

Gordon v Voronova
2017 NY Slip Op 30587(U)
March 28, 2017
Supreme Court, New York County
Docket Number: 151694/16
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
DMITRY GORDON,

Index No. 151694/16

Plaintiff,

Motion seq. nos. 004, 008, 009, 010

-against-

DECISION AND ORDER

YELENA VORONOVA,

Defendant.
-----X

BARBARA JAFFE, JSC:

For plaintiff:

Yosef Y. Weintraub, Esq.
Weintraub, LLC
30 Wall St., 8th fl.
New York, NY 10005
646-450-6177

For defendant:

Elan Layliev, Esq.
Layliev Law, PC
125-10 Queens Blvd., Ste. 311
Kew Gardens, NY 11415
718-412-3434

By order to show to cause dated October 13, 2016, plaintiff moves pursuant to CPLR 2308(a) and 5251, and Judiciary Law § 753, for an order holding defendant in civil contempt for failing to comply with a subpoena dated August 22, 2016, and for an order compelling defendant to comply with it. Defendant opposes. (Mot. seq. no. 004).

By notice of the motion dated November 16, 2016, plaintiff moves for an order imposing sanctions on defendant, her attorney, and her attorney's law firm, for frivolously asserting that the documents he had requested pursuant to an August 24, 2016, subpoena were confidential and protected by her attorney-client privilege, and for filing a frivolous opposition to his October 2016 motion for contempt. Defendant opposes and cross-moves for an order quashing the August 24 subpoena, for a protective order precluding defense counsel's testimony, and for sanctions based on plaintiff's abuse of process and other frivolous conduct. Plaintiff opposes. (Mot. seq. no. 008).

By notice of motion dated December 1, 2016, plaintiff again moves for an order imposing sanctions on defendant and her attorney for filing a frivolous cross motion to quash the August 24 subpoena and for sanctions. Defendant opposes and cross-moves for sanctions against plaintiff. Plaintiff opposes. (Mot. seq. no. 009).

By notice of motion dated February 13, 2017, plaintiff moves pursuant to CPLR 602 for an order consolidating this action with an action pending in Supreme Court, Kings County, dismissing the consolidated action, and for sanctions against defendant and her attorney. Defendant opposes. (Mot. seq. no. 010).

The motions are consolidated for disposition.

I. MOTIONS FOR SANCTIONS

While incessant, vexatious motion practice may warrant sanctions (*see eg Levy v Carol Mgt. Corp.*, 260 AD2d 27, 34 [1st Dept 1999] ["Motion practice several years after judgment, lacking legal support and intended only to delay enforcement of the judgment, is a valid basis for sanctions."]), the conduct alleged by the parties does not. Each party believes that the other is wrong and cancels out the other's vexatiousness. Each attorney is reminded to comply with my part rules (http://www.nycourts.gov/courts/1jd/supctmanh/Uniform_Rules.pdf, I.C., D., E., at 29).

II. POST-JUDGMENT SUBPOENAS

A. August 22, 2016 subpoena

In attempting to obtain payment of the judgment, plaintiff demands that defendant appear for a deposition and with

any and all bank statements, payroll records, payroll stubs, payroll receipts, tax returns, copies of any loans, mortgages, notes, etc., and all other books, papers and records in

[defendant's] possession or control which have or may contain information concerning the Judgment-Debtor's property, income or other means relevant to the satisfaction of the Judgment,

and any documents as specified in an annexed schedule. (NYSCEF 66). It is undisputed that defendant has not complied.

Plaintiff contends that as the judgment has not been stayed, defendant must comply with the subpoena. (NYSCEF 64). Defendant does not oppose, except to note that her noncompliance does not constitute a ground for holding her in civil contempt. (NYSCEF 109).

"At any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matters relevant to the satisfaction of the judgment, by serving upon any person a subpoena," (CPLR 5223). The standard for compelling disclosure by post-judgment subpoena affords the judgment creditor "a broad range of inquiry through either the judgment debtor or any third person with knowledge of the debtor's property." (*Gryphon Dom. VI, LLC v GBR Info. Servs., Inc.*, 29 AD3d 392, 393 [1st Dept 2006]; *ICD Group, Inc. v Israel Foreign Trade Co. [USA] Inc.*, 224 AD2d 293, 294 [1st Dept 1996]).

Absent any contention that the sought-for documents are not discoverable, the August 22 subpoena seeks information that may assist plaintiff in satisfying the judgment. Consequently, plaintiff's motion for contempt is premature. (*See* CPLR 2308[b][1] [if person fails to comply with nonjudicial subpoena, court may compel compliance, and upon party's further noncompliance, may hold him or her in contempt]; *Matter of Reuters Ltd. v Dow Jones Telerate, Inc.*, 231 AD2d 337, 341 [1st Dept 1997] ["(A) person who is served with a non-judicial subpoena cannot be held in contempt for failure to comply unless and until a court has issued an order compelling compliance, which order has been disobeyed."])).

B. August 24, 2016 subpoena

In this subpoena, plaintiff demands that defense counsel's firm provide substantially the same documents requested in the August 22 subpoena. (NYSCEF 113).

In support of her cross motion to quash the subpoena, defendant maintains that the information sought is confidential and protected by attorney-client privilege, as her attorney would have only gleaned such information through consultations with her and attorney investigation, and claims that plaintiff's attempt to depose her attorney "borders on the sanctionable." (NYSCEF 126).

In opposition to that motion, plaintiff denies that attorney-client privilege can be invoked absent a privilege log, and that in any event, defendant's method of paying her lawyer, and any other communications of non-legal advice, are not privileged, nor is advice to defendant that she ignore the subpoena. He also denies that the subpoena contains a demand to depose her attorney or for any information pertaining to the underlying facts of the case. (NYSCEF 134).

In reply, defendant asserts that plaintiff's claim that she possesses non-privileged information is speculative, and that she fails to allege that he exhausted other means of acquiring it. (NYSCEF 136).

Defendant fails to establish that her attorney or his law firm does not possess evidence that would assist plaintiff in satisfying the judgment, nor does she show that the evidence sought is privileged or that it pertains to facts that are immaterial to the enforcement and satisfaction of the judgment. (*See Kozel v Kozel*, 145 AD3d 530, 530-532 [1st Dept 2016] [subpoenaed nonparty attorney failed to demonstrate conclusively that he lacked information pertinent to plaintiff's satisfaction of judgment, as he was involved in underlying transaction, and cited no authority that

nonparty attorney is exempt from standard on motion to quash subpoena]). Accordingly, to the extent that defense counsel possesses non-privileged information relevant to the satisfaction of the judgment, he is compelled to provide it, and to the extent that information comes within the attorney-client privilege, he must provide a log to the court asserting each ground for withholding any documents.

III. MOTION TO CONSOLIDATE

By decision and order dated August 5, 2016, I granted plaintiff's motion for summary judgment in lieu of complaint based on defendant's breach of a promissory note, and directed entry of judgment in the amount of \$16,000 in plaintiff's favor. The case was thereafter marked disposed, and judgment was entered by the clerk on August 22, 2016. (NYSCEF 36, 40).

On or about January 6, 2017, defendant and one Filton LLC commenced an action in Supreme Court, Kings County, against plaintiff and other affiliated entities, advancing claims of fraudulent inducement/misrepresentation, a breach of fiduciary duty, unjust enrichment, and a violation of General Business Law § 349, all pertaining to the events surrounding her execution of the promissory note. (NYSCEF 157).

By decision and order dated February 2, 2017, I denied defendant's motion for leave to renew and/or reargue my August order, adhering to the grounds set forth therein, and granted plaintiff's motion for leave to reargue to the extent of awarding him attorney fees pending receipt of the pertinent invoices which had not been provided. (NYSCEF 141).

A. Contentions

In support of consolidation, plaintiff contends that the allegations set forth in the Kings County action are identical to those advanced in opposition to his motion for summary judgment in lieu of complaint. Thus, he concludes, there are common questions of law and fact warranting

consolidation, and asserts that the consolidated action should be venued in New York County as the instant action was commenced here, and maintains that defendant will suffer no prejudice from a consolidation. (NYSCEF 147).

In opposition, defendant alleges plaintiff's attorney is forum shopping, and contends that consolidation is unwarranted where, as here, the instant action is disposed and no longer pending. In any event, she contends, the instant action concerns the enforcement of the promissory note, whereas her claims in the Kings County action concern transactions distinct from the execution of the note, and thus there is no commonality of law and fact. (NYSCEF 169).

In reply, plaintiff contends that the action pends for purposes of his motion to consolidate as the amount of attorney fees to which he is entitled has not been resolved, defendant's appeal is pending, and there are several open motions. He disputes that defendant raises entirely new claims in the Kings County action, but has purposefully recast the defenses and counterclaims advanced in this action to avoid the entry of judgment in plaintiff's favor. (NYSCEF 171).

B. Analysis

A party may move for an order consolidating for a joint trial multiple pending actions where they involve "a common question of law or fact." (CPLR 602[a]). Consolidation is warranted where separate actions might result in inconsistent rulings. (*Grynberg v BP Exploration Operating Co. Ltd.*, 127 AD3d 553, 554 [1st Dept 2015], *lv dismissed* 26 NY3d 940; *JP Foodservice Distribs., Inc. v Pricewaterhousecoopers LLP*, 291 AD2d 323, 324 [1st Dept 2002]). The party opposing the motion has the burden of demonstrating that consolidation "would prejudice its substantial rights." (*Grynberg*, 127 AD3d at 554; *Alizio v Perpignano*, 78 AD3d 1087, 1088 [2d Dept 2010]).

Here, notwithstanding post-judgment motion practice and defendant's pending appeal, or

that the amount of plaintiff's award for attorney fees has not yet been determined, a judgment has been entered and the instant action is not pending within the meaning of CPLR 602(a). (*See IndyMac Bank, F.S.B. v Vincoli*, 105 AD3d 704, 707 [1st Dept 2013] [as final judgment of foreclosure and sale entered in first action, there was no pending action that could be consolidated with second action]; *see also* 1 NY Jur 2d, Actions § 105 [pending motion to vacate judgment does not "revive" judgment to warrant dismissal on ground of another action pending]; *cf. Katan Group, LLC v CPC Resources, Inc.*, 110 AD3d 462, 463 [1st Dept 2013] [action deemed "pending" for consolidation purposes even though second action dismissed, where "court had directed further proceedings with respect to defendants' attorneys' fees in the second action and no judgment had been entered in that action"])). Given this result, I need not reach the parties' remaining contentions.

IV. CONCLUSION

Accordingly, for all of the foregoing reasons, it is hereby

ORDERED, that plaintiff's motion (seq. no. 004) is granted to the extent that defendant is directed to comply with a subpoena dated August 22, 2016, within 20 days of service of this order with notice of entry, and the motion is otherwise denied; it is further

ORDERED, that plaintiff's motion (seq. no. 008) for an order imposing sanctions on defendant, her attorney, and her attorney's law firm, is denied; it is further

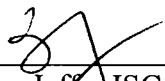
ORDERED, that defendant's cross motion (seq. no. 008) for an order quashing a subpoena dated August 24, 2016, and for sanctions, is denied, and defense counsel is directed to comply with the subpoena as specified herein within 20 days of service of this order with notice of entry; it is further

ORDERED, that plaintiff's motion and defendant's cross motion (seq. no. 009) for orders

imposing sanctions on the other are denied; and it is further

ORDERED, that plaintiff's motion (seq. no. 010) for an order consolidating this action with an action pending in Supreme Court, Kings County, bearing Index No. 500356/17, dismissing the consolidated action, and for sanctions, is denied.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: March 28, 2017
New York, New York