

Nick v Schneider

2015 NY Slip Op 32734(U)

July 17, 2015

Supreme Court, Nassau County

Docket Number: 011894-13

Judge: Timothy S. Driscoll

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER

Present:

HON. TIMOTHY S. DRISCOLL

Justice Supreme Court

-----x
NORMAN NICK, individually, and as President
of The Ashley Group, THE ASHLEY GROUP and
THE MAST GROUP INC.,

Plaintiffs,

-against-

IRWIN N. SCHNEIDER, JOEL C. SCHNEIDER,
ESQ., ESTATE OF HERBERT H. SOMMER, ESQ.,
Deceased, and SOMMER & SCHNEIDER, P.A.,

Defendants.
-----x

TRIAL/IAS PART: 14
NASSAU COUNTY

Index No: 011894-13
Motion Seq. No. 4
Submission Date: 6-5-15

The following papers having been read on this motion:

- Notice of Motion, Affirmation in Support and Exhibits.....x
- Memorandum of Law in Support.....x
- Affidavit in Opposition and Exhibits.....x
- Reply Affirmation in Support.....x

This matter is before the Court for decision on the motion by Plaintiffs Norman Nick, Individually, and as President of the Ashley Group, The Ashley Group and The Mast Group, Inc. ("Plaintiffs") filed May 6, 2015 and submitted June 5, 2015. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order 1) pursuant to CPLR § 2221(d), granting Plaintiffs leave to renew the Court's prior decision ("Prior Dismissal Decision") dated December 3, 2014 based on matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion ("Prior Motion") by Defendant Irwin Schneider ("Irwin") to dismiss the action on

the basis of lack of personal jurisdiction; 2) pursuant to CPLR § 2221(e), granting Plaintiffs leave to reargue based on new facts not offered on the Prior Motion that would change the Prior Dismissal Decision; and 3) upon granting Plaintiffs leave to renew and argue, directing Irwin to produce copies of his bank records, and a fully executed copy of the escrow agreement annexed to Plaintiffs' papers as Exhibit 6.

Irwin opposes the motion.

B. The Parties' History

The parties' history is outlined in detail in a prior Order ("Prior Order") of the Court dated April 3, 2014 in which the Court reserved decision on the Prior Motion and permitted discovery on the issue of personal jurisdiction so that the parties could submit supplemental papers in support of their respective positions on the motion. Plaintiffs subsequently filed a motion for an Order, pursuant to CPLR §§ 3124 and 3126, compelling Defendants to comply with certain of Plaintiffs' discovery demands. In its prior decision dated September 25, 2014 ("Discovery Decision"), the Court denied Plaintiffs' motion to compel, and for other related relief, based on its conclusion that Defendants had complied with their discovery obligations and that Plaintiffs had received extensive discovery which, by their own admission, contained information supporting their position that the Court has personal jurisdiction over Irwin. In the Discovery Decision, the Court also directed counsel for the parties to submit their supplemental submissions regarding the Prior Motion and, pursuant to that direction, counsel submitted their supplemental submissions regarding the Prior Motion which made reference to information obtained during discovery.

In its Prior Dismissal Decision dated December 3, 2014 (Ex. 1 to Weber Aff. in Supp.), the Court granted Irwin's Prior Motion to dismiss this action against him on the basis of lack of personal jurisdiction. The Court incorporates the Prior Order, Prior Discovery Decision and Prior Dismissal Decision by reference as if set forth in full herein. As noted in the Prior Order and Prior Decisions, Plaintiffs allege that Defendants induced Plaintiff Norman Nick ("Nick") to deposit monies in their attorney escrow account and made false and fraudulent representations that they would use the funds to make investments in legitimate business ventures. Plaintiffs allege that Nick deposited the "investment" money in the escrow account of S&S and that the

proceeds of the investments were used by the Defendants for personal obligations. Defendants have allegedly refused to provide Plaintiffs with an accounting or to return any money to the Plaintiffs, except for the sum of \$22,000 that was returned by Joel on or about March 14, 2012. Irwin was, and continues to be, a resident of the State of Florida. The Complaint alleges that Irwin was previously an attorney admitted to practice in New York and before the Securities and Exchange Commission, who was suspended from the practice of law in 1989 as a result of his conviction for a felony and was convicted again in 1999 of conspiracy to violate securities laws. Defendants Joel and Herbert F. Sommer ("Sommer"), now deceased, the son and son-in-law respectively of Irwin, were attorneys who engaged in the practice of securities law. Joel was and is, and Sommer was, a resident of New York. Sommer & Schneider, P.A. ("S&S") is a New York partnership that maintains an office for the practice of law in Garden City, New York.

In the Prior Dismissal Decision, the Court, after analyzing the applicable law regarding the exercise of personal jurisdiction over non-residents, held as follows:

Here, none of the provisions of CPLR 302(a) discussed above warrant exercising personal jurisdiction over Irwin in a New York State court. Plaintiff's submissions do not establish that Irwin knowingly participated with defendants Joel, Herbert and/or Sommer & Schneider in the fraud that is the basis of the Complaint, beyond the bare-bones assertions that Irwin and the other Defendants conspired with each other in committing a fraud on Plaintiffs, and that Joel and Herbert "have and continue to engage in a continuing conspiracy to enable said Defendant [Irwin] to conduct his fraudulent business practices." Complaint at para. 21. The record before the Court, however, merely establishes that Irwin sent numerous communications to Joel. It does not establish that Irwin participated in any alleged wrongdoing in New York State with Joel, Herbert or Sommer & Schneider. Under these circumstances, the Court cannot conclude that Irwin was transacting business in New York, or otherwise participated in conduct that would make it appropriate to exercise jurisdiction over Irwin in New York. Accordingly, the Court grants the motion and dismisses the Complaint as asserted against Defendant Irwin Schneider.

In support of the motion now before the Court, Plaintiffs provide a copy of a November 30, 2012 email from Irwin to Joel (Ex. 3 to Weber Aff. in Supp.) which states "I am sure by now you have received a Certified Letter from William Weber counsel for Norman Nick. Relying on the Rule of Privilege I specifically do not authorize to release any information [sic] regarding deposits I may have directly of [sic] indirectly to the escrow accounts of Sommer and Schneider." An email dated March 24, 2015, that is also part of Exhibit 3, reflects that Joel sent

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this email to David Bolton, who was his attorney at the time.¹ Counsel for Plaintiffs affirms that Joel had this document in his possession since November 30, 2012 and did not include it in the 261 pages of emails sent to his attorney on May 23, 2014. Plaintiffs submit that this document reveals an attorney-client relationship between Irwin and Joel, “or at worst a legal relationship that entitled defendant Irwin to exercise a “Right of Privilege” (Weber Aff. in Supp. at ¶ 16), and supports the conclusion that there was a “nexus” (*id.*) between Irwin and the transactions complained of by Plaintiffs. Plaintiffs submit that this document refutes Irwin’s assertion that he was not doing business in New York and, had it been available to the Court at the time that the Prior Dismissal Decision was issued, would have changed the Court’s determination.

Plaintiffs also provide a series of pages from the S&S IOLA escrow account reflecting deposits and withdrawals (“IOLA Documents”) (Ex. 4 to Weber Aff. in Supp.). Plaintiffs’ counsel affirms that he received these materials on April 22, 2015 even though they were to be delivered during the jurisdictional discovery stage of this action. Plaintiffs suggest that the Prior Discovery Decision contributed to Plaintiffs’ failure to obtain these materials. Plaintiffs list many of the transactions reflected by these materials (Weber Aff. in Supp. at ¶¶ 20(a) - (r)) and submit that the total amount of money paid to Irwin from the S&S escrow account is \$226,926.54. Plaintiffs submit that this new evidence demonstrates that Irwin was engaged in doing business in New York, directly, and indirectly with his co-defendants. Plaintiffs also ask the Court to direct Irwin to produce his bank records and the executed copy of the January 2010 escrow agreement (“Escrow Agreement”) between Flynb Brazos, LLC and Ashley Investors Corp., Pet -Core, Inc., and S&S, as Escrow Agent.

In opposition, Irwin affirms that, although Plaintiffs did not have the IOLA Documents when they opposed the Prior Motion, Plaintiffs had the information contained in those Documents when they opposed the Prior Motion. Irwin affirms that in Plaintiffs’ Supplemental Affirmation in Opposition to the Prior Motion, Plaintiffs annexed as their Exhibit 12 a document titled “Copy of Sommer & Schneider Escrow Account bank statement,” which was also annexed to Nick’s affidavit in opposition to the Prior Motion. Irwin provides a copy of that document

¹ At the time, Defendants Joel and Sommer & Schneider were represented by David Bolton, Esq. Pursuant to a Consent to Change Attorney form dated May 7, 2015, Joel was substituted as attorney of record for Defendants Joel and Sommer & Schneider in place of Mr. Bolton.

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(Ex. 3 to Irwin Aff. in Opp.). Irwin affirms that the IOLA Documents replicate information contained in that document and describes as “flagrantly false” (Irwin Aff. in Opp. at p. 3) the affirmation of Plaintiffs’ counsel that this information was not available to him when he opposed the Prior Motion. Irwin contends, further, that Plaintiffs’ counsel has intentionally misstated the information contained in the IOLA Documents and sets forth in detail the manner in which Plaintiffs’ counsel has allegedly misstated that information (*see* Irwin Aff. in Opp. at pp. 4-15). Those alleged misstatements include, but are not limited to, 1) identifying the incorrect recipient of certain payments; and 2) improperly referring to routing numbers as account numbers.

Irwin submits that none of the payments to him reflect that he was doing business in New York and argues that Plaintiffs’ counsel’s “intentional misstatements of the information contained in the bank statements was necessary in order to inflate, dramatically the amount of money that was paid to me from the Sommer & Schneider escrow account” (Irwin Aff. in Opp. at p. 15). By way of example, with respect to Plaintiffs’ reference to a wire transfer in the amount of \$59,500 (*see* Weber Aff. in Supp. at ¶ 20(K)), Irwin disputes Plaintiffs’ contention that this transaction is proof that Irwin did business in New York. The description of this transaction in the IOLA Documents includes the word “Fluid Form.” Irwin provides details regarding that wire transfer, including his conversation with Mike Mihelic (“Mihelic”), a resident of Toronto, Canada, regarding the company Fluidform. Irwin provides an affidavit of Mihelic dated May 11, 2015 (Ex. 4 to Irwin Aff. in Opp.).

Mihelic affirms that 1) he is a resident of Canada; 2) for several years prior to April 2010, he was working with a Canadian firm that sold companies listed for trading on the Frankfurt Exchange, and subsequently left that firm and opened his own company to perform the same work; 3) during his affiliation with the Canadian firm, he met Irwin who had purchased or brokered the sale of three Canadian companies listed on the Frankfurt Exchange; 4) in April 2010, Mihelic received a call from Irwin who said that he was looking for a shell company listed on the Frankfurt Exchange, and the two subsequently met in Toronto; 5) Mihelic and Irwin agreed that Mihelic would try to convince stockholders to agree to the sale of Fluidform and that Irwin would act as Mihelic’s agent; 6) shortly thereafter, Irwin advised Mihelic that the buyer agreed to pay \$225,000 for Fluidform; 7) Mihelic asked Irwin to recommend a firm that he could

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use as his attorney/escrow agent and Irwin suggested that Mihelic contact S&S; 8) Mihelic spoke to Joel and retained S&S as escrow agent and legal advisor; 9) Irwin thereafter negotiated the purchase transaction with the buyer, a Canadian resident, and discussed the due diligence requirements with the buyer's attorney; 10) the due diligence requirements were met and all Fluidform stock certificates were delivered to S&S by Global Sentry, the transfer agent in Canada; 11) immediately prior to the delivery of stock, Joel advised Mihelic that the \$225,000 wire had been received from an individual in Switzerland to finance the purchase for the buyer; 12) due to the buyer's objection to the cost of certain legal fees, it was agreed that \$10,000 would be transferred from S&S' escrow account to the buyer's account; and 13) the matter was thereafter closed.

C. The Parties' Positions

Plaintiffs submit that 1) the Court should permit renewal because Plaintiffs have explained why the new evidence, specifically the November 30, 2012 email from Irwin to Joel and the IOLA Documents, was not presented in opposition to the Prior Motion; 2) the new evidence demonstrates that Irwin was doing business in New York; 3) the Court overlooked the facts and the law in issuing its Discovery Decision and improperly curtailed Plaintiffs' right to discovery relating to jurisdiction; and 4) the court has jurisdiction over Irwin because he transacted business in New York, and committed a tortious act within New York, and used the co-defendants, who are residents of New York, to conduct his investment business using their office, attorney bank accounts and attorney escrow accounts.

Irwin opposes the motion submitting that 1) the purportedly new evidence is not new, as it was presented by Plaintiffs in opposition to the Prior Motion; 2) Plaintiffs have mischaracterized the contents and significance of the information in the IOLA Documents in an effort to persuade the Court that Irwin was doing business in New York; and 3) the Mihelic affidavit, and Irwin's affirmations regarding the transactions on which Plaintiffs rely, demonstrate that Plaintiffs' representations regarding the significance of the transactions in the IOLA Documents are inaccurate and/or misleading.

In reply, Plaintiffs submit *inter alia* that 1) the Mihelic affidavit demonstrates that Irwin used New York contacts to conduct business; and 2) Irwin has failed to address certain

transactions in the IOLA Documents which reflect payments to him, and support the conclusion that he was doing business in New York.

RULING OF THE COURT

A. Leave to Renew

A motion for leave to renew must be supported by new or additional facts not offered on the prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion. *Schenectady Steel Co., Inc. v. Meyer Contracting Corp.*, 73 A.D.3d 1013, 1015 (2d Dept. 2010), quoting CPLR §§ 2221(e)(2) and (3) and citing, *inter alia*, *Barnett v. Smith*, 64 A.D.3d 669 (2d Dept. 2009) and *Chernysheva v. Pinchuk*, 57 A.D.3d 936 (2d Dept. 2008).

B. Leave to Reargue

A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion. *Matter of American Alternative Insurance Corp. v. Pelszynski*, 85 A.D.3d 1157, 1158 (2d Dept. 2011), *lv. app. den.*, 18 N.Y.3d 803 (2012), quoting CPLR § 2221(d)(2). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Mazinov v. Rella*, 79 A.D.3d 979, 980 (2d Dept. 2010), quoting *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999).

C. Application of these Principles to the Instant Action

The Court denies the motion. In the Prior Dismissal Decision, the Court set forth in detail the evidence on which Plaintiffs relied in support of their contention that Irwin was engaged in purposeful business activities in New York. As noted in the Prior Dismissal Decision, Plaintiffs argued, in opposition to the Prior Motion, that the documentation submitted established *inter alia* that 1) Irwin solicited several proposals and completed business transactions involving Bee Yoo and Grandall Solutions, as well as PetCore Inc. and DynaPep; 2) Joel disbursed checks relating to Plaintiffs' \$80,000 wire transfer into the Sommer & Schneider escrow account in August of 2011, including payments to Irwin, Sommer & Schneider, and Joel, which, Plaintiffs contended, contradicts Joel's testimony that he never spoke

to his father about the escrow account until after Herbert's death several months later;

3) Defendants never paid Plaintiffs for the loans/investment that they made in Petcore while, at the same time, taking legal and finder fees from the proceeds; 4) the Petcore Escrow Agreement contains provisions supporting the conclusion that Irwin engaged in substantial business activities in New York, including but not limited to the fact that Irwin was described as the designated agent of the Depositors and Pet Core, and that the Escrow Agent agreed to hold \$180,000 deposited by the Depositors and to release the monies in accordance with written directions from Irwin; and 5) as evidenced *e.g.* by Irwin's May 11, 2011 email to Joel regarding "speedfry due diligence" and July 29, 2011 email to Joel "re Global," Irwin used Joel to solicit business. The Court concludes that the purportedly new evidence on which Plaintiffs rely in support of the instant motion to renew was presented in opposition to the Prior Motion. Moreover, a consideration of that evidence would not change the Prior Decision and, accordingly, the Court denies Plaintiffs' motion to renew.

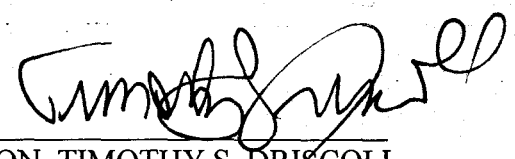
The Court also denies the motion to reargue. Plaintiffs have not established that the Court overlooked or misapprehended matters of fact or law in determining the Prior Motion.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
 July 17, 2015

ENTER



HON. TIMOTHY S. DRISCOLL
 J.S.C.

ENTERED

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 COUNTY CLERK'S OFFICE