

Visual Arts Found., Inc. v Egnasko

2009 NY Slip Op 31754(U)

July 24, 2009

Supreme Court, New York County

Docket Number: 603078/2008

Judge: O. Peter Sherwood

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

PRESENT: Q. PETER SHERWOOD
Justice

PART 61

VISUAL ARTS FOUNDATION, INC.

Plaintiff,

-against-

LOUIS A. EGNASKO, SHARI EGNASKO,
CHARLES EGNASKO and GOLD LEAF
TRAVEL CENTER, INC.,

Defendants.

INDEX NO. 603078/08

MOTION DATE July 15, 2009

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion to stay proceedings

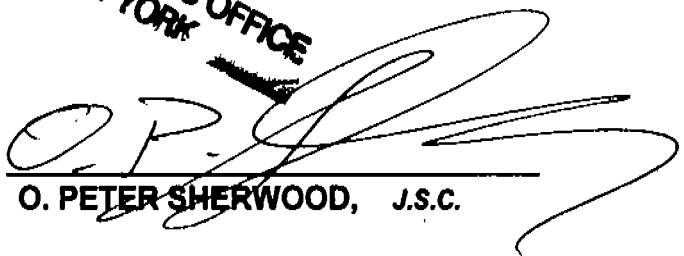
| | PAPERS NUMBERED |
|---|-----------------|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | <u>1-4</u> |
| Answering Affidavits — Exhibits _____ | <u>5-6</u> |
| Replying Affidavits _____ | <u>7</u> |

Cross-Motion: Yes No

Upon the foregoing papers, defendants' motion for an order pursuant to CPLR § 2201 staying this action pending the resolution of a related criminal proceeding is decided in accordance with the accompanying decision and order.

FILED
JUL 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/24/09


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X
VISUAL ARTS FOUNDATION, INC.,

Plaintiff,

-against-

LOUIS A. EGNASKO, SHARI EGNASKO, CHARLES
ESNASKO and GOLD LEAF TRAVEL CENTER, INC.,

Defendants.
-----X

O. PETER SHERWOOD, J.:

DECISION AND
ORDER

Index No. 603078/2008

FILED
JUL 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

Defendants move by Order to Show Cause for an order pursuant to CPLR § 2201¹ staying this action pending the resolution of a criminal action pending in New York County against defendant Louis Egnasko.

On or about October 24, 2008, plaintiff Visual Arts Foundation ("plaintiff" or "the Foundation") commenced the instant action by filing the summons and verified complaint to recover the sum of \$176,551.43 alleged to have been misappropriated by Louis Egnasko ("Louis") for his personal use, \$1,000,000 in punitive damages, amounts paid to Louis as compensation for his employment and benefits in the sum of \$56,969.32, together with attorney's fees and costs of the action. The complaint also names Louis' wife, Shari Egnasko ("Shari") and his father, Charles Egnasko ("Charles") stemming, *inter alia*, from the fact that Louis deposited allegedly forged checks into Shari's and Charles' personal accounts.¹

Issue was joined as to defendants Louis, Charles, and Shari by service of their respective *pro se* answers in which they each asserted counterclaims sounding in intentional infliction of emotional distress and alleging that the Foundation with knowledge of the individual defendants' health issues initiated this proceeding. By decision and order dated March 5, 2009, this Court granted, upon default, plaintiff's motion to dismiss the counterclaims.

¹Defendant Gold Leaf Travel Center has neither appeared nor answered in this proceeding.

In the interim, a preliminary conference was held and an order entered setting a discovery schedule which required, *inter alia*, that defendants' depositions be held on specific dates in March and April 2009, and scheduled a compliance conference for May 9, 2009. As of the May 9th compliance conference, only Louis had been deposed. The preliminary conference order was, therefore, amended to set dates for Charles' and Shari's depositions, which were scheduled for June 17 and 18, 2009, respectively. A continuation of Louis' deposition was scheduled for June 15, 2009. On June 2, 2009, Louis was arrested on an indictment filed in New York County involving the same transactions underlying the instant civil action.

Defendants are now seeking a stay in this action pursuant to CPLR § 2201 pending the resolution of the related criminal proceeding on the ground that during the pendency of the criminal proceeding defendants may seek to invoke in this action their respective Fifth Amendment privilege against self-incrimination. Defendants also contend that granting a stay will serve to avoid the duplication of effort entailed in separate adjudications and the burden on the court of making individual rulings of Fifth Amendment assertions, while plaintiff will in no way be prejudiced by the stay. In spite of their counterclaims having been dismissed, defendants continue to suggest that plaintiff is exploiting its knowledge of their individual emotional and health issues and acting in bad faith in prosecuting this action.

Plaintiff vigorously opposes the stay application contending that it has already deposed Louis over six days and has expended enormous effort and expense obtaining defendants' bank and credit card information due to defendants' failure to respond in a meaningful way to their discovery demands. Plaintiff contends that in the course of his deposition, Louis made many admissions concerning his misappropriation of the Foundation's funds and implicated both Shari and Charles in this scheme. Plaintiff notes that the criminal proceeding is against Louis only and that there is no indication that a criminal investigation has been commenced against Shari or Charles. Since Louis has already been extensively questioned and substantial paper discovery has been conducted, there will be little duplication or waste of judicial resources if this civil proceeding is permitted to proceed to disposition while the criminal action is pending. Indeed, plaintiff suggests that given Louis's admissions during his deposition, the criminal proceeding is likely to reach an expedited disposition. Lastly, contrary to defendants' contention, plaintiff claims that it will be prejudiced by a stay as any

delay in bringing this action to judgment will permit defendants to dispose of or secrete assets that could be used to satisfy the potential judgment.

CPLR § 2201 provides that “except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case upon such terms as may be just.” The decision is entirely discretionary and the motion court is not obligated under the United States or New York State Constitutions to stay a civil proceeding simply because a related criminal action is pending (*see, Fortress Credit Opportunities I LP v Netschi*, 59 AD3d 250 [1st Dept 2009]; *Campbell v New York City Tr. Auth.*, 32 AD3d 350, 352 [1st Dept 2006]; *see also, Matter of Astor*, 62 AD3d 867, 868-869 [2d Dept 2009]). Nor is the court compelled to issue a stay under such circumstances simply because defendants are faced with the difficulty of choosing between presenting evidence in their own behalf and asserting their Fifth Amendment rights against self-incrimination (*id.*). The courts have held that the assertion of the Fifth Amendment privilege is an insufficient basis for precluding discovery in a civil matter (*see, Access Capital, Inc. v DeCicco*, 302 AD2d 48, 52-53 [1st Dept 2002]).

Here, although defendants may be faced with the difficulty of choosing to present evidence in their defense or foregoing production of self incriminating evidence, the Court declines to exercise its discretion by granting a stay under these circumstances. The Court notes that the right against self incrimination in a civil case differs from that retained by a defendant in a criminal action (*see e.g., Steinbrecher v Wapnick*, 24 NY2d 354 [1969]). A witness in a civil action cannot refuse to be deposed or issue a blanket refusal to answer all questions (*id.*; *see, State v Carey Resources, Inc.*, 97 AD2d 508, 509 [2d Dept 1983]). A witness refusing to answer a question on the basis of his or her Fifth Amendment rights is required to explain his or her invocation (*see, Access Capital, Inc. v DeCicco, supra*). Relevant in this regard is the fact that neither Shari nor Charles has been indicted nor is there anything in this record to suggest that they are the subjects of a criminal investigation. In addition, given the fact that Louis, the principal defendant in this action, has already been subject to six days of deposition, that motions have been filed and resolved and that extensive paper discovery has been produced, a stay of this action would likely have a minimal effect on the conservation of judicial resources. Conversely, as plaintiff observes, the evidence adduced in this case is likely to lead to a speedy resolution of the criminal proceeding. In reaching this

determination, this Court finds that the prejudice, if any, to the defendants in the denial of their stay application is outweighed by the benefit of an expeditious disposition of this action.

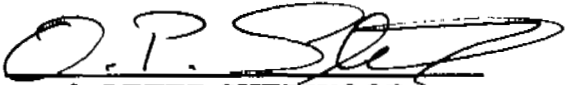
Accordingly, it is

ORDERED, that defendants' motion for a stay of this action pursuant to CPLR § 2201 pending the resolution of a related criminal proceeding is denied.

This constitutes the decision and order of the court.

DATED: 7/24/09

ENTER,


O. PETER SHERWOOD
J.S.C.

FILED
JUL 28 2009
COUNTY CLERK'S OFFICE
NEW YORK