

Minovici v Wexler
2017 NY Slip Op 30319(U)
February 17, 2017
Supreme Court, New York County
Docket Number: 160691/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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Stefan Minovici,

Plaintiff/Counterclaim-Defendant,

- against -

Elias Wexler,

Defendant/Counterclaim-Plaintiff.

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Index No.

160691/2015

**DECISION AND
ORDER**

Mot. Seq.: 5, 6, and 7

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Steven Minovici ("Plaintiff" or "Minovici"), seeks a declaratory judgment that the Promissory Note, executed by Plaintiff on February 16, 2015 and delivered to Defendant, Elias Wexler ("Defendant" or "Wexler") is usurious and void ab initio. Defendant has asserted four Amended Counterclaims against Plaintiff. The first and second counterclaims are for breach of contract, and the third is for unjust enrichment.

The fourth counterclaim is for fraudulent inducement. The fourth counterclaim alleges that on February 15, 2015, Plaintiff called Defendant and "explained to Wexler that there was a sudden and unexpected \$40,000 shortfall in the budget for the 2015 annual 'Romanian Day on Broadway' festival." The fourth counterclaim alleges, "As Minovici explained, a sponsor of the 2015 'Romanian Day on Broadway' Festival had suddenly and unexpectedly reneged on its financial commitments to the event." Defendant alleges that Plaintiff's statements were false, and at the time Minovici made them, he knew that they were false. The fourth counterclaim further alleges, "Wexler learned after the commencement of this lawsuit that the supposed sponsor had never committed any funds to sponsor the 2015 festival" and that "Minovici purposefully concocted this lie in February of 2015 in order to fraudulently induce Wexler to extend a short-term \$40,000 loan to cover the alleged shortfall." It alleges that Defendant justifiably relied upon Plaintiff's misrepresentations and omissions of existing fact, and Defendant made the \$40,000 loan in reliance upon Plaintiff's misrepresentations and omissions.

By Decision and Order dated September 15, 2016, the Court directed Plaintiff to produce certain documents and information sought by Defendant in Defendant's December 10, 2015 First Request for Production of Documents and Interrogatories

relating to Defendant's fraudulent inducement counterclaim. Specifically, the Court ordered Plaintiff to (1) supplement his response to Interrogatory #6 which directed Plaintiff to identify any person he "transferred or disbursed, in whole or in part, the proceeds of the \$40,000 loan referenced in the Complaint and that Minovici received from Wexler;" (2) produce complete copies of bank records relating to the \$40,000 loan proceeds with no missing pages and all checks relating to the disclosed accounts; and (3) provide an affidavit stating whether Minovici has already produced all responsive documents in his possession, or whether there are additional responsive documents that he has not yet produced, in response to Interrogatories Nos. 3, 4, and 7 and if there are additional responsive documents, those documents were to be produced.

Mot. Seq. 5 and 6

By Notice of Motion filed on October 6, 2016, with a return date of November 3, 2016 (Mot. Seq. 5), Defendant filed a motion seeking an Order striking Plaintiff's Complaint as a result of Plaintiff's failure to respond to Defendant's Second Request for Production of Documents ("Second Document Request"), Plaintiff objected to each of the nine requests. Defendant argues that these objections lack merit, and that Plaintiff refused to supplement his responses.

Plaintiff did not file opposition to Defendant's motion. On November 4, 2016, the day after the return date of Defendant's motion, stating that Plaintiff "intends to file proposed opposition papers."

By Notice of Motion filed on December 19, 2016, with a return date of January 9, 2016 (Mot. Seq. 6), Plaintiff filed a motion for leave to file for "Minovici to file a late affirmation in opposition to defendant Elias Wexler's pending motion for discovery sanctions." Plaintiff's attorney states, "[A]lthough Minovici fully responded to the Second Requests, he continues to maintain that the Second Requests are objectionable because they seek information that is completely irrelevant to any claim or defense in this action. Minovici nevertheless produced all documents responsive to the Second Requests with the two narrow exceptions: (i) documents protected by the attorney-client privileged or work product doctrine; and (ii) confidential documents that Minovici offered to produce pursuant to the same 'attorney-eyes-only' provisions set forth in the June 7, 2016 Stipulation and Order."

Defendant opposes Plaintiff's motion seeking leave to file opposition. Defendant acknowledges that Plaintiff has supplemented his responses to the Second Requests. Defendant, however, claims that Plaintiff continues to be in default on his

discovery obligations. Defendant states that “Minovici has refused to produce certain new batches of documents in response to [the Second Document Request] unless Wexler allows him to designate the documents as ‘Attorneys’ Eyes Only’” without any good-faith basis to warrant such relief. With respect to those documents that Plaintiff is withholding based on privilege, Plaintiff provided Defendant with a privilege log. However, Defendant further claims that Plaintiff is withholding documents on the basis of attorney client privilege that Defendant argues are not subject to any privilege.

Defendant is directed to produce to Plaintiff all documents that he has previously withheld unless Plaintiff allowed him to designate them as “Attorneys’ Eyes Only” within 30 days. Defendant is directed to produce to the Court, in camera, the allegedly privileged documents that are responsive to Plaintiff’s Second Document Request within 30 days. As per the Part Rules, all documents submitted for in camera review must be bate stamped and accompanied by a privilege log.

Motion Seq. 7

On November 11, 2016, Defendant served Plaintiff with a Third Request for Production of Documents (“Third Document Request”).

By Notice of Motion filed on December 21, 2016, with a return date of January 11, 2017, Defendant moves for an Order striking Plaintiff’s Complaint and Answer to Defendant’s Amended Counterclaims based on Defendant’s failure to respond to Defendant’s Third Document Request.

The Third Document Request sought the following categories of documents: (1) all documents relating to a \$30,000 check that Plaintiff tendered to his attorney, Edward Griffith, marked “rent” in the memo line within two weeks after Plaintiff procured the \$40,000.00 loan from Defendant for use in connection with the “Romanian Day on Broadway” festival; (2) all communications relating to the \$30,000 check; (3) and all leases between Ed Griffith (or his firm) and Minovici (or any of his related business entities) from January 1, 2013 through March 1, 2015.

Defendant opposes, stating that it has now responded to the Third Document Request.

In reply, Plaintiff states that Defendant’s responses remain deficient for the following reasons:

20. First, Minovici acknowledges that documents responsive to Wexler's requests were filed in a different lawsuit brought against Minovici in the United States District Court for the Southern District of New York and styled *Holt v. Minovici*, 14-cv-09660-PAE ("Federal Action"). See Jan. 6, 2017 Griffith Aff. (NYSCEF Doc. No. 177), Edx. B, at 1-2. Minovici did not produce these documents together with his responses, as he ought to have done.

21. Second, Minovici's responses suggest that there are privileged documents which are responsive to Wexler's demands. See Jan. 6, 2017 Griffith Aff. (NYSCEF Doc. No. 177), Exh. B ("Plaintiff states that there are no responsive non-privileged documents" responsive to Wexler's demands). Minovici did not serve a privilege log together with his responses as required by the CPLR.

Defendant is directed produce to Plaintiff all documents responsive to Plaintiff's Third Document Request, including those that were filed in the Federal Action. Regarding those responsive documents that Defendant has withheld from production based on privilege, Defendant is directed to produce a privilege log to Plaintiff in accordance with CPLR 3122(b) and, thereafter, the court shall review, in camera, the allegedly privileged documents in the privileged log.

Wherefore it is hereby,

ORDERED that Mot. Seq. 5 and 6 are granted to the extent that Defendant is directed to produce to Plaintiff all documents that he has previously withheld unless Plaintiff allowed him to designate them as "Attorneys' Eyes Only" and to produce to the Court, in camera, the allegedly privileged documents that are responsive to Plaintiff's Second Document Request within 30 days.

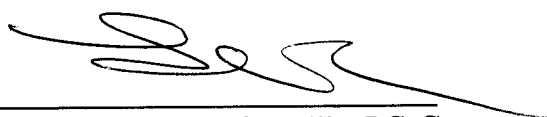
ORDERED that Mot. Seq. 7 is granted to the extent that Defendant is directed to produce to Plaintiff all documents responsive to Plaintiff's Third Document Request, including those that were filed in the Federal Action and to produce a privilege log to Plaintiff with respect to responsive documents to the Third Document Request that are being withheld based on privilege in accordance with CPLR 3122(b) within 30 days;

ORDERED that all parties are reminded to appear for the scheduled compliance conference on March 29, 2017.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: FEBRUARY 17, 2017

FEB 17 2017



EILEEN A. RAKOWER, J.S.C.