XX
Reply Affirmation .....	X
Memorandum of Law.....	XX

This motion, by defendants, for a Protective Order under CPLR 3103 denying plaintiff's certain disclosure demands and under CPLR 3124 demanding the plaintiff's production of documents according to defendants' outstanding demands; and a cross-motion, by plaintiffs, for an order rejecting the papers submitted by the defendants, or alternatively, denying the motion of defendants Alex Chirinkin, Nellie Chirinkin, Alex Chirinkin LLC and Chirinkin Enterprises, LLC, pursuant to CPLR §§3103 and 3124, an order granting the plaintiff's motion pursuant to CPLR §§3103 and 3124, and in the event of willful non-

compliance, for an order of sanctions pursuant to CPLR §3126(3) striking the defendants' claims and defenses, together with such other and further relief as this Court deems just and proper, are **both** determined as hereinafter set forth.

Factually, the members of the entity entered into an operating agreement; and this action arises out of an alleged wrongful transfer of property from the plaintiff entity and Alex Chirinkin Enterprises, LLC to Alex Chirinkin LLC and Dr. Pavlov, and the attendant damages arising out of that transaction.

The moving defendants seek to compel the plaintiff Gitlin to produce his income tax returns and bank statements because they are relevant to the issue of the plaintiff's membership interest in the Kew LLC since 1997; and that the plaintiff has not produced evidence that, during 2003, he had an ownership interest in Kew LLC, when the property in question was sold. Therefore, counsel asserts that the plaintiff's income tax returns are the sole source of that information, and they would show what funds the plaintiff used to make the alleged loan. With respect to the request for a protective order, defendants' counsel argues that the plaintiff's demand for tax returns and bank statements is not substantiated and is irrelevant.

The plaintiffs' attorney notes the lack of an affirmation of good faith as required by 22NYCRR 202.7 and lacks, as well, the verification pursuant to 22NYCRR 130-1.1-a; counsel notes that, without a joinder by the defendant Pavlov, he is not entitled to any relief that the movants may obtain. Counsel recounts that she served Notices of Discovery at the very outset of the action, i.e., March 6, 2008 and March 25, 2008, as well as May 10, 2008. She sets forth a long series of letters and other communications made by her in an ongoing attempt to resolve discovery disputes, i.e., April 12, 2008, April 23, 2008, June 7, 2008, July 1, 2008 and August 12, 2008, without any production of the tax returns demanded of the defendants. She states that the demands made of the defendants are relevant to the causes of action for fraud, breach of fiduciary duty, aiding and abetting such breach and violations of Debtor and Creditor Law. With respect to the defendants' demands for the plaintiff's tax returns and bank statements, counsel argues that the defendants' assertions of necessity are repetitive and frivolous inasmuch as the defendants have been provided with eleven separate documents showing the plaintiff's interest in Kew, including, but not limited to, the operating agreement, a company resolution, a contract of sale, and several others; all of which clearly demonstrate the individual plaintiff's interest in Kew. Further, she argues, the defendants have not produced any document which shows that Mr. Gitlin is not a member of Kew; and

at some point in time ceased being a member. With respect to the alleged loan from Chirinkin to Gitlin, there is no logical rationale for such documentation as substantiation for that allegation. Plaintiffs' counsel argues that the facts and allegations warrant the production of the documents demanded by the plaintiffs, as the deeds (as suggested by the defendants) will not show the consideration for the transaction. The individual plaintiff and a former partner both assert that their former accountant was terminated for incompetence, and such should be considered when his affidavit is also considered.

The Chirinkin defendants' attorney avers that his good faith attempts to obtain discovery was fulfilled by the conference before this Court on August 18, 2008; and that the motion is timely, having been made within ten days after this Court's decision on the plaintiff's motion to amend the Amended Verified Complaint. He asserts that plaintiffs' counsel distorts the actual sequence of events relative to discovery; that the defendants have made a large production of documents on May 29, 2008 and supplemented it on August 7, 2008; and he repeats his assertion that the plaintiff has not documented his membership in Kew at the time of the allegedly fraudulent transaction and any default of this warrants the relief requested in this motion. Chirinkin's attorney argues that, with respect to the \$430,000 loan, the plaintiff has not documented such transfer of money to Chirinkin; and that the existing document demonstrates that the money is, in fact, owed to Chirinkin. He further argues that the plaintiff has not demonstrated how the defendant's income tax returns and bank statements are indispensable to the plaintiff's claims.

### **DECISION**

“It is well settled that “[t]he supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed”. (Mattocks v White Motor Corp., 258 AD2d 628, 629; see Kaplan v Herbstein, 175 AD2d 200)”.

(Gilman v Ciocia, Inc. v Walsh, 45 AD3d 531, 845 NYS2d 124, 2<sup>nd</sup> Dept., 2007).

More particularly, with respect to the defendants' request for the individual plaintiff's tax return and bank statements in order to possibly prove that he was not a member of Kew at the time when the subject transactions took place, the individual plaintiff has demonstrated his membership in Kew, LLC on March 21, 1997, the date of the execution of the Kew LLC operating agreement. That document identifies Mr. Gitlin as having a 50% ownership interest in Kew LLC. That document imposes several obligations on the members, **inter alia**, a fiduciary obligation and responsibility to the LLC and its members. That document also requires some affirmative action to accomplish the withdrawal of a member and that must be accomplished "either in writing or at a meeting called for such purpose" (Article IX, 9.1). The defendants have not produced any evidence of such an event, and without such event, there is a clear presumption that such membership continues.

The defendants' demand for documentation to prove the negative (i.e., that he was not a member at the time of the subject transaction) would be material and necessary if there was proof that, pursuant to 9.1 of the agreement, his status changed. The defendants have not demonstrated that the plaintiff's tax returns and bank statements would be a more definitive form of proof that is "material and necessary to the defense" (CPLR 3101) herein than a document that would be in the defendants' possession. Put another way "[t]he defendant[s] failed to meet [their] burden of showing that the relevant information possibly contained in the plaintiff's tax documents. . . cannot be obtained from any alternative source" (**Banigan v Hill**, 57 AD3d 463, 868 NYS2d 313, 2<sup>nd</sup> Dept., 2008). With respect to that part of the defendants' demand for production of tax returns so that discovery might show the existence of a loan between the parties, the defendants have not rationalized how such documents would show the existence of such loan. Accordingly, that portion of the defendants' motion which seeks to compel the production of documents is **denied**.

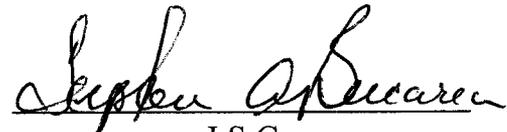
Turning now to the plaintiffs' request for documentation, which process has been ongoing and protracted for a significant number of months, the plaintiffs' attorney has appropriately substantiated that the production of the documents that she has demanded from the defendants are "material and necessary to the prosecution" (CPLR 3101(a)) of her action for fraudulent transfers of property and the profits therefrom, violations of the Debtor Creditor Law, and breach of fiduciary duty. The tax documents, both corporate and individual, are also necessary to show that Kew was rendered insolvent over the years that the defendants were allegedly perpetrating this fraud on the plaintiff. Accordingly, that part of the defendants motion which seeks a protective order is **denied**; and conversely, the plaintiffs'

motion to compel the production of such documents is **granted**.

The production of those documents shall be made to the plaintiffs' attorney's office within 20 days after service of a copy of this order upon defendants' counsel.

A status conference is scheduled for August 17, 2009 at 9:30 a.m. in Chambers of the undersigned.

Dated JUL 06 2009

  
J.S.C.

**ENTERED**

JUL 07 2009

NASSAU COUNTY  
COUNTY CLERK'S OFFICE