SGM Holdings LLC v Lisiak
2015 NY Slip Op 30411(U)
March 20, 2015
Supreme Court, New York County
Docket Number: 653676/2013
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION PART 49

SGM HOLDINGS LLC, RICHARD R. FEATHERLY, and LAWRENCE FIELD

Plaintiffs,

–against-

PAUL K. LISIAK, METROPOLITAN EQUITY PARTNERS LLC, METROPOLITAN EIH13 LP, METROPOLITAN GP HOLDINGS LLC, REED ENERGY LLC, REED ENERGY EXPLORATION INC., and NORTH EAST FUEL INC.,

Defendants.

DECISION AND ORDER

Index No. 653676/2013
Mot. Seq. Nos.: 004-006

O. PETER SHERWOOD, J.:

This Decision and Order concerns three pending motions. In motion sequence 004, defendants Metropolitan Equity Partners LLC, Metropolitan EIH13 LP, and Metropolitan GP Holdings LLC (together the "Metropolitan Defendants") move to dismiss Counts 3, 4 and 7 of the amended complaint, and to strike from it certain allegedly irrelevant allegations. In motion sequence 005, defendants Paul K. Lisiak, Reed Energy LLC, Reed Energy Exploration Inc., and North East Fuel, Inc. (The "Lisiak/Reed Defendants"), seek identical relief, incorporating the Metropolitan Defendants' submissions by reference. In motion sequence 006, the Lisiak/Reed Defendants seek to strike additional allegations from the amended complaint.

Background

In October, 2013, plaintiffs filed a verified complaint (the "Original Complaint") containing eight causes of action seeking declaratory relief and monetary damages based on the defendants' alleged violations and repudiation of a Global Settlement Agreement (the "GSA") dated November 30, 2012, and the agreements annexed thereto. The GSA was later amended and renamed the Restructuring Plan Agreement (the "RPA").[1]

On December 26, 2013, defendants moved to dismiss the Original Complaint pursuant to

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[1]The GSA is discussed in this Court's decision dated June 23, 2014, familiarity with which is assumed. In these motions, the parties use the acronyms, GSA and RPA, interchangeably. The Court will refer to the agreements as the GSA.

CPLR 3211(a). By Decision and Order dated June 23, 2014, the Court denied those motions in their entirety with the limited exception that Mr. Lisiak was dismissed from Count 8 seeking indemnification and attorneys' fees (*see* NYSCEF Doc. No. 89). Defendants answered the Original Complaint on July 7, 2014. On July 25, 2014, the plaintiffs filed an amended complaint pursuant to CPLR 3025(a) (the "Amended Complaint").

On August 14, 2014, the defendants filed new motions to dismiss pursuant to CPLR 3211(a), seeking dismissal of the Third, Fourth, and Seventh Causes of Action of the Amended Complaint. The Third Cause of Action asserts a claim for breach of contract based on the alleged failures of certain of the Defendants to grant and record Overriding Royalty Interests ("ORRIs") in favor of plaintiff SGM Holdings LLC ("SGM"), and "concurrent failures to pay attorneys' fees and title work expenses" (Am. Compl., ¶¶ 111-37). The Fourth Cause of Action asserts a claim for breach of contract based on the defendants' alleged violation of the general release provisions in the GSA, as well as for improperly inducing claims against the plaintiffs by third parties (Am. Compl., ¶¶ 138-607). The Seventh Cause of Action seeks a declaratory judgment that defendants are contractually required to provide accurate financial and tax documents. The motions also seek to strike certain allegedly irrelevant matters from the Amended Complaint. Also on August 14, 2014, the Lisiak/Reed Defendants filed a separate motion seeking to strike from the Amended Complaint further allegedly irrelevant and prejudicial allegations and an exhibit thereto. The plaintiffs oppose all three motions on substantive and procedural grounds.

Discussion

I. Motions to Dismiss

A. Procedural Challenge to the Motions

Plaintiffs' opposition to the defendants' motions to dismiss raises gating issues that must be addressed before reaching the merits. First, plaintiffs assert that the motion violates the "one motion" rule of CPLR 3211(e) which provides that "[a]t any time before service of the responsive pleading is required, a party may move [to dismiss] on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted". The rule precludes successive motions to dismiss where the party seeking dismissal could have sought dismissal in a prior CPLR 3211 motion but failed to do so (*see, e.g., Ramos v City of New York*, 51 AD3d 753, 754

[2d Dept 2008]). The one motion rule, however, does not bar a successive motion to dismiss that addresses causes of action made for the first time in an amended pleading (*see Kocourek v Booz Allen Hamilton Inc.*, 114 AD3d 567, 568 [1st Dept 2014]). Additionally, challenges to the court's subject matter jurisdiction are never waived, and therefore are not subject to the one motion rule (*see, e.g. Fin. Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12, 17 [2008]).

Plaintiffs contend that each cause of action in the Amended Complaint addressed by the new motions to dismiss appears in substantially the same form in the Original Complaint. They argue that because defendants filed (and the Court denied) the prior motions to dismiss the Original Complaint, the instant motion violates the one motion rule. Furthermore, the plaintiffs contend that the instant motions are defective for the added reason that they were filed after the defendants answered the Amended Complaint, thereby violating CPLR 3211(c).

Defendants reply that the challenged claims in the Amended Complaint raise new factual allegations not made in the Original Complaint (Count 4), or raise subject matter jurisdiction challenges which are never waived (Counts 3 and 7). Accordingly, they contend that the one motion rule does not bar the instant motions.

1. Fourth Cause of Action

As to the Fourth Cause of Action, the issue is whether it is the same as the corresponding cause of action in the Original Complaint. The Fourth Cause of Action appears in both the Original Complaint and the Amended Complaint and seeks essentially the same relief: damages and equitable relief for the defendants alleged past and continuing breaches of the GSA by (1) asserting claims, (2) filing lawsuits and (3) inducing others to assert claim and file lawsuits. The Amended Complaint amends the Fourth Cause of Action to reflect the filing of another complaint against the plaintiffs in Tennessee, which the plaintiffs allege the defendants induced a third party to file. This additional allegation does not change the nature of the claim. It merely adds factual details to the claim. Defendants had an opportunity to test the sufficiency of this cause of action in their prior motion to dismiss. That the amended Count 4 adds factual detail does not alter this conclusion.

Defendants cite a number of cases which they contend support this court entertaining a second motion to dismiss the Fourth Cause of Action (*see, eg, Defs. Reply Br.*, NYSCEF Doc. No. 241, pp 3-6). These cases are inapposite. In each case, the cause of action challenged in the

amended complaint did not appear in the original complaint (*see, e.g., Kocourek*, 114 A.D.3d at 569 [holding that the "'single motion rule' . . . does not bar defendants' motion because *the cause of action . . . was not set forth in plaintiff's prior complaints*"] [emphasis added]; *Wallace v Merrill Lynch Capital Servs., Inc.*, 12 Misc 3d 1153[A], 819 NYS2d 214 [Sup. Ct., NY Cty, May 16, 2006] [holding that "a second motion cannot seek dismissal *of the same claim* on the same grounds raised during a prior motion] [emphasis added]; *Barbarito v Zahavi*, 107 AD3d 416, 420 [1st Dept 2013]). In *Barbarito*, the First Department held that:

> [T]he 'single motion rule' . . . does not bar [defendants] Seelig and MSF from moving to dismiss the amended complaint, as the fraud cause of action in the amended complaint is not the same as the corresponding cause of action in the original complaint. Indeed, plaintiffs did not assert the fraud claim against MSF in the original complaint, so MSF could not have moved to dismiss that claim. . . . Therefore, because Seelig and MSF did not have the opportunity to address the merits of the original cause of action, the single motion rule does not apply.

(107 AD3d at 420). Here, however, the addition of one factual allegation does not change the nature of the claim. In ruling on defendants' prior motion to dismiss, this Court found that the Fourth Cause of Action sufficiently pleaded a claim. The mere addition of factual detail to the claim does not alter this conclusion. Further, unlike *Barbarito*, the Amended Complaint in this case does not add a defendant to the challenged cause of action. Lastly, the defendants here had an "opportunity to address the merits of the original *cause of action*" in their motion to dismiss the Original Complaint (*id.* [emphasis added]). At bottom, these cases stand for the unremarkable proposition that a second motion to dismiss may be filed challenging entirely new causes of action pleaded in an amended complaint. The cases do not address the situation here: namely, where a cause of action pleaded in the original complaint is amended merely to add factual detail. For the reason, defendants may not maintain this second motion to dismiss testing the sufficiency of the Fourth Cause of Action's allegations.

In addition to moving to dismiss Count 4 for failure to state a claim, defendants also contend that a portion of that claim is now moot. Specifically, defendants claim that the portions of the Fourth Cause of Action seeking a declaration that plaintiffs are released from claims regarding pre-GSA conduct is now moot. Plaintiffs respond that the claim is not moot. Mootness is a challenge

to the court's subject matter jurisdiction which is never waived (*Callwood v Cabrera*, 49 AD3d 394, 394 [1st Dept 2008] ["Nevertheless, dismissal was appropriate because the landlord's voluntary agreement to withdraw its objection to petitioner's succession rights application rendered the petition moot and nonjusticiable, leaving the court without subject matter jurisdiction over the proceeding"]). Accordingly, consideration of the motions to dismiss the Fourth Cause of Action is not barred by the one motion rule and the Court will proceed to consider whether the Fourth Cause of Action is moot.

2. Third and Seventh Causes of Action

Regarding the Third and Seventh Causes of Action defendants maintain that those counts involve matters outside the Court's subject matter jurisdiction. Specifically, defendants challenge the Seventh Cause of Action on the ground that it seeks an impermissible advisory opinion. Such is a challenge to the Court's subject matter jurisdiction and may be raised at anytime. Similarly, defendants challenge the Third Cause of Action on the ground that it is moot. As discussed above mootness is a subject matter jurisdiction challenge. Accordingly, the Court will address the mootness issue in relation to the Third and Seventh Causes of Action.[2]

B. Merits of the Motion to Dismiss

1. The Fourth Cause of Action

In relevant part, the Fourth Cause of Action of the Amended Complaint seeks a declaration that plaintiffs are released from claims regarding pre-GSA conduct (*see* Am. Compl., ¶¶ 215, 606). Defendants correctly argue that this issue is now moot. By Decision and Order dated June 23, 2014, the Court held that such claims are in fact released as to plaintiffs SGM Holdings and Richard Featherly (*see* NYSCEF Doc. No. 89). Defendants have voluntarily discontinued their claims against Lawrence Field, the only other plaintiff in this action (*see Reed Energy, LLC v Regent Private Capital LLC, et al,* Index No. 653403/2013, NYSCEF Doc. No. 5 [notice of discontinuance]).

Plaintiffs apparently misconstrue the relief defendants seek on this motion to dismiss. Plaintiffs construe defendants' position as follows: "Defendants argue that Count Four is moot now

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[2] In a footnote, plaintiffs further contend that "[d]efendants also served and filed their motions to dismiss several hours after answering in violation of CPLR 3211[c]" (Pls. Opp. Br, p. 4 fn. 5). This argument is unavailing because a motion to dismiss based on lack of subject matter jurisdiction may be brought at anytime during the pendency of the action (*see, e.g. Fin. Indus. Regulatory Auth.*, 10 NY3d at 17).

that the Court has ruled that advancement and reimbursement is due in New York" (Pls. Opp. Br., p. 6). However, defendants are not seeking to dismiss any obligation to pay attorney fees for which they may be liable under the Eighth Cause of Action seeking indemnification and attorneys fees. Rather, defendants are seeking to dismiss the Fourth Cause of Action to the extent it seeks a declaration that plaintiffs are released from claims regarding pre-GSA conduct. Given the court's Decision and Order of June 23, 2014 and the notice of discontinuance filed in *Reed Energy, LLC v Regent Private Capital LLC, et al*, such relief is now moot. However, the Amended Complaint includes allegations of asserting claims and encouraging third parties to assert claims after the GSA and RPA were signed as to matters covered by the GSA releases. To the extent that the Amended Complaint seeks a declaration that defendants breached the GSA by asserting claims against plaintiffs and encouraging others to do so as to conduct subsequent to execution of the GSA, those claims cannot be dismissed.

The remaining request for relief in the Fourth Cause of Action is for "payment of attorney fees and other indemnification only" (*Am. Compl.*, ad damnum I., ¶ d, p. 114). This claim will be dismissed as it is duplicative of the Eigth Cause of Action (*see Am. Compl.* ¶¶ 668-672). Accordingly, motion sequence numbers 004 and 005 are granted to the extent they seek dismissal of that petition of the Fourth Cause of Action that seeks a declaration that plaintiffs' are released from claims regarding pre-RPA conduct.

2. The Third Cause of Action

The Third Cause of Action of the Amended Complaint asserts that the defendants breached the GSA by failing to grant and record ORRIs in favor of SGM (Am. Compl, ¶ 111-137). Defendants argue that this claim has been rendered moot by plaintiffs' admission that "[w]ell after the filing of the Verified Complaint in this action, the WR ORRIs were granted and filed. Also, on information and belief, certain of the Required ORRIs – but not the New SGM ORRIs – were granted and filed subsequent to the filing of the Verified Complaint" (Am. Compl. ¶ 135). The "WR ORRIs" referred to herein are specific ORRIs pertaining to deep oil rights. Plaintiffs respond that the Amended Complaint "makes clear that defendants are in breach of the [GSA] for failure to grant and file all of the Required ORRIs, including the New SGM ORRI" (Pls. Opp. Br., p. 8). Plaintiffs do not contest that the Count 3 is moot with regard to the WR ORRIs and those ORRIs that have

been granted and filed. Instead, plaintiffs seek to have "all of the Required ORRIs granted, assigned recorded and filed to the extent [defendants] have not done so "(Am. Compl. ¶ 135). Thus, the Third Cause of Action cannot be dismissed because SMG claims that there are some ORRIs that may not have been granted and filed.

3. The Seventh Cause of Action

The Seventh Cause of Action of the Amended Complaint seeks a declaration that certain of the defendants are required under the GSA to provide (1) an audited year-end accounting for defendant Metropolitan EIH13 LP ("MET13") and (2) true and correct K-1s on a timely basis (*see* Am. Compl. *ad damnum* cl. ¶ [g]). Defendants argue that the only alleged defect with the K-1 is that they do not "accurately reflect the membership interest of [third party] Jaden Oil in Reed" (Def. Br., p. 11 [citing Am. Compl. ¶ 632]). On this basis, "SGM seeks a declaration that [the Metropolitan Defendants] are required to provide SGM and other MET13 limited partners with a corrected 2012 K-1, properly reflecting Jaden's ownership interests in Reed and NFI" (Am. Compl. ¶ 667). Defendants contend that, in effect, this cause of action improperly seeks an advisory opinion concerning the respective contractual rights of Reed and non-party Jaden Oil as to which contract SMG is stranger.

Defendants' arguments miss the mark. The thrust of the claim is that the defendants were contractually required to provide accurate K-1s and failed to do so because, for example, the K-1s failed to reflect a purported interest that third party Jaden Oil holds in Reed. Accordingly, defendants seek a declaration that defendants must now provide a corrected K-1 in accordance with the terms of the contract. In order to prevail on this cause of action, plaintiffs will be required to prove that defendants had a contractual obligation to provide accurate K-1s and that the defendants breached this obligation by providing a 2012 K-1 statement that was inaccurate. To prove that the 2012 K-1 was inaccurate, plaintiffs may be required to show that Jaden Oil (and perhaps other entities) had ownership interests in Reed that should be reported on the K-1 but were not. The Court is not being asked to propound on the rights of Reed and Jaden Oil, as the defendants contend. Rather, the Court is being asked to consider whether defendants breached a contractual obligation to SMG to provide a K-1 that is accurate. In order to do so, the Court may be required to determine whether Jaden Oil receives K-1 statements reflecting an interest in Reed, and affects the percentage

ownership interest of SMG in Reed.

Defendants' motion to dismiss Count 7 is denied.

II. Motion to Strike

A. Timeliness

The plaintiffs also raise gating issues with regard to those aspects of motion sequences 004-005 that seek to strike allegations from the Amended Complaint. CPLR 3024 governs motions to strike scandalous or prejudicial matter unnecessarily inserted in a pleading. Subsection (c) provides that "[a] notice of motion under this rule shall be served within twenty days after service of the challenged pleading" (CPLR 3024[c]). Plaintiffs contend that because the motion was not served within 20 days of the Original Complaint, it is untimely. Defendants counter that the motion was served within 20 days of the Amended Complaint, and is therefore timely.

The plain wording of the statute supports the defendants' position. CPLR 3024(c) requires a motion to strike to be filed within 20 days of the "challenged pleading". Here the Amended Complaint is the challenged pleading. Although many of the allegations which defendants wish to strike appeared in the Original Complaint, the Amended Complaint supersedes the Original Complaint and is the only complaint in this action (*see Healthcare I.Q., LLC v Tsai Chung Chao*, 118 AD3d 98, 98 [1st Dept 2014] ["Once plaintiff served the Amended Complaint, the original complaint was superseded, and the Amended Complaint became the only complaint in the action. The action was then required to proceed as though the original pleading had never been served."]). Accordingly, the pleading to which the motion to strike is properly addressed is the Amended Complaint (*see Connolly v Napoli Kaiser & Bern, LLP*, 2010 NY Slip Op 31584[U] [Sup. Ct., NY Cty June 16, 2010] [finding motion to strike allegations in an amended complaint to be timely where "plaintiff served the Second Amended Complaint on August 21, 2009, and defendants served their motions to strike by mail within 20 days thereafter on September 10, 2009"]). Because the motion to strike was filed within 20 days of service of the Amended Complaint, it is timely.[3] In any event, even if the motion to strike were to be deemed untimely, the Court nonetheless has discretion to

[3] The Amended Complaint was filed and served on July 25, 2014 (*see* NYSCEF Doc. No. 116). The notice of motion to strike was filed and served on August 14, 2014 (*see* NYSCEF Doc. No. 197).

consider it where the plaintiffs would not be prejudiced by doing so (*see Dong Woo Park v Michael Parke Dori Group, Inc.*, 12 Misc 3d 1182[A], 2006 NY Slip Op 51376[U] [Sup Ct, Nassau Cty July 10, 2006]); *Szolosi v Long Is. R.R. Co.*, 52 Misc 2d 1081 [Sup Ct, Suffolk Cty 1967]).

None of the cases that the plaintiffs cite support a different conclusion. In each case, the motion to strike was filed more than 20 days after the filing and service of the challenged pleading (*see, e.g., Kleinman v Blue Ridge Foods, LLC*, 32 Misc 3d 1219[A], 934 NYS2d 34 [Sup Ct., Kings Cty July 7, 2011] [denying request strike where motion was not served within 20 days of the motion *to which it was addressed*]; *Cent. Nat. Bank v Bd. of Ed. Cent. Sch. Dist. No. 1 of Towns of New Lebanon & Canaan of Columbia Cnty. & Town of Stephentown of Rensselaer Cnty.*, 3 AD2d 258, 260 [3d Dept 1957] [same]; *Dotson v Easly*, 28 Misc 2d 456, 456 [Sup Ct, NY Cty, December 2, 1960] [same]). Here, as noted above, the challenged pleading is the Amended Complaint. Because the motion to strike was filed and served within 20 days of filing of the Amended Complaint, those cases are factually distinguishable.

B. Merits of the Motion to Strike

CPLR 3024(b) provides that "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading". "Motions to strike out parts of a pleading as improper are addressed to the sound discretion of the court, are not favored, and will be denied unless the court can see that the allegations have no possible bearing on the subject matter of the litigation" (*Zirn v Bradley*, 269 AD 961, 961 [2d Dept 1945]; *New York City Health & Hospitals Corp. v St. Barnabas Cmty. Health Plan*, 22 AD3d 391, 391 [1st Dept 2005]; *Rice v St. Luke's Roosevelt Hosp. Ctr.*, 293 AD2d 258, 258 [1st Dept 2002]; *Indelli v Lesster*, 130 AD 548, 550 [1st Dept 1909]). Furthermore, such motions will not be granted unless prejudice is shown (*Indelli*, 130 AD at 550-551).

Defendants challenge two sets of allegations.[4] The first set (¶¶ 166-191 of the Amended Complaint), outline the relationships between the parties and their respective roles and obligations with regard to the transactions underlying this litigation. The second set (¶¶ 216-605 of the Amended Complaint), give further background and set forth the alleged motivations that defendants had for making allegedly disparaging comments, filing lawsuits, and inducing the filing of lawsuits

[4] All of the challenged allegations appear in Count Four of the Amended Complaint.

in violation of the GSA. Defendants challenge each of these allegations on two grounds. First, the defendants argue that all of the challenged allegations are irrelevant because the activities described in those allegations relate to pre-GSA conduct. Defendants contend that the Court having already ruled that claims based on such conduct were released, these allegations have no bearing on the remaining issues in the litigation. Second, defendants argue that the challenged allegations are prejudicial in that (1) they are devoted solely to "smearing" the defendants (Pls. Br., p. 9); and (2) "[p]laintiffs intend to keep the meter running for their counsel to run rampant through these irrelevancies and then present the bill to Defendants" pursuant to contractual indemnification provisions (Pls. Reply Br., p. 2).

The defendants have failed to satisfy the standard for striking the challenged pleadings. Although the Court has already ruled as to claims based on released pre-GSA conduct (*see* Section I.B.1., *supra*), the challenged allegations are nonetheless relevant to the portion of Count 4 that remains. The background of the case, the relationships among the parties, and the allegations as to defendants' potential motivations for making disparaging statements, filing lawsuits, and inducing the filing of lawsuits, at the very least have some "possible bearing on the subject matter of the litigation" (*Zirn v Bradley*, 269 AD at 961). Indeed, the allegations are relevant to the determination of whether disparaging statements were in fact made. Whether defendants had motivations to make disparaging statements, file lawsuits themselves against the plaintiffs, or induce the filing of lawsuits by others against the plaintiffs is relevant to determining whether the defendants did so. As an example, the parties sharply dispute whether the defendants induced the filing of the aforementioned suit by a third party against the plaintiffs in Tennessee. If it is proven that the defendants had a motivation to do so, a finder of fact could consider such proof along with other evidence and conclude that it is more likely than not that the filing of the suit was a result induced by defendants.

In response, defendants argue that "whether Defendants breached a contractual obligation of non-disparagement does not turn on what Defendants did in the past, but only on the content of the allegedly disparaging statements" (Defs. Reply Br., p. 11). However, allegations about the history of the relationship between the parties and the defendants' potential motivations for making disparaging statements provides context to the determination of whether the statements made can be found to be "disparaging." As such, the Court cannot conclude that "allegations have no possible

bearing on the subject matter of the litigation" (*Zirn v Bradley*, 269 AD at 961).

The defendants arguments with regard to prejudice they may suffer if the challenged allegations are retained are similarly unpersuasive. The argument that the challenged allegations serve only to "smear[]" the defendants and thereby "instill undue prejudice in the jury" is mitigated by the fact that this is a non-jury action in which the parties have contractually waived the right to a jury (*see* Am. Compl., Ex. 1, Global Settlement Agreement ¶ 19). The defendants alternative argument that the allegations are meant only to unnecessarily accrue attorneys fees by litigation of irrelevant matters and then pass those fees on to defendants through indemnification provisions, is similarly unavailing. As noted above, the challenged allegations cannot be said to be wholly irrelevant to the subject matter of the litigation. Further, the defendants fears will ring true only to the extent that they are unsuccessful in this litigation, a matter that has yet to be determined.

III. The Lisiak/Reed Defendants Further Motion to Strike (Mot. Seq. 006)

A. Timeliness

In their opposition to motion sequence 006, plaintiffs argue initially that the motion is untimely. As the court discussed in connection with motions sequence numbers 004-005, CPLR 3024 is the relevant governing statute. The standards to be applied here are the same as those applied under motion sequences 004-005. For the reasons that motion sequences 004-005 were held to be timely, motion sequence 006 is likewise timely. The notice of motion to strike in motion sequence 006 was filed within 20 days of service of the Amended Complaint. Indeed, it was filed on the same day as the notices of motion pertaining to motion sequence numbers 004-005. Because the motion is properly addressed to the Amended Complaint, it is timely.

B. Merits

The Lisiak/Reed Defendants move to strike paragraphs 202, 252, and 253 as well as Exhibit 25 to the Amended Complaint. Paragraph 202 of the Amended Complaint states:

> 202. Lisiak and Ganning repeatedly have expressly characterized their threats to Regent, Mr. Field, and Mr. Stephenson, both in conversations with Mr. Stephenson and Mr. Field, and in conversations with third parties, including Mr. Featherly, as "greenmail."

(Am. Compl. ¶ 202). The Lisiak/Reed Defendants contend that this paragraph asserts that

defendants committed "greenmail" (Defs. Br., p. 5) and should be stricken as irrelevant to the claims at issue and as highly prejudicial.

Paragraph 202 does not allege that the defendants committed greenmail. Instead, it just relays the defendants' characterization of their own alleged threats to the plaintiffs. Moreover, the allegation appears to be relevant to plaintiffs claims that defendants breached the GSA by making disparaging statements, and inducing third parties to assert claims and lawsuits against the plaintiffs. Further, the Lisiak/Reed Defendants contention that the "use of the term 'greenmail' and related allegations in Paragraph 202 are thus Plaintiffs' improper attempt to unnecessarily inflate the allegations of 'threats' . . . and impugn the reputations of the [Lisiak/Reed] Defendants" is mitigated by the fact that the instant litigation is a non-jury action (*see* Am. Compl., Ex. 1, Global Settlement Agreement ¶ 19 re. waiver of right to a jury trial).

The remaining challenged allegations and an exhibit (paragraphs 252, and 253, and Exhibit 25) relate to accusations that Miles Peet, a non-party, was accused of criminal behavior. At oral argument on the motion, plaintiffs' counsel voluntarily withdrew these allegations (see NYSCER Doc. No. 256, p. 56). Thus the issue is moot.

Conclusion

For the foregoing reasons, it is hereby;

ORDERED that motion sequences 004 and 005 are GRANTED in part and Count 4 of the Amended Complaint is DISMISSED except as to those limited allegations concerning assertion by defendants against plaintiffs of claims and/or threatened litigation involving post-GSA conduct and for inducement of third parties to do the same; and it is further

ORDERED that the portion of motion sequence numbers 004 and 005 seeking dismissal of the Third and Seventh Cause of Action are DENIED; and it is further

ORDERED that motion sequence 006 is GRANTED in part, plaintiffs having voluntarily withdrawn paragraphs 252 and 253 in the Amended Complaint and Exhibit 25 apended thereto, said paragraphs and exhibits are hereby stricken from the Amended Complaint; and it is further

ORDERED that within ten (10) days of the date service of this Decision and Order with notice of entry, plaintiff shall serve and file Second Amended Complaint that conforms to this Decision and Order.

This constitutes the decision and order of the court.

DATED: March 20, 2015

E N T E R,

O. PETER SHERWOOD
J.S.C.