

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

TODD B. ROSENFELD, AMY G. LERNER,
STEVEN E. ROSENFELD and EDITH ZELMAN,

INDEX No. 011965/07

Petitioners,

MOTION DATE: Jan. 17, 2008
Motion Sequence # 004

-against-

ANTHONY LUCCARO, LURO HOLDING
CORP. and TOM'S POINT MARINA, INC.,

Respondents.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X
Reply Affirmation X

This motion, by petitioners, for an order pursuant to §§ 3124 and 3126:

- i. compelling Respondents to produce the information specified in the Fisher Affirmation;
- ii. compelling Respondents to consent to the release of the Corporations' tax records maintained by Edward Leuschner; or alternatively, compelling Mr. Leuschner to produce those records;

- iii. compelling Respondents to execute such powers of attorney as are necessary to authorize federal and state taxing authorities to release the Corporations' tax records to the Petitioners;
- iv. providing that failure to fully comply with this Court's order by a date certain will result in a further order precluding Respondents from contesting that Petitioners are 50% owners of the Corporations; and
- v. granting such further relief as the Court deems just and proper,

is determined as hereinafter set forth.

FACTS

This dissolution proceeding of Luro Holding Corp. and Tom's Point Marina, Inc. (collectively, the "Corporations") is brought pursuant to New York Business Corporation Law. The Corporations own and operate the Tom's Point Marina. Petitioners claim, collectively, to own a 50% share in both Corporations. Respondents maintain that Petitioners are not shareholders of either Corporation; Mr. Luccaro is the Corporations' only shareholder and all evidence submitted by Petitioners is fraudulent.

An evidentiary hearing was ordered, pursuant to BCL §§1108 and 1109, to determine whether Petitioners are, in fact, shareholders, and the percentage of such holdings, if any. The evidentiary hearing began on November 27, 2007 before the Honorable Thomas Dana. Special Referee Dana, after hearing testimony, adjourned the hearing, authorized limited discovery and directed Respondents to produce the following documents on or before December 21, 2007: (1) all federal, state and local tax documents for Tom's Point Marina, Inc. and Luro Holding Corp. from 1983 until the present; (2) all certificates concerning ownership of shares in Tom's Point Marina, Inc. and Luro Holding Corp.; (3) all minute books or other corporate documents reflecting any meetings of directors and/or shareholders of Tom's Point Marina, Inc. and Luro Holding Corp.; and (4) all documents concerning the formation and incorporation of Tom's Point Marina, Inc. and Luro Holding Corp. and all documents concerning any changes in the corporate status of Tom's Point Marina, Inc. and Luro Holding Corp. The respondents have not

produced these documents as directed.

PETITIONERS' CONTENTIONS

Petitioners assert that respondents have refused to produce the documentation that the Honorable Thomas Dana directed respondents to produce; and that respondents have refused to authorize the release of the Corporations' tax records maintained by Mr. Leuschner, the Corporations' accountant. Petitioners' attorney avers that the respondents have refused to authorize the release of the Corporations' tax records from the federal and state taxing authorities. Counsel argues that respondents' continued refusal to produce the required documentation is a clear failure by respondents to meet the burden imposed by the court and set forth in the October 29, 2007 order. Further, the petitioner's counsel avers that the reason for the respondents' delay is that the release of the corporate tax documents and other corporate records will undermine respondents' baseless claim to be sole owner of the Corporations and its equally frivolous refusal to acknowledge that petitioners are 50% owners in the Corporations. Petitioners respectfully request that the court put an end to respondents' meritless, time-consuming and expensive tactics of evasion.

RESPONDENTS' CONTENTIONS

In opposition to the motion to compel, respondents contend that petitioners have admitted, and the court has previously ruled, that petitioners are not entitled to corporate document discovery until after a hearing determines whether petitioners are, in fact, shareholders. The respondents' attorney directs the court's attention to the original order to show cause, amended order to show cause and reply affidavit of petitioner Todd Rosenfeld and points out that these requests for document production were all denied. The issue of petitioners' request for privileged corporate documents has been determined by court order and is therefore res judicata and thus discovery is not available to petitioners unless and until petitioners are found to have standing.

Counsel for the respondents argue that, procedurally, petitioners are not permitted corporate documents disclosure. Respondents contend that, pursuant to the CPLR, there is no authorization in a special proceeding to authorize discovery prior to a scheduled hearing. Further, petitioners may not move for a motion to compel, pursuant to 3124 or 3126, until after the issue has been joined and an answer has not been served.

Additionally, the majority of petitioners failed to attend the hearing on their own behalf and disregarded respondents' subpoenas to be present and that failure requires the denial of this motion.

PETITIONERS' REPLY

The petitioners assert that respondents' Affirmation in Opposition ignores the current posture of the case and of this motion and once again directs the Court's attention to the ruling of the Special Referee Dana, which authorized limited discovery in connection with this action. Respondents have refused to provide the information that Special Referee Dana has ordered. Respondents have also refused, and continue to refuse, to authorize the Corporations' accountant, Edward Leuschner, to produce the Corporations' tax records to petitioner, in response to an outstanding subpoena. Petitioners' attorney argues that the respondents have refused, and continue to refuse, to execute powers of attorney to allow for the release of these records by the federal and state taxing authorities, and he expects these documents to show that for a period of over twenty years, Mr. Luccaro has admitted, under the penalty of perjury, in many documents filed with state and federal government, that petitioners are 50% shareholders, as they have claimed to be. Petitioners further assert that respondents' argument that this request for relief has been previously denied is incorrect. Additionally, that respondents' other arguments are all part of an effort to obfuscate the issues.

DECISION

Petitioners claim, collectively, to own a 50% share in each of the two Corporations and have submitted documentary evidence supporting such. Respondents argue that petitioners are not shareholders in either Corporation, that Anthony Luccaro is the Corporations' only shareholder and as such all documentary evidence submitted by petitioners is fraudulent.

The Court ordered an evidentiary hearing to determine whether petitioners are, in fact, shareholders, and the percentage of such holdings, if any. Inasmuch as the respondents are contesting the legitimacy of the evidence presented by the petitioners, the respondents carry the burden of proving such at the hearing (October 29, 2007 Order, Pg. 5). Referee Dana ordered that further disclosure was necessary to determine whether the petitioners are 50% shareholder in the Corporations and therefore have standing to commence this proceeding for dissolution. Referee Dana granted petitioners leave to seek

limited discovery. Although there is a general presumption against discovery in a special proceedings, CPLR 408 provides for such procedure. Further, the fact that this Court struck a TRO seeking disclosure is neither res judicata nor the law of the case.

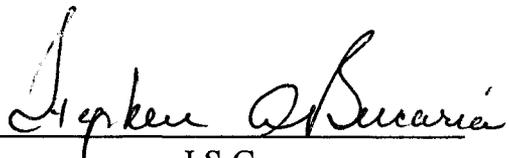
The court has broad discretion in supervising disclosure and in fashioning just and proper remedies concerning failure to comply with court ordered disclosure (Falco v. Caterpillar, Inc., 248 A.D.2d 352, 2nd Dept., 1998). The discretion to compel compliance in discovery matters is soundly vested with the trial court (Sladowski-Casolaro v. World Championship Wrestling, Inc., 47A.D.3d 803, 2nd Dept., 2008).

Those documents, which Referee Dana directed to be produced, shall be produced for in camera inspection before him. The respondents shall formally enumerate and identify those documents that will be produced and those that are not in their possession, custody or control within 30 days after service of a copy of this Order upon respondents' counsel.

Additionally, respondents are ordered to direct Edward Leuschner, the Corporations' accountant, to release the Corporations' Federal and State tax records and returns to Referee Dana under the same conditions.

Accordingly, the petitioners' motion is **granted** as set forth herein, and failure to comply with the provisions of disclosure herein set forth may result in an order precluding the respondents from contesting petitioner's 50% ownership of the corporations.

Dated MAR 14 2008


J.S.C.

ENTERED

MAR 18 2008
NASSAU COUNTY
COUNTY CLERKS OFFICE