

Barrett v Koteen

2016 NY Slip Op 32473(U)

January 4, 2016

Supreme Court, Rockland County

Docket Number: 031608/2015

Judge: Margaret Garvey

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
ANDREW BARRETT,

Plaintiff,

-against-

MICHAEL J. KOTEEN,

Defendants.
-----X

Margaret Garvey, J.

DECISION AND ORDER

Index No.: 031608/2015

(Motion # 1)

The following papers, numbered 1 to 3, were considered in connection with the Notice of Motion filed by Plaintiff seeking an Order, pursuant to Civil Practice Law and Rules § 2201, staying the instant action pending the resolution of the related criminal charges currently pending against Plaintiff ANDREW BARRETT in the Eastern District of New York, and for such other and further relief as the Court deems just, proper and equitable:

PAPERS

NUMBER

NOTICE OF MOTION/AFFIRMATION OF JAMES J. MAHON, ESQ. DATED NOVEMBER 9, 2015 IN SUPPORT OF MOTION TO STAY ACTION/EXHIBITS (A-B)/MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY ACTION	1
AFFIRMATION OF VINCENT A. DEPASQUALE, ESQ. DATED DECEMBER 2, 2015 IN OPPOSITION TO PLAINTIFF'S MOTION TO STAY THE ACTION/EXHIBITS (A-B)	2
REPLY AFFIRMATION OF JAMES J. MAHON, ESQ. DATED DECEMBER 9, 2015 IN FURTHER SUPPORT OF MOTION TO STAY ACTION/EXHIBIT (C)/MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY ACTION	3

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

Plaintiff commenced the instant action by filing a Summons and Complaint through the NYSCEF system on April 15, 2015. Issue was joined with the filing and service of Defendant's Answer through the NYSCEF system on May 26, 2015. The nature of the action sounds in professional and accounting malpractice against Defendant who provided accounting and bookkeeping services for Plaintiff.

Plaintiff filed the instant motion seeking a stay of the proceedings, pursuant to Civil Practice Law and Rules § 2201, pending the resolution of the related criminal action pending against Plaintiff ANDREW BARRETT on a federal felony indictment in the Eastern District of New York. Plaintiff argues that a stay is necessary for two reasons: (1) continuing with discovery, particularly an EBT of Plaintiff, could require production of evidence that will prejudice Plaintiff's 5th Amendment right against self-incrimination; and (2) Plaintiff's damages, specifically and civil fines assessed by the Federal Court and attorneys' fees and costs in defending the Federal indictment, cannot be quantified until the criminal action is resolved.

Additionally, Plaintiff notes that prior to the commencement of the instant action, Plaintiff's counsel approached Defendant about entering into a stipulation waiving any statute of limitations defense on the underlying claims so that the instant action did not have to be started while the criminal action is pending. Obviously, in light of the current motion practice before the Court, Defendant declined said stipulation, and Plaintiff was required to commence the instant action in order to avoid a statute of limitations dismissal. Further, Plaintiff's counsel provides a notification from the Federal Court in the Eastern District of New York that the related criminal trial is scheduled to commence on April 4, 2016.

Defendant opposes the instant motion, and argues that Plaintiff has not met its burden on the instant motion of establishing necessity of a stay. Defendant argues that the potential assertion of the 5th Amendment privilege is not a sufficient basis for a stay, and the Court is not obligated to stay proceedings even where the party invokes the 5th Amendment privilege. Defendant argues that the unnecessary delay will prejudice Defendant because memories will fade, making it increasingly difficult for Defendant to defend the instant action. Defendant's counsel argues that the more appropriate course for Plaintiff would be to invoke the 5th Amendment privilege on specific questions during the EBT, rather than delay the entire proceeding indefinitely.

Civil Practice Law and Rules § 2201, titled "Stay," states: "Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of

proceedings in a proper case, upon such terms as may be just.”

Defendant is correct that the pendency of a criminal action does not give rise to an absolute right under the United States or the New York Constitution to stay the related civil proceeding - the decision whether or not to issue a stay is within the discretion of the trial judge. [*In re Astor*, 62 A.D.3d 867 (2d Dept. 2009)]. Further, while courts recognize the difficulty faced by a criminal defendant in choosing between presenting evidence on their own behalf and asserting their 5th Amendment rights, the Court does not have to permit the criminal defendant to avoid that difficult decision by staying the civil action until the resolution of the criminal action. [*El-Dehdan v. El-Dehdan*, 114 A.D.3d 4 (2d Dept. 2013), *aff'd* 26 N.Y.3d 19 (2015); *In re Astor*, 62 A.D.3d 867 (2d Dept. 2009)]. The fact that a witness may invoke the privilege against self-incrimination is not a basis for precluding civil discovery. [*El-Dehdan v. El-Dehdan*, 114 A.D.3d 4 (2d Dept. 2013), *aff'd* 26 N.Y.3d 19 (2015)].

The Court has considered all of the relevant circumstances on the instant motion, including but not limited to, the fact that the criminal trial is scheduled to commence April 4, 2016 (only 3 months from the date of this Decision and Order), and the fact that a portion of the criminal indictment relates to the personal and corporate tax returns filed by Plaintiff ANDREW BARRETT for 2010, 2011 and 2012 (clearly overlapping with the issues in the instant civil matter), the Court is exercising its discretion and granting Plaintiff's application to the extent that the instant matter, and any discovery, is stayed until April 29, 2016, or the conclusion of the criminal trial, whichever is sooner.

The Court will note that the trial date notification provided by Plaintiff ANDREW BARRETT also notes that the trial date was adjourned to April 4, 2016 at BARRETT's request as the criminal defendant in that action. Plaintiff ANDREW BARRETT is advised that the stay in this matter will be automatically lifted on April 29, 2016 whether or not the criminal trial has gone forward, and discovery will proceed in this civil action at that point. To that end, the preliminary conference in this matter is adjourned from January 8, 2016 to **MONDAY, MAY 2, 2016 at 9:15 a.m.**, and appearances by counsel for the parties are required on that date. The

Court will issue a Preliminary Conference Order on that date, and the parties will cooperate fully with said Order, completing discovery in this civil matter in a timely fashion as directed by the Court.

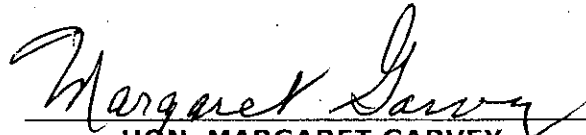
Accordingly, it is hereby

ORDERED that Plaintiff's Notice of Motion is granted to the extent that this matter is stayed, and all discovery in this matter is stayed, until April 29, 2016 or the conclusion of the related criminal trial, whichever is sooner; and it is further

ORDERED that counsel for the parties shall appear at a preliminary conference before the undersigned on **MONDAY, MAY 2, 2016 at 9:15 a.m.** at which time the Court will issue a discovery schedule that will be adhered to by the parties and counsel.

The foregoing constitutes the Decision and Order of this Court on Motion # 1.

Dated: New City, New York
January 4, 2016


HON. MARGARET GARVEY
Justice of the Supreme Court

TO:

by e-filing -

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