

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

MICHAEL VECCHIO,

Plaintiff,

-against-

POST ROAD ENTERTAINMENT, LLC,
DONALD G. KELLY, TODD KOSAKOWSKI,
ALBERT SILVERMAN, TRI-KELLY'S, INC.,
WPENT, INC., SONOTURTLE, LLC,
TURTLECOVE OF STANFORD, LLC,
CLUB, LLC, GREENWICH BEAR, LLC and
HULA'S NEW HAVEN, LLC,

Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 187/08

MOTION DATE: March 21, 2012
Motion Sequence # 004, 005

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affirmation in Opposition..... XX

Motion by defendants to quash the subpoena served on Kevin Mullins, Esq. is **denied**. Cross-motion by plaintiff to compel Kevin Mullins, Esq. to appear for a deposition is **granted** to the extent indicated below.

This is an action for an accounting. Plaintiff Michael Vecchio and defendants Donald

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Kelly, Todd Kosakowski, and Albert Silverman formed defendant Post Road Entertainment, LLC. The purpose of the company was to operate bars and restaurants. Vecchio alleges that he provided \$850,000 of financing, and Kelly and Kosakowski operated the business.

On October 29, 2004, the four members of Post Road entered into a “buy-sell” agreement whereby the other members had a right of first refusal, if a member wished to sell his interest. If any member died, his interest would be purchased by Post Road for \$1.5 million. The purchase price was to be paid from the proceeds of life insurance policies held by the company on the life of the members.

This action was commenced on January 4, 2008. In the first cause of action, plaintiff seeks an accounting with respect to the affairs of Post Road and the return of his investment. In the second cause of action, plaintiff alleges that defendants breached Post Road’s operating agreement, as well as the buy-sell agreement. Plaintiff asserts various other claims, including fraud, unjust enrichment, and breach of fiduciary duty.

Michael Vecchio died on February 19, 2010. By order dated August 11, 2011, Vecchio’s executor, Philip J. O’Reilly, was substituted as plaintiff in the action. In the order, the court denied defendants’ motion to disqualify O’Reilly’s law firm, O’Reilly, Marsh & Corteselli, PC, from representing plaintiff in the action. The court determined that defendants had not established that O’Reilly was likely to be called as a witness concerning Post Road’s operating agreement, the buy-sell agreement, or any other significant issue in the case.

On January 16, 2012, plaintiff served a subpoena on Kevin Mullins, Esq., an attorney who represented Post Road and drafted its operating agreement. The subpoena required Mullins to appear for a deposition at the courthouse on February 2, 2012. The subpoena called for the production of all financial records concerning business dealings between Vecchio and the defendant limited liability companies. Although the subpoena does not contain a notice as to why discovery was sought from Mullins, plaintiff has made the required showing in opposition to the present motion (See *Kooper v Kooper*, 74 AD3d 6, 13 [2d Dept 2010]).

By notice of motion dated February 1, 2012, defendants move to quash the subpoena served on Mullins based upon the attorney-client privilege. Defendants argue that because they hold a majority interest in Post Road, they control the limited liability company’s assertion of the privilege. Additionally, defendants claim that the documents requested in

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the subpoena have already been provided to plaintiff in discovery.

Plaintiff cross moves for an order compelling Mullins to give deposition testimony. Plaintiff claims that Post Road's operating agreement provided that each member could participate in the management of the business. Plaintiff also claims each member had to consent to the dissolution of the company and to operation of the business after dissolution. Plaintiff asserts that Mullins handled the dissolution of Post Road, although Vecchio did not consent to dissolution or operation of the business after dissolution of the company. Plaintiff argues that the fiduciary exception to the attorney-client privilege applies and, in any event, defendants waived the privilege through previous disclosure of financial information.

When a lawyer retained by an organization is dealing with the organization's shareholders or members, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents (Rule 1.13 (a) of the Prof Conduct Rules). If a lawyer knows that a person associated with the organization is engaged in action in a matter related to the representation that is in violation of a legal obligation to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization (Rule 1.13[b]). Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization (Id).

Because Mullins' client was Post Road Entertainment, as opposed to the individual defendants, Mullins' duty of confidentiality runs to the limited liability company rather than to its individual members. Moreover, because Vecchio was an insider with respect to Post Road, disclosure to Vecchio would not violate Mullins' duty to minimize the risk of disclosure to outsiders.

When ownership of a corporation changes hands, whether the attorney-client relationship transfers to the new owners turns on the "practical consequences" rather than the formalities of the particular transaction (*Tekni-Plex v Meyner & Landis*, 89 NY2d 123, 133 [1996]). In *Tekni-Plex*, the surviving corporation in a merger could not assert the attorney-client privilege to preclude the law firm who represented the original corporation from revealing information about the merger to the original corporation's sole shareholder (Id at 139).

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In similar fashion, a dissolved limited liability company cannot assert the attorney-client privilege to prevent its attorney from revealing information about the dissolution to one of the members.

Accordingly, defendants' motion to quash the subpoena served on Kevin Mullins, Esq. is **denied**. The subpoena is modified to require production of documents relating to the dissolution of Post Road Entertainment, LLC and any transaction of business by the company after dissolution. Plaintiff's cross-motion to compel Kevin Mullins, Esq. to appear for a deposition is **granted** to the extent of giving testimony concerning the dissolution of Post Road Entertainment and any conducting of business after dissolution of the company.

So ordered.

Dated

1 MAY 12

Stephen A. Bucaria
J.S.C.

ENTERED
MAY 07 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE