SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Jaffe Justice

PART 5

Index Number : 114718/2010
WALKER, H. BRIAN
vs.
SANDBERG & SIKORSKI CORP.
SEQUENCE NUMBER : 002
REARGUMENT/RECONSIDERATION

CAL.# 126

INDEX NO. 114718/10
MOTION DATE 10/18/11
MOTION SEQ. NO. 002

The following papers, numbered 1 to 3, were read on this motion to/for leave to reargue

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 1
Answering Affidavits — Exhibits ____ No(s). 2
Replying Affidavits ____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

JAN 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/9/12
JAN 09 2012

BARBARA JAFFE, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

H. BRIAN WALKER and LEONARD A. WALKER,

Petitioners,

-against-

SANDBERG & SIKORSKI CORPORATION, FIRESTONE, INC., JAMES MCARDLE and MIHIR BHANSALI,

Respondents.

----------x

Index No. 114718/10

Argued: 10/18/11

Motion Seq. No.: 002
Cal. No.: 126

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

For petitioners:
H. Brian Walker, self-represented
272 Woodland Avenue
River Edge, NJ 07661
917-373-3112

Leonard A. Walker, self-represented
2721 Oakmont Court
Weston, FL 33332
954-349-4444

For respondents:
Sharron E. Ash, Esq.
Hamburger Law Firm, LLC
61 West Palisade Avenue
Englewood, NJ 07631-2706
201-705-1200

By notice of motion dated July 29, 2011, petitioners move pursuant to CPLR 2221 for an order granting them leave to reargue the June 20, 2011 order directing the New York County clerk to impound preaction discovery materials respondents were directed to provide pending disposition of respondents' appeal. Respondents oppose.

I. BACKGROUND

On August 16, 2010, petitioner H. Brian Walker began working for respondent Sandberg & Sikorski Corporation (S&S), only to be terminated a week later. (Affirmation of Sharron E. Ash, Esq., in Opposition, dated Aug. 19, 2011 [Ash Opp. Aff.], Exh. A). By letter to petitioner H. Brian Walker (H. Brian), dated September 2, 2010, S&S explained, through counsel, that the

termination resulted from information obtained soon after he was hired. (*Id.*). Subsequently, petitioner Leonard A. Walker contacted S&S to negotiate their re-hiring of H. Brian, and during the course of the negotiations, learned that H. Brian had been terminated because an individual in the jewelry industry had told S&S that he had demanded and accepted bribes from his previous employer. (*Id.*). S&S neither re-hired Brian nor disclosed the identity of the source. (*Id.*).

By notice of petition dated November 12, 2010, petitioners moved pursuant to CPLR 3102(c) for an order compelling respondents to provide preaction discovery, including the identity of the source. (*Id.*). By decision and order dated April 29, 2011, I granted the petition "solely to the extent of directing respondents, within 30 days of the date of th[e] order, to provide petitioners with information as to the identity of the source of the allegedly defamatory statement made to them, including the source's name, the dates that the statements were made to respondents, and any other information that would assist in ascertaining the identity of the source." (*Id.*).

On June 3, 2011, respondents filed a notice of appeal of the decision and order. (*Id.*, Exh. B). By letter of the same date, they requested a short-form order directing the county clerk to impound the disclosed material so that it could remain confidential pending the determination of their appeal. (*Id.*, Exh. C).

By letter dated June 6, 2011, petitioners objected to the request, claiming that respondents failed to demonstrate entitlement to a stay under CPLR 5519, absent the existence of any of the circumstances listed in subsections (a) and (b), and that in any event, there is no need to maintain the confidentiality of the material, as it will become "public knowledge" through the course of future litigation. (*Id.*, Exh. D).

By letter dated June 20, 2011, petitioners supplemented their submission, requesting a redacted copy of the material should they be impounded. (*Id.*, Exh. E).

By short-form order of the same date, I ordered the material impounded, stating:

> The New York County Clerk is directed to impound the pre-action disclosure that respondents . . . were directed to provide to petitioners . . . , as set forth in the decision and order dated April 29, 2011, pending the hearing and determination by the Appellate Division of an appeal that has been filed by respondents.

(*Id.*, Exh. F).

By letter of the same date, respondents were directed to provide me with a redacted copy of the impounded material "[i]n order to alleviate Mr. Walker's concerns and to monitor the situation." (*Id.*).

II. CONTENTIONS

Petitioners allege that I misapprehended or misapplied the pertinent law in ordering the disclosed material impounded for the following reasons: 1) respondents failed to establish entitlement to a discretionary stay; 2) CPLR 5519(a)(5) is inapplicable, as the material does not constitute an instrument; and 3) there is no need to maintain the confidentiality of the material, as disclosure will not harm respondents. (Affidavit of H. Brian Walker and Leonard A. Walker, dated July 28, 2011).

In opposition, respondents assert that petitioners have failed to establish entitlement to leave to reargue, as they impermissibly assert new arguments, and in any event, it is irrelevant that the material is not an instrument, as I have the discretion to order it impounded, thereby staying enforcement of the April 29 decision and order, pursuant to CPLR 5519(c). (Ash Opp. Aff.).

In reply, petitioners deny that they assert new arguments. (Affidavit of H. Brian Walker and Leonard Walker in Reply, dated Aug. 29, 2011).

III. ANALYSIS

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." (CPLR 2221[d][2]). Whether to grant reargument is committed to the sound discretion of the court, and the motion may not "serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Foley v Roche*, 68 AD2d 558, 567-68 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]) or to "present arguments not previously advanced" *(Giovanniello v Carolina Wholesale Office Mach. Co., Inc.*, 29 AD3d 737, 738 [2d Dept 2006]).

Pursuant to CPLR 5519(c), the court may, in its discretion, "stay all proceedings to enforce the order or judgment appealed from" pending determination of the appeal. (CPLR 5519[c]). "In considering whether to grant a stay under subdivision (c), the court's discretion is the guide." (Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, CPLR C5519:4 [1995 main vol.]). CPLR 5519(a) and (b), by contrast, set forth the circumstances under which the enforcement of an order or judgment is automatically stayed pending appeal.

As petitioners cite no authority for the proposition that I misapplied the law, instead reiterating their previous argument that the automatic stay provisions of CPLR 5519(a) and (b) are inapplicable, and improperly advancing a new argument that a discretionary stay pursuant to CPLR 5519(c) was improperly ordered, they fail to establish any ground upon which to grant leave to reargue. (*See Mazinov v Rella*, 79 AD3d 979 [2d Dept 2010] [as movant failed to show

that trial court misapplied applicable law and improperly advanced new arguments, leave to reargue should have been denied]). Therefore, petitioners have failed to demonstrate that I overlooked or misapprehended any matter of fact or law and have not established entitlement to an order granting them leave to reargue. In any event, having ordered the disclosed material impounded, I, in effect, stayed the enforcement of my June 20 order pending determination of respondents' appeal pursuant to subsection (c).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that petitioners' motion for leave to reargue is denied.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: January 9, 2012
New York, New York

JAN 0 9 2012

FILED

JAN 11 2012

NEW YORK
COUNTY CLERK'S OFFICE