

ALP, Inc. v Moskowitz

2024 NY Slip Op 31416(U)

April 12, 2024

Supreme Court, New York County

Docket Number: Index No. 652326/2019

Judge: Nancy M. Bannon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 61M

Justice

-----X

ALP, INC., and LIBRA MAX,
Plaintiffs,

- v -

LAWRENCE MOSKOWITZ, BENDER CICCOTTO &
COMPANY CPA'S, LLP, ROBERT FRANK, ROBERT J.
FRANK, GENE LUNTZ, LAUREN MOSKOWITZ, and ADAM
MAX,
Defendants.

-----X

INDEX NO. 652326/2019
MOTION DATE 09/12/2023,
01/26/2024
MOTION SEQ. NO. 020 021

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 020) 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 935, 936, 939, 940, 941, 951, 952, 953

were read on this motion to/for SANCTIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 021) 963, 964, 965, 966, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

In this action arising from a dispute over control of ALP, Inc. ("ALP"), plaintiff ALP moves, pursuant to 22 NYCRR 130-1.1(a) and CPLR 3126, to sanction defendants Bender Ciccotto & Company CPA's, LLP, Robert M. Frank and Robert J. Frank (collectively, the "Bender Ciccotto defendants") for the purportedly improper issuance of two non-party subpoenas, and for a protective order pursuant to CPLR 3103 precluding any further attempts by the Bender Ciccotto defendants to obtain discovery pertaining to the finances of ALP or its shareholders (MOT SEQ 020). The Bender Ciccotto defendants oppose the motion and separately move, pursuant to CPLR 4403, to confirm a discovery conference order issued by Hon. Alan C. Marin, Judicial Hearing Officer ("JHO") (MOT SEQ 021). That motion is in turn opposed by the plaintiffs, who also cross-move to vacate the subject discovery conference order, which cross-motion is opposed by the Bender Ciccotto defendants. The parties' motions are denied.

ALP'S Motion for Sanctions

On March 16, 2023, the Bender Ciccotto defendants served two non-party subpoenas that sought information pertaining to compensation paid to ALP's owners and ALP's historical liabilities for rent owed (the "Subpoenas"). At the time the Subpoenas were served, the Bender Ciccotto defendants had a pending motion to compel ALP to produce certain documents pertaining to ALP's financial condition for 2019 and subsequent years (MOT SEQ 018). By a Decision and Order dated March 23, 2023, the court denied the Bender Ciccotto defendants' motion to compel because it sought documents that were "the same or similar" to those sought by their co-defendants in motions pending at the time of filing, in violation of the court's directive in its status conference order entered on September 13, 2022, that the parties are not to file new discovery motions with respect to "categories [of documents] already the subject of pending discovery motions." The court warned the Bender Ciccotto defendants that further violation of court orders on similarly frivolous grounds would result in sanctions. The court further stated that, even had it been properly authorized, the motion would be denied for the same reasons stated in the court's orders dated October 14, 2022, and October 24, 2022, which resolved the already referenced motions of the co-defendants seeking the same or similar documents. In those two prior orders, the court denied the co-defendants' motions to compel the disclosure of additional categories of financial information (MOT SEQ 013 and MOT SEQ 014), holding, as relevant here, that the financial information that ALP had already agreed to produce was sufficient for the co-defendants to establish any defenses they may have.

Thereafter, on March 30, 2023, the parties appeared for a pre-motion conference concerning ALP's request for leave to move for an order quashing the Subpoenas, to which ALP objected, *inter alia*, on the grounds that they sought information that the court had previously found was irrelevant and not discoverable. On April 5, 2023, the court issued a status conference order granting ALP leave to file its motion, setting a filing deadline of May 1, 2023, and again cautioning the Bender Ciccotto defendants that "violation of court orders and/or other frivolous conduct shall result in sanctions against them[.]" The Bender Ciccotto defendants heeded the court's warning and, on April 28, 2023, having determined that ALP's objections were well-founded, withdrew the Subpoenas, mooted out ALP's yet-to-be-filed motion to quash. Inexplicably, despite the underlying discovery dispute having been fully resolved by the withdrawal of the Subpoenas, ALP persisted in filing its motion, reworking it from the anticipated motion to quash into the instant sanctions motion.

ALP's motion seeks to have the court sanction the Bender Ciccotto defendants for serving the Subpoenas, and for thereafter failing to withdraw the Subpoenas with sufficient haste. ALP contends that the Subpoenas were frivolous from the outset and that the Bender Ciccotto defendants, in an effort to harass ALP and force it to incur unnecessary litigation costs, delayed withdrawing the Subpoenas until just before ALP's motion to quash was due. ALP seeks an award, pursuant to 22 NYCRR § 130-1.1(a), of its attorney's fees and costs incurred in objecting to the Subpoenas and preparing the instant motion. It further seeks, pursuant to CPLR 3126, to have the court strike the Bender Ciccotto defendants' counterclaims and to preclude them from asserting a defense, introducing evidence or arguing in this litigation the "Enrichment Theme," as defined in ALP's moving papers. In addition, ALP seeks a protective order pursuant to CPLR 3103 precluding any further attempts by the Bender Ciccotto defendants to obtain discovery pertaining to the finances of ALP or its shareholders.

22 NYCRR § 130-1.1(a) provides, in relevant part, that the court, "in its discretion, may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." Frivolous conduct includes conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, is undertaken primarily to harass or maliciously injure another, or asserts material factual statements that are false. See 22 NYCRR § 130-1.1(c). "In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of . . . the party." Id.

CPLR 3126 authorizes the court to sanction a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" and that "a failure to comply with discovery, particularly after a court order has been issued, may constitute the "dilatatory and obstructive, and thus contumacious, conduct warranting the striking of the [pleading]." Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1st Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1st Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1st Dept. 2004).

ALP's sanction motion borders on the frivolous. The request for sanctions pursuant to CPLR 3126 is plainly baseless given that the Bender Ciccotto defendants' conduct with respect to the Subpoenas has nothing to do with any failure to comply with discovery, let alone a refusal to obey an order for disclosure. Nor will the court exercise its discretion to impose sanctions pursuant to 22 NYCRR § 130-1.1(a). The Subpoenas were served prior to the issuance of the March 23, 2023, Decision and Order, which made clear that the Bender Ciccotto defendants were precluded from obtaining the same financial information that their co-defendants had previously sought for the same reasons stated in the court's prior decisions. Shortly thereafter, the court issued its April 5, 2023, status conference order granting ALP leave to move to quash the Subpoenas and cautioning the Bender Ciccotto defendants against seeking financial information as to which the Court had previously ruled they were not entitled. The Bender Ciccotto defendants, in response to the court's warning, withdrew the Subpoenas, thereby resolving the parties' discovery dispute without the need for motion practice. It is ALP who, by insisting on moving forward with its motion, has subjected the parties and the court to the cost and delay of unnecessary motion practice. Therefore, the branch of MOT SEQ 020 that seeks the imposition of sanctions against the Bender Ciccotto defendants is denied.

The branch of ALP's motion seeking a protective order pursuant to CPLR 3103 is premature, as there are no outstanding discovery requests from the Bender Ciccotto defendants seeking any objectionable financial information from ALP or its owners. See Ward v Arcade Bldg. Maint., Inc., 200 AD2d 455, 455 (1st Dept. 1994); Arnold Constable Corp. v Chase Manhattan Mortg. & Realty Tr., 59 AD2d 666, 667 (1st Dept. 1977). Moreover, given the court's multiple prior orders delineating the scope of allowable discovery with respect to ALP's finances and cautioning the parties against frivolous conduct, and in light of the voluntary withdrawal of the Subpoenas, the court does not discern a need for a protective order at this juncture to prevent further attempts by the Bender Ciccotto defendants to improperly obtain from ALP financial information to which they are not entitled. Therefore, the branch of ALP's motion seeking a protective order is denied without prejudice.

The Parties' Motion's Regarding JHO Marin's Discovery Order

The parties' motion and cross-motion pertaining to the December 12, 2023, discovery conference order issued by JHO Marin are denied as procedurally improper. Discovery

conference orders are not generally reviewable. See, e.g., CPLR 2221(d)(2) & (e)(2) (motions to reargue or renew must be addressed to orders determining a prior motion); cf. Daniels v City of New York, 291 AD2d 260, 260 (1st Dept. 2002); (preliminary conference order not appealable); Postel v New York Univ. Hosp., 262 AD2d 40, 41 (1st Dept. 1999) (same). The subject order is not a final report, filed with the court, on an issue requiring decision by the court that was referred to JHO Marin to hear and report. See CPLR 4403. Nor is it an order resolving a discovery motion. See CPLR 3104(c) (referee designated to supervise discovery “shall have all the powers of the court” and “[a]ll motions or applications made under this article [i.e., pertaining to disclosure] shall be returnable before . . . the referee”); CPLR 3104(d) (providing for court’s review of order made by referee). As such, the Bender Ciccotto defendants’ purported motion to confirm, and the plaintiffs’ purported cross-motion to vacate JHO Marin’s discovery conference order are denied as procedurally improper.

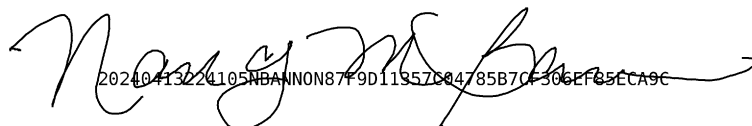
Accordingly, it is

ORDERED that the motion of plaintiff ALP, Inc. for sanctions pursuant to 22 NYCRR § 130-1.1(a) and CPLR 3126, and for a protective order pursuant to CPLR 3103 (MOT SEQ 020) is denied; and it is further

ORDERED that the purported motion of defendants Bender Ciccotto & Company CPA’s, LLP, Robert M. Frank and Robert J. Frank to confirm, pursuant to CPLR 4403, and the purported cross-motion of plaintiffs ALP, Inc. to vacate the discovery conference report, dated December 12, 2023, issued by JHO Alan C. Marin (MOT SEQ 021) are denied as procedurally improper; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



20240413224105NBANNON87F9D11957064785B70F306EF85ECAA9C

4/12/2024

DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER