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

PRESENT: _____ PART 56

Justice

Index Number : 110909/2001

FUNDAMENTAL PORTFOLIO

VS

TOCQUEVILLE ASSET MANAGEMENT

Sequence Number : 007

TRIAL DE NOVO

INDEX NO. _____

MOTION DATE 5/22/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
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

FILED

MAY 30 2007

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 5/23/07

_____ J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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FUNDAMENTAL PORTFOLIO ADVISORS, INC., FUNDAMENTAL SERVICE CORP., INC., AND LANCE M. BROFMAN,

Index No. 110909/01

Plaintiffs,

-against-

TOCQUEVILLE ASSET MANAGEMENT, L.P., TOCQUEVILLE SECURITIES L.P., TOCQUEVILLE MANAGEMENT CORPORATION, ROBERT KLEINSCHMIDT, FRANCOIS DANIEL SICART, KIERAN LYONS AND DREW RANKIN,

Defendants.

----------X

HON. RICHARD B. LOWE, III:

Plaintiff moves for an order pursuant to CPLR 4404(a) for a new trial.

Background

The facts in this matter have been extensively discussed in the court's prior decisions and will not be reiterated except where pertinent. Briefly, this is an action for breach of contract which was tried before a jury for seven days, commencing on January 16, 2007.

Plaintiffs were investment advisors to the funds known as Fundamental Funds. Because of securities violations they were in the process of being removed by the Funds' Board when they entered into a September 1996 Agreement with the Defendants. This was done in furtherance of a proposed transfer of the group of funds from the plaintiffs to the defendants in exchange for compensation. The Agreement provided through a non-disclosure, non-compete clause that the Defendants needed Plaintiffs' consent to do business with the Funds. This provision was

included to prevent the defendants from soliciting or doing business with the Funds if the deal was not consummated. Plaintiffs argued that the Defendants breached the Agreement by doing business with the Funds without the Plaintiffs consent and without the deal being completed. They brought a cause of action for breach of contract after the Defendants took over the Funds pursuant to approval given by the Fundamental Funds' Board. Defendants argued at trial that such consent was provided through extensive correspondence between the parties, Board minutes, and filing with the United States Securities and Exchange Commission ("SEC").

The jury was asked to decide (1) whether the non-compete agreement between the parties was breached, (2) whether the plaintiffs had waived the consent clause contained in the agreement and (3) whether the plaintiffs were estopped from enforcing the non-compete agreement. The jury unanimously voted that the non-compete agreement was breached and that the plaintiffs had not waived the consent requirement of the agreement. However, the jury, through a 5 to 1 vote found in favor of the defense on the issue of estoppel.

The plaintiff now moves for a new trial alleging that the facts primarily relied on by the jury in support of the estoppel claim were false and were the result of perjured testimony given by the defendant Robert Kleinschmidt ("Kleinschmidt"). The plaintiff also argues the evidence on the record does not support the estoppel defense.

Discussion

In considering a motion for a new trial under CPLR 4404(a), "[i]t is well settled that a jury verdict in favor of a defendant should not be set aside as against the weight of the evidence unless the preponderance of evidence in plaintiff's favor is so great that the jury could not have reached the verdict on any fair interpretation of the evidence "(*Jamal v NY City Health and*

Hospitals Corp., 721 NYS2d 337, 338-39 [1 st Dept 2001]). Indeed, "great deference [is] to be accorded to the jury's conclusion (*McDermott v Cofee Beanery, Ltd.*, 777 NYS2d 103 [1st Dept 2004]).

Where, a motion for a new trial is purportedly based upon "newly discovered" evidence, it should be denied if the evidence or information could have been discovered earlier with due diligence (*Pullman v Pullman*, 606 NYS2d 618, 619 [1st Dept 1994])(affirming order denying a new trial because there was no showing "why the claimed newly discovered evidence could not have been earlier discovered by the exercise of due diligence"). For a new trial to be granted on grounds of "newly discovered" evidence, the evidence must be newly discovered post-trial, not evidence that was presented at trial and left unchallenged by the party seeking retrial (*See Greenwich Sav. Bank v JAJ Carpet Mart, Inc.*, 510 NYS2d 594 [1st Dept 1987]).

Perjury at trial may be grounds for a new trial (*See Trapp v American Trading and Production Corp.*, 66 AD2d 515 [1st Dept 1979]). However, evidence of perjury must be clearly established and relate to a competent and material fact in order to merit consideration of a new trial (*Id at* 12-13).

Testimony of Kleinschmidt

The plaintiffs argue that Kleinshmidt's testimony is perjured whereby he testified that defendant Tocqueville Asset Management, LP ("Tocqueville") expended approximately $250,000 - $300,000 in connection with the plan to appoint Tocqueville as the fund's advisor and to merge the funds into new Tocqueville funds that were created to allow Tocqueville to succeed Plaintiffs as investment advisor. The defendant refers to these five newly created funds as "clone funds"

The plaintiffs allege that subsequent to the trial, he learned that these clone funds were registered virtually cost free. He alleges this is documented by an SEC filing of a form N-1A dated October 28, 1997. Plaintiff Lance M. Brofman ("Brofman") also submits an affidavit affirming in hindsight that "to create and register the five new legal entities simply required the approval of Tocqueville's trustees and then the simple filing of Amendment No. 19 to the above mentioned form N1-A. This was done, as is indicated in the filing, by the law firm of Kramer, Levin which represented both the Fundamental Funds and the Tocqueville Funds at the time. As Kramer Levin had the forms for both Fund groups, it was simply a matter of cutting and pasting the appropriate sections of the existing N1-A's" (Brofman Aff. ¶ 10). Brofman also notes, under industry practice and based on experience with the same attorneys, the minimal expense would be either generally disregarded as a courtesy, or billed to the funds after they commenced operation (Brofman Aff ¶¶ 11-12).

Plaintiffs offer no evidence to clearly contradict Kleinschmidt's unchallenged testimony concerning the costs of setting up the New Tocqueville Funds. Instead, Brofman submits an affidavit that asserts that following the trial he reviewed the filings and refreshed his recollection of the events in question and concluded Kleinschmidt's testimony was false (Brofman Aff ¶ 6). The SEC filing of the form N1-A dated October 28, 1997 further does not clearly indicate that no expense was incurred in setting up the clone funds (Brofman Aff, Exhibit A). Rather, there is no indication of the cost or process for setting up the new funds.

Furthermore, the plaintiffs never cross examined the witness to test his testimony and never pursued discovery on the issue. Plaintiffs allege that the issue was never raised until the last day of the trial and they did not have an opportunity to pursue the issue. Plaintiffs also argue

the amount expended was never an issue in the case until Kleinschmidt raised it in his testimony. However, at his deposition, Brofman testified that he offered to pay Tocqueville $300,000 for expenses and to walk away (Hyland Aff., Ex. 23, Brofman Dep. at 162:8-163:5. The plaintiff alleges Brofman meant these payments were to cover monies paid to Christopher Culp, who was hired as a senior officer to manage the day-to-day operations of the Funds and not in reference to the cost of creating the clone funds. However, if plaintiff doubted the nature of the expenses and whether they were payments to Culp or for the creation of the clone funds, he could have cross-examined Kleinschmidt on the issue. Plaintiff chose not to do so.

Plaintiffs did not choose to pursue discovery on the issue of defendants' expenses. The defendants objected to the plaintiffs' demands for relevant discovery, however plaintiffs never pursued the documents. No motion to compel was ever filed and there is no evidence submitted by the plaintiff that he sought production of the documents. Therefore, the un controverted testimony cannot be challenged now on a motion for a new trial.

Plaintiffs argue that this court should find it telling the defendants' have not submitted any evidence to prove the claim which is the subject of the perjured testimony. Unsupported allegations of perjury do not automatically force an opponent to re-try the issue raised by the allegation of perjury. The plaintiffs have not shown clear evidence of perjury, as they are required to do so (*Trapp* at 12-13), which would force the defendants to again litigate the issue in order to disprove the allegations. If the plaintiffs' doubted the veracity of Kleinschmidt's testimony, then it should have been tested through cross-examination at the time of trial.

Verdict Against the Weight of the Evidence

In the alternative, Plaintiffs seek a new trial on the grounds that the jury's verdict was

against the weight of the evidence. "A verdict should only be set aside as against the weight of the evidence where it is palpably wrong and the jury could not have reached its conclusion upon any fair interpretation of the evidence" (*Rivera v 4064 Realty Co*, 17 AD3d 201 [1st Dept 2005]).

Estoppel "rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury" (*Nassau Trust Co. v Montrose Concrete Prods.*, 56 NY2d 175, 184 [1982]). In this matter, the Court of Appeals sustained the cause of action for estoppel and held that to establish the defense of equitable estoppel, a party must show that it "significantly and justifiably relied on th[e] conduct [of another] to its disadvantage (*Fundamental Portfolio Advs., v Tocqueville Asset Mgmt., L.P.* 7 NY3d 96, 106-107[2006]).

The evidence on the record supports a finding by the jury in favor of the defense on the issue of estoppel. This court has reviewed the testimony given at trial and there is sufficient evidence on the record that could lead a reasonable jury to find in favor of the defendant on the issue of estoppel. The record provides evidence demonstrating that, even had the jury not considered Kleinschmidt's testimony concerning costs, Tocqueville "significantly and justifiably relied on the actions of the plaintiff to its detriment" (*Fundamental*, 7 NY3d at 106-107). There are numerous instances of testimony which support the record on this issue (*see Hyand Aff., Exhibits* 3, 4, 7, 10, 11, 12, 16, 17).

Furthermore, to the extent plaintiffs argue that a new trial is warranted because Tocqueville did not claim it had been misled into acting upon the belief that Plaintiffs would not enforce their agreement, the court finds the record to evidence the contrary. After review, this court finds the record contains undisputed facts that a jury could fairly interpret as establishing that Tocqueville was induced by Plaintiffs to act in furtherance of the merger of the funds into

Tocqueville.

Therefore the plaintiff has failed to show that a new trial is warranted and necessary.

Conclusion

Therefore, based on the foregoing, it is hereby

ORDERED that the motion for a new trial is denied.

This shall constitute the order and decision of the court.

Dated: May 29, 2007

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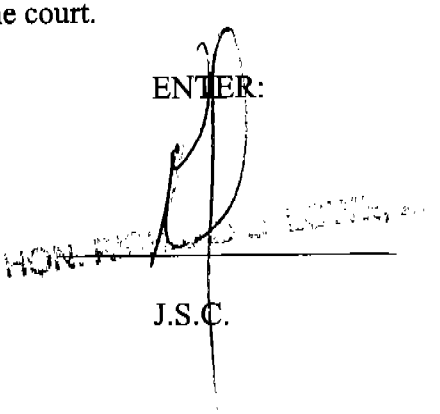

HON.

J.S.C.