

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON
OPINIONS

ROBERT FARRELL and ROBERT SZOSTAK,
individually, and derivatively on behalf of
PRINCETON ALTERNATIVE FUNDING,
LLC, a Delaware limited liability company,

Plaintiffs,

v.

MICROBILT FINANCIAL SERVICES CORP.,
MICROBILT CORPORATION, PHILIP N.
BURGESS, JR., WALTER WOJCIECHOWSKI,
ALONZO J. PRIMUS, PRINCETON
ALTERNATIVE FUNDING, LLC,
PRINCETON ALTERNATIVE FUNDING, LLC
F/K/A/ MICROBILT CAPITAL FUNDING,
LLC, and JOHN DOES 1,2 and 3,

Defendants,

and,

PRINCETON ALERNATIVE FUNDING, LLC,
a Delaware limited liability company,

Nominal Defendant.

PRINCETON ALERNATIVE FUNDING, LLC
F/K/A MICROBILT CAPITAL FUNDING,
LLC,

Third Party Plaintiff,

SUPERIOR COURT OF NEW
JERSEY

CHANCERY DIVISION –
MERCER COUNTY

DOCKET NO: C-6-16

CIVIL ACTION

DECISION

v.
MICHELLE FARRELL,
Third Party Defendant.

Argued: May 12, 2017

Decided: May 23, 2017

Edward M. Bernstein, Esq. Bernstein & Manahan, LLC, attorney for plaintiffs on the complaint.

Angelo A. Stio, III, Esq., Pepper Hamilton, LLP, attorney for defendants-counterclaimants.

Robert Farrell, self-represented on the counterclaim.

Robert Szostak, self-represented on the counterclaim.

Innes, Paul, P.J.Ch.

Plaintiffs Robert Farrell (“Farrell”) and Robert Szostak (“Szostak”), on behalf of themselves and derivatively on behalf of Princeton Alternative Funding, LLC (“PAF”), filed suit against defendants Microbilt Financial Services Corp., Microbilt Corporation, Philip N. Burgess, Jr., Walter Wojciechowski, Alonzo J. Primus, Capital Funding, LLC, and PAF on January 25, 2016. Plaintiffs filed a verified first amended complaint on or about March 29, 2016, and defendants responded by filing a motion to dismiss on April 10, 2016. After oral argument on the motion, this court entered an order granting in part and denying in part defendants’ motion to dismiss.

In essence, the underlying matter stems from plaintiffs’ allegations that defendants improperly terminated plaintiffs’ employment, breached the services agreement between PAF and

Microbilt and wrongfully completed a merger of PAF into Microbilt. The complaint contains counts for breach of contract, breach of fiduciary duties, breach of the covenant of good faith and fair dealing, and unjust enrichment. Plaintiffs now seek to compel defendants to purchase their interest(s) in PAF or Successor PAF, or both.

On March 3, 2017, the court granted defendants' motion for leave to amend their answer pursuant to R. 4:8-1 and R. 4:9-1 to include counterclaims against plaintiffs for tortious interference, misappropriation, and unfair competition. In addition, the court granted defendants' motion to file a third-party complaint against Michelle Farrell for slander.

On October 31, 2016, plaintiffs propounded their First Demand for Documents upon defendants. On December 7, 2016, plaintiffs served defendants with a Second Demand for Documents.

Defendants now move for the issuance of a protective order. Defendants argue that plaintiffs, through their document requests, seek detailed information deemed confidential to PAF and the survivor PAF's business. Defendants contend these requests exceed the scope of information needed to calculate certain financial valuations and should therefore be denied under R. 4:10-3(a). Defendants ask that if the court denies defendants' motion, the documents should be produced under an attorney's eyes only arrangement pursuant to R. 4:10-3(g).

Plaintiffs' argue that all discovery requests made upon defendants are relevant to the underlying matter. Further, an attorney's eyes only designation would be problematic because the individually named plaintiffs are self-represented and serve an integral part of the underlying case. Plaintiffs' attorney asserts that it is imperative that plaintiffs have the ability to review the documents at issue. Moreover, defendants' confidential information is adequately protected by existing confidentiality orders that plaintiffs are willing to expand, if necessary.

Defendants have provided a response maintaining their position that the requests seek information that is confidential and irrelevant to the underlying dispute. Based on the facts pertaining to defendants' counterclaim, however, the discovery should be provided only if restricted to attorney-only access.

“New Jersey’s discovery rules are to be construed liberally in favor of broad pretrial discovery.” Payton v. N.J. Turnpike Auth., 148 N.J. 524, 535 (1997) (citing Jenkins v. Rainer, 69 N.J. 50, 56 (1976)). However, the applicable rules do not provide for infinite discovery. K.S. v. ABC Prof'l Corp., 330 N.J. Super. 288, 291 (App. Div.), motion for leave to appeal denied, 174 N.J. 411 (2000); see also Berrie v. Berrie, 188 N.J. Super. 274, 282 (Ch. Div. 1983) (the broad scope of discovery is not unlimited).

In general, parties may obtain discovery on any non-privileged matter that is relevant to the subject matter of the litigation. See, generally, R. 4:10-2. Specifically, in civil suits,

[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

[R. 4:10-2(a)].

Pursuant to N.J.R.E. 401, relevant evidence is defined as “evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.”

To avoid disputes pertaining to broad or overreaching discovery requests, the court rules provide that “a party from whom discovery is sought may apply for a protective order which shall be granted for ‘good cause shown.’” Catalpa Investment Grp., Inc. v. Franklin Twp. Zoning Bd.

of Adjustment, 254 N.J. Super. 270, 273 (Law Div. 1991); R. 4:10-3. The moving party bears the burden of persuading the court that good cause exists for issuing an order protecting the party “from annoyance, embarrassment, oppression, or undue burden or expense.” Kerr v. Able Sanitary & Env'tl. Servs., Inc., 295 N.J. Super. 147, 155 (App. Div. 1996).

If good cause exists, the court may enter an order directing:

- (a) That the discovery not be had;
- (b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (c) That the discovery may be had only by a method of discovery other than selected by the party seeking discovery;
- (d) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (e) That discovery be conducted with no one present except persons designed by the court;
- (f) That a deposition after being sealed be opened only by order of the court;
- (g) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designed way; or
- (h) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

[R. 4:10-3(a)-(h)].

When the court is determining whether good cause has been shown, the court should engage in a balancing of the following factors: (1) the nature of the lawsuit and the issues raised by the pleadings; (2) the substantive law likely to be applied in the resolution of the issues raised by the pleadings; (3) the kind of evidence which could be introduced at the trial, and the likelihood

of it being discovered by the pretrial discovery procedure which is the subject of the application for a protective order; (4) whether trade secrets, confidential research, or commercial information are sought in the discovery procedure employed, whether they are material and relevant to the lawsuit, and whether a protective order will insure appropriate confidentiality; (5) whether the pretrial discovery seeks confidential information about persons who are not parties to the lawsuit; (6) whether the pretrial discovery sought involves privileged material; (7) whether the pretrial discovery sought relates to matters which are or are not in dispute; (8) whether the party seeking discovery already has the materials sought; and (9) the burden or expense to the party seeking the protective order. Catalpa Investment Grp., Inc., supra, 254 N.J. Super. at 273-74.

Furthermore, it is well settled that:

[a] court, and especially a court of equity, can enter a protective order for disclosure which may exclude dissemination to a party and its employees. Disclosure may be limited solely to the parties' attorneys and experts who must agree to make no further disclosure, including a disclosure to the clients, without further order of the court.

[ALK Assocs. v. Multimodal Applied Sys., Inc., 276 N.J. Super. 310, 316 (App. Div. 1994).]

In this case, defendants move for an order striking numbers 20-22, 24-27, and 32-41 of plaintiffs' Demand for Documents, and numbers 5,7, 11, and 20-24 of plaintiffs' Second Demand for Documents. In Numbers 20-22, plaintiffs seek audit work papers; in Numbers 24-27, plaintiffs seek communications between defendants and Howard Davner, Jeff Davner and Jack Cook; and in Numbers 32 through 41 plaintiffs seek information concerning defendants' dealings with its investors and borrowers.¹ Regarding the second request, Number 5 asks for defendants' tax

¹ Plaintiffs have withdrawn the production request contained within number 40 of the first set of document demands.

returns, Number 7 demands defendants' financial statements, and Number 11 demands defendants' general ledgers, and Numbers 20-24 inquires as to defendants' ability to pay loans and outstanding obligations.²

Most of plaintiffs' discovery demands, while broad and voluminous, have a causal relation to plaintiffs' claims and the various demands for relief. Plaintiffs seek discovery related to the merger; the valuation of plaintiffs' individual percentage interest; the termination of plaintiffs' employment; and the Services Agreement. The information sought by plaintiffs is already subject to prior confidentiality orders entered into by the parties, and defendants are free to seek an expansion of the existing confidentiality order.

Having said this, the court does find that Numbers 32 and 33 of the First Document Demand are not discoverable. Those demands relate to documents and communications between PAIF and its borrowers. The court finds that those documents and communications are not discoverable.

Defendants also ask that the court permit them to produce documents in response to Numbers 15 through 19 and 23 of plaintiffs' first request, and Numbers 4, 5, 7 and 10 through 12 of plaintiffs' second demand for documents subject to a protective order designating the production as attorney's eyes only. Specifically, plaintiffs' seek the following:

FIRST DEMAND FOR DOCUMENTS

² Plaintiffs have withdrawn the production requests contained within number 20 and 21 of the second set of document demands.

15. All documents you have provided to any expert in this matter.

16. Financial statements (consisting of balance sheet, income statement, statement of cash, etc.) for each calendar year – 2014 and 2015 in the case of Princeton Alternative Funding, LLC, and 2016 in the case of Princeton Alternative Funding, LLC f/k/a MicroBilt Capital Funding, LLC, and 2014, 2015, and 2016 in the case of Princeton Alternative Income Fund, LP.

17. Income tax returns (IRS forms 1065) and IRS forms K-1s for each calendar year – 2014 and 2015 in the case of Princeton Alternative Funding, LLC, and 2016 in the case of Princeton Alternative Funding, LLC f/k/a MicroBilt Capital Funding, LLC, and 2014, 2015 and 2016 in the case of Princeton Alternative Income Fund, LP.

18. Bank statements for Princeton Alternative Funding, LLC for 2014, 2015 and 2016.

19. Bank statements for Princeton Alternative Funding, LLC f/k/a MicroBilt Capital Funding, LLC for 2016.

23. Bank statements for Princeton Alternative Income Fund, LP for 2014, 2015 and 2016.

SECOND DEMAND FOR DOCUMENTS

4. Copies of PAF's, its direct and indirect subsidiaries, federal, state, and local income tax returns and information returns and reports for the years 2014 through the present.

5. Copies of PAF/MCF's, its direct and indirect subsidiaries, federal, state, and local income tax returns and information returns and reports for the years 2014 through the present.

7. Copies of the financial statements (audited and unaudited) of PAF and its direct and indirect subsidiaries and PAF/MCF and its direct and indirect subsidiaries for the period from 2014 through the present.

10. Copies of PAF's, its direct and indirect subsidiaries, general ledger for the periods from 2014 through the present.

11. Copies of PAF/MCF's, its direct and indirect subsidiaries, general ledger for the periods from 2014 through the present.

12. Copies of PAF's, its direct and indirect subsidiaries, business plans and budgets including projections for future performance, and all documents relating thereto, for the periods from 2014 to anytime in the future.

Defendants have demonstrated good cause necessitating the issuance of a protective order that designates the resulting production as attorney's eyes only. The documents sought by plaintiffs involve confidential financial and commercial information from on-going business entities. See Catalpa Investment Grp., Inc., supra, 254 N.J. Super. at 273-74. Moreover, defendants have asserted counterclaims alleging that plaintiffs have already utilized defendants' proprietary information to disrupt defendants' business and impermissibly compete with defendants while employed at Keycap Business Funding LLC. Plaintiffs did not dispute these claims in their opposition. These facts warrant the entry of a protective order excluding dissemination or access to any individual other than legal counsel, without further order from the court. See ALK Assocs., supra, 276 N.J. Super. at 316.

Finally, with regard to Numbers 22, 23, 24 and 25 of the Second Demand for Documents, the court limits the time period for these documents to the date of the filing of plaintiffs' complaint-January 25, 2016.

Based upon the foregoing, the court denies defendants' Motion for a Protective Order Striking Numbers 20-22, 24-27, and 34-41 of Plaintiffs' First Demand for Documents, and Numbers 5, 7, 11, and 20-24 of Plaintiffs' Second Demand for Documents. The court grants defendants' Motion for a Protective Order pursuant to R. 4:10-3(g) classifying defendants' production of Numbers 15 through 19 of plaintiffs' First Demand for Documents, and Numbers 4, 5, 7, and 10 through 12 of plaintiffs' Second Demand for Documents as attorney's eyes only. The court grants defendants' motion to strike the requests in Numbers 32 and 33 of plaintiffs' First Demand for Documents.