

Waxstein v Mesivtha Tifereth Jerusalem of Am.

2021 NY Slip Op 32400(U)

November 17, 2021

Supreme Court, New York County

Docket Number: Index No. 657219/2017

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA JAMES

PART 59

Justice

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ARTHUR WAXSTEIN,

Plaintiff,

- v -

MESIVTHA TIFERETH JERUSALEM OF AMERICA,

Defendant.

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INDEX NO. 657219/2017

MOTION DATE 11/09/2021

MOTION SEQ. NO. 008

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 008) 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228

were read on this motion to/for REARGUMENT/RECONSIDERATION.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff for leave to reargue defendant's cross motion to preclude plaintiff from offering any evidence rebutting defendant's defense that plaintiff did not declare gains realized on trades made on defendant's subject accounts at TD Ameritrade, Oppenheimer & Co., Josephthal & Co., Inc. and Scottrade over the past twenty years is granted; and it is further

ORDERED that, upon reargument, the Court adheres to its Decision and Order, dated August 23, 2021, granting such cross motion for an order of preclusion.

DECISION

In Becerril v Skate Way Roller Rink, Inc., 184 AD2d 365, 366 (1st Dept 1991), the appellate panel stated:

"A certain amount of discretion is reserved to the IAS court in crafting conditional orders to encourage the cooperation of neglectful parties so that their claims can be litigated on the merits. A plaintiff ignores such conditional orders at his peril, for the burden then falls upon him not only to explain his delay in, or failure of, compliance, but also to convince the court of the merit in proceeding with this now stale claim. Absent an excuse for failure to comply with a conditional order of preclusion and to submit an affidavit of merit, denial of summary dismissal of the claim is an *abuse of discretion* (Ramos v Lapommeray, 140 AD2d 286, 287-288; Canter v Mulnick, 93 AD2d 751, 752, affd 60 NY2d 689), especially where the discovery demands are directed at a 'loosely drawn' complaint whose merits are 'highly dubious' (Jawitz v British Leyland Motor, 42 AD2d 536, 537).

It is now more than four years since defendant made its discovery demands, and a year since service of the 60-day conditional order of preclusion. Plaintiff has not formally been heard from since service of the complaint in January 1988. Her failure to respond even on this appeal is consistent with the inference that there is no merit to this case. Plaintiff was not entitled to a second 'last chance' to comply. Proper exercise of discretion required dismissal without further condition."

Though Becerril involved a conditional dismissal order, rather than as here, a conditional preclusion order, the Becerril opinion is nonetheless instructive.

On January 2, 2018, defendant demanded

"Copies of any tax returns, State and Federal, showing any income and/or profit and losses realized from all investments/trading from the approximately 1 million dollars in funds that Plaintiff claims to have transferred to Defendant. Said information is to be provided from the date that Plaintiff transferred the approximately 1 million dollars in funds to Plaintiff to the present."

(Defendant's First Demand for Discovery and Inspection, NYSCEF Document Number 5, page 7.)

Thereafter, this court issued Orders dated September 24, 2018 (NYSCEF Document Number 25), January 29, 2019 (NYSCEF Document Number 61), March 11, 2019 (NYSCEF Document Number 183) and August 23, 2021 (conditional preclusion order, NYSCEF Document Number 199) directing plaintiff to produce such income tax returns.

It has been more than three years since defendant first made such discovery demands and, not counting 2020, the year of the global pandemic, nearly two years since issuance of the March 11, 2019 Order, and plaintiff, to date, has failed not only to comply with such discovery requirement, but also to submit any affidavit/affirmation (i.e., any statement signed by plaintiff), explaining the reason(s) that he is unable to secure from the Internal Revenue Service not even one year of his own income tax returns for the period in question.

In opposing defendant's prior cross motion to preclude for plaintiff's failure to comply with this court's January 2019 and March 2019 orders to produce certain tax records, plaintiff never raised the following argument, the gravamen of which is highlighted in italics:

"In counsel for Defendant's moving Affirmation in support of their cross-motion for preclusion, she

stated that co-counsel for Plaintiff could have obtained an IRS Form 2848 Power of Attorney. (See Affirmation of Helen Setton \$21). (NYSCEF Doc. No.188). *However, this form can be used solely to represent a taxpayer before the IRS and the person must be eligible to practice before the IRS. (See IRS "About Form 2848, Power of Attorney 2 annexed hereto as Exhibit A). Accordingly, using this Form would have been of no utility in merely seeking to obtain Plaintiff's tax returns.*

This court cannot consider on reargument, arguments that were not made on the prior motion. See Simpson v Loehmann, 21 NY2d 990 (1968). In addition, on this motion, the court may not consider the contention that implies that neither plaintiff's present counsel nor prior counsel represented plaintiff before the IRS and that each were ineligible to practice before the IRS, as such argument is made for the first time in reply. See Simon v FrancInvest, S.A., 192 AD3d 565, 569 (1st Dept 2021).

The court notes that the IRS letter of rejection of the request by plaintiff's counsel for his tax records dated September 12, 2019 (NYSCEF Document No. 210), which was sent to plaintiff's counsel, was appended neither to the supporting papers of plaintiff's original show cause order, nor to plaintiff's papers opposing defendant's cross motion for an order of preclusion. Such document, for which no excuse has been proffered for its omission from the record on the prior motion, should not be considered on plaintiff's herein motion to reargue. See Simpson, supra.

Even were the court to consider such document, plaintiff's argument that the court overlooked the law or facts in its prior determination fails. Plaintiff's counsel states that his client told him that plaintiff never received the explanation from the IRS for its September 12, 2019 rejection of his request for copies of his records, which the IRS, in such letter of rejection, wrote to plaintiff's counsel was provided to plaintiff. As plaintiff submits no affidavit/affirmation signed by plaintiff, such statement by plaintiff's counsel is not only self-serving but also hearsay. Thus, the credibility of such statement is unestablished.

Plaintiff's counsel argues that this court overlooked his argument that plaintiff's counsel "attempted to obtain the transcripts" of plaintiff's tax records from the IRS but as "[plaintiff] does not have a United States telephone number there is no means for the IRS to complete the verification process". Plaintiff presents not one written record of such communication from the IRS, which alleged communication is rank hearsay. Nor does or did plaintiff's counsel even append any copies of the many letters concerning same that he allegedly sent to the IRS, either to his papers on the prior motion or to the papers on the herein motion.

Plaintiff suggests that he will cooperate in providing defense counsel with a Form 4506 that such defense counsel may

submit to IRS requesting plaintiff's tax records. It strains credulity that it would be reasonable to expect the IRS, after rejecting a request for the records from counsel for plaintiff taxpayer, to provide such records to the attorney for his adversary in the herein lawsuit. Such is so particularly in light of the plaintiff's never having taken any action to obtain IRS's reason(s) for rejecting his own attorneys' Form 4506 request for such records.

Plaintiff contends that the 30-day deadline for securing the tax records, set forth in the challenged Order dated August 23, 2021 (NYSCEF Document Number 199) was impossible to meet due to the pandemic that had unfolded one year and one half before. However, plaintiff's counsel offers no explanation for failing to submit any documentary evidence, within such thirty-day period, or even to date, of any further written inquiry to IRS to secure copies of the income tax return records. Nor does the alleged impossibility of IRS providing copies of income tax returns more than six years old or transcripts beyond the past three years excuse plaintiff's failure to document his efforts to obtain the records that IRS would provide.

Finally, plaintiff's counsel argues that:

"Mr. Waxstein has repeatedly stated that he has treated the deposited funds as his own individual property and that he never deducted any of the payments of the deposited funds as a charitable contribution on his individual income tax returns."

Such statement of plaintiff begs the question at hand, which is whether plaintiff paid taxes on the capital gains realized on such deposited funds, which issue is the subject of the Order dated August 23, 2021 that precludes him from offering evidence of same. However, this court agrees with plaintiff to the extent that the Order dated August 23, 2021 does not dismiss his claims, but merely precludes him from offering certain evidence to refute one of defendant's defenses. Therefore, contrary to any argument made by defendant, such preclusion order does not bar plaintiff from offering evidence of defendant's tax returns and/or arguing that, under the terms of the parties' transaction, be it loan or gift, defendant was legally responsible for the payment of taxes on any capital gains as "unrelated trade or business" income.

Debra A. James
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| <u>11/17/2021</u> DATE | | | | | <u>DEBRA JAMES, J.S.C.</u> |
| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | FIDUCIARY APPOINTMENT | <input type="checkbox"/> |
| | | | | | REFERENCE |