[* 1]
SCANNED ON 2/27/2014

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

PRESENT: DEBRA A. JAMES **PART 59**
Justice

MERGENT SERVICES and JOHN BAL,

Plaintiffs,

- v -

ITEX CORPORATION, NYTO TRADE CORPORATION, JOHN CASTORO, personally and in the capacity of President and CEO, IZZY GARCIA, personally and in the capacity of Manager, CORAL HOMOKI, Trade Director, MICHAEL MARICH, Trade Director, JESSICA TAVERAS, Trade Director, and NEW YORK DAILY NEWS,

Defendants.

Index No.: 601777/07
Motion Date: 07/26/13
Motion Seq. No.: 008
Motion Cal. No.: _____

FILED
FEB 27 2014
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 3 were read this motion seeking an order of recusal and for leave to reargue/renew this court's order dated March 26, 2013.

	PAPERS NUMBERED
Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2, 3
Replying Affidavits - Exhibits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that *pro se* plaintiff's motion for an order of recusal shall be denied.

> Moreover, where, as here, a party inexplicably withholds an allegation of bias until after the court adversely rules against it, denial of the recusal motion is generally warranted and the courts' discretion in so ruling will not be disturbed (see e.g., Anonymous v Anonymous, 222 AD3d 295 [1995]; Leventritt v Eckstein, 206 AD2d 313 [1994]."

Glazer v Bear, Stearns & Co., Inc., 95 AD3d 707 (1st Dept 2012).

See also People v Greenberg, 979 NYS2d 333, 334 (1st Dept 2014).

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

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Here, plaintiff *pro se* complains fiercely that the undersigned is biased against him because he is self represented. Yet, plaintiff *pro se* did not seek an order of recusal of the undersigned for more than five years after the Order dated January 14, 2008, wherein this court granted defendant ITEX Corporation's cross motion to compel arbitration and to dismiss plaintiff's complaint. The court finds that plaintiff's motion for recusal that comes more than five years after the court ruled adversely against him must be denied.

The court grants *pro se* plaintiff's motion to the extent that it seeks to reargue/renew the Order dated March 26, 2013, but adheres to such decision.

Unfortunately *pro se* plaintiff seeks to reargue not only this court's Order dated March 26, 2013 but also its Order dated January 26, 2009. By the Order dated January 26, 2009, this court denied as untimely plaintiff's motion to reargue the original Order dated January 14, 2008 dismissing the complaint. Plaintiff's time to seek review of either Order has long expired. Nonetheless, the court shall address the argument of *pro se* plaintiff that in the January 14, 2008 Order that dismissed the complaint, this court overlooked the statutory requirement that this action be stayed rather than dismissed pursuant to CPLR § 7503(a). CPLR § 7503(a) reads "the order shall operate to stay a pending or subsequent action, or so much of it as is referable to

arbitration." The record shows that the Order dated January 14, 2008 so operated and that the court denied defendant ITEX Corporation's cross motion to the extent that it sought a dismissal **with prejudice** because by Order dated November 17, 2011, this court granted plaintiff's motion to reinstate the complaint and restore the action to the calendar. That there is nothing to restore at this juncture is due to plaintiff's choice to commence his arbitration proceeding and to name defendants NYTO Trade Corporation, John Castoro, and Izzy Garcia only (AAA Commercial Arbitration Tribunal American Arbitration Association Case No. 75 148 000320 09 GLO) and not to name defendant ITEX Corporation. *Pro se* plaintiff was apparently under the mistaken impression that since defendant ITEX Corporation sought the order to compel arbitration, it was compelled to demand arbitration of plaintiff's claim. It should be noted that the American Arbitration Association terminated the arbitration proceeding that plaintiff commenced against the other parties, without prejudice.

Nor are the other contentions of plaintiff *pro se* with respect to the January 14, 2008 Order either timely before the court or meritorious. With respect to forum non conveniens, see Matter of Intercontinental Packaging Co v China National Cereal, Oils & Foodstuffs Import & Export Corporation, Shanghai Food Branch, 159 AD2d 190 (1st Dept 1990).

To the extent that plaintiff seeks renewal of this court's prior order of March 26, 2013, Business Corporation Law § 1312, which prohibits an unauthorized foreign corporation from maintaining "any action or special proceeding in this state", does not prevent the foreign corporation from defending any action or special proceeding, since the statute only applies to a proceeding pending in a court and not, as here, to the out-of-court institution of an arbitration proceeding. Matter of Knoll v N Am v IBF Group, 158 Misc2d 227 (NY County Supreme 1993). The court concurs with defendant ITEX Corporation that its cross motion to compel arbitration does not constitute commencement of a special proceeding but was a defense to this action and therefore is not prohibited under Business Corporation Law § 1312(b).

Plaintiff *pro se* casts all manner of aspersions with respect to the integrity and competency of the undersigned, and complains bitterly that he never had his "day in court" with respect to his claim that defendant ITEX Corporation misappropriated $56,650 of funds in his trading account. Yet, it is plaintiff who has chosen not to arbitrate his claim against defendant ITEX Corporation. In that regard, CPLR § 7502(c), cited by *pro se* plaintiff, is inapplicable to the action at bar as the court did not issue any preliminary injunction or attachment in favor of defendant ITEX Corporation or any other

party. The thirty day time limit set forth in CPLR § 7502(c) applies to the duration of any provisional remedy issued in connection with an arbitration and therefore does not pertain here. Such provision does not support plaintiff's argument that defendant ITEX Corporation forfeited its right to arbitrate because it did not commence an arbitration within thirty days of the Order dated January 14, 2008 that granted its motion to compel the parties to arbitrate.

Accordingly, it is

ORDERED that the motion of plaintiff seeking recusal of the court is denied; and it is further

ORDERED that the motion of plaintiff seeking renewal of this court's order dated March 26, 2013 is denied; and it is further

ORDERED that the motion of plaintiff seeking reargument of this court's order dated March 26, 2013 is granted, and upon reargument, the court adheres to its original decision.

Dated: February 24, 2014 ENTER:

FILED

FEB 27 2014

NEW YORK
COUNTY CLERK'S OFFICE

DEBRA A. JAMES J.S.C.