Dual Diagnosis Treatment v Complete Bus. Solutions
2020 NY Slip Op 31935(U)
June 17, 2020
Supreme Court, New York County
Docket Number: 655860/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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DUAL DIAGNOSIS TREATMENT

Plaintiff,

- v -

COMPLETE BUSINESS SOLUTIONS

Defendant.

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INDEX NO. 655860/2018

MOTION DATE 11/13/2019, 12/27/2019

MOTION SEQ. NO. 005 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 219, 220, 221, 222, 223, 224, 225, 227, 228, 229, 255, 274, 275, 276, 277, 278, 279, 280, 284

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 234, 235, 236, 237, 243, 244, 245, 285

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, Dual Diagnosis Treatment Center, Inc. and Tonmoy Sharma's (the **Plaintiffs**): (1) motion to preclude (Mtn. Seq. No. 005) is granted solely to the extent that (i) Joseph Laforte and James Laforte are hereby precluded from depositions in their individual capacity in this action, (ii) the Defendants (hereinafter defined) are to pay the costs and attorneys' fees of the cancelled depositions in July, August, and October 2019, and (iii) the Defendants are to provide an accounting to the Plaintiffs of the items set forth below, and (2) motion to vacate (Mtn. Seq. No. 007) is granted solely to the extent of (i) vacating any supplemental proceedings, restraining notices, and/or any notices under the Uniform Commercial Code, Article 9, or otherwise seeking non-judicial enforcement of any alleged security interest arising from the MCA Agreements (hereinafter defined) and (ii) vacating any supplemental proceedings/restraining notices, or other process and collections, judicial and/or non-judicial

enforcement, restraining the Plaintiffs' receivables, bank accounts, funds, insurance funds or other assets claimed to be due under the Judgment (hereinafter defined).

The Relevant Facts and Circumstances

Reference is made to three merchant cash advance agreements, dated February 28, 2018, May 1, 2018, and June 29, 2018, respectively, each by and between the Plaintiffs and Broadway Advance LLC a/k/a Broadway Advance Funding (the **MCA Agreements**; NYSCEF Doc. Nos. 4, 6, 7), pursuant to which Broadway Advance LLC extended a series of loans to the Plaintiffs.

Reference is also made to two Assignment Agreements, (i) dated June 29, 2018, by and between Broadway Advance LLC as assignor and Complete Business Solutions Group Inc. as assignee and (ii) dated June 30, 2018, by and between Complete Business Solutions Group Inc. as assignor and New York Unity Factor, LLC (**New York Unity Factor**) as assignee, pursuant to which the MCA Agreements were assigned from Broadway Advance LLC to Complete Business Solutions Group, LLC and, ultimately, to New York Unity Factor, LLC (NYSCEF Doc. Nos. 73, 74).

On July 12, 2018, defendant, New York Unity Factor, entered a judgment by confession against the Plaintiffs in Westchester County, Supreme Court in the sum of $12, 283, 472.97 pursuant to the MCA Agreements (the **Judgment**; NYSCEF Doc. No. 8).

On November 26, 2018, the Plaintiffs commenced this action against Complete Business Solutions Group, LLC, New York Unity Factor, Broadway Advance, LLC, Par Funding LLC,

Lisa McElhone, James McElhone, Joseph Laforte, James Laforte, Fast Business Financial, LLC and Yoili Berkowitz (collectively, the **Defendants**) to set aside the Judgment, among other relief (NYSCEF Doc. No. 2). In sum and substance, the Plaintiffs allege that the MCA Agreements were disguised usurious loans, the Judgment was fraudulently obtained, and that in any event, the Defendants advanced less than the Judgment and only $3,037,832.47 is owed by the Plaintiffs.

A. Discovery Orders

Pursuant to a preliminary conference order, dated March 4, 2019, the parties were to serve their document demands and interrogatories by April 5, 2019 and responses were due by May 6, 2019 (NYSCEF Doc. No. 94). On April 4, 2019, the Plaintiffs timely served demands on the Defendants (NYSCEF Doc. Nos. 97-105), however the Defendants failed to timely produce documents and did not respond to the Plaintiffs' demand for a Bill of Particulars (NYSCEF Doc. No. 220, ¶¶ 34-39).

Pursuant to a so-ordered stipulation, dated May 15, 2019, depositions of the individual defendants, James LaForte and Joseph LaForte, and plaintiff Tonmoy Sharma were scheduled for July 2019 (NYSCEF Doc. No. 134). By a so-ordered stipulation, dated June 11, 2019, the Plaintiffs agreed to depose the Defendants' witnesses by video and preserved their priority for same (NYSCEF Doc. No. 153).

The depositions never took place in July. By a so-ordered stipulation (NYSCEF Doc. No. 155), dated June 27, 2019, depositions were rescheduled for August 2019, but the depositions were

then cancelled due to certain threats made by the Defendants' then-counsel, Sheldon Burnett (NYSCEF Doc. No. 179; *see* Mtn. Seq. 004). By a so-ordered Stipulation (NYSCEF Doc. No. 214), dated October 3, 2019, the depositions were rescheduled for October 2019 and then unilaterally cancelled again by the Defendants who purported to raise certain conflicts of interest and sought to obtain alternate counsel.

B. Court Orders Staying Collection Under the MCA Agreements

By order, dated November 26, 2018, the court granted the Plaintiffs' a temporary restraining order that stayed all proceedings to enforce the Judgment or any obligation pursuant to the MCA Agreements (the **November 2018 TRO**, NYSCEF Doc. No. 18). By decision and order dated March 4, 2019, as modified by the decision and order dated June 28, 2019, the court vacated the Judgment (NYSCEF Doc. Nos. 92, 160).

By order, dated May 15, 2019, the court granted the Plaintiffs' another temporary restraining order enjoining the Defendants from initiating or maintaining any action to collect pursuant to the MCA Agreements (Mtn. Seq. No. 003, NYSCEF Doc. No. 135). By a so-ordered stipulation, dated June 11, 2019, the parties agreed, among other things, that the Defendants were "restrained from all collections under the MCA agreements … [and] enjoined from any collection activity arising from the judgment vacated by this court on 3/4/10" (Mtn. Seq. No. 003 NYSCEF Doc. No. 153).

C. The Florida Action

On December 16, 2018, New York Unity Factor commenced an action against the Plaintiffs' Florida affiliates in Lee County, Florida, captioned, *New York Unity Factor, LLC v. Sovereign Health of Phoenix, Inc., et al.*, Case No. 2019 CA 000877, for the alleged fraudulent conveyance of moneys due under the MCA Agreements (the **Florida Action**; NYSCEF Doc. No. 121). An amended complaint was filed in the Florida Action on February 1, 2019 (NYSCEF Doc. No. 146).

On or around April 1, 2019, New York Unity Factor obtained a default judgment against the defendants in the Florida Action (NYSCEF Doc. No. 124, at 2). Afterwards, counsel for New York Unity Factor, Sheldon Burnett, caused certain writs of garnishment to be issued against various insurance companies that did business with the Plaintiffs (NYSCEF Doc. No. 143, ¶ 5).

The defendants in the Florida Action then brought a motion to vacate the default judgment and quash the writs of garnishment, which motion was granted by Judge James R. Shenko on the record at oral argument (5/13/2019 Tr., NYSCEF Doc. No. 125). At that argument, counsel for the defendants brought the November 2018 TRO to Judge Shenko's attention, and Judge Shenko explained, when quashing the writes of garnishment, that he was "troubled" by the fact that the prior default judgment in the Florida Action was for the identical sum of the Judgment in New York (*id.*, at 67:14-20). During oral argument, defendants' counsel also advised Judge Shenko that approximately $375,000 had been removed from the Florida defendants' bank accounts due to the Florida Action (*id.*, at 10:6-10, 42:22-43:1).

In a subsequent decision, dated August 29, 2019, Judge Shenko held New York Unity Factor in contempt for violations of certain discovery orders for information about funds it collected from the Florida Action defendants and provided that the contempt could be purged if New York Unity Factor responded to the document demands and returned all funds it had collected (NYSCEF Doc. No. 204, ¶¶ 13-15). On November 5, 2019, Judge Shenko entered judgment on the principal of $370,404.52 against New York Unity Factor, which sum represented the wrongfully garnished funds of the Florida Action defendants (the **Florida Judgment**; NYSCEF Doc. No. 221).

On January 22, 2020, New York Unity Factor filed an emergency motion for relief from the Florida Judgment on the basis that Mr. Burnett allegedly acted without his client's knowledge or consent when he garnished and retained funds in the Florida Action. By affidavit, dated January 22, 2020, Anthony Gibson, managing member of New York Unity Factor, attested that he only discovered in late December 2019 that Mr. Burnett received $370,303.52 in his trust account related to collection efforts in the Florida Action, which sum was allegedly not transferred to New York Unity Factor (NYSCEF Doc. No. 278, ¶¶ 7-8). The emergency motion was denied by Judge Shenko, who looked to hold New York Unity Factor or other Florida Action defendants responsible for the Florida Judgment (NYSCEF Doc. No. 275, ¶ 9). Mr. Burnett no longer represents the Defendants in this action or the Florida Action.

Discussion

I. Motion Sequence 005 (Plaintiffs' Motion to Preclude)

A. Defendants' Discovery Obligations

The Plaintiffs argue that the Defendants' failure to produce documents, respond to their demand for a bill of particulars, and comply with three so-ordered stipulations scheduling depositions constitute willful, deliberate, and contumacious behavior that justifies the imposition of sanctions. In opposition, the Defendants argue that they should not be bound by the actions of their prior counsel, Mr. Burnett, and that in any event, they did not willfully violate any of this court's orders.

The court may exercise its discretion to determine an appropriate sanction for a party's failure to comply with an order for disclosure or willful failure to disclose information that ought to have been disclosed (*Husovic v Structure Tone, Inc.*, 171 AD3d 559, 560 [1st Dept 2019]). Pursuant to CPLR § 3126 (2), a court may preclude a party from testifying in an action. Pursuant to CPLR § 3126 (3) , a court may strike a pleading when the moving party establishes "a clear showing that the failure to comply [with an order for disclosure] is willful, contumacious or in bad faith" (*Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1st Dept 1999]).

To the extent that the Plaintiffs seek sanctions for the Defendants' purported failure to produce certain documents, the court declines to issue any sanctions where the Defendants have produced documents while this motion was pending and the parties have since conferred over purported discovery deficiencies (*see* NYSCEF Doc. No. 276).

However, the record indicates that the Defendants indisputably failed to comply with three so-ordered stipulations setting depositions of the individual defendants, Joseph Laforte and James Laforte, or to provide a reasonable excuse for same. As noted above, the depositions were initially scheduled for July 2019 in a so-ordered stipulation, dated May 15, 2019 (NYSCEF Doc. No. 134). Three weeks later, after expressly agreeing to these deposition dates, Mr. Burnett purported to file a "notice of unavailability" on June 4, 2019 to advise that he was occupied with "prior scheduled hearings, depositions and other matters" on the same dates as the July depositions (NYSCEF Doc. No. 152). Having had advance notice of the July depositions and having expressly agreed to the July deposition dates, Mr. Burnett was not entitled to unilaterally set aside the deposition dates that he had originally agreed to based on "prior scheduled hearing, depositions and other matters." A so-called "notice of unavailability" is simply not a "affirmation of engagement," particularly where it involves unspecified "other matters" and not, e.g., a trial or other significant court appearance.

Shortly afterwards, Mr. Burnett requested that the July 2019 depositions be adjourned because he wished to take a vacation (NYSCEF Doc. No. 162) and, as a result, the depositions were moved to August 2019 (NYSCEF Doc. No. 155). Prior to the August 2019 depositions, however, Mr. Burnett made a series of physical and verbal threats to Plaintiffs' counsel, resulting in the cancellation of the August depositions and a motion by the Plaintiffs to revoke Mr. Burnett's *pro hac vice* admission (NYSCEF Doc. No. 220, ¶ 48; *see* Mtn. Seq. No. 004).

As a result, the depositions were then rescheduled for October 24 and 25, 2019 pursuant to a so-ordered stipulation, dated October 15, 2019 (NYSCEF Doc. No. 215). One week later on

October 22, 2019, the Defendants' counsel called the Plaintiffs' counsel attempting to settle the case and to once again adjourn the depositions (NYSCEF Doc. No. 220, ¶ 55). After the Plaintiffs' counsel refused to adjourn the depositions, the Defendants' counsel purported to raise certain conflicts of interest to avoid the depositions, of which the Defendants' counsel had been aware for almost one year prior (*id.*, ¶¶ 56-57; NYSCEF Doc. No. 223). On the morning of October 24, 2019, i.e., the morning of the first scheduled deposition, the Plaintiffs were advised that the individual defendants would not attend their depositions because they had terminated their counsel due to these purported conflicts of interest (NYSCEF Doc. No. 222).

Based on the foregoing, it is clear that the Defendants have no reasonable excuse for their failure to attend court ordered depositions on three separate occasions, especially as they had ample advance notice of the depositions dates and their counsel had expressly agreed to these dates. Further, it was solely the Defendants' actions, or that of their counsel, which caused the continued and repeated delay and cancellation of the depositions.

Notwithstanding the Defendants' willful conduct in avoiding depositions as outlined above, their actions are not so extreme as to warrant the ultimate penalty of striking the answer. In this regard, the court is mindful of the New York's public policy in favor of deciding actions on the merits and the fact that the Defendants have obtained new counsel. However, the court will preclude the depositions of Joseph Laforte and James Laforte inasmuch as the depositions were noticed for these defendants in their individual capacity (*Santini v Alexander Grant & Co.*, 245 AD2d 30, 31 [1st Dept 1997] [preclusion is harsh remedy but warranted where legitimate demands by adversary and orders of court are not complied with]). For the avoidance of doubt,

Joseph Laforte and James Laforte are nevertheless permitted to testify on behalf of any corporate defendant. Further, the Defendants' conduct is sufficient to justify the imposition of sanctions in costs and attorneys' fees to compensate the Plaintiffs for the time and expense repeatedly incurred in preparing for the depositions originally scheduled for July, August, and October 2019 and in their efforts to secure these deposition dates (*see Oppenheim & Macnow, P.C. v Worth*, 103 AD2d 687 [1st Dept 1984] [declining to strike defendant's pleading for failure to appear for court-ordered deposition and, instead, imposing sanctions to compensate the time and expense incurred by plaintiff]).

B. Defendants' Obligation to Refrain from Collecting Under the MCA Agreements

The Plaintiffs argue that they are entitled to an accounting because of the Defendants' failure to comply with certain orders restraining all collection pursuant to the MCA Agreements. The court agrees.

The record indicates that the Defendants violated the temporary restraining order, dated November 26, 2018, which enjoined the Defendants from filing any new proceedings for collection pursuant to the MCA Agreements when New York Unity Factor commenced the Florida Action for relief pursuant to the Judgment on December 16, 2018 (*compare* NYSCEF Doc. No. 18 *with* NYSCEF Doc. No. 121).

Further, even after the Defendants were ordered to refrain from any and all collections under the MCA Agreements or the Judgment due to a temporary restraining order, dated May 15, 2019, and a so-ordered stipulation, dated June 11, 2019 (NYSCEF Doc. Nos. 135, 153), Mr. Burnett

collected and retained $370,303.52 from the Florida Action plaintiffs, who are affiliates of the Plaintiffs in this action. Although the Defendants argue that Mr. Burnett independently obtained these funds without communicating his collection activities to New York Unity Factor, Mr. Burnett was counsel to and an agent of New York Unity Factor. Thus, Mr. Burnett purported to act ***on behalf of New York Unity Factor*** in undertaking the collection activity in the Florida Action, which conduct the Defendants remain accountable for.

In addition, on October 22, 2019, the Defendants' in-house counsel, Peter Mulcahy, advised the Plaintiffs' counsel that Mr. Burnett claimed he restrained funds in Texas and Arizona (NYSCEF Doc. No. 220, ¶ 24). Mr. Mulcahy also advised by email dated, December 12, 2019, that there was an estimated $2,500,000 of holds on the Plaintiffs' insurance receivables in California and $1,300,000 of holds in Arizona, Florida, and Texas that would require further litigation and discovery (NYSCEF Doc. No. 280). Although the Plaintiffs' counsel was unable to confirm whether there were holds on insurance receivables by certain defendant entities (*id.*), Mr. Burnett's collection of, at minimum, $370,303.52 due to the Florida Action and evidence regarding other potential restraints is sufficient to justify an accounting from the Defendants, which explains any assets they levied or garnished and fully discloses any amounts received or paid pursuant to any process, judicial or otherwise, arising from the MCA Agreements.

Accordingly, the Defendants are directed to provide, within 20 days of this decision and order: (i) with regard to monetary judgments obtained against the Plaintiffs, arising out of the underlying MCA Agreements and Judgment, the dates of filing, index numbers, captions, and identities of the courts and jurisdictions in which such actions were filed, amounts of money

collected and/or restrained, and copies of said monetary judgments, (ii) an accounting/breakdown and/or ledger setting forth the date, amount, and source, including account numbers as to any assets of the Plaintiffs levied upon or garnished, disclosing amounts received, amounts paid to attorneys from said amounts received, frozen, demanded or paid over pursuant to any judicial or non-judicial collections by the Defendants as against the Plaintiffs, arising from the MCA Agreements and/or the Judgment, (iii) a list of pending plenary actions commenced by any of the Defendants against the Plaintiffs or their affiliates in any jurisdiction, regarding the MCA Agreements and/or the Judgment, and (iv) a copy of every restraining notice, garnishment notice, collection notice, or lien enforcement notice served with regard to the MCA Agreements and the Judgment.

II. Motion Sequence 007 (Plaintiffs' Motion to Vacate)

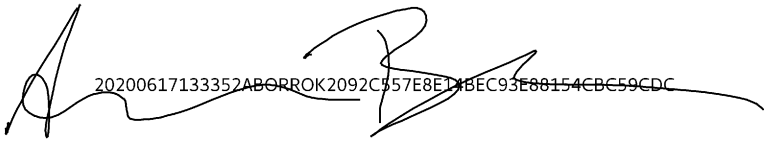
As the court has vacated the Judgment (*see* Mtn. Seq. No. 001), there is no basis for the Defendants to assert any supplemental proceedings to restrain or collect the Plaintiffs' funds allegedly due under the MCA Agreements. Accordingly, the Plaintiffs' motion to vacate is granted solely to the extent of (i) vacating any supplemental proceedings, restraining notices, and/or any notices under the Uniform Commercial Code, Article 9, or otherwise seeking non-judicial enforcement of any alleged security interest arising from the MCA Agreements between Plaintiffs and Broadway Advance LLC a/k/a Broadway Advance Funding (purportedly assigned to Complete Business Solutions Group, LLC and New York Unity Factor, LLC), dated, February 28, 2018, May 1, 2018, and June 29, 2018 (NYSCEF Doc. Nos. 4, 6, 7) and (ii) vacating any supplemental proceedings/restraining notices, or other process and collections, judicial and/or non-judicial enforcement, restraining the Plaintiffs' receivables, bank accounts, funds, insurance

funds or other assets claimed to be due under the Judgment against Plaintiffs in favor of New York Unity Factor, vacated by this Court on March 4, 2019 (NYSCEF Doc. Nos. 92, 160).

Accordingly, it is

ORDERED that the Plaintiffs' motion to preclude (Mtn. Seq. No. 005) is granted solely to the extent that solely to the extent that (i) Joseph Laforte and James Laforte are hereby precluded from depositions in their individual capacity in this action, (ii) the Defendants (hereinafter defined) are to pay the costs and attorneys' fees of the cancelled depositions in July, August, and October 2019, and (iii) the Defendants are directed to provide an accounting, within 20 days of this decision and order: (a) with regard to monetary judgments obtained against the Plaintiffs, arising out of the underlying MCA Agreements and Judgment, the dates of filing, index numbers, captions, and identities of the courts and jurisdictions in which such actions were filed, amounts of money collected and/or restrained, and copies of said monetary judgments, (b) an accounting/breakdown and/or ledger setting forth the date, amount, and source, including account numbers as to any assets of the Plaintiffs levied upon or garnished, disclosing amounts received, amounts paid to attorneys from said amounts received, frozen, demanded or paid over pursuant to any judicial or non-judicial collections by the Defendants as against the Plaintiffs, arising from the MCA Agreements and/or the Judgment, (c) a list of pending plenary actions commenced by any of the Defendants against the Plaintiffs or its affiliates in any jurisdiction, regarding the MCA Agreements and/or the Judgment, and (d) a copy of every restraining notice, garnishment notice, collection notice, or lien enforcement notice served with regard to the MCA Agreements and the Judgment; and it is further

ORDERED that the Plaintiffs' motion to vacate (Mtn. Seq. 007) is granted solely to the extent of (i) vacating any supplemental proceedings, restraining notices, and/or any notices under the Uniform Commercial Code, Article 9, or otherwise seeking non-judicial enforcement of any alleged security interest arising from the MCA Agreements and (ii) vacating any supplemental proceedings/restraining notices, or other process and collections, judicial and/or non-judicial enforcement, restraining the Plaintiffs' receivables, bank accounts, funds, insurance funds or other assets claimed to be due under the Judgment (NYSCEF Doc. Nos. 92, 160).



6/17/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE