Gottlieb v Northriver Trading Co., LLC
2008 NY Slip Op 30288(U)
January 30, 2008
Supreme Court, New York County
Docket Number: 0601546/2004
Judge: Jane S. Solomon
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SCANNED ON 2/4/2008

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

PRESENT: Jane S. Solomon

PART 55

Index Number : 601546/2004

GOTTLIEB, HELENE

vs

NORTHRIVER TRADING

Sequence Number : 008

~~VACATE~~ "RENEW/REARGUE" ~~DECISION~~

INDEX NO. ______

MOTION DATE 12/17/07

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	5-7
Replying Affidavits	8-11

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order.

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

FILED
FEB 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1-30-08

JANE S. SOLOMON 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: PART 55
-------------------------------------- X

HELENE GOTTLIEB,

Index No. 601546/04

Plaintiff,

- against -

NORTHRIVER TRADING COMPANY LLC; STEVEN SCHLAM; ARIEL WOLFSON; MORRIS WOLFSON; AARON WOLFSON; and ABRAHAM WOLFSON,

Defendants.
-------------------------------------- X

DECISION and ORDER

NORTHRIVER TRADING COMPANY LLC and STEVEN SCHLAM,

Counterclaimants,

- against -

PHILIP GOTTLIEB a/k/a FEIVEL GOTTLIEB,

Additional Defendant on the Counterclaims.

-------------------------------------- X

JANE S. SOLOMON, J.:

In motion sequence number 007, plaintiff Helene Gottlieb and additional defendant on the counterclaim, Philip Gottlieb a/k/a Feivel Gottlieb (Feivel) (together, the Gottliebs), move for an order striking the Certificate of Readiness for Trial and Note of Issue, dated May 25, 2007.

In motion sequence number 008, the Gottliebs move for an order vacating the decision and order of this court, dated May 9, 2007 (Prior Decision), and granting reargument and renewal of the motion and cross motion underlying the Prior Decision.

Defendants Northriver Trading Company LLC (Northriver), Steven Schlam, Ariel Wolfson, Morris Wolfson, Aaron Wolfson, and Abraham Wolfson cross-move for an order (1) imposing an award of sanctions, pursuant to 22 NYCRR § 130-1.1 of the Rules of the Chief Administrator, against the Gottliebs based upon alleged frivolous litigation conduct; and (2) permitting defendants to withdraw voluntarily the remaining counterclaims in this action.

The facts underlying this action were set forth in a decision dated February 14, 2005, and in the Prior Decision. Briefly summarized, plaintiff commenced this action seeking to compel defendants to provide her with an accounting of the financial affairs of Northriver, a New York limited liability company, and of which plaintiff is a member. From 1995 to 1999, plaintiff held a 50% interest in Northriver. Since 1999, and continuing to at least the date of the prior motion, plaintiff has held a 20.6% interest in Northriver.

Defendants allege that Feivel used his wife, plaintiff, as an instrumentality to commit insurance fraud against insurance companies, and to trade securities with impunity without attracting inordinate attention. To facilitate this scheme, Feivel directed that his interest in Northriver be given to plaintiff, as nominee, and he directed that no membership certificates are to be issued to Northriver's principals, and that no operating agreement be prepared or adopted. Allegedly,

plaintiff's purported interest in Northriver was a sham, and her interest illusory.

Defendants counterclaimed against the Gottliebs (with Feivel as additional defendant on the counterclaims), alleging that, in 1999, the Northriver partners and Feivel entered into an agreement whereby Feivel agreed to dilute his share of profits in the company from 45% to 20.6% to offset his losses. They allege further that Feivel continued to drain company resources; Northriver ceased doing business in 2000; the Gottliebs had losses in Feivel's personal sub-account exceeding $200,000; and their percentage share of Northriver's losses as of December 31, 2003, was almost $300,000. They also claimed that, in August 2002, Northriver loaned Feivel an additional $25,000, and that no part of that loan was ever repaid, despite due demand.

In the Prior Decision, this court (1) granted a motion by defendants to the extent of dismissing the complaint seeking an accounting, and granting summary judgment in favor of Northriver on the sixth counterclaim in the amount of $201,123, with interest from September 13, 2005, and (2) denied the cross motion by the Gottliebs, which sought an order (a) denying or deferring defendants' motion pending examinations before trial of defendants and the deposition of non-party witnesses, (b) compelling defendants to appear for depositions before trial, and (c) extending all outstanding discovery cut-off dates and the

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date for the filing of a note of issue and certificate of readiness by at least 90 days.

In support of their motion for reargument, the Gottliebs cite 26 instances in which, allegedly, this court either overlooked or misapprehended law and fact pertaining to the Prior Decision.

In support of the motion for renewal, the Gottliebs ask the court to review 20 paragraphs of the Affirmation, dated June 14, 2007, of Edward S. Rudofsky, Esq. (Rudofsky Affirmation), which pertain to the motion for reargument (see ¶ 4, referring to ¶¶ 3 [c] and ¶¶ 3 [h] through 3 [z]), and, presumably, to construe them in the context of motion for renewal. The Gottliebs also cite exhibits "C" through "G," "I" through "K," "M," and "O through Z" of the Rudofsky Affirmation, which 21 exhibits, they contend, constitute new materials, recently obtained, that were not previously submitted to the court, and which, again presumably, the court, after reviewing these 21 exhibits, will discover for itself the basis for renewal.

The motion for reargument and renewal are denied. Notwithstanding their global challenge to the Prior Decision, the Gottliebs have not demonstrated that the court overlooked any relevant fact, misapprehended the law or, for any other reason, mistakenly arrived at its determination (*Spinale v 10 W. 66th St. Corp.*, 193 AD2d 431 [1st Dept 1993]; *Pro Brokerage v Home Ins.*

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Co., 99 AD2d 971 [1st Dept 1984]). Moreover, they have not properly presented new facts not offered on the prior motion that would change the prior determination (*American Audio Serv. Bur. Inc. v AT & T Corp.*, 33 AD3d 473 [1st Dept 2006]). Simply stated, their assertions are without merit.

As way of example, the Gottliebs first argue that the court misapprehended the relief sought in the amended complaint. Rather than making any assertions as to this alleged error, the Gottliebs merely quote the ad damnum clause of the amended complaint, and underline the words "money judgment" and "liquidation of the limited liability company," and move on to alleged error number two. The body of the complaint only addresses the request for an accounting, however, and is devoid of any allegations pertaining to damages or liquidation. The only reference to these types of relief is in the ad damnum clause, seeking some sort of "money judgment" and "liquidation," and, thus, as to these purported "claims," the complaint is not validly stated. A prayer for relief is not considered in determining the sufficiency of a pleading (*Aspesi v Shahinian Acoustics*, 84 AD2d 543 [2d Dept 1981]).

Moreover, because the Prior Decision set forth the determination that plaintiff is not entitled to an accounting, she is also not entitled to a money judgment based on "any amount determined upon such accounting to be due plaintiff," which

language, as noted above, is contained only in the ad damnum clause.

The Gottliebs also contend that the court misapprehended the law by not granting plaintiff an accounting, and, in support of their argument, the Gottliebs cite *Matter of Spires v Lighthouse Solutions, LLC*, 4 Misc 3d 428 [Sup Ct, Monroe County 2004]). There, petitioner sought an order *dissolving* Lighthouse Solutions, LLC and *appointing a receiver* to gather the assets of Lighthouse to market and liquidate such assets, and, thereafter, to distribute to the members the proceeds of such liquidation. Here, however, plaintiff only sought an accounting, not a dissolution or the appointment of a receiver, and defendants counterclaimed for money damages.

Citing *Matter of Spires v Lighthouse Solutions, LLC* is consistent with the arguments asserted on the prior motion, which, as noted in the Prior Decision, were without force, because they did not involve limited liability companies (*see Allied Bingo Supplies of Fla., Inc. v Hynes*, 27 AD3d 597 [2d Dept 2006] [at-will partnership]; *Italia Imports v Weisberg & Lesk*, 220 AD2d 226 [1st Dept 1995] [issue of whether party entitled to an audit is governed by the parties' engagement letter agreement]; *Marine Trust Co. of Buffalo v Pierce*, 53 NYS2d 710 [Sup Ct, Erie County 1945] [trustee seeking to have account judicially settled]).

The Gottliebs assert that the "Court twice refers to the defendants' expert, Steven Levy, as a 'forensic accountant.' He is not and does not claim to be an accountant . . . ." (Rudofsky Affirmation, ¶ 3 [G]). The assertion that Levy does not claim to be an accountant is belied by the very first paragraph of Levy's affidavit, submitted on the prior motion, that he is "a forensic accountant and president of Steven Levy Investigations."

The Gottliebs describe numerous instances in which the court allegedly misapprehended the record, without any discussion as to the impact such alleged errors have on the findings set forth in the Prior Decision. Furthermore, their assertions overlook the fact that the Prior Decision partially denied defendants' motion for summary judgment on their counterclaims, because of the existence of material issues of fact.

I have considered the other alleged errors, and find the assertions unavailing. I note that in paragraph 46 of his 27-page reply affidavit, Feivel states that "he is unaware of any subsequent decision by any Court overruling the New York Court of Appeals decision in the *Berlin* case" (citations omitted). Feivel's awareness of case law is without consequence, because he is a party to this action, and is represented by counsel which is imbued with the duty of presenting the law to the court.

As for the motion for renewal, supplying the court with

21 exhibits and, in effect, stating that therein lies the basis for renewal, without any discussion whatsoever, fails to demonstrate good grounds for renewal. Thus, the Gottliebs have not established that consideration of these materials would change the Prior Decision. Furthermore, the Gottliebs have not offered a reasonable justification for the failure to present such new materials on the prior motion (*American Audio Serv. Bur. Inc. v AT & T Corp.*, 33 AD3d at 476).

Defendants' request for an order permitting them to withdraw voluntarily the remaining counterclaims in this action is granted. Withdrawal will not prejudice the Gottliebs, in their sole remaining capacity in this action as counterclaim-defendants, because only the interests of defendants, as counterclaim-plaintiffs, will be adversely affected by the withdrawal. Thus, granting the request is warranted (*Parraguirre v 27th St. Holding, LLC*, 37 AD3d 793 [2d Dept 2007]). Withdrawing the remaining counterclaims will have the effect of discontinuing the action, something that a court should permit at any time unless the other party will be prejudiced thereby (*Michael v Michael*, 209 AD2d 1055 [4th Dept 1994]). The Gottliebs have not alleged, let alone, demonstrate, prejudice. Their argument – that the counterclaims should continue, because that will permit the Gottliebs to obtain discovery and "expose . . . [defendants] financial shenanigans" – is not a valid basis

(*see Davidson v Regan Fund Mgt. Ltd.*, 13 AD3d 117 [1st Dept 2004] [defendant's request for further discovery is an unwarranted "fishing expedition"]).

The Gottliebs assert that withdrawal should be permitted only on condition that it be discontinued with prejudice, and that they be awarded costs, including legal fees, in litigating the dismissed counterclaims. Neither request is granted. CPLR § 3217 (c) provides for a discontinuance without prejudice, and there is no grounds for departing from that standard. The Gottliebs have also not demonstrated a basis to award fees and costs, because it has not been shown that the counterclaims were without merit, especially considering that defendants were granted judgment on one of them. As a consequence of the withdrawal of the remaining claims, the motion by the Gottliebs for an order striking the Certificate of Readiness for Trial and Note of Issue is denied as moot.

The motion for sanctions is granted, but only to the extent of awarding the costs of the motion for renewal and reargument, including reasonable attorney's fees.

22 NYCRR § 130-1.1 allows courts to sanction attorneys for engaging in frivolous conduct, including conduct that is: (1) completely without merit in law; (2) undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) asserting material factual

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statements that are false (*Tavella v Tavella*, 25 AD3d 523 [1st Dept 2006]). Sanctions are appropriate where, as here, the motion to reargue and renew made frivolous legal assertions (*207 Second Ave. Realty Corp. v Salzman & Salzman*, 291 AD2d 243 [1st Dept 2002]), and was intended to delay and prolong the resolution of the litigation. I make this finding, even while mindful that every reasonable doubt as to whether the conduct comes within the meaning of the statute is resolved in favored of the party facing sanctions (McKinney's Cons Law of NY Book 1, Statutes § 271 [e]).

The conduct is frivolous in two of the three enumerated ways: it makes assertions that are completely without merit in law, and was undertaken primarily to delay or prolong the resolution of the litigation.

To the extent, that the Gottliebs cited 26 instances in which this court allegedly either overlooked or misapprehended law and fact pertaining to the Prior Decision, without providing an arguably sound basis for any of them (as discussed above), together with the act of supplying the court with 21 exhibits and, in effect, stating that therein lies the basis for renewal, renders the motion frivolous. Compounding their frivolity, the Gottliebs describe numerous alleged errors in which the court misapprehended the record, without any discussion as to the impact such alleged errors have on the determinations contained in the Prior Decision. Failing to articulate the manner in which

these supposed errors merit the court's reversal of the Prior Decision constitutes frivolous conduct (*Mountain Lion Baseball Inc. v Gaiman*, 263 AD2d 636 [3d Dept 1999]).

I also note that, as discussed in the Prior Decision (at page six), the amended complaint failed to articulate why plaintiff named Ariel Wolfson, Morris Wolfson, Aaron Wolfson, and Abraham Wolfson as defendants, and it sought no remedy as against them. This conduct, too, was frivolous. Hence, the instant motion is not the only example of frivolous conduct on the Gottliebs' part, and reflects a pattern of frivolous conduct in this action, another factor militating in favor of sanctions (*Steiner v Bonhamer*, 146 Misc 2d 10 [Sup Ct, Allegany County 1989]).

Once the court finds conduct that is frivolous, sanction is mandatory (*Nyitray v New York Athletic Club in City of N.Y.*, 274 AD2d 326 [1st Dept 2000]). Indeed, frivolous conduct imposes an unnecessary burden on the judicial system (*Hoeflich v Chemical Bank*, 149 AD2d 341 [1st Dept 1989]). Moreover, even if a portion of the motion were deemed not frivolous, the fact that the bulk of it is, warrants an award of sanctions (*Wesselmann v International Images*, 259 AD2d 448 [1st Dept] [although plaintiff prevailed to a limited extent upon reargument, the thrust of the motion was a rehash of arguments that the court previously refused to entertain on their motion to

submit sur-sur-reply papers], *lv dismissed* 94 NY2d 796 [1999]). Thus, defendants are granted an award of the costs of the motion for renewal and reargument, including reasonable attorney's fees.

Accordingly, it is

ORDERED that the motion (sequence number 007) by plaintiff Helene Gottlieb and additional defendant on the counterclaim Feivel Gottlieb for an order striking the Certificate of Readiness for Trial and Note of Issue is denied; and it is further

ORDERED that the motion (sequence number 008) by Helene Gottlieb and Feivel Gottlieb for an order vacating the decision and order of this court, dated May 9, 2007, and granting reargument and renewal of the motion and cross motion underlying that decision is denied; and it is further

ORDERED that the motion by defendants Northriver Trading Company LLC, Steven Schlam, Ariel Wolfson, Morris Wolfson, Aaron Wolfson, and Abraham Wolfson for an order (1) imposing an award of sanctions, pursuant to 22 NYCRR § 130-1.1 of the Rules of the Chief Administrator, against plaintiff Helene Gottlieb and Feivel Gottlieb, based upon their frivolous litigation conduct; and (2) permitting defendants to withdraw voluntarily the remaining counterclaims in this action is granted; and it is further

ORDERED that the amount to be awarded as the reasonable

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value of defendants' costs and expenses, including reasonable attorney's fees, in opposing the motion for reargument and renewal is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee shall determine the aforesaid issue; and it is further

ORDERED that, except as addressed above, the portion of defendants' motion for recovery of attorney's fees in this action is denied; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Motion Support Office (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk is directed to enter judgment in accordance with the foregoing, provided that entry of judgment shall be held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR § 4403 or receipt of the determination of the Special Referee or the designated referee.

Dated: January 30, 2008

ENTER:

FILED
FEB 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.
JANE S. SOLOMON