Gonzalez v Societe General
2007 NY Slip Op 32878(U)
September 14, 2007
Supreme Court, New York County
Docket Number: 0605012/1998
Judge: Charles E. Ramos
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SCANNED ON 9/17/2007

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

PRESENT: **Charles Edward Ramos** PART **53**

Justice

Index Number : 605012/1998

TURBEL, ANTONIO LAURENTINO

VS

SOCIETE GENERALE

Sequence Number : 015

PRECLUDE

INDEX NO. ______

MOTION DATE ______

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
SEP 14 2007
NEW YORK
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is decided in accordance with accompanying memorandum decision and order.

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

Dated: 9/14/07

J.S.C.
CHARLES E. RAMOS

Check one: [ ] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

--X

ARMANDO GONZALEZ, as auxiliary executor for the estate of ANTONIO LAURENTINO TURBEL, ANTONIO MARIA TURBEL MUNILLA, MARIA VIVIANA TURBEL MUNILLA, and ARTURO EDUARDO,

Plaintiffs,

-against-

SOCIETE GENERAL,

Defendant.

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Index No. 605012/98

FILED
SEP 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

Charles Edward Ramos, J.S.C.:

In Motion Seq. 015, plaintiffs, Antonio Laurentino Turbel, Antonio Maria Turbel Munilla, Maria Viviana Turbel Munilla, and Arturo Eduardo, (collectively referred to as "Turbels"), move, (i) pursuant to CPLR 3126, for issue preclusion sanctions against defendant, Society Generale ("SG"); (ii) pursuant to CPLR 2221(e), leave to renew SG's oral motion to limit the issue to be tried and vacating the October 17, 2005 Order granting SG's oral motion; (iii) pursuant to CPLR 3025(b), leave to file an amended complaint; and (iv) pursuant to CPLR 2201, a one week stay of the trial after the Court has decided the motion.

Background

This case is essentially a contract dispute between plaintiffs and defendant who is alleged to have transferred Mr. Turbel's money to another bank without his consent or knowledge.

The plaintiffs originally filed a complaint on October 13, 1998, alleging that Mr. Antonio Laurentino Turbel (who since the filing of the complaint has passed away, and is now represented

[* 3]

by Armando Gonzalez, as auxiliary Executor for Mr. Turbel's estate) opened a bank account with Banco Supervielle Societe Generale ("BSSG")[1], an Argentinean bank that was affiliated with SG, in 1990. At the time the account was opened, SG, a French Bank headquartered in Paris, France, owned 40% of BSSG, and later SG owned as much as 98.5% of BSSG stock before, in March 2005, it sold of all its stake in BSSG.

On October 27, 1992, Mr. Turbel allegedly instructed BSSG to wire transfer US$ 222,299.19 from Argentina Banco Hispanoamericano in New York City in the name of "Jorge Gerrova." Plaintiffs now claim that these transfers were made without their knowledge and authority.

The Turbels originally brought this action alleging three causes of action; breach of contract against BSSG, breach of contract against SG, and a third party beneficiary claim against SG. The first cause of action was dismissed once BSSG was no longer a party to the action. (Judgment entered on January 24, 2001). The third cause of action, a third party beneficiary claim, was withdrawn with prejudice and on the merits, by an Order of this Court dated October 17, 2005 ("October Order"). Plaintiffs are now left with one cause action against SG and are seeking discovery of two classes of information from SG. Plaintiffs allege that they are unable to complete discovery

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[1] Originally included as a defendant, but was later dismissed on the basis that it had no presence directly or as an agent in New York. *Turbel v Societe General*, 276 AD2d 446 (1st Dep't 2000) (affirming this Court's Judgment dismissing BSSG from the action).

because SG has wilfully failed to comply with this Court's November 19, 2002 Order ("November Order"), compelling SG to produce information concerning (i) the relationship between defendant and BSSG; and (ii) information within the possession and control of BSSG, and that the withheld information is relevant to the issues for which it seeks issue preclusion sanctions.

Plaintiffs have submitted their second motion[2] for issue preclusion sanctions which seeks the following relief: (i) that BSSG be found to have acted as defendant's agent for the purpose of communicating with defendant's account holders in Argentina; (ii) that the three withdrawals from the plaintiffs' account in the aggregate amount of $100,000 were never authorized by plaintiffs and, (iii) that the final transfer of plaintiffs account balance to Banco Hispanoamericano was never authorized by plaintiffs.

Plaintiffs argue that this Court should grant the issue preclusion sanctions on two grounds. First, defendant has wilfully violated discovery orders after this Court's denial of

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[2] Plaintiffs filed their first issue preclusion motion, Motion No. 10, on February 19, 2004 as a cross motion to an Order to Show Cause to dismiss the complaint or in the alternative, *In Limine*, to preclude the Plaintiffs from offering evidence. A hearing was held on February 24, 2005 where the motion was granted only to the extent of compelling production of documents. Another hearing was held on June 30, 3005 where plaintiffs orally renewed their first issue preclusion motion, and the Court denied the motion. Plaintiffs then filed an Order to Show Cause, Motion No. 14, which essentially asked for the same relief as the previous motions for issue preclusion sanctions. The application was denied. Finally, plaintiff filed the current motion, Motion No. 15, for issue preclusion sanctions.

[* 5]

plaintiff's previous motion for issue preclusion sanction. Second, that the decision of the First Department, even though denying plaintiff's appeal without prejudice on a procedural ground, explicitly recognizes that SG was in noncompliance with this Court's November Order.

The standard for granting sanctions is whether "any party... refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed..."(CPLR 3126(1)). In order to impose the remedy of issue preclusion sanctions, this court must find that "the offending party's failure to comply with discovery demands was wilful, deliberate, and contumacious." *Siegman v Rosen*, 270 Ad2d 14, 15 (1st Dep't 2000).

On two previous occasions, February 24, 2005 and June 30, 2005, plaintiffs have argued for issue preclusion, and have failed both times to make a showing that SG wilfully or deliberately failed to disclose information. In this third application for sanctions, plaintiff has once again failed to produce any additional evidence that would compel this court to grant sanctions, and therefore, plaintiff's motion for issue preclusion sanctions is denied.

This Court first takes issue with plaintiff's characterization of the November Order, that underlies all the motions for issue preclusion. The November Order states very clearly, "[P]laintiffs are entitled to responses to those specific interrogatories and notices to admit as they have stated

[* 6]

in their papers. In addition, plaintiffs are entitled to all responsive documents relating to Societe's relationship with Supervielle." (November 19, 2002 Order, 5). The November Order is clear in that it compels two items from SG: (i) responses to plaintiff's interrogatories and notices to admit; and (ii) all responsive documents relating to SG's relationship with BSSG. Plaintiffs, on the other hand, read the November Order as allowing access to all documents regarding SG's relationship with BSSG and all documents within the possession of BSSG regarding the bank account. This court has notified plaintiffs, on several occasions, that they must make a showing of an agency relationship between SG and BSSG before SG can be compelled in turn to have BSSG produce documents.

> The Court: "The Motion to compel discovery responses is granted. The bank [SG] shall supply us with - first, with the documents, if any, and an affidavit that these are all the documents, and then we will have to determine whether or not we need a deposition from somebody in Paris to testify as to what relationship, if any, is between Paris and New York, and the bank in Argentina, Supervielle. However the caveat is I will renew - I will permit the defendants to renew the motion to dismiss after [sic] summary judgment to dismiss in the event we find out there is no proof of the agency that the plaintiff is relying on.
> (Transcript of February 24, 2005 Hearing, 45:14-46:2)
>
> The Court: "I wanted to compel the Argentine Bank to produce documents through Societe General"
> Mr. Griffith: "[I]t's that during all of the relevant time in this litigation the French Bank owned 98 point something percent of the Argentine bank. So they certainly had control over the documents in Argentina.
> The Court: "That's a leap that you've never filled in for me...you got to show me that the French home office in Paris had control over those documents in Argentina."
> (Transcript of June 5, 2007 Hearing, 5:4-25)

With regard to the first class of information, SG's

[* 7]

relationship with BSSG, plaintiff alleges a slew of violations by SG. These violations include: (i)SG's failure to provide written verification for the assertion that they could not find documents that were responsive to the request for documents relating to the relationship between SG and BSSG; (ii) SG was to have a Paris representative verify the interrogatory responses and instead a New York representative verified the responses; and (iii) SG's affidavit from a representative of its Paris headquarters failed to comply with the previous discovery orders in that the affidavit concedes that the search for documents relating to SG's acquisition of an equity interest was limited to the period of 1990-1992, and no order specifies such a limit.

Starting with the last supposed violation of the discovery orders, this Court is perplexed by this assertion, as a close reading of the Paris representative's affidavit completely contradicts plaintiffs' assertion. The affidavit of Martine Orelio, the SG Paris representative, states:

> "Mr. Tipton [general counsel of SG in New York] requested that I conduct a search of SG's records for documents relating to SG dealings with Supervielle...I, therefore requested that the "Retail Banking Division outside Metropolitan France"...search for documents concerning the relationship between SG and Supervielle for the period from the 1960's...up to and including 1992." (Affidavit of Martine Orelio, ¶4)

This Court on several occasions has made clear to plaintiffs that they must prove there was some relationship between SG and BSSG. SG has provided plaintiffs with an affidavit of Martine Orelio, a party with knowledge of the search process conducted in

Paris, and she attests that SG's offices in Paris have identified and sent documents relating to SG's acquisition of BSSG. The only two outstanding items regarding responsive documents of SG's and BSSG's relationship are (i) the verification of SG's interrogatory responses by a SG representative of its Paris headquarters; and (ii) the deposition of a SG representative from Paris to testify to the relationship between SG and BSSG.

Plaintiffs complain that SG's verification of its interrogatory responses were completed by an officer from New York, and not an officer from Paris. As for the deposition, plaintiffs had every opportunity to depose this witness from June 1, 2005 onwards, and now, more than 2 years later, they are still without a deposition, and they have failed to attach any affidavits that would explain the delay. This case has been pending since 1998, and it is time that plaintiffs stop making this a discovery case and one that will be adjudicated on the merits.

The second class of information relates to the specific bank transaction conducted at BSSG. Plaintiffs allege that there are documents in BSSG's control relating to the policies and procedures of maintaining accounts from SG because BSSG is a foreign majority owned subsidiary of SG, and that this Court's November Order recognized this fact by ordering SG to produce information within the possession and control of BSSG.

Plaintiffs have repeatedly mis-characterized this Court's orders and the instructions contained within. Plaintiffs allege

[* 9]

that "SG's responses ignore the Court's repeated orders granting plaintiffs' motions to compel ...which sought production of responsive information within the possession of BSSG..." (Affirmation of Edward Griffith, 5). However, plaintiffs conveniently forget to mention in their papers that this Court, at a hearing on June 30, 2005, modified its order directing SG to produce documents from Argentina that were not in possession of SG. ("And to the extent that I have directed that Societe General has to produce documents from Argentine [*sic*] that are not in the possession of Societe Generale, I am modifying that order. It cannot be done. It cannot.") (Transcript of June 30, 2005 Hearing, 18:9-13).

This Court's basis for the above ruling is that documents in the possession of a foreign entity can be obtained through treaty with the home country of the foreign entity but they cannot be compelled to produce documents through a parent corporation located in America. Plaintiffs' appealed this Court's ruling contained in an order dated October 17, 2005 ("October 2005 Order"). The October 2005 Order was appealed by plaintiffs on the grounds that the trial court's legal conclusion, that it lacked authority to compel SG to produce the information within BSSG's possession, was contrary to the law and a November Order by this Court, which granted plaintiffs' motion to compel SG to produce documents that BSSG had in its possession on the basis that SG owned 98% of BSSG's stock.

Plaintiffs submit that the First Department's grant of their

motion for a stay of trial pending appeal coupled with a denial of the motion, not on the merits but on procedural grounds, is evidence that the First Department recognizes, that "as a matter of law," parent companies are required to produce information within the control of their majority owned subsidiaries. After reading the same opinion, this Court is even more inclined to deny the issue preclusion sanctions because plaintiffs have not put forth any solid ground or case law in which the First Department has ruled, that as a matter of law, parent companies are required to produce information within the control of their majority-owned foreign subsidiaries.

Furthermore, in order for plaintiffs to be granted issue preclusion sanctions, they must show that SG wilfully and deliberately failed to produce such information, and that is simply not the case. At a hearing conducted on June 5, 2007, to reargue plaintiffs' motion for issue preclusion that was made on June 30, 2005, SG's attorney stated that he had requested documents from BSSG and shared them with plaintiffs' lawyer. Second, and more importantly, SG was following this Court's ruling that SG does not have to produce documents in the possession of BSSG.

The second and third branch of plaintiffs' motion are related in that plaintiff seeks leave to renew SG's motion to limit the issues to those framed by the original complaint and to vacate that portion of the order granting the motion because (i) SG made its oral motion without notice; (ii) plaintiffs did not

have an opportunity to submit any evidence in opposition to SG's oral motion; and (iii) at the time the motion was granted discovery was on-going. On the basis of vacating the order granting the motion, plaintiffs seek leave to amend its complaint.

First, plaintiffs' contention that SG never made a motion to this Court because certain verbs, such as "to move," were not used is a red herring. No where is it required that parties who come before this Court use particular verbs or phrases to make an oral motion. As the October 2005 Order reflects, this Court granted SG's motion to limit the issues to those framed by the "complaint as originally filed" because plaintiffs had seven years prior to that ruling to engage in due diligence and complete the discovery it needed to conform the pleadings to the facts. Plaintiff who is now approaching the ninth year since this action has been filed is grasping at every opportunity to delay trying this case. It has become a repeated pattern of behavior. This has included counsel's failure to know of the death of his plaintiff for a considerable period of time. It was defendant's counsel who finally informed this Court that their was no longer a living plaintiff.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination... and shall contain reasonable justification for the failure to present such facts on the prior motion." *Luna v Port Authority of New York and New Jersey*, 21 AD3d 324, 325 (1st

Dep't 2005).

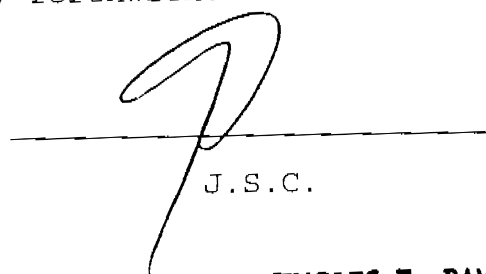
Plaintiffs submit that the affidavit of Edward Griffith and their proposed amended complaint contain new factual grounds and therefore, this court should grant the motion to renew. The affidavit of Edward Griffith and the proposed amended complaint contain no new factual ground upon which this court should grant a motion to renew. First, the affirmation of Mr. Griffith contains no explanation of why plaintiffs, who have been aware of the facts which form the underlying basis of the allegations since at least 1998, when plaintiff knew that the account was with Societe Generale, failed to conform the pleadings earlier. Second, there is no document from Societe Generale that has been produced which supports plaintiffs' contention that BSSG was an agent of SG. Lastly, parties are on the eve of trial, in a case where the note of issue has been outstanding since July 5, 2002. The only outstanding matter that was pending when the note of issue was filed was one deposition, and plaintiffs are now trying to get a second bite of the discovery apple by resorting to delay tactics and frivolous motions.

Finally, Plaintiffs' fourth and last branch of their motion argues that they are entitled to a stay of the trial pending the Court's resolution of the motion, because SG wilfully violated this Court's discovery orders and plaintiffs shall be prejudiced by trial unless SG is sanctioned and plaintiffs should be allowed time to file their proposed amended complaint.

This Court no longer has the ability to grant a stay of

trial because the trial is no longer on this Court's docket. However, if this matter was still before this Court, the plaintiffs would be proceeding to trial, forthwith.

Dated: September 14, 2007



J.S.C.

CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

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SEP 14 2007
NEW YORK
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