Deutsche Bank AG v Vik
2016 NY Slip Op 31329(U)
July 14, 2016
Supreme Court, New York County
Docket Number: 161257/13
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

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DEUTSCHE BANK AG,

Index No. 161257/13

Plaintiff,

- against -

ALEXANDER VIK, CARRIE VIK, as an individual and as Trustee of the CSCSNE TRUST, THE CSCSNE TRUST, C.M. BEATRICE, INC., and SEBASTIAN HOLDINGS, INC.,

Defendants.

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SINGH, J.:

Defendants move: 1) for partial summary judgment dismissing the first cause of action in the instant complaint on the ground that another case with similar issues is pending in Connecticut and 2) for a stay of this case pending the final outcome of the proceeding in Connecticut. In the alternative, defendants move: 1) for a stay of this action pending the resolutions of an appeal and of motions to confirm/reject the decision of a Special Referee and 2) for a protective order. Plaintiff cross-moves to compel disclosure.

In an action in the UK entitled *Deutsche Bank AG v Sebastian Holdings, Inc.*, commenced in the High Court of Justice Queen's Bench Division Commercial Court, Case No: 2009 Folio 83 (cited as [2013] EWHC 3463 (Comm), 2013 WL 5905024), Deutsche Bank AG (the Bank/plaintiff) obtained a judgment against Sebastian Holdings Inc. (SHI) in the amount of $243 million. Alexander Vik (Vik) owns SHI. On December 5, 2013, the Bank commenced the instant New York action (the NY action) to compel Vik and the other defendants to pay the

judgment against SHI. On December 13, 2013, the Bank commenced an action in the Superior Court of the Judicial District of Stamford/Norwalk in Connecticut under Docket No. FST-CV13-5014167-S (the CT action), to compel Vik to pay the judgment against SHI.

The Bank is plaintiff in the CT action and in the instant NY action. In the CT action, Vik and SHI are the only defendants. In this NY action, SHI, Vik, his wife, Carrie Vik, the Cscsne Trust (the Trust), and C.M. Beatrice, Inc. (Beatrice) are defendants. The Trust and Beatrice are entities allegedly owned or controlled by Vik or family members.

In the NY action, the first cause of action seeks a declaration of alter ego liability against Vik and SHI; the second seeks the same against Vik and Beatrice; the third seeks enforcement of the UK judgment against Vik; the fourth alleges unjust enrichment against Vik; the fifth alleges fraudulent conveyance against Vik, Beatrice, and SHI; the sixth alleges the same against Vik and Carrie Vik in her personal capacity; the seventh alleges the same against Vik, Carrie Vik, as trustee for the Trust, and the Trust; the eighth alleges aiding and abetting fraudulent conveyance against Vik and Beatrice; and the ninth, against Vik and SHI, seeks a declaration of joint liability for expenses pursuant to a contract between the Bank and SHI.

The CT complaint contains two causes of action, one seeking a declaration of alter ego liability and the second seeking to enforce the UK judgment. It makes most of the same allegations as the NY complaint. Both the NY and CT complaints allege that Vik caused SHI to make numerous fraudulent transfers to various entities, including Beatrice, that Vik transferred his shares of Beatrice to the Trust, and that the purpose of these and other transfers was to prevent SHI from paying the UK judgment. Both complaints allege that the Vik controls the transferees.

In the CT action, the parties engaged in extensive disclosure, and each side moved for summary judgment. Judge Robert Genuario denied both motions on October 15, 2015. The case management order in the CT action scheduled trial to begin on November 10, 2015. The only reason that trial did not begin, according to defendants, is that each side appealed the denial of its summary judgment motion. Some evidence that the parties would have proceeded to trial if not for the appeals is provided by the January 21, 2016 transcript of oral argument on a motion by the Bank (Zaroff aff, exhibit 3). The Bank had moved to lift the stay imposed by the appeal process so that it could complete discovery. Judge Genuario said that he had a "problem" with the motion, that being that the Bank had not previously denied that it was ready to go to trial on the scheduled date and had not asked for a stay (*id.* at 5).

Nonetheless, in a written decision on February 4, 2016, Judge Genuario issued a decision in the Bank's favor, ruling that, in fact, no stay was in effect and that further discovery could proceed (Ramesh aff, exhibit E). In his decision, Judge Genuario noted that the "discovery proceedings in this case can fairly be characterized as active, time consuming and adversarial. The court has held multiple hearings and issued multiple orders and rulings with regard to various discovery issues raised by the parties" (*id.* at 2).

In this NY case, in a decision entered February 4, 2015, this court denied defendants' motion to dismiss the complaint and they appealed. The parties proceeded to a traverse hearing after which each side moved to confirm parts and reject parts of the Special Referee's recommendations. After the parties made the instant motions, the denial of defendants' motion was affirmed (*Deutsche Bank v Alexander Vik*, 138 AD3d 506 [1st Dept 2016]), and this court issued its decision on the motions to confirm/reject the Special Referee's recommendations.

Defendants move to dismiss the first cause of action in the NY complaint, under CPLR 3212, on the ground of another action pending under CPLR 3211 (a) (4). A defendant may move for summary judgment on the grounds listed in CPLR 3211 (a) when those are asserted as defenses in the answer; in this case, defendants have done that (*see Houston v Trans Union Credit Info. Co.*, 154 AD2d 312, 313 [1st Dept 1989]).

A party may move to dismiss an action because "there is another action pending between the same parties for the same cause of action" (CPLR 3211 [a] [4]). The trial court is vested with broad discretion in deciding how to resolve such a motion (*Jadron v 10 Leonard St., LLC,* 124 AD3d 842, 843 [2d Dept 2015]). The court is not obligated to dismiss the action before it "but may make such order as justice requires" (CPLR 3211 [a] [4]), such as ordering a stay (*see SafeCard Servs. v American Express Travel Related Servs. Co.*, 203 AD2d 65, 65 [1st Dept 1994]).

For the court to dismiss the action before it (or one cause of action in the case before it), because another action is pending, there must be sufficient identity as to the parties and the causes of action asserted in the respective actions (*Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 96 [1st Dept 2013]). While the actions need not set forth precisely the same legal theories, they must arise out of the same subject matter or alleged wrongs (*id.; Cherico, Cherico & Assoc. v Midollo*, 67 AD3d 622, 622 [2d Dept 2009]). It is appropriate to stay an action in deference to another where the determination in the latter will resolve all or some of the issues in the stayed action (*Belopolsky v Renew Data Corp.,* 41 AD3d 322, 322-323 [1st Dept 2007]). Avoiding the risk of inconsistent rulings is a primary consideration (*Asher v Abbott Labs.*, 307 AD2d 211, 212 [1st Dept 2003]).

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With respect to parties, sufficient identity means substantial, not complete, identity (*Syncora,* 110 AD3d at 96; *White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 93-94 [1st Dept 1997]). Substantial identity is present when at least one party is common to both actions (*ibid.*).

Other factors for the court to consider in determining the disposal of one action when another action is pending include which one began first and how far each has progressed (*Certain Underwriters at Lloyd's, London v Hartford Acc. & Indem. Co.,* 16 AD3d 167, 168 [1st Dept 2005]; *San Ysidro Corp. v Robinow*, 1 AD3d 185, 186 [1st Dept 2003]; *Seneca Ins. Co. v Lincolnshire Mgt., Inc.,* 269 AD2d 274, 274-275 [1st Dept 2000]).

In addition to moving to dismiss the first cause of action in the NY case, defendants move to stay the entire NY action under CPLR 2201, pending the outcome of the CT case. CPLR 2201 provides that "the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." The determination to stay an action is discretionary, and may be granted when another action has the same parties, claims, and relief sought (*Simoni v Napoli*, 101 AD3d 487, 487-488 [1st Dept 2012]).

In the NY and the CT cases, the Bank is plaintiff, and Vik and SHI are defendants. Between the two actions, there is sufficient identity of parties under CPLR 3211 (a) (4). The NY case has three more defendants than the CT case; however, the presence of additional defendants in one case will not necessarily defeat a motion pursuant to CPLR 3211 (a) (4) (*Kent Dev. Co. v Liccione,* 37 NY2d 899, 901 [1975]; *Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 370 [1st Dept 2007]). No reason is suggested that the presence of the additional defendants in this case or their absence in the CT case will hinder resolution in either case.

The first cause of action in the NY complaint and the two causes of action in the CT complaint seek the same relief and are based on the same allegations, that Vik and SHI are alter egos, that Vik moved assets in and out of SHI according to his convenience without corporate formalities, that the corporate veil between them should be pierced, and that Vik should be made to pay the judgment granted against SHI in the UK action.

The resolution of the CT action will resolve the first cause of action in the NY case. Also, the CT action seems likely to resolve other causes of action in this NY case, such as those alleging fraudulent conveyance and unjust enrichment, in regard to Vik and SHI, who are parties to both actions. In addition, in the process of determining facts about Vik and SHI, the CT action may very well establish some facts about the other defendants in this case. The CT complaint in makes the same allegations about the parties in this NY action that the NY action does. For instance, both complaints allege that Vik moved assets from SHI to Beatrice and the Trust so that SHI would not pay the UK judgment. There is no need for two courts to go over the same ground and, given that the courts will be weighing the same allegations and claims, there is a risk of inconsistent rulings.

If, in the CT case, one of the denials of summary judgment is reversed, the CT action will be concluded. Either the Bank's complaint will be dismissed, or the Bank will be awarded summary judgment and Vik will be liable for the judgment against SHI. Thus, the question of Vik's liability will be resolved in Connecticut and will not need to be litigated in New York. If the denials of summary judgment are affirmed, a trial will be rescheduled. Either by trial or by summary judgment, the CT action will resolve veil piercing and other issues concerning Vik and SHI.

Neither side says anything about when the appeals in Connecticut are likely to be resolved. As of June 24, 2016, the online records of Connecticut's Judicial Branch, Supreme and Appellate Courts, uses the term, "briefing," to indicate the status of the appeal on each side.[1] However, in spite of the pending appeals, it is probable that the CT action will be resolved before the NY action. The CT action is further ahead than the NY action.

In the NY case, a first request for the production of documents and things was served on defendants in December 2013 (it will be referred to as the December 2013 request). Defendants answered that request, but not to plaintiff's satisfaction. In November 2015, the Bank served a set of interrogatories on Beatrice, which have not been answered. No other disclosure has taken place in the NY case and, because of defendants' motion for a protective order, disclosure has been stayed, pursuant to CPLR 3103 (b). The Bank has made a cross motion to compel answers to the December 2013 request and the interrogatories. Thus, disclosure in the NY action is far from complete. On the other hand, the CT case has seen extensive disclosure, which continues. There is no reason for it to continue concerning the same cause of action and the same parties in the NY case.

The Bank argues in favor of the first-in-time rule, which calls for the controversy to be decided in the court which first took jurisdiction (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 7 [1st Dept 2007]). The first-in-time rule is not hard and fast, and may also be disregarded where the actions began reasonably close in time (*White Light*, 231 AD2d at 99), or are at the early states of litigation (*San Ysidro,* 1 AD3d at 186). The CT case commenced just one week after the NY case and, as stated above, is further along than this case. Moreover,

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[1] http://appellateinquiry.jud.ct.gov/PartyNameInq.aspx

staying the claims against SHI and Vik in the NY case does not prejudice the Bank, as the litigation against them continues in the CT action.

Defendants' motion to dismiss the first cause of action in the NY case is denied. That cause of action, which is asserted against Vik and SHI, is stayed, rather than dismissed, because there is no telling how dismissal may affect the causes of action against the other defendants or the other causes of action against Vik and SHI. To dismiss the cause of action, without knowing the outcome of the CT case, is not appropriate. Defendants' motion to stay the entire NY action is granted as to the claims against Vik and SHI, since those claims are likely to be resolved in the CT case. The motion is denied as to the claims in the NY case affecting the other three defendants. While it is possible that the CT case may suggest or even determine the liability of those three defendants, they are not parties in the CT case and all litigation against them should not cease because the CT action is pending.

Defendants' alternative motion to stay the NY action pending the resolution of an appeal and the resolution of both sides' motions to confirm and reject the Special Referee's decision is denied as moot. The appeal and the motions have already been decided.

Defendants make another alternative motion for a protective order and the Bank cross-moves to compel Beatrice to answer the set of interrogatories served in November 2015 and to compel Beatrice, SHI, and Vik to produce documents responsive to the December 2013 request.

Defendants' motion for a protective order purports to concern all defendants but it discusses only Beatrice, Vik, and SHI. As the claims in this action against Vik and SHI are stayed, defendants do not need a protective order concerning them and they will not be compelled to produce disclosure. The Bank states that its cross motion does not concern Carrie

Vik and the Trust. Therefore, the motion and cross motion concern Beatrice.

22 NYCRR 202.7 (a) (2) requires that a motion relating to disclosure be accompanied by an affirmation that counsel has conferred with opposing counsel in a good faith effort to resolve the issues raised by the motion (*Chichilnisky v Trustees of Columbia Univ. in City of N.Y.*, 45 AD3d 393, 393 [1st Dept 2007]). The failure to include the good faith affirmation may be excused, however, where any effort to resolve the dispute non-judicially would have been futile (*Baulieu v Ardsley Assoc., L.P.*, 84 AD3d 666, 666 [1st Dept 2011]; *Northern Leasing Sys., Inc. v Estate of Turner*, 82 AD3d 490, 490 [1st Dept 2011]). The history of the CT action and the attorneys' letters about the December 2013 request suggest that any such attempt may have been futile. Therefore, the lack of good faith affirmations is excused.

CPLR 3103 provides that the court may make a protective order denying or limiting disclosure. "Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103 [a]). CPLR 3124 provides that a party may move to compel compliance with discovery requests.

In general, parties are entitled to "full disclosure of all matter material and necessary" to prosecute or defend an action (CPLR 3101 [a]). The scope of discovery is "generous, broad, and is to be construed liberally" (*Mann v Cooper Tire Co.*, 33 AD3d 24, 29 [1st Dept 2006]). Parties are entitled to discover any facts relevant to the controversy, which means not only admissible proof, but facts which may lead to admissible proof and facts which will assist preparation for trial by sharpening the issues and promoting efficiency (*ibid.*; *Andon v 302-304 Mott St. Assocs.*, 257 AD2d 37, 40 [1st Dept 1999]). When deciding whether to compel or excuse compliance with a disclosure demand, the court must weigh the relevancy of the matter sought and its usefulness

to the demanding party against the burden production will place on the producing party (*Gilbert-Frank Corp. v Guardsman Life Ins. Co.*, 78 AD2d 798, 799 [1st Dept 1980]).

A party seeking documents must not impose an undue burden or conduct a fishing operation, and should request documents that are relevant and described with reasonable particularity (*Konrad v 136 E. 64th St. Corp.*, 209 AD2d 228, 228 [1st Dept 1994]). "[O]verly broad or unnecessarily burdensome demands may be considered palpably improper" (*Haller v North Riverside Partners,* 189 AD2d 615, 616 [1st Dept 1993]). On the other hand, a burden or expense is not "undue" simply because it is burdensome or expensive, taking into account the issues, the parties' resources, the nature of the litigation and other factors (*see First Am. Corp. v Price Waterhouse LLP*, 154 F3d 16, 23 [2d Cir 1998]).

The Bank's December 2013 request was addressed to all defendants in this action. In November 2015, the Bank's attorney sent a letter to defendants' attorney asking that Beatrice alone augment its response to the December 2013 request by producing both the documents that it agreed to produce, but did not, and the documents to which it objected (Zaroff aff, exhibit 13). Defendants say that of the 34 requests from the December 2013 request that are listed in the letter, 31 are substantially identical to requests for documents served in the CT action in October 2014. Defendants claim that some documents requested are protected by privilege and the requests are burdensome, over broad, and harassing. Defendants state that the parties stipulated that any discovery in the CT action can be used in this action, so the Bank has no need to make the demands already made.

Defendants do not produce a statement by someone with knowledge attesting to the fact that producing these documents would be unduly expensive or cause an undue amount of trouble.

Defendants' motion is also defective in failing to specify which requests in the disclosure demands are substantially identical or repetitive. In addition, they do not address the fact that disclosure requests in the CT action concern Vik and SHI, not Beatrice, which is not a party in that action. Although the Bank may be seeking the same kind of information in both actions, such as, for example, asset transfers and the names of board members, different responders will produce different answers. Moreover, the Bank alleges that in the CT action, defendants would not answer certain inquiries, giving as their reason that those did not concern Vik or SHI, but Beatrice or another defendant in this action. Therefore, the court will not rule that the Bank cannot ask the same questions of Beatrice that it did of Vik and SHI in the CT action.

Beatrice should produce the documents that it agreed to produce or explain the reasons that it cannot. Where a document is protected by work-product or another privilege, the responding party should provide an explanation. The burden of proving that a statement is privileged as material prepared solely in anticipation of litigation or trial is on the party opposing discovery (*Sigelakis v Washington Group, LLC*, 46 AD3d 800, 800 [2d Dept 2007]; *Aetna Cas. & Sur. Co. v Certain Underwriters at Lloyd's*, 263 AD2d 367, 368 [1st Dept 1999]).

Defendants complain that the Bank's request uses the term "any and all." While that term can indicate a lack of specificity, it is not improper in itself (*Stevens v Metropolitan Suburban Bus Auth.*, 117 AD2d 733, 734 [2d Dept 1986]; *see also Ensign Bank, FSB v Gerald Modell, Inc.*, 163 AD2d 149, 149-150 [1st Dept 1990]). The term is not improper in this case. The Bank states that it seeks information relating to veil piercing and fraudulent transfers. To that end, it seeks evidence showing misuse of corporate form, inadequate capitalization, corporate formalities and common personnel, independent discretion, transfers, enrichment, and also

defenses. The Bank is entitled to search for such information and its December 2013 request is tailored to elicit such information.

The December 2013 demand seeks information related to the Vik Entities. A Vik Entity is defined as "any company owned or controlled by Vik, including [several names follow], any agent, employee, professional, consultant, or other person acting on behalf of a Vik Entity, including but not limited to Vik" (Ramesh aff, exhibit 2, no. 11). Defendants say that this definition imposes an undue burden on them, requiring the production of documents from dozens of nonparty entities and persons. In the CT action, the Bank was ordered to provide a more narrow definition of which entities were the Vik Entities. The Bank should do the same here. After the Bank does that, Beatrice should answer the December 2013 request. The Bank's requests will be qualified in another respect. The Bank seeks documents going back to 2003. The date for the requests should be limited to five years before this action began, which is 2008.

Thus, the Bank's motion to compel disclosure is granted. Defendants' motion for a protective order is denied.

ORDERED that defendants' motion is granted to the extent that the first cause of action in the complaint is stayed pending the resolution of an action in Connecticut, and the rest of the motion is entirely denied; and it is further

ORDERED that plaintiff's cross motion to compel disclosure is granted and defendant shall respond to the discovery requests within 45 days of today.

Dated: July 14, 2016

J.S.C.

ANIL C. SINGH