Iacovacci v Brevet Holdings, LLC
2021 NY Slip Op 31707(U)
May 19, 2021
Supreme Court, New York County
Docket Number: 158735/2016
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** — ***Justice*** — **PART** **IAS MOTION 18EFM**

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PAUL IACOVACCI,

Plaintiff,

- v -

BREVET HOLDINGS, LLC, BREVET SHORT DURATION PARTNERS, LLC, BREVET SHORT DURATION HOLDINGS, LLC, BREVET CAPITAL PARTNERS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, BREVET CAPTIAL HOLDINGS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, DOUGLAS MONTICCIOLO, MARK CALLAHAN, JOHN TRIPP,

Defendants.

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INDEX NO. 158735/2016

MOTION DATE 01/19/2021

MOTION SEQ. NO. 030

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 030) 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126

were read on this motion to/for RENEWAL.

Upon the foregoing documents, defendants move for leave to renew and reargue the decision and order of this Court dated September 29, 2020 (NYSCEF Doc. No. 1105). Plaintiff cross moves for attorneys' fees and costs pursuant to 22 NYCRR § 130-1.1.

Renewal

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2]-[3]). "While the statutory prescription to present new evidence 'need not be applied to defeat substantive fairness,' such treatment is available only in a 'rare case,' such as where liberality is warranted as a matter of judicial policy, and then only where the movant presents a reasonable excuse for the failure to provide the evidence in the first instance" (Henry v Peguero, 72 AD3d 600, 602 [1st

Dept 2010] [internal citations omitted]). "Renewal is . . . not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation. Nor is it available to argue new legal theories which could have been previously relied upon but were not on the assumption that what was submitted was adequate" (Matter of Matter of Beiny, 132 AD2d 190, 210 [1st Dept 1987]).

Defendants' claimed basis for renewal is set forth in the affirmation of counsel, wherein Mr. Solomon states: "Defendants do not have the control necessary to produce documents not in their control, particularly if the Offshore Fund's independent investment board objects. Defendants neither can nor do have any control or influence over the Offshore Fund's directors, and Defendants could face adverse consequences if they attempt to produce documents beyond those which are otherwise in their possession" (NYSCEF Doc. No. 1115 at ¶ 14).

The idea that the Offshore Fund's independent investment board *might* object to producing information is speculation — it is barely a "fact" at all (*see* NYSCEF Doc. No. 1125 [plaintiff mem] at 18, n 6). In any event, the overall assertion that defendants have no "control" to produce the Court-ordered disclosure has not come with a reasonable justification for not presenting the information in the underlying motion. The Court finds no basis to relax the statutory requirement and grant leave to renew in the interests of justice (see Meija v Nanni, 307 AD2d 870, 871 [1st Dept 2003]) as the "new fact" could have been raised in the underlying motion[1] and/or at multiple court conferences spanning over two years. Accordingly, that branch of the motion seeking leave to renew is denied (see Matter of Weinberg, 132 AD2d at 210-211 ["most of the purportedly 'new' facts are not new at all, and, therefore, would not, under any circumstances, constitute a proper basis for renewal"]).

[1] Or within a few other prior motions, namely motion sequence nos. 18 and 21 (see NYSCEF Doc. Nos. 587, 754).

Reargument

"A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law" (McGill v Goldman, 261 AD2d 593, 594 [2d Dept 1999]). "Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979]; see Anthony J. Carter, DDS, P.C. v Carter, 81 AD3d 819, 820 [2d Dept 2011]). Nor should reargument be used to present "new" questions, "provide a party an opportunity to advance arguments different from those tendered on the original application," or "assume a different position inconsistent with that taken on the original motion" (Foley, 68 AD2d at 568).

Defendants claim that the order[2] exceeds the scope of prior orders, stating "the Court had not granted discovery over those additional entities because Plaintiff had never before sought discovery of that scope" (NYSCEF Doc. No. 1114 at 13 [defendants mem]). Assuming arguendo that the assertion was true (i.e., that the Court had not previously directed disclosure about the Offshore Fund in prior motion practice), this argument as to the scope of the proposed order, the proposed order itself that included the additional entities was, in any event, considered and addressed by the Court in rendering its September 29, 2020 decision and order, and upon signing the proposed order.

Defendants also argue that "[t]he information requested is not relevant to Plaintiff's claim for damages, as the information necessary to compute the net profits of [Brevet Short Duration Partners, LLC] and [Brevet Short Duration Holdings, LLC] can be ascertained from documents

[2] Though defendants continue to label the order as the "proposed order" it has been signed and entered, and is, therefore, not a proposed order but an actual order of the Court (NYSCEF Doc. No. 1108).

previously provided" (id. at 16). This, too, was considered and previously rejected by the Court in its September 29, 2020 decision and order.

As the Court finds that the issues identified by defendants as overlooked or misapprehended by the Court were the same as those raised in the underlying motion and in fact properly addressed, leave to reargue should be denied. Even if leave to reargue was granted, the Court would adhere to its original determination for the reasons set forth in the September 29, 2020 decision and order.

Modify, Vacate, Clarify and/or Confirm

The Court finds that the branch of the motion seeking to modify, vacate, clarify and/or confirm part of the Court's order (presumably NYSCEF Doc. No. 1108, in addition to NYSCEF Doc. No. 1105) is without any legitimate basis.

More specifically, "Defendants request that the Order be modified to provide that Defendants are not under an obligation to produce documents over which they lack control to produce" (NYSCEF Doc. No. 1114 [defendants mem] at 18). To the extent that this motion, or this branch of the motion, is couched as a motion seeking a simple clarification or similar modification in that vein (as alluded to in the defendants' reply papers), it would be considered as a motion to resettle. However, "[r]esettlement of an order is a procedure designed solely to correct errors or omissions as to form, or for clarification. It may not be used to effect a substantive change in or to amplify the prior decision of the court" (Foley, 68 AD2d at 566]). Motions to resettle an order "rest on the inherent power of courts to 'cure mistakes, defects and irregularities that do not affect substantial rights of [the] parties'" (Matter of Torpey v Town of Colonie, N.Y., 107 AD3d 1124, 1125-27 [3d Dept 2013], quoting Bennett v Bennett, 99 AD3d 1129, 1129 [3d Dept 2012] [alteration in original]).

There is no mistake, defect, or irregularity — indeed, absolutely no "clarification" is necessary here. Contrary to defendants' arguments, the order (NYSCEF Doc. No. 1108) is not susceptible to be read in this way and another — it is abundantly clear (cf. NYSCEF Doc. No. 1126 [defendants reply mem] at 6 [insinuating that there are "potential differences in interpretation between the parties" of the order directing disclosure about the Offshore Fund]).

Rather, defendants here are attempting to gut the order by limiting the entities for which they have to produce financial information. Accordingly, it could hardly be said that the requested modification to the order would not be a substantial change to the order and prior orders of the court, rendering any innocent view of "clarification" as disingenuous and without merit (see, e.g., Foley, 68 AD2d at 566-67; Matter of Torpey, 107 AD3d at 1125-27; Hutchings v Garrison Lifestyle Pierce Hill, LLC, 188 AD3d 1332, 1333 [3d Dept 2020]).

The Court finds it worthy to note that any attempt to fix errors or inconsistencies in the then-proposed order (which would be the proper basis to resettle) was given to defendants, but ultimately ignored. During the status conference on July 22, 2020, the Court through its Principal Law Clerk, took time and attention to develop a procedure to give defendants an opportunity to submit a counter order and/or statement in order to object to any part of the plaintiff's then-proposed order (filed as NYSCEF Doc. No. 1076). Instead, defendants chose to not honor the agreed-upon procedure and filed motion sequence no. 29 without leave of Court.

The idea that defendants seek modification of the order to permit discovery that is only within their "control" is unsupported by any evidence that the information ordered to be disclosed is not within defendants' and/or their counsel's control.[3] It is axiomatic that "control"

[3] Defendants only state that the Offshore Fund's investment board might refuse to provide the requested information — in doing so, defendants appear to be asking this Court for a litmus test to see the adequacy of any claimed inability to comply with the order — which is obviously premature at this juncture.

is inherent in the ability of a Court to impose discovery obligations (see Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, C3101:19 ["The fact that a person is in the control of a party enables the law to impose upon that party the responsibility of seeing to it that such person submits to disclosure"]). There is much literature on the notion of "control" (see id.) yet defendants cite none of it. The concept of "control" is clearly not being advanced as a legitimate concern or issue, but another tactic in avoiding court-ordered disclosure.

Lastly, this Court will not grant that branch of the motion seeking to "confirm and declare" that "Defendants have fully complied with the Court's discovery orders concerning financial information relating to net profits of the two entities in which Plaintiff has an interest," as defendants have **obviously** not yet complied.

Plaintiff's Cross-Motion

The Uniform Rules for Trial Courts (22 NYCRR) § 130-1.1 (a) states that the "court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part" or it "may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part." Frivolous conduct is defined as conduct that is (1) "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;" (2) "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another;" or (3) "asserts material factual statements that are false" ((22 NYCRR § 130-1.1[c]).

"In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time

available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party" (22 NYCRR § 130-1.1[c]).

In arguing that defendants are engaging in frivolous conduct, warranting the imposition of sanctions in the form of attorneys' fees and costs, or otherwise, plaintiff claims, in relevant part, as follows:

> "Brevet is throwing spaghetti at the wall, arguing simultaneously (a) for a reading of the Order that defies its plain terms, (b) that they already complied with the Order, (c) that they will comply with the Order sometime in the future, and (d) that they cannot possibly comply with the Order—and appealing the Order for good measure. The Court should award Plaintiff his reasonable attorneys' fees and costs to oppose Brevet's unauthorized motion for protective order and the instant motion" (NYSCEF Doc. No. 1125 [plaintiff mem] at 24-25).

Even if this Court were to put aside the prior motions[4] because, as defendants contend, the discovery related to the Offshore Fund was never explicitly mentioned in those motions, the Court still finds that defendants conduct meets the definition of frivolous. As the Court noted above, the motion is premised upon a speculative assertion that defendants *might* not be able to produce information related to the Offshore Fund — whether because its investment board *might* refuse or because the Offshore Fund is ultimately not within the defendants' control. The "control" argument was asserted for the first time here in this motion and is without any factual or legal basis to substantiate the same. It is inconceivable that such sophisticated counsel would engage in such motion practice without having any legal basis to back up their claims (see, e.g., Borstein v Henneberry, 132 AD3d 447, 450-52 [1st Dept 2015]). It is evident to the Court that the motion was intended to delay proceedings by continually refusing to provide the discovery related to net profits (see William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 32-33 [1st Dept

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[4] Namely, motion sequence nos. 18 and 21.

1992] ["Such *ad hominem* attack without the assertion of a proper basis for reargument/renewal justifies the imposition of a sanction"]). This motion, coupled with the history of defendants' prior conduct in this action,[5] warrant the imposition of sanctions (see id.; Borstein, 132 AD3d at 450-52).

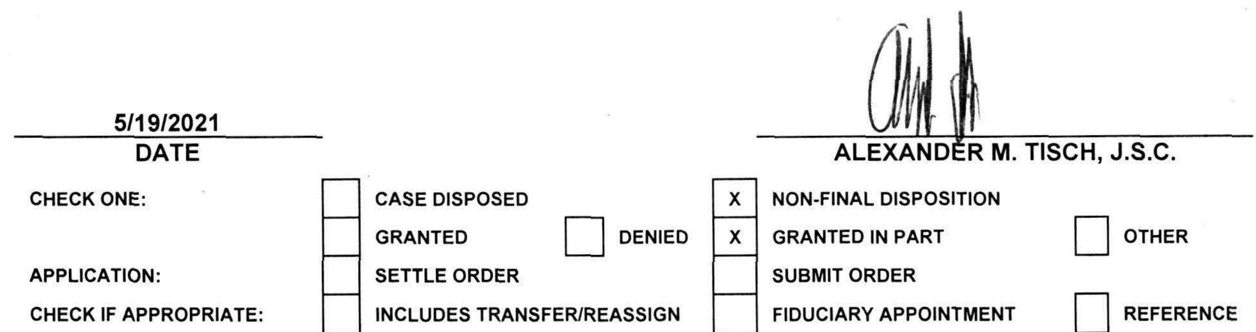
Accordingly, it is hereby ORDERED that defendants' motion for leave to renew, reargue, modify, vacate, confirm and/or clarify is denied in its entirety; and it is further

ORDERED that plaintiff's cross motion seeking sanctions is granted; and it is further

ORDERED that counsel for plaintiff shall e-file an attorneys' affirmation and provide supporting proof of "actual expenses reasonably incurred and reasonable attorney's fees" (22 NYCRR 130-1.1 [a]) pertaining to this motion only within thirty (30) days; and it is further

ORDERED that defendants may, within 30 days thereafter, submit an attorneys' affirmation that may include argument as to the reasonableness of the fee and calculation thereof.

This constitutes the decision and order of the Court.



5/19/2021
DATE

ALEXANDER M. TISCH, 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

[5] This Court previously found that defendants' actions in commencing a proceeding in Connecticut "was not brought in good faith and was commenced as a blatant end-run around discovery in this Court" (NYSCEF Doc. No. 583). Defendants commenced a related action *Brevet Holdings LLC v Enascor LLC*, index no. 657280/2020 and neglected to list this matter as related on the request for judicial intervention, resulting in an unnecessary assignment to the commercial division only to have it be reassigned to the undersigned. Lastly, for purposes here, this Court is also inclined to grant, at least in part, plaintiff's motion for contempt for falsely certifying that plaintiff's privileged materials were no longer in defendants' possession (motion sequence no. 26).