

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

PRESENT: JUDITH J. GISCHE

PART 10

Justice

PRIMESTONE LLC

INDEX NO.

600715/06

MOTION DATE

- v -

MOTION SEQ. NO.

002

MOTION CAL. NO.

LICHTENSTEIN &
LIGHTHOUSE LLC

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED

MAY 05 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/28/08

JUDITH J. GISCHE, J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York
County of New York: Part 10

Primestone, LLC,

Plaintiff,

Decision/Order

-against-

Index#602715/06

David Lichtenstein and
Lighthouse Prime LLC,

Mot. Seq. #002, 003

Defendants.

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS

NUMBERED

Motion Seq. # 002

Notice of Motion, SRP affd. Dated 10/19/07, exhibits.....1
CJ affirm in Opp dated 11/5/07, exhibits.....2
SRP Reply affd. Dated 12/05/07, exhibits.....3

Motion Seq. 3 003

Notice of Motion to dismiss.....1
CJ affirm. Dated 11/05/07, exhibit.....2
SRP affd. Dated 11/30/07, exhibits.....3

FILED
MAY 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff moves to compel defendants to comply with providing responses to its first set of interrogatories and its first demand for documents, each dated July 9, 2007 (mot. Seq. #002). Defendants have separately moved to dismiss the action for lack of subject matter jurisdiction (mot. Seq. # 003). Defendants' earlier motion (mot. Seq. #001) to dismiss the complaint for lack of jurisdiction was denied. Since the two motions presently before the court are interrelated, the court consolidates them for determination in this single decision.

Plaintiff is the minority member of defendant Lightstone Prime, LLC ("Lightstone"). Defendant David Lichtenstein ("Lichtenstein") is the majority and managing member of the Lightstone. Lightstone is a Delaware LLC which is located in Lakewood, New Jersey. Plaintiff is a Delaware LLC which is located in Manhattan. On December 11, 2003 plaintiff and Lichtenstein entered into an LLC agreement for Lightstone ("LLC agreement"). According to the LLC agreement, Lighthouse owns and manages Prime Outlets Acquisition Company, LLC ("Prime Outlets"), which in turn owns and operates shopping centers and malls throughout the United States.

The parties' present dispute concerns whether plaintiff received its share of capital proceeds distributions. Although plaintiff acknowledges that its percentage share in the business is modest, it claims that the monetary distributions due to him are quite large. Thus, he claims that in 2005 he last received a distribution of approximately \$700,000. He further alleges that since that time Lighthouse has engaged in capital events of \$800 million and \$388 million respectively, yet he has not been given any documentation or proceeds due him as a result of such events.

The complaint sets forth three causes of action respectively for breach of fiduciary duty [1st cause of action]; breach of contract [2nd cause of action] and accounting [3rd cause of action]. On the first and second causes of action plaintiff is seeking monetary damages. On the third cause of action it is seeking "an order directing defendants to provide plaintiff with full and complete information regarding the finances and operation of Lightstone Prime, including but not limited to refinancing of debt, property sales, acquisitions, and other capital transactions, periodic operating results by individual properties, all financial reports regarding Prime Outlets, all books of

Lighthouse Prime, and all other information necessary to the preparation of plaintiff's tax returns".

Motion to dismiss

The gravamen of defendants' second motion to dismiss is that because the complaint is, at its core, a request for Lighthouse' documents, it is governed by the LLC agreement and Delaware Law. Defendants further argue that under Delaware Law the Delaware Court of Chancery has exclusive jurisdiction over issues regarding what documents are legally required to be provided to plaintiff.

Section 18-305(f) fo the Delaware Code provides in pertinent part:

"Any action to enforce any right arising under this section shall be brought in the Court of Chancery...the court of Chancery is hereby vested with exclusive jurisdiction to determine whether of not the person seeking such information is entitled to the information sought."

Relying also on the Federal district court decision in Reserve Solutions Inc. v Vernaglia, 438 F Supp. 2d 280 (SDNY 2006), defendants seek dismissal of the entire complaint. For the reasons that follow, however, defendants motion is denied.

The controlling authority on this issue of law is the Appellate Division, first department. decision in Sachs v. Adeli (26 AD3d 52[2005]). In interpreting the application of the identical Delaware statute, the court ruled on whether the exclusive jurisdiction provision divested the New York Courts of jurisdiction over such controversies. It held that the New York courts are not so divested of jurisdiction. The court reasoned:

"As a threshold issue, although KNY was incorporated in Delaware, that does not divest New York of its interest in adjudicating this matter. The defendant-respondents' allegation that New York lacks jurisdiction to decide this case is based solely on the fact that the Delaware Commerce

and Trade Law (Del Code Ann, tit 6, § 18-305 [f]) vests exclusive jurisdiction over this dispute in the Delaware court of Chancery. That, however, does not mandate that this case be tried in Delaware. This court has repeatedly held that '[a] statute or rule of another State granting the courts of that State exclusive jurisdiction over certain controversies does not divest the New York courts of jurisdiction over such controversies.' "(citations omitted)

The court went on to state:

" The Court of Appeals has held that the doctrine of comity 'is not a rule of law, but one of practice, convenience and expediency.' If an action concerns a commercial transaction in New York and it is a matter on which the New York courts would otherwise have proper jurisdiction, comity does not prevent the New York courts from exercising jurisdiction." (citations omitted).

This court has already ruled that New York has jurisdiction over the matters presented (See: Order Gische, J. dated March 22, 2007). Other than being the place of LLC formation, the underlying business transactions have no particular connection to the State of Delaware. Moreover, the Delaware statute only arguably applies to the third cause of action. The jurisdiction over claims for monetary damages in the first two asserted causes fo action do not even come within the purview of the Delaware law. Under these circumstances, the court finds that jurisdiction is properly had in the courts of this State. The motion to dismiss is, therefore, denied.

Motion to compel

Plaintiff served a demand for production and interrogatories on defendant on or about July 9, 2007. By preliminary conference order the responses, including any objections, were due August 9, 2007 or within 30 days of service. Defendants did not respond and plaintiff was compelled to make this motion. After the motion was made, defendants responded to plaintiff's first set of interrogatories and then to plaintiff's

document demand. The responses consisted primarily of objections. No interrogatory was substantively answered and very few documents were provided. Plaintiff now seeks to compel compliance or, alternatively, to have this court order that defendants' answer be stricken.

Defendants opposition to the motion is that plaintiff's access to documents is limited under the LLC agreement and Delaware law. They claim that plaintiff is only entitled to Lightstone Books of account, Lightstone tax returns and any financial reports regarding Prime Outlet that Lightston receives from Prime Outlet. Defendants claim they have provided all of the documents to which plaintiff is entitled. In particular they argues that plaintiff has no right to documents from Prime Outlets which is a separate legal entity. Defendants do not even try to justify the myriad of other objections they raises in their actual responses.

Defendants arguments are rejected. Even if under the LLC agreement plaintiff is only entitled to certain categories of documents, now that this matter is being litigated the documents required are governed by the legal scope of discovery under CPLR article 31 and not the LLC agreement. Reserve Solutions Inc. v Vernaglia, 438 F Supp. 2d 280 (SDNY 2006). Contrary to defendants' position, the litigation seeks more than just an accounting, it seeks monetary damages for breach of fiduciary duty and breach of contract. Thus this legal action is not an end run to get documents that the plaintiff is not otherwise entitled to. Defendants are obligated to produce all matter and information material and necessary in the prosecution or defense of this action. CPLR 3101(a). The court rejects any claim that the LLC agreement shields documents from production in this action.

Respect this standard of disclosure, the court finds that neither the answers to interrogatories nor the response to demands for material are responsive. To the extent that they raise general objections to each and every request, they are incomprehensible. Thus, for example, each raises a general objection of attorney client privilege without identifying the document of information to which such privilege might apply. When general objections are then mixed with a claim that certain requested documents are not in defendants' custody control or possession, the objections are even more muddled. How can defendants assert a legitimate claim of privilege as to documents that are not in their custody, control or possession.

The interrogatories and demands are not vague and/or ambiguous. The court rejects any refusal to answer on account of such objection. Although defendants claim certain interrogatories are burdensome, they have not satisfied their own burden to prove them so. This objection is flatly rejected.

The court concludes that no serious effort was made by defendants to either answer the interrogatories or provide the material requested. The court will give defendants one final opportunity to provide substantive answers to the interrogatories and demand for materials within 30 days of the date of this decision. In the event defendants fail to comply with this order, plaintiff may renew its motion for CPLR article 31 discovery sanctions.

All of the objections asserted by defendants, excepts as to privilege, are rejected by the court. Objections as to privilege can only be asserted by identifying particular documents withheld and the privilege asserted with respect to such document on a privilege log. The privilege log must be provided to plaintiff simultaneously with the

other discovery ordered herein to be produced. Any document for which a privilege is asserted shall be separately maintained by defendants for *in camera* review by the court, if necessary. Failure to follow this procedure will be deemed a waiver of any objection based on privilege.

Conclusion

In accordance herewith it is hereby:

ORDERED that plaintiff's motion to compel (mot. Seq. #002) is granted to the extent set forth herein, and it is further

ORDERED that defendants' motion to dismiss (mot. Seq. # 003) is denied in its entirety, and it is further

ORDERED that this matter is set down before this court for a compliance conference on June 19, 2008 at 9:30 am

ORDERED that any requested relief not expressly addressed herein is denied, and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
April 28, 2008

SO ORDERED:



J.G. J.S.C.

FILED
MAY 05 2008
COUNTY CLERK'S OFFICE
NEW YORK