

Deutsche Bank AG v Sebastian Holdings Inc.

2017 NY Slip Op 30241(U)

February 3, 2017

Supreme Court, New York County

Docket Number: 161079/2013

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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DEUTSCHE BANK AG,

Plaintiff,

-against-

SEBASTIAN HOLDINGS INC.

Defendants.

-----X

DECISION AND
ORDER

Index No.
161079/2013
Mot. Seq. 004

HON. ANIL C. SINGH, J.:

In this action, defendant Sebastian Holdings Inc.¹ (“defendant”) moves to quash information and deposition subpoenas served by plaintiff Deutsche Bank AG (“plaintiff”). Plaintiff opposes and cross-move for an order nunc pro tunc permitting alternative service.

Motion Sequence 002, 003 and 004 are consolidated for disposition.

On June 18, 2014, this Court granted plaintiff’s motion to register and domesticate an English Judgment in New York. On May 6, 2016, the clerk of the court entered judgment for approximately \$369 million. In the next few months, plaintiff served (1) an information subpoena to Christiana Spirits; (2) an information subpoena to Conconfirm, Inc.; (3) an information subpoena to El Pelicano Inc.; (4) an

¹ Counsel for Defendant Sebastian Holdings Inc., Zaroff & Zaroff LLP, also submits its papers on behalf of non-party Alexander Vik.

information subpoena to JP Morgan Chase; (4) an information subpoena to Merrill Lynch; and (5) an information subpoena with restraining notice and a deposition subpoena to SHI. Defendant now moves to quash these subpoenas.

Discussion

CPLR 5223 provides that a “judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment.” CPLR 5223, “as noted by Professor Siegel, is a generous standard which permits the creditor a broad range of inquiry through either the judgment debtor or any third person with knowledge of the debtor's property.” ICD Group, Inc. v Israel Foreign Trade Co. (USA) Inc., 224 A.D. 2d 293, 294 (1st Dept 1996).

Generally, information subpoenas, served on an individual or entity other than the judgment debtor, may be served only if the judgment creditor has a reasonable belief that the party receiving the subpoena has in its possession information about the debtor that will assist the creditor in collecting his or her judgment.

Information subpoena to Confirmit, Inc., Christiana Spirits and El Pelicano

Plaintiff has alleged that Confirmit, Inc. is a Norwegian company with offices in New York of which SHI was the owner until it fraudulently conveyed its ownership stake to Mr. Vik in October 2008. Plaintiff also allege that Sebastian + Barquet is an art gallery located in New York City in which Mr. Vik has admitted to having a beneficial interest. Finally, plaintiff alleges that Christiana is a vodka

company in which Mr. Vik held or holds an ownership interest, and that is registered to do business in New York and may have offices in New York. [cite]

Despite the generous standard of CPLR 5223, the New York courts have also held that information subpoenas are improper to the extent that they seek information regarding persons or entities who are not the judgment debtor. See e.g., Lupe Dev. Partners, LLC v Pac. Flats I, LLC, 118 A.D. 3d 645, 645 (1st Dept 2014) (where the court held that “the subpoenas improperly sought examination of the individual assets of Baird, who is not a judgment debtor”); Ungar v. The Palestinian Authority, 2009 WL 5019743 (S. Ct. NY Cnty, 2009) (“This is not an inquiry directed at uncovering information about the judgment-debtors’ property that could be used to satisfy the judgment. Hence, it is utterly beyond the scope of the broad inquiry authorized by CPLR 5223”).

In Stern v Carlin Communications, Inc., 210 A.D. 2d 110, 110–11 (1st Dept 1994), the court affirmed the trial court’s decision to quash the subject subpoena, relegating plaintiff instead to the pretrial disclosure devices available to him in a related pending action to set aside fraudulent conveyances². The court held that the

² The court also held that “[w]hile disclosure in post-judgment enforcement proceedings may be favored over pretrial disclosure in a fraudulent conveyance action where the enforcement proceedings involve assets not put in issue in the fraudulent conveyance action...here, the opposite is the case, the action putting in issue all of the assets controlled by all of the corporations controlled by the individual said to be their alter ego, such that there is nothing in issue in the enforcement proceedings that is not also in issue in the plenary action.” Here, there is a related plenary action against Vik. Deutsche Bank AG v. Alexander Vik et. al., Index No. 161257/2013.

subpoena went beyond its proper role of seeking information concerning defendant corporations' assets by demanding "all cancelled checks and other checking account records" of certain nonparty corporations, claimed to be closely related to defendants, regardless of whether such checks and records involved defendants' assets or wholly unrelated funds.

There is no dispute that the subpoenas served on the three companies seek information regarding Mr. Vik as well. In light of these cases, to the extent that the plaintiff is seeking information regarding Mr. Vik, the court holds that the subpoenas are improper as Mr. Vik is a non-party to this action. To the extent that the plaintiff is seeking information regarding defendant SHI, the subpoenas are proper. However, given that the court will not prune through the subpoena, (see e.g. Riverside Capital Advisors, Inc. v. First Secured Capital Corp., 28 AD 3d 457, 460 (2d Dept 2006)) plaintiff's subpoenas to Confermit, Inc., Christiania Spirits and El Pelicano are hereby quashed.

Information subpoena on JP Morgan Chase and Merrill Lynch

Plaintiff has also issued information subpoenas to two banks, JP Morgan Chase and Merrill Lynch. The subpoena to JP Morgan Chase request information regarding defendant SHI (Questions 4-9) and non-party Alexander Vik (Questions 1-3). The subpoena to Merrill Lynch request information regarding defendant SHI.

As discussed above, to the extent that the plaintiff is seeking information regarding defendant SHI, the subpoenas are proper. Therefore, Questions 1-3 of the subpoena to JP Morgan are improper while Questions 4-9 are proper. Accordingly, plaintiff's motion to quash the subpoena to JP Morgan Chase is granted as to Questions 1-3 and denied as to Questions 4-9. Defendant's motion to quash the subpoena to Merrill Lynch is denied.

Information Subpoena with restraining notice and deposition subpoena on SHI

Defendant argues that it was not properly served with the information subpoena with restraining notice and the deposition subpoena. Plaintiff served the Information Subpoena with Restraining Notice and deposition subpoena upon defendant's New York counsel. At issue is whether the service was proper, given that SHI is a non-domiciliary.

At the commencement of this action, this court held that it had jurisdiction over defendant, despite the latter's argument to the contrary. SHI brought an action against Deutsche Bank in New York alleging breach of various agreements. (See, Sebastian Holdings, Inc. v. Deutsche Bank AG, Index No. 603431/2008). The bank commenced a similar action in London alleging that SHI breached the agreements. Deutsche Bank prevailed in London and sought to domesticate the judgment in New York. This court found that service on SHI through its attorneys was proper pursuant

to CPLR 303 as plaintiff could have interposed the judgment as a counterclaim in the related action. See, Docket No 25, Transcript of Proceedings at page 15.

Deutsche Bank now seeks to enforce its money judgment under Article 52 of the CPLR. “The judgment has not yet been satisfied, the action, of course, is still pending for purposes of enforcing the judgment.” Coutts Bank (Switzerland) Ltd. v. Anatian, 275 A.D.2d 609, 612-13 (1st Dept 2000). Accordingly, since this action is still pending, the court may continue to exercise jurisdiction over SHI.

In Coutts the First Department held that CPLR 303 is extended to the service of a subpoena since the judgment-debtor has, by his voluntary act in demanding justice from the judgment-creditor in federal court, submitted himself to the jurisdiction of the state court. See also, General Electric Co. v. Metals Resources Group Ltd., 293 A.D.2d 417, 419 (1st Dept 2002) (authorizing service of post-judgment subpoenas and restraining notices on the New York attorney of a judgment-debtor).

Similarly, here SHI, a non-domiciliary, appeared in New York on its own volition, seeking redress against Deutsche Bank under our laws and submitted to the jurisdiction of the court. It is not unreasonable or unfair for SHI to anticipate that Deutsche Bank will continue to attempt to enforce its judgment in New York. See e.g., Adam v Saenger, 303 US 59, 67–68 (1938) (“The plaintiff having...submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in

treating him as being there for all purposes for which justice to the defendant requires his presence.”)

CPLR 5224(a)(3) also states that service of an information subpoena “may be made by registered or certified mail, return receipt requested”. The language of the statute is permissive and not mandatory. Moreover, CPLR 5222 provides that a restraining notice “shall be served personally in the same manner as a summons or by registered or certified mail, return receipt requested”. CPLR 318 authorizes a person or entity to designate a person to act as agent for service of process. CPLR 308(3) dealing with service of summons, allows service of process to be made on that agent in behalf of the principal. Here, defendant’s attorney has been designated as agent to accept service of behalf of defendant. Moreover, pursuant to CLPR 311(b), this court may direct alternative service on a corporation defendant. Therefore, plaintiff complied with the CPLR by serving the subpoenas on defendant’s attorney.

Defendant also argues that the subpoena is overly broad and harassing and a protective order pursuant to CPLR 3103 should be issued.

As an initial matter, the information subpoena only seeks information with regard to defendant’s assets. Defendant’s argument that plaintiff’s request is overbroad because it seeks information relevant in the plenary cases is without merit.

Question 5 of the subpoena seeks information regarding “any and all amounts owed by SHI to other Person(s)”.

Moreover, CPLR 5223, *supra*, is a generous standard which permits the creditor a broad range of inquiry. ICD Group, Inc., 224 AD 2d 294 (1st Dept 1996). In ICD Group, the court held that “given the wholesale nature of plaintiff’s transfer of assets, the stock purchase agreement which, *inter alia*, transferred plaintiff’s stock, is discoverable so that defendants may inquire into such transfer to determine whether there was an intent to defraud the creditor.” Id. Hence, post-judgment discovery is not limited to a judgment debtor’s current assets.

Finally, defendant’s argument that the subpoena is overbroad because it seeks information regarding assets held, owned or controlled by SHI going back to 2008 is unavailing. Post-judgment discovery under CPLR 5223 encompasses relevant material dated prior to the judgment at issue, including the period of the “transaction which gave rise to the judgment in the underlying action.” Young v Torelli, 135 AD 2d 813, 814 (2d Dept 1987).

Accordingly, this Court grants nunc pro tunc alternative service on defendant SHI’s attorneys effective as of September 15, 2016. See e.g., Alfred E. Mann Living Trust v Etirc Aviation S.a.r.L, 2009 WL 8612703, at *4 (Sup. Ct. N.Y. Cnty. June 29, 2009; Estate of Robert Marceca, 2006 N.Y. Misc. LEXIS 5240 (N.Y. Sur. Ct. 2006).

Accordingly, it is hereby,

ORDERED that defendant's motion to quash the information subpoenas to Christiana Inc, El Pelicano, and Conconfirm, Inc. is granted; and it is further

ORDERED that defendant's motion to quash the information subpoena served to JP Morgan Chase is granted as to Questions 1, 2 and 3, and the remainder of the Questions shall be answered within 30 days from notice of entry of this Order; and it is further

ORDERED that defendant's motion to quash the information subpoenas to Merrill Lynch and SHI is denied and the subpoena shall be answered within 30 days from notice of entry of this Order; and it is further

ORDERED that defendant's motion to quash the deposition subpoena to SHI is denied and the deposition shall be held within 60 days from notice of entry of this Order.

Date: February 3, 2017
New York, New York



Anil C. Singh