

Melcher v Apollo Med. Fund Mgt. L.L.C.
2007 NY Slip Op 32962(U)
September 17, 2007
Supreme Court, New York County
Docket Number: 0604047/2003
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn
Justice

PART 49m

James L. Melcher

INDEX NO. 604047/03

MOTION DATE 8/16/07

MOTION SEQ. NO. 014

- v -

Apollo Medical Fund Management L.L.C. MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...
Answering Affidavits -- Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

FILED
SEP 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/17/07 Al Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
JAMES L. MELCHER,

Plaintiff,

-against-

Index No. 604047/03

APOLLO MEDICAL FUND MANAGEMENT L.L.C.
and BRANDON FRADD,

Defendants.

-----X
Cahn, J.:

FILED
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Plaintiff James L. Melcher (Melcher) moves to strike defendants' pleadings and for a default judgment. The grounds of the motion are defendants' alleged destruction of evidence and deceit in connection therewith (the Spoliation Motion). A trial date of October 10, 2007 has been set, (which on the parties' agreement has been adjourned to November 26, 2007).

Melcher accuses Harold of wilful destruction of evidence. He and his attorney have recently also made accusations of factual misrepresentations against defendants' counsel. Movant urges the court to rule in his favor and uphold the accusations on motion.

The document at issue in the instant motion is the purported Net Profits Agreement, which was burned by Fradd. Fradd maintains that the burning was accidental and occurred while he was making tea. He states that the document was accidentally burned. He states that he signed and dated the Net Profits Amendment on May 21, 1998, and that it reflected an oral agreement between himself and Melcher to change the formula under which Melcher would be compensated by defendant Apollo Medical Fund Management, L.L.C. (Apollo Management). Melcher denies any such oral agreement. He alleges that it was written, signed and backdated by Fradd in 2003, after Melcher informed Fradd that he would sue to enforce his rights under the

contract as it was actually written. Melcher asserts that Fradd intentionally burned the Nets Profit Agreement to interfere with Melcher's plan to have a forensic expert perform a test on Fradd's signature on the agreement, in order to determine the date of the signature.

In the instant motion, Melcher does not seek, and argues that he would not accept, the remedy of merely precluding defendants from relying on the burned document. Melcher argues that as Fradd has been caught destroying evidence and thereafter, he opines, lying, defendants would like to keep the document, Fradd's burning thereof, and the false stories he told thereafter, as far from the jury as possible.

Defendants cross-move for an order granting them their expenses and attorneys' fees, and for the imposition of sanctions on Melcher and his attorney, pursuant to 22 NYCRR § 130-1.1, for engaging in frivolous conduct by asserting material factual statements that are patently false and misleading, and that are calculated to delay the resolution of this action.

Defendants oppose the instant motion, because they argue that there has not been spoliation. They further maintain that Melcher fails to show that the physical damage to the Net Profits Amendment so prejudices the prosecution of his case that it warrants the drastic sanction of striking defendants' pleadings. They argue that Melcher is fully capable of setting forth his case.

Defendants deny plaintiff's accusation of wilful destruction of the document or other improprieties. Basically, the court is presented with a number of accusations and denials which it can not decide on paper alone.

Defendants further contend that their case is not based upon the Net Profits Amendment. They state that the document supports, but is not central to, their defense, which is that Melcher

waived his breach of contract claim because, for more than five and a half years, he accepted payment according to the terms to which Fradd says he and Melcher orally agreed. Defendants state that, during that period, Melcher received approximately 53 financial statements that reflected the alleged underpayment. Defendants state that Melcher did nothing about the alleged underpayment until Fradd removed him as a member and a manager of defendant Apollo Management.

Defendants further assert that Melcher has never alleged that, but for the burning of the Net Profits Amendment, he could have proven that the document was actually typed and printed in or around May of 1998. Melcher's expert was asked to determine the timing of Fradd's signature and the date, which are handwritten in ink. Defendants state that, even if Melcher had been able to test and show that the ink was new, the litigation would have gone forward, because that result would not have conclusively proven that the document had not been created in May of 1998, just that Fradd had recently signed it. Thus, according to defendants, Fradd's credibility would have been at issue, which credibility Melcher is still able to attack at trial upon Fradd's cross-examination.

Fradd's credibility regarding when he signed the Net Profits Agreement, the circumstances surrounding the burning of the document and his statements regarding the attorneys who allegedly drafted it, are issues of fact to be submitted to a jury. It is beyond argument that these issues of fact cannot be resolved on documents alone.

"The determination of spoliation sanctions is within the broad discretion of the court." Denoyelles v Gallagher, 40 AD3d 1027, 1027 (2d Dept 2007). This court denies Melcher's motion. The "drastic remedy of striking [defendants'] answer [is] not warranted, as the plaintiff

failed to establish that [the defendants'] conduct deprived him of the means of proving his claim." Chui Ping Chung v Caravan Coach Co., 285 AD2d 621, 621-622 (2d Dept 2001).

While striking a pleading may be appropriate when a defendant willfully destroys key evidence, thereby depriving a plaintiff of the ability to prove his or her claim, "outright dismissal remains a drastic remedy and is appropriate only where less severe sanctions have been ruled out." Tommy Hilfiger, USA v Commonwealth Trucking, 300 AD2d 58, 60 (1st Dept 2002); see also Linarello v City Univ. of New York, 6 AD3d 192, 194 (1st Dept 2004). When the destruction of evidence does not create an "unsurmountable burden to plaintiff," a lesser sanction, such as an adverse inference at trial, may be appropriate. Tommy Hilfiger, USA v Commonwealth Trucking, 300 AD2d at 60; see also Rodriguez v 551 Realty LLC, 35 AD3d 221, 221 (1st Dept 2006). Whether any sanctions or jury instructions are appropriate here can not be determined on motion, but must await the trial testimony.

Defendants' cross-motion is also denied at this time.

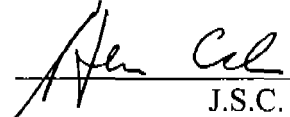
Accordingly, it is

ORDERED that the motion to strike defendants' pleadings is denied; and it is further

ORDERED that defendants' cross-motion for sanctions is denied at this time.

Dated: September 17, 2007

FILED
SEP 20 2007
NEW YORK
COUNTY CLERK

ENTER:

J.S.C.