Energy EIAC Capital Ltd. v Maxim Group LLC

2013 NY Slip Op 33361(U)

May 22, 2013

Sup Ct, New York County

Docket Number: 650180/10

Judge: Richard B. Lowe III

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

PRESENT: JUSTICE RICHARD [illegible] III *Justice* **PART** 56

Energy

- v -

Marcin

INDEX NO. 650180/10
MOTION DATE 11/1/12
MOTION SEQ. NO. 010
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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with the attached memorandum decision.

Dated: 5/22/13

JUSTICE RICHARD [illegible] III

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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

----------X

ENERGY EIAC CAPITAL LTD. AND
SANIBEL INTERTRADE CORP., as
Asignees of ENERGY INFRASTRUCTURE
ACQUISITION CORP.,

Plaintiffs,

Index No 650180/10

-against-

Mot Seq 010

MAXIM GROUP LLC,

Defendant.

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Hon. Richard B. Lowe, III:

Plaintiff moves for an order, pursuant to CPLR 4403, rejecting the report of the Special Referee dated June 29, 2012. Defendant Maxim Group LLC ("Maxim") opposes the motion, requesting the report be confirmed and seeking the award of attorneys' fees.

In a decision and order dated October 13, 2010, the issue of alleged spoliation of various emails by the Plaintiffs was referred to the Special Referee to hear and report with recommendations. The matter was originally assigned to Judicial Hearing Officer William P. McCooe who presided over the taking of live testimony. On March 31, 2011, New York State discontinued the Judicial Hearing Officer program and Justice McCooe returned the reference back to the Special Referee's Part. The matter was then referred to Special Referee Lancelot Hewitt. The hearings continued before Special Referee Hewitt who directed the parties to submit for review the entire record of the proceedings.

In his report, the Special Referee found that the evidence showed Plaintiffs had "engaged

in the spoliation of thousands of e-mails that they failed to produce to Maxim during discovery" (Report at 10). Consequently the referee recommended that an adverse inference be drawn from the failure to produce (*Id*).

Background

Energy Infrastructure Acquisition Corporation ("EIAC") is a special purpose acquisition company ("SPAC") formed to acquire one or more operating companies. If it were to fail in completing a business transaction within a certain period of time, all proceeds received through an IPO would be returned to the public investors. Defendant Maxim, a financial services firm, was retained as an advisor to EIAC.

It is undisputed that George Sagredos ("Sagredos") served as EIAC's President, Chief Operating Officer, and Director of a nine person Board of Directors. Marioos Pantazopolous ("Pantazopolous") was a Director, Chief Financial Officer, and Sagredo's assistant. EIAC's other Board of Directors were Peter Blumen ("Blumen"), Arie Silverberg ("Silverberg"), Andreas Theotokis ("Theotokis"), Maximos Dremos ("Dremons"), David Wong ("Wong"), Jonathan Kollek ("Kollek") and Phillipe Meyer ("Meyer") . The Special Referee found that the principal role of the Board of Directors was to assist Sagredos in finding a entity to acquisition and to resolve any related issues which came before the board (Report at 4).

In July 2007, a company known as Vanship was identified as a target for EIAC to acquire. The Special Referee found that Sagredos was responsible for negotiating the proposed agreement with Vanship and for communicating with Maxim on behalf of EIAC (Report at 4). EIAC never completed the Vanship acquisition and the SPAC was dissolved.

In March 2010, plaintiff Energy EIAC Capital Ltd and Sanibel Intertrade Corp.

(collectively "Energy")[1] brought this action against Maxim alleging claims for breach of contract, breach of fiduciary duty, and negligence. Energy seeks to hold Maxim liable for its inability to acquire Vanship by the necessary deadline resulting in EIAC's liquidation.

In late 2010, Defendants brought a motion alleging that Energy failed to put a proper litigation hold in place which led to the spoliation of necessary documents. In the motion, Maxim specifically identified 28 documents that were not turned over. During the course of the hearings, JHO McCooe indicated that although this court's Order of Reference involved 28 specifically claimed documents, "the number of e-mails had increased to 1,006 at the time the hearing commenced" (Report at 2). The report also indicates that "JHO McCooe further stated that an additional 160 e-mails "appeared" shortly before the conclusion of the hearing before him. (Report at 2-3).

After JHO McCooe was compelled to return the reference back to the Special Referee's part, Special Referee Hewitt was assigned the matter and received the record for review. The parties agreed not to begin the reference *de novo*, but rather to allow Special Referee Hewitt to essentially pick up where JHO McCooe left off.

Special Referee Hewitt found that Plaintiffs were grossly negligent with respect to their failure to preserve emails exchanged among "key players" in the proposed transaction with Vanship (Report at 10). The evidence taken showed that after consulting with an attorney regarding potential claims against Maxim, Sagredos identified himself and Pantazopoulos as the only individuals who should be subject to a litigation hold and an oral instruction was given to Pantazopoulos by Sagredos (Report at 5). Referee Hewitt found this litigation hold grossly

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[1]EIAC assigned its claims against Maxim to Energy.

negligent in that there were additional "key players" in the Vanship acquisition, including board members Blumen, Kremos, and Wong. Therefore, the referee found that a *written* litigation hold should have been issued to these directors as well (Report at 10). Because of the failure to put an appropriate litigation hold in place, the referee found that "plaintiffs engaged in the spoliation of thousands of e-mails that they failed to produce to Maxim during discovery, and that an 'adverse inference' may be drawn from such failure to produce." (Report at 10).

Plaintiff now brings this motion seeking an order rejecting the referee's report. The plaintiff argues that there is no basis for concluding that Blumen, Kremos, and Wong were "key players". Plaintiff also argues the referee's conclusion that the failure to give a written litigation hold was gross negligence is contrary to law and that there is no evidence that Defendants spoliated thousands of e-mails.

Discussion

"The report and recommendations of a Special Referee should be confirmed if its findings are supported by the record." (*Sichel v Polak* 36 AD3d 416, 416 [1 st Dept 2007]). "On questions of credibility, the court defers to the Referee's determination of credibility, which is entitled to 'great deference'" (*24 Seven Inc. v Fiorello* 14 Misc 3d 1221(A), 2006 WL 3952992 at*4 [Sup Ct NY Cnty Dec 21, 2006]).

A party seeking sanctions for spoliation must demonstrate: "(1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'; and finally (3) that the destroyed evidence was relevant to the moving party's claim or defense . . .A 'culpable state of mind,' for purposes of a spoliation sanction, includes ordinary negligence (*Voom HD Holdings LLC v EchoStar Satellite*

LLC 93 AD 3d 33, 45 [1st Dept 2012]). Relevance of the spoliated documents and prejudice to the innocent party can be presumed if it is found the spoliating party acted in bad faith or with gross negligence (*Id).*

A litigation hold must be as specific as possible and must direct all appropriate employees to preserve all relevant records, electronic or otherwise and create a mechanism for collecting the preserved records so that they might be searched by someone other than the employee. (*Id* at 41). "It is insufficient, in implementing such a litigation hold, to vest total discretion in the employee to search and select what the employee deems relevant without the guidance and supervision of counsel" (*Id* at 42*).* An adverse inference charge is appropriate where there has been spoliation of evidence as a result of gross negligence (*Id).*

The Plaintiffs argue that Sagredos' identification to counsel of both himself and Pantazopoulous as the only individuals who should receive notice of a litigation hold and his subsequent oral instruction to Pantazopoulos was a sufficient hold.

It is an undisputed fact in this matter that "[t]he principal role of the EIAC Board of Directors was to assist Sagredos in finding a suitable acquisition target and to schedule, debate and resolve issues which came before it"(Report at 4*).* Despite this, the Plaintiffs ask this court to reject the Special Referee's finding that directors other that Sagredos and Pantazopoulous played a role in identifying and seeking the acquisition of Vanship which necessitated a litigation hold including them. The record does not support such a conclusion. Rather, EIAC's sole function was to find a suitable acquisition target and to acquire that target. EIAC had no other function, meaning all work and communications among directors concerning EIAC related to acquiring the target. All directors were involved in this process. Therefore, any discovery

pertaining to them is relevant and a timely hold should have been put into place.

Furthermore, the record supports the finding of gross negligence in that there was very little oversight by Energy's counsel with respect to determining the scope of the litigation hold. The record shows that Sagredos, a non lawyer, determined the process by which documents were searched for by looking for various e-mail addressees for people with whom he communicated. As a result, many e-mail addresses were missed. Similarly, only some of Pantazopoulos' e-mail addresses were searched. Putting a litigation hold in place is not sufficient without counsel taking affirmative steps to monitor compliance and monitoring the party's efforts to maintain the documents (*Voom Holdings* at 42; *see also 915 Broadway Assocs. LLC v Paul, Hastings, Janofsky & Walker, LLP*, 34 Misc 3d 1229(A) [Sup Ct NY Cnty Feb 16, 2012]).

The facts leading to the spoliation which include the failure by plaintiff to issue an appropriate litigation hold; plaintiff's failure to identify key players and to ensure that their records are preserved; and plaintiff's failure to cease the deletion of emails are sufficient to allow the Special Referee to conclude there was gross negligence by the plaintiffs (*See Voom Holdings* at 45). Furthermore, relevance of those documents is presumed when there is gross negligence (*Id).* Therefore, the motion to reject the referee's report is denied.

Maxim seeks attorneys fees and costs incurred in connection with the spoliation motion and hearings, as well as additional fees and costs that will be necessary to conduct additional discovery as a result of Plaintiffs' spoliation. As this court has previously held, attorneys fees are appropriate when there has been a finding of spoliation through gross negligence (*See, e.g. Voom*, No 600292/08 at *44; *915 Broadway* 2012 WL 593075 at *13; *Einstein v 357 LLC*, 2009 WL 4543044, at *26, 30-31).

The finding of spoliation through gross negligence is sufficient in itself to support this court's finding that Defendant is entitled to attorneys fees. They are especially appropriate because Defendant has had to go to great lengths and incurred substantial costs obtaining documents from third parties which could have been obtained directly from the Plaintiffs. Furthermore, the court also notes that Plaintiff's conduct, if not obstructionist, borders closely. For example, the Plaintiffs, through Sagredos, have submitted contradictory affidavits and testimony on this issue of whether a litigation hold was put into place (*see e.g. Sagredos Aff* NYSCEF Doc No 61). It was only during the spoliation hearings that hundreds of documents were suddenly found and turned over by the Plaintiffs. Therefore, Defendants are entitled to attorneys fees incurred in connection with the discovery that has beentaken and with this spoliation motion.

While the spoliation motion and this subsequent motion to confirm was pending, all future discovery was placed on hold. That part of Defendants request seeking attorneys fees for the taking of additional discovery is denied.

Accordingly, it is hereby

ORDERED that the motion to reject the referee's report is denied, and it is further

ORDERED that the Defendant's motion for sanctions is granted.

This shall constitute the Order and Decision of the Court.

Dated: May 22, 2013

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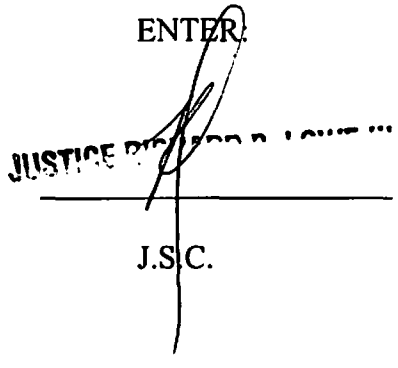

J.S.C.