

**Trimarco v Data Treasury Corp.**

2014 NY Slip Op 31540(U)

June 6, 2014

Supreme Court, Suffolk County

Docket Number: 30324-2003

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

**COPY**

**Present: HON. EMILY PINES**  
J. S. C.

Original Motion Date: 04-29-2014  
Submission Date: 05-20-2014  
Motion Sequence Number: 027 MD

\_\_\_\_\_X

**MICHAEL C. TRIMARCO,**

**Plaintiff/Counterclaim-Defendant,**

**-against-**

**DATA TREASURY CORPORATION,**

**Defendant/Counterclaim-Plaintiff.**

\_\_\_\_\_X

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Presently before this Court is Plaintiff-Counterclaim-Defendant Michael C. Trimarco’s (“Plaintiff”) third post-trial motion addressed to this Court, seeking to overturn this Court’s trial decision in this matter issued on October 30, 2013. Plaintiff’s initial post-trial motion took the form of an untimely letter application faxed to this court by Plaintiff, *pro se*, requesting an extension of time to make a motion pursuant to CPLR 4404. Said application was denied by this Court by Order dated January 7, 2014. Plaintiff’s second post-trial motion addressed to this Court was a motion, submitted on plaintiff’s behalf by one Jason Keene, Esq., who had never

before appeared or been formally substituted as counsel for plaintiff in this action, ostensibly made pursuant to “New York Judicial Law 487” and “other New York Judicial laws and the CPLR,” seeking a variety of relief, including “reversal” of this Court’s October 30, 2013 decision, an award of sanctions, treble damages against Defendant and its attorneys, and the recusal of the undersigned with respect to both the motion itself and any subsequent post-trial proceedings. That motion was also denied in all respects by decision and order of this Court dated March 7, 2014. In addition to these two prior motions addressed to this Court, plaintiff has also addressed a plethora of other post-trial motions and applications to the Suffolk County Administrative Judge, the Honorable C. Randall Hinrichs, the Appellate Division, Second Judicial Department, and to other Justices of this Court, seeking the same or equivalent relief to the relief denied by this Court, including the removal of the undersigned from this case. All of said motions have been denied or were otherwise unsuccessful.

The new motion presently before this Court purports to be submitted *pro se*, and renews Plaintiff’s application for relief under CPLR 4404, as well as, for the first time, seeking to be relieved from this Court’s October 30, 2014 trial decision pursuant to CPLR 5015(a)(3), on the ground that said decision and the resulting judgment were allegedly procured through the “fraud, misrepresentation, or other misconduct” of the defendant and its counsel, essentially the same relief as unsuccessfully demanded in Plaintiff’s earlier CPLR 4404 motion, albeit advanced under a different provision of the CPLR. For the reasons set forth below, Plaintiff’s motion is denied in its entirety.

Before addressing the contentions of the parties in the pending motion, a few brief observations concerning the conduct of the trial of this matter are in order. The trial consumed

more than 41 trial days, beginning in September, 2012, and concluding in July, 2013, during which the Court heard testimony from a total of 19 fact and expert witnesses, 12 of whom were called by Plaintiff. Out of the total of many days on which this Court heard testimony, by far the greater preponderance of testimonial days were consumed by the witnesses called by Plaintiff, including a total of nine testimonial days by Plaintiff Trimarco himself. It is of particular significance, in light of the accusations of bias, undue influence and unfairness leveled at this Court by Plaintiff, particularly with respect to the issue of rebuttal testimony (discussed below), that this Court permitted Plaintiff to call three of the Defendant's principal senior officers – Keith DeLucia (CEO), Claudio Ballard (Chairman of the Board), Shepard Lane (in-house General Counsel), and Wayne Shelton, Defendant's outside accountant – as Plaintiff's witnesses in support of Plaintiff's direct case-in-chief, before Plaintiff Trimarco himself ever took the stand for his nine days of trial testimony. Thus, as a practical matter, Plaintiff was afforded a full opportunity for "rebuttal" of the testimony of the Defendant's principal witnesses as part of his direct case, before the Defendant even had an opportunity to present a case of its own. Notwithstanding this, the Court also permitted Plaintiff to call a rebuttal expert witness after the conclusion of Defendant's case, over Defendant's vehement objection.

During the course of this lengthy trial, this Court had ample opportunity to evaluate the credibility of the trial witnesses, including Plaintiff Trimarco himself, as well as to review the substantial documentary evidence presented by both sides. At the conclusion of the trial, the Court dismissed *both* the Plaintiff's affirmative claims, as well as the Defendant's multi-million dollar counterclaims. The Court's detailed factual findings and conclusions of law are set forth its multi page trial decision dated October 30, 2013, from which Plaintiff has appealed.

Against this background, the Court will now address the motion before it.

The instant Motion is Not Properly Before this Court

As a preliminary matter, it is noted that the Plaintiff's motion has not been properly brought before this Court. Plaintiff was represented throughout this matter by an attorney, Robert Del Col, Esq. At times during the trial, Plaintiff was also represented by other attorneys who appeared at trial on his behalf, including Plaintiff's father, Vincent Trimarco, Sr., Esq. and his brother, Vincent Trimarco, Jr., Esq., both of whom "appeared on behalf of [plaintiff]" in the litigation and "served in a limited advisory capacity," (Aff. Of Vincent Trimarco, Jr., at para. 2), as well as another respected local attorney, David Besso, Esq. Most recently, Plaintiff was represented in his earlier post-trial motion addressed to this Court by one Jason Keene, Esq., who also represented Plaintiff in several of the ancillary applications and motions directed to the Administrative Judge and the Appellate Division. To the knowledge of this Court, none of these attorneys who have appeared on behalf of Plaintiff in this matter has been properly discharged or has withdrawn as Plaintiff's attorney in accordance with the requirements of CPLR 321(b). Accordingly, Plaintiff has no right or authority to appear or act in this matter *pro se*.

Plaintiff's Motion Under CPLR 4404 is Denied

As noted above, this is Plaintiff's second attempt to vacate this Court's October 30, 2013 trial decision under CPLR 4404. The first such attempt was denied as untimely in this Court's prior Order dated January 7, 2014. The present attempt, brought more than six months after entry of Judgment in this matter, is even more untimely, and in any event is without merit. Plaintiff's excuse for his earlier inaction, i.e., that, as a result of the exigencies of the trial his lead trial counsel, Mr. Del Col, was "difficult to reach" and ostensibly misled Plaintiff as to the

need to take timely action to set aside the verdict (Pltf. Motion, p. 17), is insufficient to excuse Plaintiff's neglect. Plaintiff could have availed himself of the advice of one of his numerous other trial attorneys, including his father, Vincent Trimarco, Sr., or brother, Vincent Trimarco, Jr., or David Besso, Esq.

In any event, Plaintiff has not presented any basis for this Court to set aside its earlier decision or judgment under CPLR 4404. Plaintiff appears to have abandoned his claimed basis for seeking such relief in his earlier motion, i.e. that this Court allegedly had an undisclosed "personal affinity" for one of the defendant's attorneys, John Bracken, Esq., that should have required this Court to recuse itself pursuant to Judiciary Law §14. Instead, Plaintiff has now advanced, for the first time, arguments purportedly arising under various sections of the New York Labor Law, the federal Fair Labor Standards Act, and the 13<sup>th</sup> Amendment to the United States Constitution. None of these arguments were asserted by Plaintiff in his complaint in this action, or at trial, or in Plaintiff's post-trial brief, or indeed in Plaintiff's earlier post-trial motion. The Court will not consider these arguments *ab initio* at this late date. Accordingly, Plaintiff's application for relief under CPLR 4404 is again denied.

Plaintiff's Motion Under CPLR 5015 is Denied

In addition to moving for relief under CPLR 4404, Plaintiff now moves also for the first time under CPLR 5015(a)(3), on the grounds that this Court's October 30, 2013 trial decision, and subsequent judgment, were procured by "fraud, misrepresentation, or other misconduct of an adverse party." In support of this contention, Plaintiff essentially makes two arguments; first, that Defendant and its trial witnesses engaged in systematic perjury during the trial, and that this Court mistakenly (or corruptly) credited the testimony of Defendant's witnesses over the

testimony of Plaintiff's witnesses, particularly Plaintiff Trimarco himself; and second, that this Court's refusal to allow Plaintiff to put on a rebuttal case after the conclusion of Defendant's case deprived Plaintiff of the opportunity to expose Defendant's perjury. Plaintiff supports these new arguments with both references to testimony and documents pulled from the extensive trial record, as well as proffering new affidavit testimony from several witnesses, including Plaintiff's father and brother, Vincent Trimarco, Sr. and Vincent Trimarco, Jr.

To the extent that Plaintiff bases his CPLR 5015 argument on evidence contained in the trial record, his argument is nothing more than an attempt to reargue what was already before the Court at the time it rendered its October 30, 2013 trial decision. The Court has reviewed the contentions of the Plaintiff in this regard and finds that there is no basis to disturb its trial decision. Plaintiff's remedy, insofar as he seeks to challenge this Court's trial decision, is to pursue his appeal in the Appellate Division.

To the extent that Plaintiff seeks to introduce new evidence in support of his attempt to challenge the truthfulness and credibility of the Defendant's trial witnesses and their testimony, through the proffer of new affidavit testimony and exhibits, what Plaintiff is really seeking by way of this motion is the opportunity for the very rebuttal case which this Court denied following the close of Defendant's case, with the very significant exception of this Court's permission, over Defendant's strenuous objection, to allow Plaintiff to call a rebuttal expert. The Court sees no basis to reconsider or reverse its earlier decision, following 41 days of trial, not to permit a rebuttal case, and declines to do so by considering the new factual evidence proffered by Plaintiff in the form of this motion.

In this connection, the Court particularly takes note of the following: first, it appears

from Plaintiff's present motion that the object of Plaintiff's efforts to be permitted to offer rebuttal testimony was "not to bolster Plaintiff's case-in-chief, but was...rather as an attack upon DTC's frauds on the Court and perjured testimony which formed the basis of the entirety of its counterclaims." (Pltf Motion, p. 10). However, this Court ultimately *denied* Defendant's counterclaims in their entirety. Thus, by Plaintiff's own admission, he was not prejudiced by this Court's refusal to entertain his request for rebuttal directed at Defendant's counterclaims.

Second, to the extent that the principal rebuttal witnesses intended to be proffered by Plaintiff at trial were his father and brother, Vincent Trimarco, Sr., and Vincent Trimarco, Jr., whose affidavits have now been proffered in support of the instant motion, these witnesses would have been precluded from testifying at trial, as Vincent Trimarco, Jr. himself appears to concede, *see Aff. of Vincent Trimarco, Jr.*, at ¶ 9. Both appeared as counsel for Plaintiff at trial and both were present in the courtroom during the testimony of numerous witnesses. Allowing them to testify would have violated the parties' agreement and this Court's order excluding potential witnesses from the courtroom.

Third, to the extent that the principal intended subject of Plaintiff's intended rebuttal case was to challenge the veracity of the accounts of Defendant's witnesses regarding the meeting that took place with Congressman Israel, and in particular the testimony of one Kenneth Bayne, any such testimony would have been purely cumulative. The meeting with Congressman Israel was the subject of extensive testimony during the trial by witnesses proffered by both sides, including Plaintiff himself.

To conclude, this Court heard multiple days of testimony in this case, and had ample opportunity to weigh the evidence and to evaluate the credibility of the witnesses. In any event,

the Plaintiff has failed to demonstrate fraud, misrepresentation, or other misconduct of the Defendant which would warrant vacatur of this Court's Decision and Order dated October 30, 2013. Accordingly, it is

**ORDERED** that the Plaintiff's motion (Mot. Seq. 027) is denied.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: Riverhead, New York  
June 6, 2014

  
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HON. EMILY PINES, J.S.C.