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SHORT FORM ORDER

INDEX No. 07-5623

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 1-20-10
ADJ. DATE 7-20-10
MNEMONIC: # 006 - MotD
007 - MotD
008 - XMD

DOUGLAS STEIN, Plaintiff, - against - TED DOUKAS, WKYA HOLDING CORPORATION, MD STAT, LLC and TELCOR CO., LLC, Defendants.	JERRY GARGUILO, ESQ. Attorney for Plaintiff 542 North Country Road St. James, New York 11780 KEVIN T. GRENNAN, PLLC Attorney for Plaintiff 1000 Franklin Avenue, Suite 302 Garden City, New York 11530 ROBERT J. DEL COL, ESQ. Attorneys for Defendants 34 Dewey Street Huntington, New York 11743-0509

Upon the following papers numbered 1 to 63 read on these motions and cross motion to bifurcate; strike defendants' answer; RRRR; Notice of Motion/ Order to Show Cause and supporting papers (006) 1 - 14; Notice of Cross-Motion and supporting papers (007) 15-27, (008) 28-51; Answering Affidavits and supporting papers 52-60; Replying Affidavits and supporting papers 61-63; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions and cross-motion are consolidated for purposes of this determination; and it is further

ORDERED that this motion (006) by the defendant, Ted Doukas, pursuant to CPLR §603 and §4011 for an order bifurcating this matter into individual and corporate claims and severing the causes of action appearing in the complaint to permit trial on the plaintiff's claim for a purported ownership interest in a corporate entity prior to trial of both the individual and derivative actions is denied; and pursuant to CPLR §3103(a) limiting discovery to the extent that prior to engaging in full Article 31 discovery, the plaintiff should be limited to those issues dealing exclusively with his claim of ownership as reflected in the first branch of this motion and identified as the third and fifth causes of action in the complaint, is granted only to the extent that examination of the account itself is not permitted until the right to an accounting has first been established by interlocutory decree, and is otherwise denied; and it is further

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ORDERED that this motion (007) by the plaintiff pursuant to CPLR §3126 for an order striking the answer of the defendants pursuant to this Court's order, dated September 3, 2009, and scheduling this case for a trial on damages; for further order restraining the defendants, including Ted Doukas, from violating this Court's order, dated September 3, 2009, and requiring the defendants to appear for an examination before trial at the office of Robert Del Col, Esq., vacating any stay that may be in place by virtue of the defendants' frivolous motion for a protective order and stay; directing the defendants to comply with outstanding document discovery; imposing sanctions against the defendants for failure to comply with orders relating to discovery and sanctions pursuant to CPLR §3126 and 22 NYCRR §130-1.1 for making the frivolous and baseless motion for bifurcation, a protective order, and stay of discovery, including sanctions in the form of legal fees and costs of bringing on the instant order to show cause and the travel expenses of the plaintiff is granted to the extent that (i) the plaintiff is directed to serve a demand setting forth with specificity those items which it claims the defendants have failed to respond to, or those items in the bill of particulars which need expansion, within 20 days of the date of this order and the defendants are directed to provide a response to the same within 30 days of the date of this order, or sanctions shall be imposed, including striking of defendants' answer, and (ii) Ted Doukas is to be produced for examination before trial within 30 days of the date of this order at the office of the defendants' counsel or the defendants' answer shall be stricken and sanctions imposed, and is otherwise denied; and it is further

ORDERED that this cross-motion (008) by the defendants, Ted Doukas, WKYA Holding Corporation, MD Stat, LLC and TelCor Col, LLC pursuant to CPLR §2221 and §5015 for an order permitting reargument and renewal of that portion of this Court's order, dated September 3, 2009, which, in ruling on plaintiff's motion (003), held the defendants recalcitrant is denied.

The plaintiff's complaint states that the defendant Ted Doukas (hereinafter Doukas), is an officer, director and shareholder of WKYA Holding Corporation (hereinafter WKYA), and MD STAT, LLC (hereinafter MD Stat), and also owns Telcor Co. LLC (hereinafter Telcor). WKYA is the mortgagee of the premises known as 81 Louden Avenue and 366 Broadway, Amityville, New York (hereinafter Brunswick Hospital). MD Stat is the landlord of BH Realty Group, LLC, (hereinafter BH Realty), which leasehold relates to the parking lot and heliopad servicing Brunswick Hospital. The amount of the combined monies paid on the mortgage and leasehold is $37,083.34 per month, payable to WKYA, which check Doukas negotiates each month and retains 100% of the money. MD Stat is the landlord entitled to rents for the parking area and heliopad, but the mortgage and leasehold payments are combined in one payment instrument. The plaintiff claims that Doukas has nefariously arranged the transfer, sale and hypothecation of properties owned by the plaintiff and his family. The plaintiff is the son of the late Benjamin Stein who founded Brunswick Hospital in 1951 and who amassed extensive real estate holdings surrounding Brunswick Hospital, said property having value exceeding $40,000,000. The plaintiff alleges that the defendants have illegally transferred the real estate, including 40, 60, 80 and 120 Louden Avenue, and 349 Broadway, Amityville, New York, having sold it to Breslin Realty Development Corporation for the price of $27,200,000. The plaintiff claims that the signatures on the title reports evidencing the transactions are all forgeries and also claims that to date the plaintiff has not been paid any monies for the sale of these properties, that Doukas has wrongfully retained all the monies due on the BH Realty transaction, that Doukas maintains a dual citizenship in the United States and Greece and may flee New York jurisdiction at any time, and that he has abandoned his family and has secreted himself from all concerned parties.

In his first cause of action the plaintiff seeks an order attaching and turning over payments made by BH Realty to WKYA. In his second cause of action the plaintiff seeks a money judgment for exemplary damages against the defendants due to their unconscionable and nefarious criminal intent in the transfers of the properties that shocks the conscience of the community. In his third cause of action the plaintiff seeks an attachment and turnover of all proceeds of the transactions and the alleged fraudulent transfers involving 40, 60, 80 and 120 Louden Avenue, Amityville, New York. In his fifth cause of action, the plaintiff seeks an accounting of all the cash proceeds and other things of value obtained by the defendants in the alleged transactions. The fourth cause of action is not before the Court.

The defendants have served an answer, dated March 13, 2007, asserting counterclaims against the plaintiff. The first counter claim asserts that the plaintiff has obtained an attachment and other provisional remedies against the defendants, damaging the defendants in the amount of $75,000. The second counterclaim states that due to the plaintiff's lies and defamatory allegations, the defendants have suffered lost business income in the amount of $5,000,000. The third counterclaim sounds in defamation. The fourth counterclaim asserts a claim for malicious prosecution. The fifth counterclaim seeks punitive damages because of the plaintiff's defamatory allegations. The sixth counterclaim seeks damages for the intentional infliction of emotional distress.

MOTION (006)

In motion (006), Doukas moves in his individual capacity seeking an order bifurcating this lawsuit into individual and corporate claims and severing causes of action appearing in the complaint to permit a trial on the defendants' purported ownership interest in the corporate entity prior to trial of both the individual and derivative actions. Doukas further seeks an order pursuant to CPLR §3103(a) limiting the plaintiff's discovery to those issues dealing exclusively with his claim of ownership as stated in the third and fifth causes of action in the complaint.

In support of this application, Doukas has submitted, inter alia, an attorney's affirmation; redacted copies of the US Return of Partnership Income forms for the years 2004 and 2005 signed and dated by Doukas on December 11, 2009 on behalf of MD Stat and Telcor and for 2004 for WKYA-2004, unsigned; Operating Agreement for MD STAT, dated August 17, 1995, signed by Doukas as Member/Manager; undated Limited Liability Company Operating Agreement of TELCOR signed by Doukas as Member; Articles of Incorporation of WKYA filed with the Secretary of State of Nevada on September 8, 2003; internet status information printout-New York State Division of Corporations for Telcor with no stock information available, registered agent listed as Doukas; paper, dated November 5, 2004, bearing the signatures of the plaintiff and Doukas which states "This instrument is to memorialize the fact that Ted Doukas and Douglas Stein are 50-50 partners in WKYA Holding Corp., MD Stat, and TD Funding."

The plaintiff's third cause of action alleges that the defendants masterminded through fraud and deceit and illegality the transfer of 40, 60, 80 and 120 Louden Avenue, Amityville, New York to Breslin Realty Development Corp. for the price of $27,200,000.00, and that the plaintiff seeks the proceeds from that transaction and claims entitlement to an attachment and turnover of all proceeds of that transaction. In the fifth cause of action the plaintiff seeks an accounting as to the disposition of all cash proceeds and other things of value obtained through all of the subject transactions.

SEVERANCE

Pursuant to CPLR §4011, "The court may determine the sequence in which the issues shall be tried and otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum." Pursuant to CPLR §603, "In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others." No time limitation is fixed in CPLR §603 for filing a motion for a severance and separate trial. Any question of undue delay in filing the motion is merely one of the considerations in determining whether relief should be granted (***Schneph v New York Times Company et al,*** 21 AD2d 599, 252 NYS2d 931 [1st Dept 1964]). The complaint in this action was filed February 15, 2007, and nearly 4 years have passed since the defendants were made aware of the claims against them, and no action has been taken until now for the relief requested.

Courts, in exercising their discretion, have the authority to grant severance but should exercise this discretion sparingly. This is especially true where complex issues are intertwined. In such cases, it would be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time. Where there is an intricate involvement and interdependency of the various activities and decisions made by the multiple defendants, complete relief can be properly granted only by foregoing severance. (***County of Chenango Industrial Development Agency et al v Lockwood Greene Engineers, Inc. et al,*** 111AD2d 508, 488 NYS2d 890 [3rd Dept 1985]). In the instant action, the defendants have not demonstrated a basis for a severance of the individual causes of action. Doukas is deemed to be a necessary party to all the causes of action, either in his function as an individual or as a member of the various corporate defendants.

In weighing the equities, it is foreseeable that the plaintiff may suffer prejudice to a substantial right if a severance is granted at this juncture. Discovery is far from complete and depositions have not been conducted. Based upon the parties' contentions, there are clearly overlapping common factual and legal issues and Doukas has not demonstrated that he would suffer prejudice to a substantial right if these factual and legal issues were presented in a single trial (see, ***Mothersil et al v Town Sports International, et al,*** 24 AD3d 424, 804 NYS2d 687 [2nd Dept 2005]; ***McCrimmon et al v County of Nassau et al***, 302 AD2d 372, 753 NYS2d 900 [2nd Dept 2003]). There is only one plaintiff, and Doukas is a member of the various defendant corporations. Ordering a severance in this case would burden the Court with a duplication of trials on the same issues and repetitive testimony by the same parties. Doukas has not submitted any evidence that the issues are so complex as to preclude resolution by one jury concerning whether or not he acted within or without of his corporate status and whether the plaintiff has an ownership interest in the properties and corporations (***Finning et al v Niagara Mohawk Power Corporation et al***, 281 AD2d 844, 722 NYS2d 613 [3rd Dept 2001]).

Doukas has not submitted an affidavit or deposition transcript in which, under oath, he states his status or purported ownership interest in the corporate entities or the subject properties or the plaintiff's status or ownership interest in the corporate entities or the subject properties.

Accordingly, based upon the foregoing, the application for severance of the third and fifth causes of action is denied as the issue concerning whether the plaintiff is entitled to an accounting may abide an interlocutory determination upon a timely application by either party.

LIMITING DISCOVERY PURSUANT TO CPLR §3103(a)

The defendants previously failed to oppose motion (003), as stated above, concerning the defendants' failure to comply with prior discovery demands or producing the defendants for depositions. There were previous orders signed by this Court wherein the defendants agreed to comply with those previous discovery demands by conference order, dated June 20, 2007 and November 18, 2009, and by this Court's order, dated September 3, 2009. The defendants do not submit any evidence to demonstrate that they otherwise objected to the plaintiff's demands for discovery and inspection or for production of Doukas for examination before trial pursuant to CPLR §3101.

If the party upon whom the notice for discovery and inspection is served objects to the demand, the remedy is to move for a protective order within 10 days of service of the notice (see, CPLR §3122) . The failure to timely move for a protective order has been held to constitute a waiver of the objections to the discovery notice. Exceptions to this rule have been carved out where the material sought is claimed to fall within one of the exclusionary provisions of CPLR §3101, where the notice does not identify the material sought with sufficient particularity or where the notice is "palpably improper" (***Finn v Riley,*** 202 AD2d 880, 609 NYS2d 449 [3rd Dept 1994]; ***Holy Spirit Association for the Unification of World Christianity v New York Property Insurance Underwriting Association,*** 116 AD2d 787, 497 NYS2d 177 [3rd Dept 1986]).

In ***Haggerty v Charlie's, Inc. et al,*** 299 AD2d 522, 750 NYS2d 525 (2nd Dept 2002), the Court determined that where the defendant sought to vacate document discovery demands and that part of a preliminary conference order which directed nonparty witness depositions of the individual's accountant and son, the trial court properly directed the individual to produce relevant documents as the individual did not timely object to the defendant's demands for those documents or move for a protective order, and there was no evidence that the document requests were palpably improper or that the information was privileged under CPLR §3101.

If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross examination, it should be considered evidence material in the prosecution or defense of the lawsuit. CPLR §3101(a)(1)(i) is designed to protect against unreasonable rummaging through books and records, but it should not be used to prevent disclosure for lack of technical compliance (see, ***Quirino v New York City Transit Authority,*** 60 Misc2d 634, 303 NYS2d 991 [Supreme Court of New York, Special Term, Queens County 1969]).

Based upon the defendants' failure to object to the various discovery demands served years ago, and based upon the previous preliminary conference order, compliance conference order and this Court's order, dated September 3, 2009, the defendants have failed to move for a protective order within 10 days of service of the notices for discovery and inspection and have waived their right to do so, except with regard to the material necessary to conduct an accounting.

Where an equitable accounting is sought by the plaintiff, matters essentially fiscal in nature must remain inscrutable until the right to an accounting has been established by an interlocutory judgment (***Schreier v Mascola,*** 81 AD2d 909, 439 NYS2d 197 [2nd Dept 1981]). The right to an accounting based upon the existence of a partnership agreement must be established before examination of the account itself may be had (***Corwin v Kaufman et al,*** 37 AD2d 838, 326 NYS2d

20 [2nd Dept 1971]). In ***Wood v Cross Properties, Inc.***, 5 AD2d 853, 171 NYS2d 338 (2nd Dept 1958), the Court held that an examination as to an account itself is not permitted until the right to an accounting has first been established by interlocutory decree.

Based upon the foregoing, the plaintiff must demonstrate the right to an accounting based upon the existence of an agreement and the right to an accounting before examination of the account itself may be had, and the defendants have not demonstrated entitlement to severance of the third and fifth causes of action as the issue may be determined upon interlocutory judgment upon application by either party.

Accordingly, that part of motion (006) which seeks a severance with regard to the third and fifth causes of action is denied but that part of the motion which seeks limitation of an accounting until the plaintiff's claim as to ownership and partnership is established upon interlocutory judgment is granted.

MOTION (007)

In motion (007), the plaintiff seeks an order striking the defendants' answer; restraining Doukas from violating this Court's order, dated September 3, 2009, vacating any stay that may be in place by virtue of the defendants' motion for a protective order; directing the defendants to comply with outstanding document discovery; and sanctions.

The plaintiff claims that discovery which remains outstanding includes all real property ownership interests of all the defendants as evidenced by deeds, leases, mortgages or other documents concerning the subject disputed properties; checks, notes and consideration paid for any properties which are the subject of this action; documents and expansion of the defendants' pleadings with specificity on those issues.

The plaintiff also claims that the defendants failed to respond or object to the discovery demands of June 20, 2007 as stated in the preliminary conference order, which required that any objections be served on or before August 30, 2007. The plaintiff contends that the defendants failed to respond or object to the plaintiff's discovery demands, dated August 31, 2007 and September 5, 2007, and that the defendants failed to respond to the motion to compel discovery and the Court's subsequent order, dated September 3, 2009. On November 18, 2009, this Court so ordered a compliance order and stipulation wherein the defendants were directed to respond to the plaintiff's July 30, 2007 demand for discovery and inspection, including documents for the period of January 1, 2000 through the present. However, the only document served by the defendants was a package of closing documents relating to the Brunswick Hospital litigation.

As stated above, if the party upon whom the notice is served objects to the demand, the remedy is to move for a protective order within 10 days of service of the notice (see, CPLR §3122). The failure to timely move for a protective order has been held to constitute a waiver of the objections to the discovery notice (***Finn v Riley,*** *supra*). The defendants are deemed to have waived any objections to the discovery except to discovery relating to an accounting, as indicated above with regard to motion (006). However, the plaintiff has not stated with specificity those demands to which he claims the defendants have failed to respond, or those items in the demand for a bill of particulars to which he claims the defendants have not fully responded and this Court cannot speculate as to the same.

Accordingly, the plaintiff is directed to serve a demand stating with specificity those items to which he claims the defendants have failed to respond or those items in the bill of particulars which need expansion, within 20 days of the date of this order and the defendants are directed to provide a response to the same within 30 days of the date of this order, or sanctions shall be imposed, including striking of the defendants' answer.

No stay has been granted by virtue of defendants' applications. Accordingly, that part of motion (007) which seeks a vacatur of the stay has been rendered moot.

This Court, in its order, dated September 3, 2009, has previously directed that Doukas be produced for examination before trial and Doukas has failed to appear. However, there have been additional motions filed in this case and adjournments to the motions have been granted.

Accordingly, this Court directs and orders Doukas be produced for examination before trial within 30 days of the date of this order at the office of the defendants' counsel or the defendants' answer shall be stricken and monetary sanctions imposed.

MOTION (008)

In motion (008), the defendants, pursuant to CPLR §2221 and §5015, seek an order permitting reargument and renewal of that portion of this Court's order, dated September 3, 2009, which held the defendants recalcitrant vis-a-vis discovery.

In motion (003) the plaintiff sought an order compelling the defendants to reply to outstanding discovery demands. In support of the application, the plaintiff submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint and defendants' answer; a copy of the preliminary conference order; demand for a bill of particulars, dated July 30, 2007, a copy of a letter to the defendant's counsel seeking to obtain responsive pleadings to proceed with the depositions; and a copy of a letter, dated September 4, 2007, to the defendants' counsel.

The plaintiff states that on June 20, 2007 a preliminary conference was conducted and an order issued directing that a demand for a bill of particulars be served on or before July 30, 2007; that a bill of particulars be served on or before August 30, 2007; that names and addresses of all eyewitnesses and notice witnesses, statements of opposing parties and photographs be provided on or before July 30, 2007; that a demand for discovery and inspection be served on or before July 30, 2007; and that responses to the demand for discovery and inspection be served on or before August 30, 2007. On July 30, 2007, the defendants were served by mail with a demand for a verified bill of particulars and demand for discovery and inspection. The defendants were contacted on August 31, 2007 by facsimile concerning Court ordered depositions scheduled for September 4, 2007 and the plaintiff also requested responses to the discovery demands and advised that in the absence of responses, depositions would be adjourned. The defendants were again contacted on September 4, 2007 wherein discovery demands were requested. On or about September 4, 2007, the defendants requested 3 weeks within which to respond to the plaintiff's discovery demands, and such extension was provided by the plaintiff.

The plaintiff claims that the defendants did not provide responses to the plaintiff's discovery demands. The defendants only opposed the plaintiff's motion for summary judgment and did not demonstrate compliance with either the preliminary conference order or the plaintiff's demands. Accordingly, the Court, in its decision of September 3, 2009, granted the plaintiff's motion (003) and the defendants were directed to comply with the outstanding discovery stated above.

The defendants' counsel seeks reargument and renewal with regard to this prior application (003) because he believes that motion (003) had been withdrawn. Plaintiff's counsel avers that at no time was the motion (003) withdrawn.

CPLR §2221(d)(2) provides a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion but shall not include any matters of fact not offered on the prior motion. A movant on reargument must show that the Court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (***Bolos v Staten Island Hosp.,*** 217 AD2d 643, 629 NYS2d 809 [2nd Dept 1995]). A motion to reargue is not to be used as a means in which an unsuccessful party is permitted to argue again the same issues previously decided (***Pahl Equipment Corp. v Kassis,*** 182 AD2d 22, 588 NYS2d 8 [1st Dept 1984]). Nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (***Giovanniello v Carolona Wholesale Office Machine Co., Inc.***, 29 AD3d 737, 815 NYS2d 248 [2nd Dept 2006]).

CPLR §2221(d)(3) additionally provides that a motion for leave to reargue shall be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry. The defendants' motion is deemed untimely in that this Court's order of September 3, 2009 was served with notice of entry on October 23, 2009 and defendants' application to reargue was not served until February 17, 2010, well beyond the 30 days.

Pursuant to CPLR §2221(e)(2) a motion for leave to renew shall be based upon new facts not offered on the prior motion that would have changed the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination. Pursuant to CPLR §2221(e)(3) a motion for leave to renew shall contain reasonable justification for the failure to present such facts on the prior motion. "A motion for renewal is properly made to the motion court...to draw its attention to material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court. Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (***Beiny v Trustees of the Trust Created by Elizabeth N.F. Weinberg, as Grantor,*** 132 AD2d 190, 522 NYS2d 511 [1st Dept 1987]).

Here, the defendants failed to exercise due diligence in not opposing the prior motion (003) although served with a copy of the same. No proof of withdrawal of the motion has been submitted in support of the defendants' conclusory assertions. Only upon receipt of service of copy of this Court's order of September 3, 2009 with notice of entry did they move to renew. The defendants have failed to identify which parts of the motion they seek to renew and do not assert that there is newly discovered evidence or documentation unavailable at the time of the prior motion. Additionally, the defendants have not demonstrated full compliance, even at this date, with either the plaintiff's

demands or this Court's order, dated September 3, 2009, although there has been some late but incomplete compliance. The Court finds the defendants have not demonstrated a basis to grant either reargument or renewal of motion (003).

Accordingly, motion (008) is denied.

Dated: DEC 30 2010

J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION