5-22-2018

# BH HASID LLC, Order on Pending Motions

Alice D. Bonner

**IN THE SUPERIOR COURT OF FULTON COUNTY**
**BUSINESS CASE DIVISION**
**STATE OF GEORGIA**

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| BH HASID LLC,<br><br>Plaintiff/Counterclaim-Defendant,<br><br>v.<br><br>ARYEH KIEFFER, ADDISON CAPITAL LLC, and ADDISON ADVISORS LLC,<br><br>Defendants/Counterclaim-Plaintiffs,<br><br>v.<br><br>HASID HOLDINGS, LLC and RONI AVRAHAM<br><br>Counterclaim-Defendants. | CIVIL ACTION NO.: 2017CV298598<br><br>Bus. Case Div. 1 |

## ORDER ON PENDING MOTIONS

The above styled matter is before this Court on various pending motions, *to wit*: (1) Plaintiff's Ex Parte Emergency Motion for Expedited Discovery; (2) Plaintiff's Motion to Disqualify Jon David Huffman and Defendants' cross-Motion for Attorney's Fees; (3) Defendants' Motion to Quash Subpoena; and (4) Plaintiff's Motion to Quash Notice to Produce. Having considered the record, the Court finds as follows:

**(1) Plaintiff's Ex Parte Emergency Motion for Expedited Discovery**

Plaintiff filed the instant motion contemporaneously with its Verified Complaint prior to the transfer of the action to this Court. Insofar as discovery proceeded in this matter shortly after the transfer, the Court hereby DENIES Plaintiff's motion as MOOT.

**(2) Plaintiff's Motion to Disqualify Jon David Huffman and Defendants' cross-Motion**

**for Attorney's Fees**

In its Motion to Disqualify, Plaintiff BH Hasid, LLC initially moved the Court to disqualify Jon David Huffman as counsel for Defendants, citing (a) a conflict of interest arising from Mr. Huffman having allegedly previously represented Plaintiff with regard to certain special purpose entities that are the subject of this action, and (b) the fact that Mr. Huffman is a material witness. In response, Mr. Huffman denies that he had ever represented Plaintiff and denies that he is a material witness to any of the facts, transactions or documents at issue in this litigation. Further, Defendants ask the Court for an award of their attorney's fees under O.C.G.A. §9-15-14(a) and (b) for having to respond to the motion.

In subsequent briefing, Plaintiff "with[drew] without prejudice its Motion to Disqualify Mr. Huffman based upon the allegations that Mr. Huffman held himself out as counsel for Plaintiff" but continues "to object to Mr. Huffman's representation of Defendants at trial" and continues to seek disqualification of Mr. Huffman as trial counsel "to the extent that he is deemed to be a material witness in this matter."[1]

Pursuant to Georgia's Rules of Professional Conduct:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Ga. R. Prof. Cond. 3.7. Importantly, "[t]he party moving for disqualification of a lawyer under

[1] Plaintiff's Reply in Support of Motion to Disqualify Jon David Huffman and Opposition to Cross-Motion for Attorney's Fees, p. 2.

Rule 3.7 has the burden of showing that the lawyer "is likely to be a necessary witness" by demonstrating that the lawyer's testimony is relevant to disputed, material questions of fact and that there is no other evidence available to prove those facts." Clough v. Richelo, 274 Ga. App. 129, 132, 616 S.E.2d 888, 891–92 (2005). *See also* Lewis v. State, 312 Ga. App. 275, 283, 718 S.E.2d 112, 118 (2011) (quoting Bernocchi v. Forcucci, 279 Ga. 460, 462, 614 S.E.2d 775, 778 (2005)) ("Because of the right involved and the hardships brought about [by its deprivation], disqualification of chosen counsel should be seen as an extraordinary remedy and should be granted sparingly").

Here, the Court finds Plaintiff has not met its burden of establishing that disqualification is warranted under Rule 3.7. Specifically, although Mr. Huffman may have had some involvement in transactions and events leading up to this litigation and Plaintiff asserts he "potentially" was involved in "the drafting and alleged execution of disputed operating agreements at issue", no showing has been made that Mr. Huffman's testimony "is relevant to disputed, material questions of fact and that there is no other evidence available to prove those facts." Clough, 274 Ga. App. at 132. Accordingly, Plaintiff's Motion to Disqualify is DENIED at this time.

With respect to Defendants' cross-Motion for Attorney's Fees, O.C.G.A. §9-15-14 provides in part:

> (a) In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position…
>
> (b) The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the

> motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under Chapter 11 of this title, the "Georgia Civil Practice Act." As used in this Code section, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

Here, in light of Defense counsel's involvement in the events leading up to this litigation and with the entities holding properties that are the subject of this action, the Court finds Plaintiff's motion presented at least justiciable issues such that an award under O.C.G.A. §9-15-14(a) or (b) is not warranted. Thus, Defendants' cross-Motion for Attorney's Fees is DENIED.

**(3) Defendants' Motion to Quash Subpoena**

O.C.G.A. §24-13-23 provides:

> (a) A subpoena may also command the person to whom it is directed to produce the evidence designated therein.
>
> (b) The court, upon written motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may: (1) Quash or modify the subpoena if it is unreasonable and oppressive; or (2) Condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the evidence.

As noted by the Georgia Court of Appeals,

> [t]his standard "is tested by the peculiar facts arising from the subpoena itself and other proper sources. [Cits.]" *Aycock v. Household Fin. Corp.*, 142 Ga.App. 207, 210(3)(b), 235 S.E.2d 578 (1977). "[N]o court should impose upon the opposite party the onerous task of producing great quantities of records which have no relevancy. The notice should be specific enough in its demands to relate the documents sought to the questions at issue." *Horton v. Huiet,* 113 Ga.App. 166, 169(1), 147 S.E.2d 669 (1966).

Washburn v. Sardi's Restaurants, 191 Ga. App. 307, 310, 381 S.E.2d 750, 753 (1989). "[T]he party moving to quash has the burden of showing that the subpoena is unreasonable and oppressive." Bazemore v. State, 244 Ga. App. 460, 463, 535 S.E.2d 830, 834 (2000).

In the instant motion Defendants Aryeh Kieffer, Addison Capital, LLC and Addison Advisors, Inc. (collectively "Addison Defendants") move to quash two subpoenas ("Subpoenas") served by Plaintiff/Counterclaim Defendants on Bank of America ("BOA") requesting the financial information of 16 entities and Defendant Aryeh Kieffer, personally. The Subpoenas request "all documents pertaining to open or closed checking, savings, trust, or other deposit or checking accounts held in the name of, for the benefit of, or under the control of [the entities and Mr. Kieffer, respectively] from January 1, 2012 to present."[2] Defendants do not oppose the Subpoenas to the extent they seek the financial information of the entities that own the properties at issue in this action (collectively the "Subsidiaries")[3] but ask the Court to quash the Subpoenas as to all other non-parties and as to the Addison Defendants "because the [S]ubpoenas seek pre-judgment disclosure of their personal financial affairs."

Having considered the record and the allegations giving rise to Plaintiff's claims, the Court hereby DENIES Defendants' Motion to Quash the Subpoenas served upon the Subsidiaries and upon each of the Addison Defendants. In its Verified Complaint, Plaintiff alleges Defendants mismanaged BH Hasid, the Subsidiaries, and the subject properties and that they have failed to account for funds in excess of $20 million. Particularly given the accounting discrepancies discussed during the April 11-12, 2018 hearing in this matter, the Court finds the bank documents requested are directly relevant to the claims and matters at issue in this litigation.

The Subpoenas also seek the financial documents of other non-parties who do not appear

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2 The Subpoenas were not filed with the instant motion.

3 The Managed Entities include BH Winston Manor, LLC, BH Chamblee, LLC, Addison Hasid IV, LLC, Addison Hasid V, LLC and Addison Hasid VI, LLC.

to have any involvement in this action, including: IA Daron Village, LLC; IA One Manager, LLC; FNBA Services, LLC; Addison AGI I, LLC; IA One Investors, LLC; IA Two Manager, LLC; Mount Vernon, LLC; and IA Two Investors, LLC (collectively the "IA Parties"). Although the IA Parties appear to be entities with which Defendant Kiefer is involved, given the sensitive, financial information sought and that no showing has been made that the IA Parties have any involvement or dealings with Plaintiff or the Subsidiaries, Defendants' Motion to Quash is GRANTED at this time with respect to the Subpoenas served upon the IA Parties. If discovery reveals that assets of Plaintiff or the Subsidiaries have been commingled with those of the IA Parties, Plaintiff may seek reconsideration of this ruling. *See* Blake v. Spears, 254 Ga. App. 21, 23, 561 S.E.2d 173, 176 (2002) (subpoena requiring the defendant produce banking records from two other businesses he owned not unreasonable because the record reflected that assets of those business may have been commingled with that of business purchased by the plaintiff and the requested records were relevant to determine the extent of the comingling).

**(4) Plaintiff's Motion to Quash Notice to Produce**

Here, Plaintiff asks the Court to quash a Notice to Produce served upon it seeking "any and all records, documents, and financial or bank statements" relating to BH Hasid's ability to fund the Subsidiaries.[4] In this action, Defendants generally allege the Subsidiaries were under-capitalized because, although Plaintiff repeatedly asserted it had the requisite financial resources, it failed to sufficiently capitalize the Subsidiaries so as to properly renovate and maintain the subject properties. Defendants have asserted various counterclaims against Plaintiff BH Hasid and others, including claims for breach of fiduciary duty, breach of contract, and negligence citing, *inter alia*, the under-capitalization of the Subsidiaries and the allegedly improper withdrawal of funds in November 2017 by Roni Avraham on behalf of BH Hasid.

[4] The Notice to Produce was not filed with the instant motion.

Given the foregoing, the Court finds Defendants may obtain standard financial documents of BH Hasid, including financial statements to the extent available, as well as bank records, but their request for "any and all records, documents, and financial or bank statements" relating to BH Hasid's ability to fund the Subsidiaries is unreasonably broad and oppressive. Further, to the extent Defendants ultimately seek information regarding the personal financial wealth of BH Hasid's owners, given they are non-parties and in light of the privacy concerns with requiring nonparties to disclose their personal financial information, the Court finds Defendants' desire to "substantiate" Plaintiff's assertion that it has access to sufficient capital to fund the renovations of the Subsidiaries insufficient to justify the requested discovery. Accordingly, Plaintiff's Motion to Quash is DENIED IN PART and GRANTED IN PART, as limited above.

**SO ORDERED** this 22 day of May, 2018.

JUDGE JOHN J. GOGER *on behalf of*
ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

**Served upon registered service contacts through eFileGA**

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