

American Med. & Life Ins. Co. v Crosssummit Enters., Inc.
2011 NY Slip Op 32899(U)
October 25, 2011
Sup Ct, Nassau County
Docket Number: 018059-08
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**AMERICAN MEDICAL AND LIFE
INSURANCE COMPANY,**
Plaintiff,

-against-

CROSSSUMMIT ENTERPRISES, INC., et al.,
Defendants.
-----x

TRIAL/IAS PART: 20

NASSAU COUNTY

Index No: 018059-08

Motion Seq. Nos: 8, 9, 10, 11

Submission Date: 8/4/11

Papers Read on these Motions:

- Notice of Motion, Memorandum of Law in Support,
Affirmation in Support and Exhibits.....x**
- Notice of Motion, Memorandum of Law in Support,
Affirmation in Support and Exhibits.....x**
- Affidavit in Opposition and Exhibits.....x**
- Affirmation in Opposition and Exhibits.....x**
- Defendants' Memorandum of Law in Opposition.....x**
- Notice of Motion.....x**
- Affirmation in Support and Exhibits.....x**
- Defendants' Memorandum of Law in Support.....x**
- Reply Memorandum of Law in Further Support of Renewal Motion....x**
- Reply Memorandum of Law in Further Support of Contempt Motion..x**
- Notice of Cross Motion, Memorandum of Law in Opposition/Support,
Affirmation in Opposition/Support and Exhibits.....x**

This matter is before the court on 1) the renewal motion by Plaintiff American Medical and Life Insurance Company ("Plaintiff" or "AMLI") filed April 11, 2011, 2) the contempt motion by Plaintiff filed April 11, 2011, 3) the motion by Defendant CrossSummit Enterprises, Inc. ("CSE") filed May 17, 2011, and 4) the cross motion by Plaintiff filed June 13, 2011, all of

which were submitted on August 4, 2011, following oral argument before the Court. For the reasons set forth below, the Court 1) denies Plaintiff's motion for leave to renew (motion sequence # 8); 2) refers Plaintiff's contempt motion to a hearing (motion sequence # 9); 3) denies CSE's motion (motion sequence # 10); and 4) denies Plaintiff's cross motion (motion sequence # 11), without prejudice to renewal of that branch of Plaintiff's motion for an Order directing the Sheriff to enforce the Escrow Order following the completion of the contempt hearing as directed herein.

BACKGROUND

A. Relief Sought

AMLI moves for an Order 1) granting its motion for leave to renew its motion for partial summary judgment; 2) dismissing the counterclaims by CSE for post-termination fees and commissions pursuant to the faithless agent rule; 3) directing CSE to forfeit and disgorge all fees and commissions retained by it associated with the undisputed amount of net premium funds that CSE allegedly misappropriated and converted pursuant to the faithless agent rule; 4) awarding AMLI interest on all sums awarded; and 5) awarding AMLI reasonable attorney's fees.

AMLI also moves for an Order, pursuant to CPLR § 5104 and N.Y. CLS Jud. § 753, holding CSE in contempt for failure to comply with a Court Order.

CSE moves for an Order vacating that portion of the Court's November 18, 2010 Order imposing an escrow obligation of \$2,322,085.24 against CSE or, in the alternative, imposing an escrow obligation of \$10,000,000.00 against AMLI.

AMLI cross moves for an Order 1) directing the sheriff to enforce the Escrow Order pursuant to CPLR § 2703; 2) sanctioning CSE; and 3) awarding AMLI its reasonable attorney's fees and costs incurred in responding to CSE's motion.

B. The Parties History

This action has been the subject of four prior decisions by the Court, dated May 18, 2009 ("2009 Decision"), April 1, 2010 ("April 2010 Decision"), November 18, 2010 ("November 2010 Decision") and July 7, 2011 ("2011 Decision"). In the 2009 Decision, the Court denied Plaintiff's motion for injunctive relief. In the April 2010 Decision, the Court 1) granted the motion by the Third-Party Defendants to dismiss the Third-Party Complaint against them;

2) granted the motion by Richard J. Dunn and Kevin Dunn to dismiss the verified complaint as against them; and 3) denied the application of Defendants/Third Party Plaintiffs for leave to replead. In the November 2010 Decision, the Court denied Defendants' motion for summary judgment, and Plaintiff's cross-motion for partial summary judgment, and directed that certain funds be maintained in an escrow account pending the resolution of this litigation ("Escrow Order"). In the July 2011 Decision, the Court granted AMLI's motion for leave to file an amended complaint. In these Decisions, the Court provided a detailed background of this litigation, and the Court incorporates the Decisions herein by reference.

C. The Parties' Positions

AMLI seeks leave to renew its prior motion for partial summary judgment ("Prior Motion") based on new facts, specifically CSE's alleged misappropriation and conversion of AMLI's premium funds. AMLI argues that these new facts occurred after AMLI filed the Prior Motion and, therefore, it has provided a reasonable justification for its failure to present these facts on its Prior Motion.

Specifically, by letter dated December 18, 2010 (Ex. E to Vales Aff. in Supp.), CSE's counsel ("CSE Counsel") advised AMLI and the Court that CSE could not comply in whole or in part with the Court's order dated November 18, 2010, as modified on December 8, 2010. In the letter, CSE Counsel wrote as follows:

This is to confirm that our client, CSE has not deposited any funds into escrow and will not be able to do so by the December 22, 2010 due date. The reason is simple--CSE currently has no monies in its bank accounts, and has not had monies for quite some time. In the documents produced by CSE, AMLI's former counsel was supplied with all of CSE's bank accounts statements to the then current date, which clearly indicated CSE's cash balances. Hence, my statement that CSE does not have any funds with which to fund an escrow pursuant to the Court's directive, should have been known to AMLI at the time of the document production many months ago.

In fact, CSE has entirely ceased revenue generating operations, other than maintaining its claims against AMLI in this action (and of course, maintaining its defenses to AMLI's claims herein).

In opposition to the motion, CSE argues that AMLI has failed to satisfy CPLR § 2221(e), which governs motions for leave to renew. Specifically, CSE contends that AMLI has 1) failed

to base its motion for leave to renew on new facts not offered on the prior motion; and 2) failed to provide a reasonable justification for failing to present such facts on the prior motion.

By way of example, Exhibit A to the Affirmation in Support of Plaintiff's counsel is the January 9, 2009 Affidavit of Kathy Aber, a Vice President of CSE. This affidavit was submitted in opposition to Plaintiff's Order to Show Cause seeking injunctive relief, which was filed at the inception of this case two years ago. CSE argues that this affidavit does not constitute new facts.

CSE submits that, from the outset of this litigation in August 2008, Defendants have asserted that there is no money available to which AMLI may stake a claim. By way of example, in Defendants' October 5, 2009 responses to Plaintiff's first set of interrogatories (Ex. B to Goodgold Aff. in Opp.), Defendants 1) responded to Interrogatory number 3, which inquired about bank and other accounts, by providing a list of four (4) accounts, three of which had a zero balance and one of which had a balance of approximately \$14,000; 2) responded to Interrogatory number 6, which asked Defendants to identify the current location of the \$2.5 million in premiums withheld by Defendants, by disputing the amount and advising Plaintiff that "[a]ll of said funds were expended in the normal course of CSE business operations before the end of 2008;" and 3) responded to Interrogatory number 7, which inquired as to the location of the premium funds if they were not in CSE's possession, by referring Plaintiff to Defendants' response to Interrogatory number 6. CSE also provides a letter dated February 1, 2010 from CSE Counsel to Plaintiff's counsel (Ex. C to Goodgold Aff. in Supp.) which included an attachment containing accounting ledgers for CrossSummit "as a supplementation of Defendants' Third-Party Plaintiffs' prior discovery responses." And by letter dated January 5, 2011 (*id.* at Ex. D), CSE Counsel advised Plaintiff's counsel that this purportedly new information was not in fact new, in light of the fact that Defendants' counsel had provided Plaintiff's prior counsel with documents in discovery that reflected that CSE had a zero balance in its bank accounts. CSE submits that AMLI has not provided a justification for its failure to refer to, or provide, CSE's financial records, which have been in AMLI's possession for over one year, on the Prior Motion. Moreover, CSE has repeatedly and consistently disputed AMLI's assertions that Defendants used AMLI's premiums improperly.

CSE also argues that the Court should, likewise, deny AMLI's motion to renew its Prior Motion based on the faithless agent rule. In the November 2010 Decision (Ex. C to Vales Aff. in Supp.), the Court held that "Plaintiff has not demonstrated its right to judgment pursuant to the faithless agent rule because it has not established Defendants' misconduct and disloyalty as a matter of law." *Id.* at p. 10. CSE submits that AMLI has provided no new facts that could change the Court's prior determination that AMLI has not established CSE's alleged misconduct and disloyalty as a matter of law. AMLI's reliance on affidavits more than two years old and its assertion that CSE converted funds, although that claim has not yet been adjudicated, are not sufficient as a matter of law to support its renewal motion. Moreover, even assuming *arguendo* that the Affidavit of Susan Donato dated January 13, 2011, submitted in connection with AMLI's prior motion for leave to amend the Complaint, is considered new and a part of this motion, the allegations in Ms. Donato's Affidavit do not warrant the relief sought, as that affidavit is based on conjecture and speculation, not personal knowledge.

AMLI also contends that CSE should be held in contempt for violating the Escrow Order. In opposition, Richard J. Dunn ("Dunn"), former Chairman of CSE, affirms that CSE "has not received any substantial amount of money since the November 18, 2010 Court Order directing CSE to put money into escrow. The only monies CSE has received is rental income for computer equipment at \$250.00 per month from Hudson Valley Consultants. The \$250.00 per month is a mere pittance in comparison to the amount of money sought to be put in escrow. As I swore in my affidavit in opposition to AMLI's Motion for Leave to Amend its Complaint, CSE is dormant, but still active for the limited purpose of dealing with this lawsuit and keeping corporate formalities" (Dunn Aff. in Opp. to P's renewal and contempt motions at ¶ 8).

With respect to its motion to vacate, CSE asserts that AMLI has failed to submit evidence establishing a right to the equitable relief granted and, therefore, the Court should vacate the imposition of the escrow obligation on CSE. CSE further contends that if the requirement for CSE to place \$2,322,085.24 in escrow remains in place, the Court should require AMLI to place into escrow \$10,000,000, representing the amount of post-termination relief to date and other offsets. CSE asserts that AMLI has not come into equity with clean hands, claiming that "AMLI wrongfully terminated the MGU and MGA without justification in order to steal CSE's business"

(Ds' Memorandum of Law in Supp. at p. 1). AMLI opposes CSE's motion, submitting that it is without legal or factual support.

Finally, AMLI seeks an order directing the sheriff to enforce the Escrow Order pursuant to CPLR 2701 and 2703.

RULING OF THE COURT

A. Leave to Renew

A motion for leave to renew must be supported by new or additional 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. *Schenectady Steel Co., Inc. v. Meyer Contracting Corp.*, 73 A.D.3d 1013, 1015 (2d Dept. 2010), quoting CPLR §§ 2221(e)(2) and (3) and citing, *inter alia*, *Barnett v. Smith*, 64 A.D.3d 669 (2d Dept. 2009) and *Chernysheva v. Pinchuk*, 57 A.D.3d 936 (2d Dept. 2008). The motion court may, in its discretion, grant renewal upon facts known to the movant at the time of the initial motion if the movant offers a reasonable excuse for the failure to present those facts on the initial motion. *Id.*, citing *Lawman v. Gap, Inc.*, 38 A.D.3d 852 (2d Dept. 2007) and *Lafferty v. Eklecco, LLC*, 34 A.D.3d 754 (2d Dept. 2006). *See also Greene v. NYCH*, 283 A.D.2d 458 (2d Dept. 2001) (rejecting plaintiff's claim that trial court had discretion to grant renewal notwithstanding plaintiff's omission of reasonable justification for failure to present new facts on which renewal motion was based, on prior motion). As noted by the *First Department in Henry v. Peguero*, 72 A.D.3d 600 (1st Dept. 2010), *app. disp.*, 15 N.Y.3d 820 (2010), *reconsid. den.* 16 N.Y.3d 726 (2011):

Renewal is granted sparingly . . . ; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation... While the statutory prescription to present new evidence need not be applied to defeat substantive fairness... such treatment is available only in a rare case..., and then only where the movant presents a reasonable excuse for the failure to provide the evidence in the first instance [internal citations and quotations marks omitted].

Id. at 602.

B. Unclean Hands

The doctrine of unclean hands applies when the complaining party shows that the offending party is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct. *Kopsidas v. Krokos*, 294 A.D.2d 406, 407 (2d Dept. 2002), quoting *National Distillers & Chemical Corp. v. Seyopp Corp.* 17 N.Y.2d 12, 15-16 (1966).

C. Contempt

To find a party in civil contempt of court pursuant to Judiciary Law § 753, the applicant must demonstrate by clear and convincing evidence that the alleged contemnor has intentionally engaged in conduct which violated a lawful order of the court clearly expressing an unequivocal and explicit mandate thereby prejudicing the right of a party to the litigation. *Miller v. Miller*, 61 A.D.3d 651 (2d Dept. 2009), citing, *inter alia*, *McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994); Judiciary Law § 753 (A); *Matter of Department of Environmental Protection of City of New York v. Department of Environmental Conservation of State of New York*, 70 N.Y.2d 233, 240 (1987).

D. Frivolous Conduct

22 NYCRR § 130-1.1(a) authorizes the court, in its discretion, to award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. Section 130-1.1(c) provides that conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

E. Disposition of Property in Litigation

CPLR § 2701 provides, in pertinent part, that:

The court, upon motion or on its own initiative, with such notice as it deems proper, may order personal property capable of delivery which is the subject of the action, paid into court, or delivered to such person as it may direct, with such security as the court shall direct, and subject to its further direction if:

1. a party has such property in his possession, custody or control as trustee for another party or where it belongs or is due to another party; or
2. a party has such property in his possession, custody or control and it belongs or is due to another party . . .

CPLR § 2703 provides that:

Where the court has directed disposition of personal property capable of delivery and the direction is disobeyed, the court by order, in addition to punishing the disobedience as a contempt, may require the sheriff to take and dispose of the property in accordance with its direction.

F. Application of these Principles to the Instant Action

The Court denies Plaintiff's motion for renewal based on the Court's conclusion that Plaintiff has not provided a reasonable justification for its failure to include the alleged new facts, of which it had knowledge, in its prior Motion. Moreover, even if the Court were to consider the Affidavit of Susan Donato dated January 13, 2011 as new facts, the allegations in that affidavit do not warrant the relief sought, as that affidavit is based on conjecture and speculation. And, even assuming *arguendo* that the Court concluded that Plaintiff had provided a reasonable justification for its failure to provide the new facts, those new facts would not warrant a change in the Court's original determination that AMLI has not established its entitlement to partial summary judgment on the claims for post-termination fees, and that Plaintiff has not established Defendants' misconduct and disloyalty as a matter of law.

With respect to Plaintiff's contempt motion, in light of the conflicting affidavits, which raise issues regarding whether CSE violated the Escrow Order and, if so, whether its violation

was willful, the Court refers AMLI's motion for a contempt adjudication to a hearing.

The Court denies CSE's motion to vacate the Escrow Order. The Court concludes that CSE has not established that the doctrine of unclean hands is applicable, and has not otherwise persuaded the Court that a vacatur of that directive is appropriate.

The Court denies AMLI's request for sanctions. The Court concludes that AMLI has not made the requisite showing to warrant that relief.

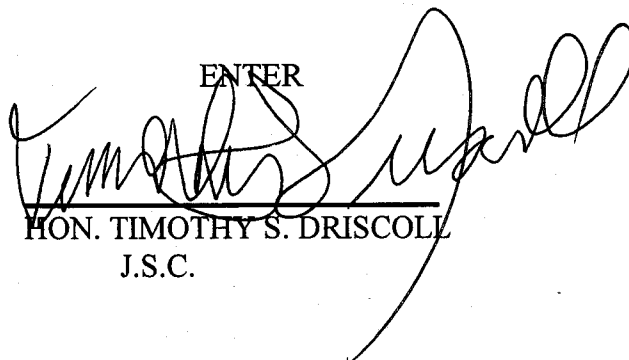
The Court denies AMLI's cross motion for an Order directing the Sheriff to enforce the Escrow Order, without prejudice to renewal of that application upon completion of the contempt hearing as directed herein.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel are reminded of their required appearance before the Court for a conference on December 1, 2011 at 9:30 a.m., at which time the Court will schedule the hearing as directed herein.

DATED: Mineola, NY
October 25, 2011

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
OCT 28 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE