

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN PART 12

Justice

WILLIAM NG, et al.

INDEX NO. 114291/10 E

- v -

MOTION DATE _____

STEVEN NG, et al.

MOTION SEQ. NO. 001

The papers considered on this motion (~~and cross motion~~) are enumerated in the attached decision/order.

Cross-Motion: Yes No

^{is} Upon the foregoing papers, it is ORDERED that this motion (and cross motion) ~~are~~ decided in accordance with the annexed decision and order.

Dated: 4/17/2012

Paul G. Feinman
J.S.C.

- 1. Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate:
 - SETTLE ORDER/JUDGMENT SUBMIT ORDER/JUDGMENT
 - DO NOT POST FIDUCIARY APPOINTMENT
 - REFERENCE
 - PC/CC 5/23/2012 2:45pm

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
WILLIAM NG and CHOUK NG,
Plaintiffs,

against

STEVEN NG, individually and as fiduciary of
CHOUK KING CO. INC., and TIEN YICK CO.
INC.; and WILSON NG, individually and as
fiduciary of CHOUK KING CO. INC., and
TIEN YICK CO. INC.,
Defendants.

Index Number 114291/2010E
Mot. Seq. No. 001

DECISION AND ORDER

-----X
For the Plaintiffs:
Agus & Partners, P.C.
By: Louis Belfiore, Esq.
75 Maiden Ln, ste 607
New York, NY 10038

For the Defendants:
Poch & Luckow, P.C.
By: Howard Poch, Esq.
15 Maiden Ln, ste 1601
New York, NY 10038

E-filed papers considered in review of this motion to quash :

Papers	E-filing Document Number:
Order to Show Cause, Affidavit of Service	3, 10, 11
Affirmation in Support, Exhibits	4, 5
Affirmation of Good Faith and, Emergency and Exhibits	6 - 9
Affidavit in Opposition, Exhibits	13, 13-1
Reply Affirmation, Affidavits	16, 17, 18
Transcript of oral argument	20

PAUL G. FEINMAN, J.:

Defendants, two brothers and their two corporations, move by order to show cause to quash, fix conditions, or modify a non-party subpoena duces tecum dated November 2, 2011, served by plaintiff, also their brother, on defendants' accountant, and to grant a protective order with regard to the subpoena, pursuant to CPLR 2304 and 3103.¹ For the reasons which follow, defendants' motion is granted.

¹By stipulation dated May 2011, the parties agreed that Chouk Ng, the father, would withdraw as a party without prejudice, and that the caption would be amended (Doc. 5 at 14-15, Aff. in Supp. ex. C, Stipulation). The stipulation appears not to have been served on the County Clerk's office in order to change the caption.

This is an action seeking an accounting. According to the verified complaint dated March 29, 2011, plaintiff is an officer and director, and a shareholder, and has “legal and equitable ownership interests” in the two defendant corporations, both of which are organized under the laws of the State of New York (Doc. 5 at 6 *et seq.*, Aff. in Supp. ex. B, Ver. Compl. ¶¶ 2-4, 10). It alleges that on about January 1, 2000, the individual defendants “seized control” without authority, and “continue to maintain exclusive control and possession” of the corporations’ records (Doc. 5 at 6 *et seq.*, Aff. in Supp. ex. B, Ver. Compl. ¶ 5). Plaintiff has sought the financial reports and an accounting from defendants of both corporations and asked that he be paid his rightful percentage of net profits, but defendants have refused (Doc. 5 at 6 *et seq.*, Aff. in Supp. ex. B, Ver. Compl. ¶¶ 6-7). Plaintiff alleges that defendants have been diverting corporate funds and assets for their own benefit, and have wrongfully converted corporate money and assets for personal use (Doc. 5 at 6 *et seq.*, Aff. in Supp. ex. B, Ver. Compl. ¶¶ 10-16). In addition, although plaintiff has advised defendants that he “wanted to return and resume working for the [c]orporations,” defendants refused his request and refused him access to any of the corporations’ assets (Doc. 5 at 6 *et seq.*, Aff. in Supp. ex. B, Ver. Compl. ¶ 19).

Defendants’ verified answer denies that plaintiff is or was a shareholder or officer of either corporation and contains seven affirmative defenses, including failure to state a cause of action, statute of frauds, statute of limitations, and that plaintiff lacks standing (Doc. 5 at 16 *et seq.*, Aff. in Supp. ex. D, Ver. Ans.).

The subpoena duces tecum, dated November 2, 2011, seeks

Financial statements, quarterly and annual; financial records; copies of Federal and State Income Tax Returns, including all schedules . . . and all financial

matters pertaining to the operations of the buildings . . . for the period January 1, 2000 to date inclusive, now in your custody, and all other deeds, evidences and writings, which you have in your custody or power, concerning the aforesaid...”

(Doc. 5 at 1, Aff. in Supp. ex. A, Subpoena Duces Tecum). Defendants argue that the subpoena should be quashed for several reasons, including that it is burdensome and lacking in specificity, and that the documents it requests are only available to shareholders and officers of the corporations, with the issue here being that plaintiff has not established that he is or was a shareholder or an officer. They also argue that the subpoena should be quashed on procedural grounds. First, although CPLR 2303 (a) requires that a subpoena is to be served on “each party who has appeared in the litigation,” plaintiff did not serve a copy on defendants’ attorney, who states he only learned of its existence through defendants’ accountant (Doc. 4, Aff. in Supp. ¶ 13). Defendants further argue that the subpoena is facially defective and should be quashed because it does not give notice pursuant to CPLR 3101 (a) (4) of the reasons why the disclosures are sought or required (Doc. 4, Aff. in Supp. ¶ 14, citing *Matter of American Express Prop. Cas. Co. v Vinci*, 63 AD3d 1055, 1056 [2d Dept 2009]).

In opposition to the motion to quash, plaintiff contends that the only way to determine his “respective ownership interest” in the two corporations, is through a “thorough[] review [of] the corporate records, financial and tax information, and related matter” (Doc. 13, W. Ng Aff. ¶ 13). He avers that the corporations are private closely held corporations which have been owned, managed, and operated by members of the family since their inception (Doc. 13, W. Ng Aff. ¶ 6).² He states he “turned over actual management” of the corporations and the realty “several

² He points out that after this litigation was commenced, the New York State Department of State listed Tien Yick Co. as “dissolved by proclamation/annulment of authority as of April 27, 2011” (Doc. 13, W. Ng Aff. ¶ 11, citing Doc. 13-1, ex. 2).

years ago,” but for more than 15 years, was a manager, officer, and holder of a beneficial interest, and has not relinquished this beneficial ownership interest; he remains “a current beneficial owner today.” (Doc. 13, W. Ng Aff. ¶ 7). He states that he previously issued and signed corporate checks, executed agreements and contracts, and had authority to bind the corporations in the conduct of business (Doc. 13, W. Ng Aff. ¶ 8). He provides copies of certain documents signed by him which indicate variously that he was head officer, managing agent, emergency contact, officer, and responsible person, and that he is currently listed as the party authorized to accept service of process on behalf of Chouk King Co. (Doc. 13, W. Ng Aff. ¶¶ 8-10; Doc. 13-1, ex. 1 [Agent for process], ex. 3-5 [various documents dated 2002, 2006, 2007 of New York City Housing Preservation & Development [HPD]]). Plaintiff also states that he had received regular disbursements from the net profits of the corporations but has not received his “rightful share” for more than 10 years, despite repeated demands (Doc. 13, W. Ng Aff. ¶ 12).

Defendants dispute plaintiff’s characterization of the facts. They provide an affidavit by their father, former co-plaintiff Chouk Ng, who states that plaintiff “is not and has never been a shareholder” of either corporation, has no interest, “beneficial or otherwise” in the shares or assets of either company, and never received dividends, distributions or other compensation as a shareholder (Doc. 17, Chouk Reply Aff. ¶¶ 5-7). Chouk Ng further states that the former accountant for Chouk King Co. Inc. died in 2004, and their current accountant “does not have records prior to” 2005, when he was first hired (Doc. 17, Chouk Reply Aff. ¶ 13). In addition, defendants point out numerous seeming inconsistencies in plaintiff’s admissions, including his statements both that he was excluded from the corporations and that he turned over actual management, and that although he has been excluded for 10 years, the documents proffered by him showing his corporate titles were all created after the year 2000.

They argue that because plaintiff's status vis-a-vis the corporations is disputed, and he does not provide any evidence to show that he is in fact a shareholder or officer or director such that he would be entitled to any of the corporate documents, the subpoena should be quashed, or should be limited or conditions fixed, pursuant to CPLR 3103 (a) and CPLR 2304.

Business Corporation Law § 624 sets forth the rules concerning the maintenance of corporate books and records, the right of shareholders, upon notice, to inspect the minutes of the proceedings and record of shareholders, the procedure to follow where inspection is refused, and that upon written request by a shareholder, an annual balance sheet and profit and loss statement for the preceding fiscal year is to be provided, as well as, in certain instances, interim balance sheets or profit and loss statements. Notably, BCL § 624 (g) provides that the books and records of the corporation, including "a record containing the names and addresses of all shareholders, the number and class of shares held by each and the dates when they respectively became the owners of record thereof," "shall be prima facie evidence of the facts therein stated in favor of the plaintiff in any action or special proceeding against such corporation."

CPLR 2304 provides for a motion to quash, fix conditions or modify a subpoena. CPLR 3103 provides for a protective order that can be used to limit, condition or regulate the disclosure device used. Here, where plaintiff's entitlement to access records of the two corporations is sharply disputed, and his proof is currently insufficient to establish his status as a shareholder or corporate officer, defendants' arguments are persuasive that the documents requested by the subpoena to be produced by defendants' accountant, namely financial and tax records, need not be produced.

However, at the preliminary and compliance conferences in this matter, and at the oral argument of this motion, the court discussed with counsel what documents plaintiff should be

allowed to demand in order to have a fair opportunity to establish his relationship to the corporations. The court indicated in the January 25, 2012 compliance conference order that a modified discovery order would need to be issued after the court's determination of the instant motion. Accordingly, the parties are directed to appear for a compliance conference on May 23, 2012 at 2:15 p.m.

In the meantime, the defendants are directed to produce for in camera review, not later than May 16, 2012, the corporate records containing the names and addresses of all shareholders, the number and class of shares held by each and the dates when they respectively became the owners of record, from the inception of the two corporations until the present, and any minute books or other documentation that would show the history of the two corporations' structure and leadership, also from inception to the present.

The documents, if not in English, should be produced both in their original form and with a certified translation, and should include a document-by-document explanation of what each particular document shows, including the year it was created and the reason for its production. Any gaps in documents that are statutorily required to be created and maintained, must be explained and the inference will be, unless shown otherwise, that the missing documents would show that plaintiff was likely a shareholder or an officer during the period of time for which no documents are provided. The documents should be Bates stamped. Whether these documents should be provided to the plaintiff will be among the topics discussed at the May 23, 2012 compliance conference.

Defendants are to submit these documents directly to the Part 12 Clerk, Mr. Michael Kasper, in room 212 of 60 Centre Street, no later than May 16, 2012. Accompanying the documents should be a letter, a copy of which shall be mailed to plaintiff's counsel, noting the

number of documents provided to the court and the date.

It is

ORDERED that defendants' motion to quash or modify the subpoena duces tecum dated November 2, 2011, is granted; and it is further

ORDERED that the compliance conference scheduled for April 25, 2012 at 2:15 p.m. in room 212 of 60 Centre Street, is adjourned and rescheduled for May 23, 2012 at 2:15 p.m.; and it is further

ORDERED that the corporate documents which are to be reviewed in camera in accordance with this decision shall be produced no later than May 16, 2012 in accordance with the procedures set forth herein.

This constitutes the decision and order of the court.

Dated: April 17, 2012
New York, New York



J.S.C.

(2012 Pt 12 D&O_114291_2010_001_jh)