

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ROCHE-BOBOIS U.S.A. LTD.,

Plaintiff,

-against-

GREGORY BORSTELMANN, DEBRA ANNE
BORSTELMANN, MARK BORSTELMANN,
RICHARD BORSTELMANN and JOAN
BORSTELMANN,

Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 6006/09

MOTION DATE: Feb. 18, 2011
Motion Sequence # 003

The following papers read on this motion:

Notice of Motion..... X
Affirmation..... XX
Reply Affidavit..... X
Memorandum of Law..... X

Motion by plaintiff for an order directing defendants Mark Borstelmann and Debra Anne Borstelmann to produce documents is **granted** to the extent indicated below. Motion by plaintiff for an order directing defendants to appear for depositions is **denied**. Motion by plaintiff for sanctions is **denied** with leave to renew upon trial or upon a summary judgment motion.

This is an action for conversion. Plaintiff Roche-Bobois USA, Ltd is engaged in the business of selling high-end furniture and accessories. Defendant Gregory Borstelmann, who

was employed by plaintiff as a bookkeeper, embezzled \$1,015,639.30 by drafting checks and forging the signature of an authorized Roche-Bobois employee. The checks were made payable to various banks, to defendant himself, and certain other payees. Plaintiff discovered the embezzlement during the course of a routine audit shortly after Borstelmann left its employ.

The present action was commenced on March 31, 2009. Plaintiff asserts claims against defendant Gregory Borstelmann for conversion, unjust enrichment, constructive trust, breach of contract, and breach of fiduciary duty. Plaintiffs' claims against defendant Debra Anne Borstelmann, Gregory's wife, and defendant Mark Borstelmann, Gregory's brother, are based on the allegation that Gregory transferred funds to them directly or for their benefit.

On April 28, 2010, defendant Debra Anne Borstelmann asserted her Fifth Amendment privilege in response to plaintiff's request to produce documents. Nevertheless, on April 30, 2010, the parties entered into a preliminary conference stipulation and order scheduling Debra Anne's deposition on July 8 and Mark Borstelmann's deposition on July 9, 2010. Defendant Mark Borstelmann asserted his Fifth Amendment privilege in response to plaintiff's request to produce documents on August 23, 2010.

By order dated September 10, 2010, the court granted plaintiff's motion for summary judgment against defendant Gregory Borstelmann in the amount of \$1,015,639.30, plus interest from March 19, 2009. The court severed plaintiff's claim against Gregory Borstelmann and allowed plaintiff to enter a separate judgment against that defendant.

Plaintiff moves pursuant to CPLR § 3124 to compel defendants to produce documents and appear for depositions. Alternatively, plaintiff moves pursuant to CPLR § 3126 to impose sanctions based upon defendants' willful failure to provide discovery. In plaintiff's view, defendants Debra Anne and Mark Borstelmann have asserted their Fifth Amendment privilege in response to plaintiff's "combined demands," i.e. requests to produce and notices of examination. In response, defendants do not interpose "any substantive opposition to plaintiff's motion to compel production of documents."

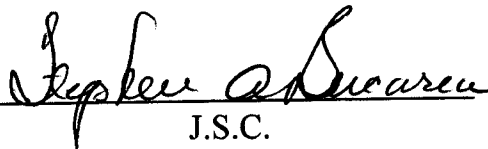
The act of producing documents does not necessarily have testimonial aspects and an incriminating effect (*In re Astor*, 62 AD3d 867, 870 [2d Dept 2009]). Moreover, defendants appear to have withdrawn their invocation of the Fifth Amendment privilege with respect to plaintiff's document requests. Accordingly, plaintiff's motion to compel defendants to produce documents is **granted**. Defendants shall produce all documents in response to

plaintiff's demands within 15 days of the date of this order.

"When a party in a civil action, capable of testifying on the issues, refuses to testify by the claim of this privilege, he must thereupon bear all of the legitimate inferences flowing from the adverse evidence against him, and this without regard to his reasons for his silence" (*Haiti v Duvalier* 211 AD2d 379, 386 [1st Dept 1995]). It appears that defendants refused to appear for their depositions based upon the assertion of the privilege against self-incrimination. However, on the present motion, plaintiff has not submitted any evidence to support its claim that Gregory Borstelman transferred plaintiff's funds to the other defendants. Accordingly, plaintiff's motion for a sanction is **denied** without prejudice to renewal at trial or upon a summary judgment motion.

So ordered.

Dated APR 11 2011.


J.S.C.

ENTERED

APR 13 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE