

Romanoff v Romanoff
2016 NY Slip Op 31703(U)
August 3, 2016
Supreme Court, New York County
Docket Number: 650152/2011
Judge: Anil C. Singh
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

-----X

ROBERT ROMANOFF, as beneficiary, and as
co-trustee of the Sheryl Romanoff Grantor Retained
Annuity Trust and the Sheryl Romanoff Irrevocable
Grantor Trust,

DECISION AND
ORDER

Plaintiff,

Index No.
650152/2011

-against-

GERALD ROMANOFF and MICHAEL ZIMMERMAN,

Defendants.

-----X

HON. ANIL C. SINGH, J.:

Plaintiff Robert Romanoff moves: 1) pursuant to CPLR 2221 for leave to reargue the order dated October 9, 2013, dismissing the claims against defendant Michael Zimmerman and severing and continuing the claims against defendant Gerald Romanoff; and 2) for leave to file an amended complaint. Defendant Gerald Romanoff and proposed defendant Sheryl Romanoff move: (A) pursuant to CPLR 2221 for leave to renew the motion for a protective order in light of the First Department's denial of the Romanoffs' motion for similar relief, without prejudice to further proceedings in this Court; (B) a protective order pursuant to CPLR 4503(a), (i) enjoining the use of the privileged communications plaintiff Robert Romanoff filed in this matter, (ii) directing that the privileged communications, and

all reference thereto, including, without limitation, paragraph 191 of the proposed second amended complaint, be stricken from plaintiff's motion papers, and (iii) directing that plaintiff return to the Romanoffs all copies he and his counsel have made of the privileged communications; (C) an order suppressing, pursuant to CPLR 4506, the content of privileged communications on the grounds that they were obtained by conduct constituting the crime of eavesdropping, as defined by section 250.05 of the Penal Law; and (D) to dismiss the current complaint pursuant to CPLR 3211(a)(3), (5) and (7) for lack of capacity to sue, collateral estoppel, res judicata, and failure to state a cause of action.

I. PLAINTIFF'S MOTION TO REARGUE

“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]).

After careful consideration, the Court declines to grant leave to reargue the order dated October 9, 2013.

II. PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT

In 2011, a related action was commenced against the trusts in issue, alleging constructive fraudulent conveyance and intentional fraudulent conveyance. The matter under index number 106008/2011 bears the caption 55 Gans Judgment LLC, as successor in interest to Union Center National Bank v. Gerald Romanoff, et al. Judge Manuel Mendez issued orders granting summary judgment for the plaintiff in that action; denying a motion to intervene; and voiding the transfer of certain shares of stock to the trusts as fraudulent conveyances.

In an opinion dated December 4, 2014, the First Department wrote:

Robert Romanoff, one of the two co-trustees for both trusts, seeks to appeal, on behalf of the trusts, from the grant of plaintiff's motion for partial summary judgment on two of its fraudulent conveyance causes of action and, for the purpose of protecting the rights of the trusts, from the denial of his motion to intervene as a defendant and co-trustee. However, having failed to obtain the consent of the other co-trustee to pursue these appeals, Romanoff lacks standing to appeal.

(55 Gans Judgment LLC v. Romanoff, 123 A.D.3d 452 [1st Dept., 2014]).

Accordingly, the First Department dismissed the appeal. Subsequently, the Court of Appeals denied leave to appeal (55 Gans Judgment LLC v. Romanoff, 26 N.Y.3d 1073 [2015]).

The precise impact of the rulings of the First Department and the Court of Appeals on the instant matter is unclear to this Court. Accordingly, the motion to amend the complaint will be denied without prejudice with leave to renew to allow plaintiff the opportunity to brief this Court on the impact of those rulings.

III. DEFENDANTS' CROSS-MOTION TO RENEW MOTION FOR PROTECTIVE ORDER

The rule that “a motion for renewal be based upon newly discovered evidence is a flexible one, and a court, in its discretion, may grant renewal even where the additional facts were known to the party seeking renewal at the time of the original motion, provided the moving party offers a reasonable justification for the failure to submit the additional facts on the original motion” (Grantat v. Walbaum's Inc., 289 AD2d 289, 290 [2nd Dept. 2001] (other citations omitted)).

This Court entered an order dated December 18, 2013, granting the Romanoffs' motion for a protective order to the extent that the County Clerk was directed to seal certain documents, and denying the remainder of the motion without prejudice.

The First Department issued an order dated January 7, 2014, in the fraudulent conveyance action under index number 106008/2011, denying a cross-motion for a protective order pursuant to CPLR 4503(a), without prejudice to further proceedings in Supreme Court (NYSCEF Doc. No. 196, p. 3)].

The Romanoffs argue that leave to renew should be granted in light of the appellate court's denial of similar relief, without prejudice to further proceedings in this Court.

In short, the Court finds that leave to renew is appropriate under the circumstances.

The Romanoffs contend that plaintiff's counsel is using emails obtained from their personal email accounts; the emails between the Romanoffs with Michael A. Zimmerman, Esq., or his firm, are protected by the attorney-client privilege; and plaintiff Robert Romanoff has refused to explain how he or his counsel infiltrated the personal password-protected email account of his parents. Further, the Romanoffs maintain that they have always intended the communications in the privileged documents to remain confidential; stored the documents in password protected electronic mailboxes; have not shared their password with third parties; and do not regularly make printouts of their emails or documents attached thereto.

CPLR 4506 provides that “[t]he contents of any overheard or recorded communication, conversation, or evidence derived therefrom, which has been obtained by conduct constituting the crime of eavesdropping, as defined by section 250.05 of the penal law, may not be received in evidence...” and “[a]n aggrieved person who is a party to any civil trial, hearing or proceeding before any court ...

may move to suppress the contents of any overheard or recorded communication, conversation or discussion or evidence derived therefrom.” New York Penal Law section 250.05 states that “[a] person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication.”

In a sworn affidavit, plaintiff Robert Romanoff vehemently denies the allegation that the emails were obtained by anyone engaged in eavesdropping, and he contends that all of the emails were made by or sent to Gerald Romanoff in his capacity as an officer of GHC and New Roads, using the company name, equipment and assets (Affidavit of Robert Romanoff dated Dec. 9, 2013, pp. 8-9, paras. 43-49). Accordingly, plaintiff maintains that all of the emails are the property of, and usable by, plaintiff as an officer of those corporations, and are not confidential or privileged as to him, so Gerald Romanoff had no reasonable expectation of privacy regarding emails he sent on behalf of corporations of which plaintiff is an executive officer.

The Court finds that the sworn affidavit of Robert Romanoff is insufficient to defeat the application for a protective order for two reasons. First, he fails to offer any explanation as to how the emails were obtained by plaintiff and his counsel. Second, he fails to state that he ever requested or received permission from Gerald

or Sheryl to have copies of the private emails, which are privileged communications.

IV. DEFENDANTS' CROSS-MOTION TO DISMISS THE CURRENT COMPLAINT PURSUANT TO CPLR 3211(A)(3), (5) AND (7) FOR LACK OF CAPACITY TO SUE, COLLATERAL ESTOPPEL, RES JUDICATA AND FAILURE TO STATE A CAUSE OF ACTION

As we noted above, the precise ramifications of the rulings of the Appellate Division and the Court of Appeals are unclear to the Court at this point. Denying the motion without prejudice with leave to renew will give the defendants an opportunity to brief this Court on the impact of those rulings.

Accordingly, it is

ORDERED that the motion of plaintiff to reargue the order dated October 9, 2013, is denied; and it is further

ORDERED that the motion for leave to amend the complaint is denied without prejudice with leave to renew addressing the decisions of the First Department and the Court of Appeals; and it is further

ORDERED that the cross-motion to dismiss the current complaint is denied without prejudice with leave to renew based upon the rulings of the First Department and the Court of Appeals; and it is further

ORDERED that the cross-motion to for leave to renew the motion for a protective order is granted as follows:

- 1) plaintiff Robert Romanoff is enjoined from using any privileged communications that were wrongfully filed in this action;
- 2) the privileged communications, and all reference thereto, including, without limitation, paragraph 191 of the proposed second amended complaint, are stricken from plaintiff's motion papers;
- 3) plaintiff is directed to return to the Romanoffs all copies he and his counsel have made of privileged communications within thirty (30) days; and
- 4) pursuant to CPLR 4506, the content of the privileged communications is suppressed.

Date: August 3, 2016
New York, New York


Anil C. Singh