

Herman v Pound W. Trading Corp.
2016 NY Slip Op 30645(U)
April 13, 2016
Supreme Court, New York County
Docket Number: 652698/2012
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ROSEMARIE A. HERMAN, individually, as beneficiary of the trust created by Harold Herman as Grantor under agreement dated March 1, 1990 and as beneficiary of the trust created by Rosemarie A. Herman as Grantor dated November 27, 1991 and ROSEMARIE A. HERMAN as Natural Guardian for GAVIN I. ESMail and JESSE A. ESMail, individually, as beneficiaries of the trust created by Harold Herman as Grantor under agreement dated March 1, 1990 and as beneficiaries of the trust created by Rosemarie A. Herman as Grantor dated November 27, 1991,

Plaintiffs,

Index No. 652698/2012

-against-

DECISION & ORDER

POUND WEST TRADING CORP.; SAVASTANO, KAUFMAN & COMPANY, LLC; and KENNETH KAUFMAN; "ABC COMPANY # 1" through "ABC COMPANY #10", the last ten entities being fictitious and unknown to the Plaintiffs, the entities intended being the entities, if any, involved in the acts or omissions described in the Complaint; and "JOHN DOE # 1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiffs, the persons intended being the Persons, if any, involved in the acts or omissions described in the Complaint,

Defendants.

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SHIRLEY WERNER KORNREICH, J.

Plaintiffs move to: 1) renew this court's decision and order, dated April 2, 2014, and entered April 4, 2014 [Dismissal Decision, Dkt 146],¹ and upon renewal to reinstate the claims against the Kaufman Defendants for conspiracy to commit breach of fiduciary duty, fraud and constructive fraud (Conspiracy Claims); and 2) to sanction the Kaufman Defendants, pursuant to 22 NYCRR 130-1.1, for not timely providing documents and for other misconduct. Motion

¹ References to "Dkt" followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing System. Unless defined in this opinion, capitalized terms in the Dismissal Decision have the same meaning here.

Sequence 004. The Reader's familiarity with the Dismissal Decision is assumed and the facts will be repeated here only as necessary.

The motion to renew is moot. On November 10, 2015, the Appellate Division reinstated the Conspiracy Claims against the Kaufman Defendants, which this court had dismissed based on the statute of limitations. *Herman v Atmas Corp*, 133 AD3d 445, 445-446 (1st Dept 2015).²

Turning to the request for sanctions, plaintiffs allege that the Kaufman Defendants did not produce in timely fashion: 1) hard copies of Rosemarie's federal, state and local tax returns for the years 1998 through 2002; 2) electronic copies of the LLCs' tax returns for 1998 through 2002 that they found on their back up archive server in March 2015; and 3) their insurance policy.

Under 22 NYCRR §130-1.1(a), "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct" Conduct is frivolous under 22 NYCRR §130-1.1(c)(1) if it is "completely without

² The caption of the action has been amended because claims against various defendants, including the first named defendant Atmas, were dismissed by the Dismissal Decision and not reinstated on appeal. The Appellate Division ruling with respect to the Kaufman Defendants held:

"The conspiracy cause of action against the Kaufman defendants is not time-barred. In *Herman v 36 Gramercy Park Realty Assoc., LLC* (131 AD3d 422, 14 N.Y.S.3d 691 [1st Dept 2015]), a related action, we reinstated a cause of action for conspiracy based on fraud, constructive fraud and breach of fiduciary duty claims against Michael Offit in his capacity as trustee, brought in a related action commenced in 2011, because the tort claims had not accrued until Offit resigned as trustee less than six years before the action against 36 Gramercy Park was commenced. That determination applies as well to the conspiracy cause of action as against the Kaufman defendants, who were plaintiff Rosemarie Herman's accountants and are alleged to have known that certain transactions were fraudulent and to have actively assisted Offit and others in concealing them from plaintiff. In view of the foregoing, the doctrine of equitable estoppel is inapplicable." [internal citations omitted]

merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." In determining whether to award costs, the court must consider the circumstances surrounding the conduct, including the time available to properly investigate the legal or factual basis for the conduct. 22 NYCRR §130-1.1(c).

Sanctions are appropriately awarded where there is no bona fide basis for a claim; where a party ignores court orders for disclosure; where a party makes false sworn statements, or for fraud that causes delay or substantial expense. *644 BRDY Realty v 684 Owners Corp.*, 216 AD2d 43 (1st Dept. 1995) (no bona fide basis for claim); *Kihl v Pfeffer*, 94 NY2d 118, 123 (1999) (ignoring court orders for disclosure); *Birch v Carroll*, 210 AD2d 119, 120 (1st Dept 1994) (substantial expense and delay due to fraudulent scheme); *Sanders v Copley*, 194 AD2d 85, 88 (1st Dept 1993) (false sworn testimony and affidavit on material issue). On the other hand, sanctions are inappropriate where a party asserts colorable, albeit unpersuasive, arguments in good faith and without an intent to harass or injure. *Gordon Group Invs., LLC v Kugler*, 127 AD3d 592, 594-595 (1st Dept 2015), citing *Yenom Corp. v 155 Wooster St., Inc.*, 33 AD3d 67, 70 (1st Dept 2006).

Sanctions are not warranted for the failure to produce Rosemarie's tax returns and the insurance policy because there was not a significant delay or injury. Plaintiffs complain that the Kaufman Defendants did not give Rosemarie copies of her own tax returns for the years 1998 through 2002 until August 2014. Avedesian Affirmation, Dkt 179 (Moving Aff), p, 7, ¶18. However, plaintiffs did not request them in this action until June 3, 2014, and responses were not due until June 30, 2014. Demands, Dkt 161 & Moving Aff, Dkt 179, p, 4, ¶7. She received the returns two months after requested and one month after they were due. The insurance policy was

turned over in response to this motion. Kaufman Defendants' 11/3/15 Opposing Memorandum, Dkt 226, p 22 & Plaintiffs' 11/16/15 Reply Memorandum, Dkt 231, p 13.

The court does not condone the Kaufman Defendants' behavior, but plaintiffs have not shown injury or prejudice *in this action* sufficient to warrant sanctions. The Kaufman Defendants inappropriately refused to provide Rosemarie with *her own returns*, based on Internal Revenue Code §7216, which requires the taxpayer's consent before a tax preparer provides returns to *third-parties*. *Refundo, LLC v Drake Enters.*, 2013 U.S. Dist. LEXIS 57671, 2013 WL 1750016 (D.N.J. Apr. 22, 2013) (nor) (IRC §7216 "requires taxpayers to authorize disclosure of tax-related information to third-parties"). Clearly, Rosemarie was entitled to her returns. Nonetheless, there was only a one-month delay in producing Rosemarie's returns. Sanctions are not warranted because after the Dismissal Decision, the Conspiracy Claims relating to the LLCs were no longer an issue in this action. What survived were claims that the Kaufman conspired with Offit in converting 1991 Trust funds and breaches of fiduciary unrelated to the LLCs. Plaintiffs received the LLCs' returns before the Appellate Division reinstated the conspiracy claims related to them. Thus, there was no injury or prejudice due to failure to provide them earlier. The court would not have compelled them to be produced in this action prior to the Appellate Division reversal.

While plaintiffs complain about the expense of obtaining the returns in the Main Action, that cannot be attributed to the Kaufman Defendants conduct here. Plaintiffs chose to pursue a third-party subpoena and contempt proceedings against the Kaufman Defendants in the Main Action. Plaintiffs likely charted that course because the returns were not germane to discovery in this action after the Dismissal Decision. Furthermore, in the Main Action, plaintiffs prevailed on

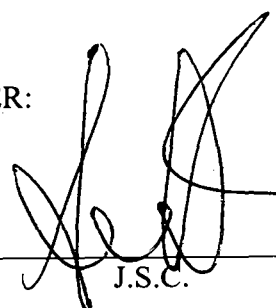
a motion to strike Maurice's pleadings, the ultimate sanction, due to, *inter alia*, failure of his agents, the Kaufman Defendants, to turn over tax returns.

In regard to the insurance policy, it was requested in June 2014 and was turned over after this motion was filed in October 2015. Plaintiffs make no showing of substantial prejudice or injury due to not having a copy.³ Accordingly, it is

ORDERED that the motion by plaintiffs (Sequence 004) to renew this court's decision and order dated April 2, 2014, and entered April 4, 2014, and for sanctions against the Kaufman Defendants, is denied.

Dated: April 13, 2016

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.

³ Most of plaintiffs' submissions on this motion focused on the motion to renew.