Maxim Inc. v Gross
2018 NY Slip Op 31617(U)
March 2, 2018
Supreme Court, New York County
Docket Number: 654137/15
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

MAXIM INC. et al.

INDEX NO. 654137/15

MOT. DATE

- v -

MOT. SEQ. NO. 012, 013, 014 and 015

WAYNE GROSS et al.

MAXIM INC. et al.

INDEX NO. 162933/15

MOT. DATE

- v -

MOT. SEQ. NO. 011 and 012

JASON FEIFER et al.

The following papers were read on this motion to/for (654137/15 - 012) protective order and x-mot to preclude, etc.
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 336-343
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 346-399

The following papers were read on this motion to/for (654137/15 - 013) default judgment
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 400-405
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 412
Replying Affidavits NYSCEF DOC No(s). 413-416

The following papers were read on this motion to/for (654137/15 – 014) dismiss
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 406-411
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 417-427
Replying Affidavits NYSCEF DOC No(s). 428-429

The following papers were read on this motion to/for (654137/15 – 015) amend
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 434-438
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 441-465

The following papers were read on this motion to/for (162933/15 – 011) quash subpoena and x-mot to preclude, sanc., etc.
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 231-240
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 242-284

The following papers were read on this motion to/for (162933/15 – 012) renew
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 285-295
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 297
Replying Affidavits NYSCEF DOC No(s). 298-319

Dated: 3/2/18

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐ **GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

Four motions in Maxim Inc. and Saradar Biglari v. Wayne Gross and Jason Feifer, Index Number 654137/15 ("Action No. 1") and two motions in Maxim Inc v. Jason Feifer and Charna Sherman, Index Number 162933/15 ("Action No. 2") are the subject of this decision and order. Plaintiffs in Action No. 1 bring claims against the defendants for defamation, breach of contract and fraudulent inducement. In Action No. 2, plaintiff seeks, *inter alia*, to enjoin the defendants from disclosing confidential business information. Plaintiffs have discontinued their claims against defendant Wayne Gross.

The four motions in Action No. 1 are as follows. In motion sequence number 012, plaintiffs move for a protective order and defendant Jason Feifer cross-moves to preclude, deem certain issues resolved, and for sanctions and attorneys fees. In motion sequence number 013, Feifer moves for a default judgment against plaintiffs on the issue of liability with respect to his counterclaim. In motion sequence number 014, plaintiffs move to dismiss defendant Feifer's counterclaim in his Amended Answer. In motion sequence number 015, plaintiff moves to amend the complaint. Each motion and cross-motion are opposed by the respective adversary.

In Action No. 2, motion sequence number 011, plaintiff moves to quash certain subpoenae *ad testificandum* and subpoenae *duces tecum* and for a protective order. Defendants oppose that motion and cross-move to preclude and for sanctions. Plaintiff opposes the cross-motion. Finally, in Action No. 2, defendant Sherman moves to renew a prior motion to dismiss the complaint against her and sanctions. Plaintiff opposes that motion as well.

Since the motions are interrelated, there are hereby consolidated for the court's consideration and disposition in this single decision/order. The court's decision follows.

The general allegations are as follows. Plaintiffs claim that Feifer is a terminated and disgruntled former employee of plaintiff Maxim Inc. ("Maxim") who made false statements to the New York Post (the "Post") about a photograph shoot of a model named Alessandra Ambrosio for Maxim's magazine. Maxim is owned by Biglari Holdings Inc. ("BH"), the CEO of which is plaintiff Sardar Biglari. On or about February 12, 2015, Feifer was hired to work as a Deputy Editor at Maxim. Fiefer's amended answer to the amended complaint in Action No. 1 asserts a counterclaim for fraudulent inducement. Fiefer alleges that he was hired to work at Maxim after a 're-brand' which occurred after BH bought Maxim and assembled a new team. Feifer claims that several events transpired which constituted "breach[es of] the most material conditions of Feifer's acceptance of employment at Maxim" and "caused [Feifer] serious professional and personal harm."

Action No. 1, motion sequence number 013, 014 and 015

The court will first consider motion sequence numbers 013, 014 and 015, since the relief sought therein is interrelated. For the reasons that follow, Feifer's motion for a default judgment is denied. There is no dispute that plaintiffs defaulted in answering the counterclaim. Plaintiffs must therefore provide a "reasonable excuse" and demonstrate the merit of their defense (CPLR § 5015 [a][1]). What constitutes a reasonable excuse for default lies within the sound discretion of the trial court (*Incorporated Village of Hempstead v. Jablonsky*, 283 AD2d 553 [2d Dept 2001]). Given the tortured procedural history in this case and in this court's exercise of discretion, plaintiffs have demonstrated a reasonable excuse for the default. Further, as a matter of public policy, New York courts strongly favor resolution of claims on the merits (*Henry v. Datson*, 140 AD3d 1120 [2d Dept 2016]; see also *Espaillat v. Greenpath, Inc.*, 9 Misc3d 132(A) [App Term, 1st Dept 2005]).

The court also finds that plaintiffs have established a meritorious defense to the counterclaim, contrary to Feifer's arguments and, relatedly, that plaintiffs' motion to dismiss the counterclaim (#014) is not untimely. Plaintiffs' prior motion to dismiss the counterclaim (motion sequence number 008 was denied by the Honorable Joan Kenney in a decision/order dated April 20, 2017 on the grounds that it was "interposed by attorneys that have since been disqualified from representing plaintiff in this action." Therefore, the previous denial was not on the merits. Given that the court finds the plaintiffs have demon-

strated a reasonable excuse for defaulting, the court will consider the second motion to dismiss on the merits.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

Feifer, an at-will employee, seeks to recover for fraudulent inducement, claiming that the plaintiffs "never intended to fulfill the promises and representations made to Feifer" which were "designed to induce Feifer to join Maxim..." Feifer specifically claims that "Maxim fraudulently induced Feifer to join Maxim by representing to him that there would be a new approach to the magazine upgrading it to one based upon serious principles of journalism and appealing to a different reader base and the hiring of a new highly regarded team to effectuate this transformation." In support of these claims, Feifer alleges the following. Feifer agreed to work as Deputy Editor on or about February 12, 2015 because he was "excited" to work with the then-Editor-in-Chief, Kate Lanphear, and her team, and "to help transform a tarnished magazine brand into an ambitious and respected journal." Feifer claims, however, that things began to go awry in or about July 2015, while Maxim was working on its December issue. Feifer claims that at this time Biglari exerted "unusual and even undue influence over multiple aspects of the issue", and Biglari posed for a photo with a model in his hotel suite and ensured that the photo would be published in the December issue without the model's consent. In August 2015, Feifer alleges that Biglari assumed an even more active role in the magazine, and "began to cause the dismantling of Lanphear's team." Feifer explalins that key Directors left and layoffs began to occur, "until the majority of the staff who worked under Lanphear was gone."

In September 2015, information about Biglari was allegedly leaked to the press, and "[u]pon information and belief, Biglari undertook an investigation to determine" the source of the leak. Biglari allegedly accused Lanphear of being the source and in October, she left the magazine "only after a few rebranded issues had been released."

These allegations fail, as a matter of law, to state a *prima facie* claim for fraudulent inducement. In order to state a claim for fraud, Feifer must allege [1] a misrepresentation or material omission of fact; [2] which was false and known to be false by plaintiffs; [3] that the misrepresentation or material omission was made for the purpose of inducing Feifer party to accept the job with Maxim; [4] justifiable reliance on the misrepresentation or material omission; and [5] injury (*Lama Holding Co. v. Smith Barney*, 88 NY2d 413 [1996]).

An at-will employee, like Feifer, "can not state a fraudulent inducement claim on the basis of having relied upon the employer's promise not to terminate the contract or upon any representations of future intentions as to the duration or security of his employment" (*Laduzinski v. Alvarez & Marsal Taxand LLC*, 132 AD3d 164 [1st Dept 2015] [internal citations omitted]). However, an at-will employee may have a viable claim if he or she alleges an injury "separate and distinct from termination of the [his or her] employment." (*Id.*)

Here, the court finds that Feifer has not alleged sufficient facts to support his claim that that the plaintiffs misrepresented the nature of the job he was hired to do and that he would not have accepted the job if he had known the truth. Certainly, if Feifer's own continued employment cannot give rise to a fraudulent inducement claim, then Lanphear's departure, the departure of "Key directors" or the layoff of any other Maxim employee cannot state a *prima facie* claim.

Fatal to the counterclaim is the fact that Feifer's claims lack a temporal nexus to his decision to accept a position with Maxim. Feifer does not advance any facts which would demonstrate that Maxim or Biglari knew there would be no "new Maxim" magazine when he was offered the job. That Biglari began exerting influence five months after Feifer began working at Maxim, that there was internal strife within

the corporate hierarchy, or that journalistic integrity was allegedly neglected and/or discarded months after Feifer began working at Maxim is of no moment. Viewing these allegations in the most favorable light, Feifer cannot show that plaintiffs knowingly made misrepresentations or omitted facts regarding the underlying events which Feifer justifiably relied upon when he decided to accept employment at Maxim. Accordingly, the motion for a default judgment on the counterclaim is denied and the motion to dismiss the counterclaim is granted.

In motion sequence number 015, plaintiff moves to amend the complaint. Plaintiffs' counsel explains that by way of the amendment, they seek to "clarify that the legal claim in this action is one of defamation *per se* because the defamatory statements at issue in this case constitute defamation *per se*." Feifer opposes the motion, "unless Feifer's legal fees and litigation expenses, incurred in more than two years of litigation that was largely focused on plaintiffs' abuses in failing to allow discovery into their alleged damages on their defamation and injury to reputation claims, are awarded."

In general, leave to amend should be freely granted in the absence of prejudice or surprise, upon showing that the proposed amendment has merit (*Centrifugal Associates, Inc. v. Highland Metal Industries, Inc.*, 193 AD2d 385 [1st Dept 1993]). Here, there is no dispute that the "limited" claim has merit. Therefore, the only issue is whether defendants have been prejudiced or surprised by the proposed amendment, which the court does not find. While Feifer's counsel laments the costs associated with this hotly contested litigation which involves two related actions, over twenty motions between both cases and multiple appeals to the appellate division, this standing alone does not establish prejudice to the proposed amendment. Nor is Fiefer's outstanding discovery requests, to the extent that they are not presently the subject of motions or appeals *sub judice*, of any moment, given that discovery should only be had of material and relevant information relating to plaintiffs' claims and/or his defenses. Accordingly, the motion to amend is granted and the amended complaint in the form annexed to the motion papers as exhibit B (NYSCEF Doc. No. 437) is deemed served and filed.

Action No. 2, motion sequence no. 012

The court now turns to Sherman's motion to renew her prior motion to dismiss plaintiff's claims and for sanctions. The court notes at the outset that although movant requested oral argument in an affidavit submitted in reply to the motion, the decision whether to hear oral argument on a motion remains in the court's discretion. In the interest of judicial economy, the court declines movant's request for oral argument. In this motion, Sherman argues that renewal is warranted because "plaintiff has recently admitted in papers filed in the Appellate Division that its claim against Sherman does not state a cause of action..."

In a decision/order dated January 18, 2017, the Honorable Joan Kenney denied Sherman's prior motion to dismiss for failure to state a cause of action, stating in pertinent part: "[h]ere, plaintiff has stated a cause of action sounding in extortion against defendant..." Sherman's counsel indicates that an appeal of the 1/18/17 decision is pending before the First Department and scheduled to be argued in the February term. Further, Sherman quotes a portion of the plaintiff's brief on appeal, which states in pertinent part:

> Plaintiff-Respondent concedes on appeal that the Lower Court erred in finding the "plaintiff has stated a cause of action sounding in extortion against defendant, Charna Sherman" because the Complaint never alleged a cause of action for extortion against Ms. Sherman.

Sherman goes on to argue by way of the instant motion that the prior motion to dismiss should be granted because plaintiff brought its claims against her for "improper purposes."

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][3]). The proponent of a motion to

renew must offer a reasonable excuse for the failure to present the "new" facts on the prior motion (*In re Defendini*, 142 AD3d 500 [2d Dept 2016]).

This court agrees with plaintiff that the motion to renew is not based upon new facts warranting the relief requested. To the extent that the court erred in framing plaintiff's cause of action as one for civil extortion, plaintiff's sole cause of action was in fact for a declaratory judgment. Specifically, plaintiff seeks a declaration that the underlying nondisclosure agreement and release are binding contracts, that Sherman "may not assist in or cause the breach of, or otherwise interfere with, the obligations set forth in" the subject agreements, and that plaintiff must not disclose any trade secret or confidential information, etc. in his possession.

Plaintiff further seeks injunctive relief enjoining the defendants from disclosing trade secret or confidential information and enjoining Sherman from assisting in or cause the breach of the underlying agreements. These requests for relief are based upon the allegations that Sherman, as Feifer's lawyer, represented to plaintiff and/or its lawyers that her client had and would disclose trade secret and/or confidential information after Feifer had executed a nondisclosure agreement and release. Plaintiff claims that Sherman's conduct constituted an anticipatory breach of the subject agreements. Assuming *arguendo* that the motion to renew was properly based upon new facts, the motion would still be denied because Sherman has failed to establish that plaintiff has failed to state a *prima facie* cause of action for the subject declarations.

Accordingly, the motion to renew is denied.

Action Nos. 1 and 2, motion sequence numbers 012 and 011, respectively

The remaining motions raise discovery related issues. Motion sequence number 012 in Action No. 1, seeks a protective order in favor of plaintiffs and Feifer cross-moves to preclude, deem certain issues resolved, and for sanctions and attorneys fees. This motion concerns plaintiff Biglari's deposition. Feifer seeks to have the deposition videotaped. Plaintiff seeks a protective order either precluding its taping or alternatively (a) precluding any and all public or private exhibition or disclosure of the videotape or other audiovisual recording of the Deposition to or among any person(s) or entity(ies) other than the parties, their counsel; (b) precluding any and all use of the videotape or other audiovisual recording of the Deposition for any purpose other than trial preparation or trial of this action; (c) requiring Defendants at the conclusion of this action to either destroy or return to the Plaintiff any extra copies of the videotape or other audiovisual recording of the Deposition in electronic files and/or fixed tangible media, and submit affidavits that they have done so.

In his cross-motion, Feifer seeks to preclude plaintiffs from offering certain evidence based upon plaintiffs' failure to comply with disclosure deadlines set in the April 20, 2017 decision/order of the Honorable Joan Kenney. Feifer again asks for sanctions and costs.

It is clear that discovery between these parties has been stalled by the contentious manner in which this litigation has been conducted. Without laying blame on any one party, the court must nonetheless fashion an order which puts this case on track as best as possible. Therefore, the court, in its discretion denies both the motion and cross-motion. The relief plaintiffs seek, either denying Feifer the right to videotape his deposition or imposing certain conditions on said deposition, is not warranted on this record. CPLR 3113(b) permits a party taking a deposition to record it on videotape (see i.e. *Jones v. Maples*, 257 AD2d 53 [1st Dept 1999]). "There is no requirement to show special need and videotaping may be employed over the objections of a bashful or reluctant witness." (*Id.*) Therefore, an order precluding videotaping is not warranted.

The court finds that plaintiffs are also not entitled to condition the use of the videotape. Plaintiffs argue that defendants will use the videotape to "humiliate and embarrass" Biglari, without any showing which would substantiate such a claim or otherwise warrant a ruling different from the treatment of all other depositions. Accordingly, the motion is denied.

As for the cross-motion, the court is mindful that discovery has been stalled in this case. The real disputes between the parties concerning the videotaping of the deposition notwithstanding, the court does not find that sanctions or costs are warranted. The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as under 22 NYCRR 130-1.1. Although plaintiff's motion for a protective order was denied, the court cannot say that the motion was frivolous within the meaning of the court rule. Therefore, the cross-motion is only granted to the extent that the court hereby schedules these actions for a conference on March 20, 2018 at 9:30am so an expedited discovery schedule can be set at that time.

Finally, in Action No. 2, motion sequence number 011, plaintiff moves to quash certain subpoenae *ad testificandum* and subpoenae *duces tecum* and for a protective order. Defendants cross-move to preclude and compel plaintiff's deposition. Both sides seek sanctions. The subject supoenas were served on or about August 24, 2017 on Christopher Clark, Sandeep Salva and Latham and Watkins' (plaintiff's prior counsel) Custodian of Records seeking documents and deposition testimony by videotape, and contain a "Schedule A" consisting of twenty-one items purporting to be documents and categories of discovery sought by Defendants to be produced.

On September 13, 2017, plaintiffs' counsel sent an email to defendants' counsel requesting that Defendants "immediately withdraw all of the Latham Subpoenas because they seek discovery of documents and/or communications protected by the attorney-client and work product privileges and/or are otherwise outside the scope of any issues remotely associated with this case." This motion to quash ensued.

Plaintiff argues that the subpoenas seek documents protected by attorney client privilege and documents that are not material and relevant. In turn, defendants contend that plaintiff is attempting to relitigate the issue of whether Latham and Watkins is a fact witness. Defendants point to the decision/order of the Honorable Joan Kenney dated May 3, 2016, which disqualified Latham and Watkins from representing plaintiff because "[s]everal members of [Lathan and Watkins] will have to be called as witnesses to attest to the facts."

Plaintiff points to requests for documents concerning the facts alleged in Action No. 1, documents concerning whether Maxim is a "lad mag", pornography or a vanity project for Biglari, and documents concerning any communication with the press. Plaintiff is correct that on their face, these requests for information are not relevant to the allegations asserted in Action No. 2. Indeed, Action No. 2 concerns Sherman's alleged communications with Latham and Watkins regarding whether Feifer would disclose certain confidential information in violation of the underlying nondisclosure agreements. The allegations in Action No. 1 do not relate to that claim.

As repeatedly noted by Justice Kenney, these actions were not consolidated, but rather, are tracking one another and assigned to this court for the purposes of conserving judicial resources. Further, that these related actions are treated together for the purposes of discovery does not mean that discovery in one action can be had from a nonparty via a subpoena issued in the context of the other action.

Since the subpoenas seek information that is overly broad and beyond the scope of discovery in Action No. 2, the subpoenaes are quashed, with leave to reserve appropriately tailored subpoenae. The court notes that if defendants serve appropriate subpoenae seeking information regarding the allegations underlying Action No. 2, and plaintiff and/or the targets of the subpoenae intend to assert a privilege, such privilege should be appropriately raised in a privilege log. Accordingly, plaintiff's motion to quash the subpoenea is granted. Defendants are permitted leave to reserve subpoenae consistenst with this court's decision/order.

Both parties request for sanctions is denied, as is the balance of the cross-motion, for the reasons already stated herein in connection with motion sequence number 012 in Action No. 1.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that the following motions in Action No. 1 are decided as follows:

1. Motion sequence number 012, plaintiff's motion for a protective order is denied and defendant's cross-motion is granted only to the extent that the court hereby schedules these actions for a conference on March 20, 2018 at 9:30am in Part 8, 80 Centre Street, Room 278, so that an expedited discovery schedule can be set; and

2. Motion sequence number 013 by plaintiff for a default judgment on his counterclaim is denied; and

3. Motion sequence number 014 to dismiss the counterclaim is granted and Feifer's counterclaim is dismissed; and

4. Motion sequence number 015 to amend is granted and the amended complaint in the form annexed to the motion papers as exhibit B (NYSCEF Doc. No. 437) is deemed served and filed; and it is hereby

ORDERED that the following motions in Action No. 2 are decided as follows:

1. Motion sequence number 011 seeking an order quashing subpoenae served on or about August 24, 2017 on Christopher Clark, Sandeep Salva and Latham and Watkins' (plaintiff's prior counsel) Custodian of Records seeking documents and deposition testimony is granted and the subpoenae are quashed; and

2. Motion sequence number 012, defendants' motion to renew the prior motion to dismiss, is denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 3/2/18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.