

Goldstein v CIBC World Markets Corp.

2004 NY Slip Op 30270(U)

December 9, 2004

Supreme Court, New York County

Docket Number: 603903/02

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 54

0603903/2002

GOLDSTEIN, NORMAN
VS
CIBC WORLD MARKETS CORP.

INDEX NO. _____

MOTION DATE 10/9/04

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 3

REARGUMENT/RECONSIDERATION

The following papers, numbered 1 to _____ were read on this motion to/for _____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED

FILED

DEC 16 2004

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

HON. RICHARD B. LOWE

Dated: 12/9/04

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----X

NORMAN GOLDSTEIN, as Executor of the
Estate of ELLSWORTH GOLDSTEIN,

Plaintiff,

Index No. 603903/02

-against-

CIBC WORLD MARKETS CORP.,
TASIN & COMPANY, INC. and
GARY EMMERICH,

-----X

HON. RICHARD B. LOWE, III, J:

Plaintiff moves for an Order, pursuant to CPLR §§ 2221 and 3126 granting renewal and reargument of this Court’s order dated June 10th, 2004, dismissing the complaint for failure to comply with disclosure orders, and upon renewal and reargument , imposing a lesser sanction upon the Plaintiff.

Background

In its memorandum decision and order dated June 10, 2004, this Court dismissed the complaint due to Plaintiff counsel’s failure to comply with the Court’s numerous discovery orders. In its decision, the Court found that plaintiff counsel’s continuous and willful disregard for the Court’s orders throughout the litigation warranted dismissal of the complaint. The Court rejected Plaintiff counsel’s argument that Michael Calvey Esq. (Calvey) of the firm Calvey & Amon was suffering from an illness which prevented compliance with the numerous disclosure orders. At no time was verified and admissible evidence of the illness ever submitted to the Court. In a dicta portion of the decision, the Court also noted that it was disturbed by the fact that Calvey, who allegedly was ill, had co-counsel in the matter by Harry Wise, III, Esq (Wise)

and yet the contumacious conduct continued. The Court also noted that at no time did any one at Calvey's law firm, Calvey & Amon, come in to assist in the matter until the eleventh hour when the Court was prepared to dismiss the complaint.

Plaintiff seeks to renew argument of this order alleging that the Court "misapprehended" the nature of the relationship between Wise and Calvey & Amon. Plaintiff also argues that since the only other attorney at Calvey & Amon is a corporate partner who was unaware of his firm's flagrant violations of this Court's discovery orders, the Court should have treated Calvey as a solo practitioner for purposes of CIBC's CPLR 3126 motion.

Discussion

Motion for Reargument

A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the Court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision. William P. Pahl Equip Corp. V. Kassis, 182 A.D.2d 22, 27, 588 N.Y.S.2d 8, 11 (1st Dept 1992).

Here, Plaintiff argues that in describing Wise as a member of Calvey & Amon and as co-counsel, the Court misapprehended the true nature of the relationship between Wise and Calvey & Amon. This argument is contrary to what Wise previously represented to the Court when he suggested that he was counsel to Calvey and Amon and that he "worked with Mike [Calvey] on the case in various capacities for the past six months (5/4/04 Tr. At 2). Irrespective of Wise's relationship to the firm of Amon and Calvey, however, the Court found that "the actions of plaintiff's counsel, alone, warrants dismissal of the complaint." (Order, June 10, 2004 at 5-6).

The Court again reiterates that it is mindful of the First Department's preference that a matter be decided on its merits. Corner v. Bernstein Mgmt Corp., 249 A.D.2d 191, 193 672

N.Y.S.2d 95, 97 (1st Dept. 1998). However, where non compliance is willfull, contumacious, or due to bad faith, the sanction of dismissal is warranted. *Id.* As the Court discussed in its June 10, 2004 order, there were numerous violations by Plaintiff's counsel to comply with discovery orders. Each time, mindful that non compliance must be contumacious in order to warrant dismissal, the Court gave Calvey another opportunity to comply. At no time to Calvey abide by the Court's orders.

Furthermore, while Calvey and Calvey & Amon argue that the flagrant behavior was due to Calvey's illness, there is not a scintilla of admissible evidence before this Court to verify this illness. The Court specifically asked for a verified statement from a doctor attesting to Calvey's illness and Calvey failed to produce such evidence.

In sum, the Court finds that the alleged misapprehension in this Court's prior decision is not a basis to allow reargument of this Court's June 10, 2004 order.

Accordingly, the motion for reargument is denied.

Motion for Renewal

Under New York law, in order for a court to grant a motion for renewal under CPLR 2221(e), the movant must (i) identify the motion as one for renewal, (ii) show that the renewal motion is based on new facts or law not offered on the prior motion that would change the prior determination, and (iii) give a reasonable justification for the failure to present the new facts and/or law on the prior motion. See CPLR §2221(e).

Although this motion is labeled as one for renewal, the moving papers do not contain any discussion relating to the renewal argument. Nor do they clearly identify any new facts not previously offered on the prior motion. It is simply a third bite at the apple, attempting to recast arguments previously rejected by the Court.

Second, a motion to reargue must be based on new found facts which were unavailable to the moving party at the time the underlying application was heard. The moving papers offer no justification for Plaintiff's failure to offer the alleged new facts on two separate occasions when the parties appeared before the Court to argue the application to dismiss.

Lastly, the purported new facts, will not change this Court's prior determination to dismiss the complaint. The Court's reason for dismissing the complaint was Plaintiff's relentless pattern of disregard for the Court's discovery orders. Nothing in these new facts go to address this Court's finding that Calvey's conduct alone justifies dismissal, let alone facts that would have changed the outcome of the prior motion.

Accordingly, the motion to renew is denied.


Conclusion

For the foregoing reasons, it is hereby ordered that the motions to renew and reargue are denied.

This shall constitute the order and decision of the Court.

Dated: December 9, 2004

ENTER:



HON. RICHARD W. LEWIS
J.S.C.

FILED

DEC 16 2004

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