SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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JAMES L. MELCHER,

Plaintiff,

-against-

DECISION AND ORDER
Index No. 650188/2007
Mot. Seq. No.: 020

GREENBERG TRAURIG LLP and LESLIE D. CORWIN,

Defendants.

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O. PETER SHERWOOD, J.:

This action was filed in June 2007, alleging that defendants made misrepresentations about an alleged May 1998 written amendment to the parties' operating agreement (the Amendment) and misled the court in an underlying action, *Melcher v Apollo Medical Fund Management LLC and Brandon Fradd*, Index No. 604047/2003 (the Apollo Action). The history of this case and of the underlying action was recently described by the First Department in *Melcher v Greenberg Traurig LLP* (135 AD3d 547, 547-50 [1st Dept 2016]) and will not be recounted here. This motion sequence number 020 seeks leave to reargue certain motions in limine and to stay trial of the case.

THE INSTANT MOTION

When the motions in limine were heard, this court determined that the expert testimony on Melcher's damages claim were to be limited to fees earned after February 17, 2004, when the alleged misrepresentation was made in a court filing. The court also observed that not all of the legal services rendered by plaintiff's counsel after the actions complained flow from the alleged deceit[1] (Decision and Order, NYSCEF Doc. No. 424 at p. 3). The court also ruled that the difference between the amount of the judgment and the amount finally collected in settlement of the underlying action could not be recovered here as the causal connection between the deceit and the uncollectable damages is "entirely speculative (*see id.* at p. 2)[2]. The proposed testimony

[1] The court made no ruling as to which party has the burden of proving what portion of the fees paid are not "excess legal fees".

[2] Testimony by Mr. Lynch who was not being offered as an expert witness, was barred as a consequence of this ruling. The court did not bar any claim for damages based on the time value of money, an issue as to which he was not being offered to testify.

of four experts, including Mr. Lupkin was rejected, although the parties were granted leave to propose revised expert reports and testimony consistent with the ruling. Concluding that the amount of potential damages would be greatly reduced as a result of the decision, Melcher now moves to stay the trial pending appeal to the First Department. He also moves for renewal and reargument.

Melcher argues that defendants' deceit caused a delay in his obtaining a judgment and his inability to collect the full amount of the jury award. Melcher claims *Amalfitano* is dispositive on this point, as in that case, the falsified documents created "issues of fact" and successfully caused the reversal of a motion to dismiss (Memo at 4-5). Damages in that case included all legal fees from the time of the complaint (*id.*, citing *Amalfitano v Rosenberg*, 533 F3d 117, 125 [2d Cir 2008], *certified question accepted*, 11 NY3d 728 [2008], and *certified question answered*, 12 NY3d 8 [2009] and *Amalfitano v Rosenberg*, 572 F3d 91, 92 [2d Cir 2009] ["because the central claim of the complaint was predicated upon a misrepresentation of fact, and because the plaintiffs were obligated to defend or default in response to that complaint and necessarily incur legal expenses as a consequence, those expenses may be treated as the proximate result of the misrepresentation"][internal quotations omitted]).

Melcher notes that in this case the First Department held that "plaintiff here seeks to recover lost time value of money and the excess legal expenses incurred in the *Apollo* action as a proximate result of defendants' alleged deceit; this course of action is permissible (*Melcher v Greenberg Traurig LLP*, 135 AD3d 547, 554 [1st Dept 2016]). Melcher contends that all legal fees and costs incurred after the document was falsified to avoid the dismissal of Fradd's case are "excess legal fees" (Memo at 8). If Fradd's pleadings in the underlying case had been struck for Fradd's presentation of the falsified document, there would have been no excess legal fees (*id.* at 8-9).

Melcher argues that the defendants' deceit went to the central issue in the underlying case, and that he should be allowed to present his damages theory to the jury and allow them to determine what damages are related to the Amendment (*id.* at 9). He observes that the jury instruction only requires the violation to be "a substantial factor in bringing about the injury" (*id.* at 12, quoting PJI 2:25).

Melcher further claims that the decision on the motions in limine, as well as the motion for leave to renew and to reargue, if it is granted, are appealable as of right, pursuant to CPLR 5701 (Memo at 13-14).

The motion is accompanied by affidavits of James Melcher and his spouse, April Benasich, who ask that the jury trial, currently scheduled for sixteen trial days commencing on September 27, 2017, be adjourned and a stay be ordered so that an appeal may be prosecuted. Ms. Benasich asks the court "to take into account the real world, personal consequences of the situation . . .and stay the case so [Melcher] can go to the appeals court and settle the question" (NYSCEF Doc. No. 415, ¶ 5).

Defendants first point out that Melcher has failed to introduce any new facts not known at the time of the original motion, and therefore the motion to renew must fail (Opp at 4). Defendants also argue that the motion to reargue fails, as the court squarely addressed and distinguished the *Amalfitano* case in the prior hearing (*id.* at 7). The Amendment was not the central issue in the underlying case, as the case proceeded to trial without it, and many of the claims and defenses did not relate to that document (*id.* at 8). Melcher's argument that the underlying case would not have proceeded without the successful deceit at the time of the motion to dismiss is a new one (*id.* at 9). Further, it is not clear that defendants were required to have Apollo Management and Fradd default on Melcher's motion to strike. Had defendants known the Amendment was fraudulent, defendants would have been prohibited from using the document but could not have revealed that information, and could have made other arguments (*id.* at 11). In any event, it is entirely speculative whether that court when presented with proof of the deceit, would have struck the Apollo Management defendants' pleadings had different arguments been made (*id.* at 14).

Defendants note that Melcher has admitted that the uncollectable damages were not proximately caused by the alleged deceit (*id.* at 17, citing transcript from July 18, 2017, NYSCEF Doc. No. 411, at 44).

Defendants also contend that the decision on the motions in limine to exclude the opinions of Lupkin and Lynch is not appealable, as it is "[a]n evidentiary ruling made before trial [which] is generally reviewable only in the context of an appeal from the judgment rendered

after trial" (Opp at 22, quoting *Rivera v New York Health and Hosps. Corp.*, 38 AD3d 476, 476 [1st Dept 2007]).

DISCUSSION

A. Motion to Renew

A motion for leave to renew must be based on evidence establishing "new facts not offered on the prior motion that would change the prior determination" (CPLR § 2221 [e] [2]), as well as "reasonable justification" for not offering these facts previously (CPLR § 2221 [e] [3]; *CLP Leasing Co. v Nessen*, 27 AD3d 291, 292 [1st Dept 2006]). Although, upon a motion for renewal seeking consideration of previously available but unsubmitted evidence, the movant is generally required to proffer a reasonable excuse for its failure to submit such evidence (*see, Burgos v City of New York*, 294 AD2d 177 [1st Dept 2002]; *Chelsea Piers Management v Forest Electric Corp.*, 281 AD2d 252 [1st Dept 2001]), emerging precedent in the First Department is that a motion to renew can be granted in the exercise of the court's discretion, even where new evidence was readily available to the moving party on the earlier motion and the only excuse proffered for the failure to furnish such evidence to the court is inadvertence or ignorance or even when no excuse is offered (*see, Trinidad v Lantiqua*, 2 AD3d 163 [1st Dept 2003]; *Mejia v Nanni*, 307 AD2d 870 [1st Dept 2003]). "Nevertheless, '[a] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation'" (*Allstate Ins. Co. v Liberty Mut. Ins. Co.*, 58 AD3d 727, 728 [2d Dept 2009], quoting *Elder v Elder*, 21 AD3d 1055 [2d Dept 2005]).

Melcher has provided no new facts not offered on the prior motion. Accordingly, the motion to renew fails.

B. Motion to Reargue

The standards for reargument are well settled. "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [quotations omitted]). Motions for reargument must be based upon facts or law overlooked or misapprehended by the court on the prior decision (*see* CPLR § 2221; *Mendez v Queens Plumbing Supply, Inc.*, 39 AD3d 260 [1st Dept 2007]; *Carillo v PM Realty Group*, 16

AD3d 611 [2d Dept 2005]). The determination to grant leave to reargue lies within the sound discretion of the court (*see Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874 [2d Dept 2010]). However, reargument is not a proper vehicle to present new issues that could have been, but were not raised, on the prior motion or to afford an unsuccessful party successive opportunities to rehash arguments previously raised and considered (*see People v D'Alessandro*, 13 NY3d 216, 219 [2009]; *Tounkara v Fernicola*, 63 AD3d 648, 649 [1st Dept 2009]; *Lee v Consolidated Edison Co. of N.Y.*, 40 AD3d 481, 482 [1st Dept 2007]).

The *Amalfitano* argument was made and discussed at length at oral argument on the prior motions. The decision in that case does not support the claim that Melcher is entitled to recover delay damages against the law firm and Corwin based on the fact that by the time Melcher was able to enforce the judgment, Apollo Management lacked the resources to pay. Assuming that liability is proven, Melcher will be able to collect "excess legal expenses" incurred in the underlying action. Melcher's new argument that all fees incurred after the motion to strike was denied are proximately caused by the deceit because, barring the deceit, the motion would have been granted, is both improperly raised in a motion to reargue and speculative.

Accordingly, the request for leave to reargue is GRANTED and upon reargument, the motion is DENIED. The request for a stay and adjournment of the trial is GRANTED in the discretion of the court on the condition that the appeal be perfected on or before October 2, 2017. Within 15 days of the date of the decision of the Appellate Division or by October 6, 2017 (if no appeal is perfected by October 2, 2017), defendants shall communicate with the court to request scheduling of a pre-trial conference as appropriate.

Regarding defendants' oral request for leave to reargue their request for leave to file a second motion for summary judgment, the requested relief is DENIED without prejudice to renew the request within 30 days after the Appellate Division decides plaintiff's appeal.

This constitutes the decision and order of the court.

DATED: August 31, 2017

ENTER

O. PETER SHERWOOD J.S.C.