

Beach v Touradji Capital Mgt., LP

2015 NY Slip Op 31970(U)

October 20, 2015

Supreme Court, New York County

Docket Number: 603611/2008

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

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

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GENTRY T. BEACH and ROBERT A. VOLLERO

Plaintiffs,

Index No.: 603611/2008

-against-

DECISION AND ORDER

TOURADJI CAPITAL MANAGEMENT, LP, and
PAUL TOURADJI

Motion Seq. No. 35

Defendants.

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TOURADJI CAPITAL MANAGEMENT, LP, and
PAUL TOURADJI

Counterclaim Plaintiffs

-against-

GENTRY T. BEACH and ROBERT A. VOLLERO

Counterclaim Defendants.

-----X
TOURADJI CAPITAL MANAGEMENT, LP,
DEEPROCK VENUTRE PARTNERS, LP, and
PAUL TOURADJI

Counterclaim Plaintiffs

-against-

VOLLERO BEACH CAPITAL PARTNERS LLC,
VOLLERO BEACH CAPITAL FUND, LP,
VOLLERO BEACH ASSOCIATES LLC,
VOLLERO BEACH CAPITAL OFFSHORE, LTD,
and GARY BEACH,

Counterclaim Defendants.

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ANIL C. SINGH, J.

Defendant and counterclaim plaintiffs, Touradji Capital (“Defendant” or “Touradji Capital”) moves for leave to reargue this court’s grant of summary judgment on count ten of defendant’s counterclaim. Plaintiff and counterclaim defendants, Gentry T. Beach, Robert A. Vollero and the Vollero Beach Capital Funds’ (“Plaintiffs”) oppose defendant’s motion and cross-move for: (1) leave to reargue the court’s denial of summary judgment as to the proposed breach of fiduciary duty allegations and a proposed aiding and abetting fraud cause of action, and (2) an order that bars defendant from filing its amended counterclaim.

Procedural History***Motion to Amend***

On September 27, 2013, defendant filed its Motion for Leave to file its Amended and Supplemental Counterclaims and Answer (“Motion to Amend”). In the Motion to Amend, defendant sought leave to file amended and supplemental counterclaims. On April 17, 2014, the court granted in part and denied in part defendant’ Motion to Amend. In relevant part, the court granted defendant’s motion to: (1) amend the first counterclaim (breach of fiduciary duty), (2) supplement their counterclaims with counterclaim ten (tortious interference of contract), and (3) supplement their counterclaims

with counterclaim eleven (aiding and abetting fraud against Gentry Beach) (collectively, “April 17, 2014 counterclaims”). The court’s order was silent as to service of the April 17, 2014 counterclaims.

In its cross-motion, plaintiffs argue that the April 17, 2014 counterclaims were never served. In reply, defendant argues that the April 17, 2014 counterclaims have been filed and served numerous times. In particular, defendant points out that the counterclaims were served when (1) it filed its Motion to Amend on September 27, 2013 [Dkt. No. 493]; (2) it filed its reply to plaintiffs’ opposition to their Motion to Amend [Dkt No. 514 at 2, 10-13]; (3) it filed the Notice of Entry with respect to the court’s April 14, 2014 order granting the Motion to Amend [Dkt. No. 581]. Moreover, defendant argues that plaintiffs had notice of the April 17, 2014 counterclaims since it appealed the Motion to Amend and filed motions to reargue the Order on the Motion to Amend.

Motion for Summary Judgment

On September 30, 2013, plaintiffs’ sought summary judgment on each of defendant’s then operative and original counterclaims, which had been filed on November 4, 2009 (the “Summary Judgment Motion”). The November 4, 2009 counterclaims did not include the April 17, 2014 counterclaims, and the plaintiffs did not discuss that counterclaim in their

memorandum of law. On November 11, 2013, while the Motion for Leave to Amend was still pending, defendant opposed the Motion for Summary Judgment. On December 17, 2013, while the Motion for Leave to Amend was still pending, the plaintiffs filed a reply brief in further support of their Motion for Summary Judgment.

On May 7, 2015, this Court issued a decision on the motion for summary judgment. Although the plaintiffs had not moved for summary judgment with respect to the April 17, 2014 counterclaims, the Court granted summary judgment on counterclaim ten and denied summary judgment on counterclaim eleven and relevant portions of counterclaim one.

Legal Analysis

“A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party to assume a

different position inconsistent with that taken on the original motion.” Foley v. Roche, 68 A.D.2d 558, 567-568 [1st Dept., 1979].

CPLR 3212(b) states that if “it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.” The court in Merritt Hill Vineyards v. Windy Hgts. Vineyard, 61 N.Y.2d 106, held that courts have the authority to grant summary judgment in favor of a nonmoving party even in the absence of a cross appeal by that party. However, the Appellate Divisions have uniformly held that a court may search the record and grant summary judgment in favor of a nonmoving party “only with respect to a cause of action or issue that is the subject of motions before the court.” Dunham v. Hilco Const. Co., Inc., 89 N.Y.2d 425, 429-430 (1996). This rule stems from the “necessity for fair notice and an opportunity of a party to present his or her defenses.” Whitman Realty Group, Inc. v. Galano, 52 A.D.3d 505, 506 (2d Dep’t 2008.) See, Marsico v. Southland Corp., 148 A.D.2d 503, 505-506 (2d Dep’t 1989) (court not permitted “to grant summary judgment, *sua sponte*, to a party absent a motion by some other party addressed to the specific issues.”)

In the case at bar, the court’s granted leave to amend the counterclaims [April 14, 2014] only after the motion for summary judgment

had been briefed [September 2013 – December 2013]. In its motion opposing the summary judgment motion brought by the plaintiffs, defendant addressed the new allegations that they sought to include in counterclaim one [Dkt. No. 518, pg. 8, 17]. However, neither plaintiffs nor defendants discussed supplemental counterclaims ten and eleven. The court granted summary judgment on the former and denied on the latter.

With respect to counterclaim one, since the new allegations were discussed, the court is allowed to take that into consideration when deciding the summary judgment motion. The breach of fiduciary duty claim was before the court and defendants had raised issues of fact relating to that claim. Accordingly, the court's decision on the allegations regarding counterclaim one (breach of fiduciary duty) is upheld.

With respect to counterclaim ten and eleven, both these counterclaims were not discussed or briefed. They were not cause of actions or issues that were the subject of motions before the court. Therefore, summary judgment should not have been awarded on the supplemental counterclaims, specifically (1) counterclaim ten (tortious interference of contract), and (2) counterclaim eleven (aiding and abetting fraud against Gentry Beach).

Since the court's granted leave to amend the counterclaims [April 14, 2014] only after the motion for summary judgment had been briefed

[September 2013 – December 2013], this court should not have entertained counterclaims ten and eleven in rendering its decision. Although multiple summary judgment motions in the same action should be discouraged, there is sufficient cause in this action to allow the defendant to renew their motion for summary judgment solely on counterclaim ten and eleven. In particular, the arguments regarding counterclaims ten and eleven could not have been raised on the prior motion since the summary judgment motions in this case were briefed before the court's permitted the supplemental counterclaims to be included. See, Amill v. Lawrence Ruben Co., 117 A.D.3d 433, 434 [1st Dept 2014] ["Successive summary judgment motions should only be entertained where there is a "showing of newly discovered evidence or other justification]; Pub. Serv. Mut. Ins. Co. v. Windsor Place Corp., 238 A.D.2d 142, 143, [1st Dept 1997] ["multiple summary judgment motions in the same action should be discouraged in the absence of newly discovered evidence or sufficient cause"].

Plaintiffs have also cross-moved to request that the court bar defendant from filing its amended counterclaims. Plaintiffs argue that the April 17, 2014 counterclaims were never served. Defendant respond that the April 17, 2014 counterclaims have been filed and served numerous times. In particular, defendant points out that the counterclaims were served when (1)

it filed its Motion to Amend on September 27, 2013 [Dkt. No. 493]; (2) it filed its reply to plaintiffs' opposition to their Motion to Amend [Dkt No. 514 at 2, 10-13]; (3) it filed the Notice of Entry with respect to the court's April 14, 2014 order granting the Motion to Amend [Dkt. No. 581].

Moreover, defendant argues that plaintiffs had notice of the April 17, 2014 counterclaims since it appealed the Court's order granting defendant's Motion to Amend and filed motions to reargue the Order on the Motion to Amend.

The court is persuaded by defendant's argument. The April 17, 2014 order was silent as to service of the counterclaims. However, the plaintiffs had notice of the counterclaims and even appealed the April 17, 2014 order. Accordingly, defendant's April 17, 2014 counterclaims are deemed served and plaintiffs' cross-motion to bar defendant from filing their amended counterclaim is denied.

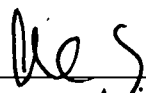
Accordingly, it is

ORDERED that the motion to reargue the court's denial of summary judgment on the allegations regarding counterclaim one (breach of fiduciary duty) is denied; and it is further

ORDERED that the motion to reargue the court's grant of summary judgment on counterclaim ten and counterclaim eleven is granted; and it is further

ORDERED that defendant's April 17, 2014 counterclaims are deemed served and plaintiffs' motion to bar defendant from filing its amended counterclaim is denied.

Date: October 20, 2015
New York, New York



Anil C. Singh