SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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HEATHER BARLOW, VALUE EXTRACTION SERVICES LLC, PHILLIP LOFASO, JAKE HENDRICKSON, MAKEEDA PERKINS, MAURA MURPHY, MARINA PUSHKINA, JEN DOBIES, ROES 1-2, and all others similarly situated and/or interested parties,

Plaintiffs

Index No. 651739/2020

-against-

DECISION AND ORDER

CHRISTOPHER SKROUPA, INSPIRE SUMMITS LLC d/b/a SKYTOP STRATEGIES, DAVID KATZ, JOHN STEPHEN WILSON, PAULA LUFF, and ADVISORY BOARD MEMBERS DOES 1-20,

Defendants

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LUCY BILLINGS, J.S.C.:

Plaintiffs commenced this action originally alleging breach of contracts with defendants Inspire Summits LLC d/b/a Skytop Strategies and its member Christopher Skroupa and related claims. The current operative complaint is the Fourth Amended Class Action Complaint, which includes claims for fraud, violations of New York General Business Law § 350 and Labor Law §§ 193 and 652, conversion, equitable relief, and intentional infliction of emotional distress. NYSCEF Doc. No. 165.

I. PLAINTIFFS' MOTION TO RENEW THEIR MOTION FOR PENALTIES DUE TO DEFENDANTS' NONDISCLOSURE

Plaintiffs move to renew (motion #011) their prior motion for penalties due to defendants' noncompliance with plaintiffs'

disclosure demands (motion #006). C.P.L.R. §§ 2221(e), 3126. In a decision and order dated November 10, 2021, the court denied the prior motion to the extent it sought to strike defendants' answer. C.P.L.R. § 3126(3). The court granted the motion, however, to the extent of precluding defendants from introducing at trial or in support of or in opposition to any motion evidence that they failed to disclose in compliance with the Status Conference Order dated November 9, 2021. NYSCEF Doc. No. 157; C.P.L.R. § 3126(2). The precluded evidence encompassed (1) any documents defendants failed to produce, (2) evidence regarding the subject of an interrogatory that defendants did not timely answer, and (3) testimony from any witness who failed to appear for a deposition. Now, plaintiffs ask that defendants be precluded from disputing liability because they failed to comply with plaintiffs' disclosure demands and the November 2021 Status Conference Order.

A motion for renewal, even if unopposed as here, must be based on evidence establishing "new facts not offered on the prior motion that would change the prior determination," C.P.L.R. § 2221(e)(2), as well as "reasonable justification" for not offering those facts previously. C.P.L.R. § 2221(e)(3); Omansky v. 160 Chambers St. Owners, Inc., 155 A.D.3d 460, 462 (1st Dep't 2017); Shomron v. Fuks, 147 A.D.3d 685, 687 (1st Dep't 2017); Sarfati v. Palazzolo, 142 A.D.3d 877, 878 (1st Dep't 2016); James v. 1620 Westchester Ave., LLC, 105 A.D.3d 1, 7 (1st Dep't 2013).

See Atlas v. Smily, 156 A.D.3d 562, 562 (1st Dep't 2017); 204 Columbia Heights, LLC v. Manheim, 148 A.D.3d 59, 71 (1st Dep't 2017); Jones v. City of New York, 146 A.D.3d 690, 691 (1st Dep't 2017); South Bronx Unite! v. New York City Indus. Dev. Agency, 138 A.D.3d 462, 462-63 (1st Dep't 2016). Although plaintiffs offer new facts showing defendants' noncompliance with the November 2021 Status Conference Order, the court denies the motion for renewal, as none of the new information would change the outcome of the prior motion for penalties. Based on the new facts, however, plaintiff is entitled to the relief awarded by the decision and order dated November 10, 2021, on that prior motion. Any documents, testimony, or other evidence sought by plaintiffs' disclosure demands, but not produced in compliance with the November 2021 Status Conference Order, is precluded.

II. PLAINTIFFS' MOTION FOR RECONSIDERATION OR MODIFICATION OF THE DECISION GRANTING DEFENDANTS' MOTION TO QUASH SUBPOENAS

A. Defendants' Motion to Quash Subpoenas

Plaintiffs move, again without opposition, for reconsideration or modification (motion #012) of the decision and order dated December 23, 2021, NYSCEF Doc. No. 183, on defendants' prior motion to quash plaintiffs' subpoenas duces tecum issued to various financial institutions seeking information regarding defendants' transactions (motion #004). The court granted the prior motion to the extent of quashing the subpoenas and requiring plaintiffs to destroy documents produced

in response to the subpoenas. Plaintiffs contend that the court erred in its findings regarding service of the subpoenas. As this motion is based on facts that the court allegedly misconstrued, the motion is, in essence, for reargument. C.P.L.R. § 2221(d).

According to plaintiffs, the court erred in finding that: "Plaintiffs failed to serve the four subpoenas on defendants when plaintiffs served the subpoenas on the four financial institutions and failed to notify defendants within five days after receiving the documents produced in response to the subpoenas." Decision and Order dated December 23, 2021, NYSCEF Doc. No. 183, at 2. As evidence of service, plaintiffs cite Exhibits B, C, and D to Adam E. Engel's affirmation in support of defendants' motion to quash the subpoenas, NYSCEF Doc. No. 70, which include the subpoenas to JP Morgan Chase Bank, N.A., Fidelity Legal Operations, and CitiBank, and proofs of service by mailing of those three subpoenas to Engel, attorney for defendants. Plaintiffs do not contest that they failed to serve the fourth subpoena, to Wells Fargo Bank, on defendants. Plaintiffs note that Katz and Luff were not represented by an attorney to accept service on October 20, 2020, when plaintiffs issued the Wells Fargo subpoena, but these defendants' lack of representation did not eliminate plaintiffs' obligation to serve them.

Even if the court failed to acknowledge evidence that

plaintiffs served three of the subpoenas on defendants, plaintiffs do not contest the court's conclusion that they failed to notify defendants within five days after receiving responsive documents to any of the subpoenas as required by C.P.L.R. § 3120(3). Therefore, to the extent that the court overlooked or misapprehended facts, they do not compel a modification of the prior decision granting the motion to quash the subpoenas. Oparaji v. Yablon, 159 A.D.3d 539, 540 (1st Dep't 2018); Jones v. City of New York, 146 A.D.3d at 691.

Since the subpoenas remain quashed due to plaintiffs' failure to re-serve them or their fruits on defendants, the court need not reach plaintiffs' motion to the extent that it seeks reconsideration or modification of the court's determination that the subpoenas were overbroad. Plaintiffs' failure to take any further action is perhaps a reflection that the subpoenas are largely moot, since the court has dismissed plaintiffs' claims against Katz and Luff, whose transactions the subpoenas mainly targeted.

B. Plaintiffs' Cross-Motion to Defendants' Motion

Plaintiffs also seek reargument of their cross-motion to defendants' motion to quash the subpoenas, for attorneys' fees and expenses plaintiffs incurred due to the reinstatement of the motion after this action was remanded from the United States District Court for the Southern District of New York. The court denied plaintiffs' cross-motion (1) because plaintiffs consented

to the reinstatement and did not expend any time or resources opposing the motion post-reinstatement, so the reinstatement did not cause plaintiffs to incur additional fees and expenses, and also (2) because plaintiffs failed to appear for the oral argument on their cross-motion.

Plaintiffs neither dispute that they consented to the reinstatement of the motion to quash the subpoenas, nor contend that reinstatement was unwarranted, nor provide an excuse for the nonappearance at the oral argument of the cross-motion. Plaintiffs claim to have withdrawn their consent to the oral argument date because the court accepted late submissions from defendant just before the appearance, but plaintiffs' consent to a date for oral argument is irrelevant. Plaintiffs do not contend that they were unaware of the oral argument, that it posed a conflict, or that they could not attend for any other reason. Plaintiffs apparently boycotted the oral argument because they wanted an adjournment of the argument, but were unwilling to confer with opposing counsel and contact the court with opposing counsel to request an adjournment as instructed.

More importantly, plaintiffs point to no evidence or argument they would have presented had they appeared. They show no additional fees or expenses incurred in response to the reinstated motion to quash the subpoenas that would support the cross-motion for fees and expenses. Plaintiffs present no facts or law that the court overlooked or misapprehended, nor new

facts, that compel a modification of the prior decision denying the cross-motion. Therefore the court denies plaintiffs' motion for reconsideration, modification, or reargument of defendants' motion to quash subpoenas and plaintiffs' cross-motion for attorneys' fees and expenses in all respects. C.P.L.R. § 2221(d).

III. PLAINTIFFS' MOTION TO REARGUE OR RENEW DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CLAIMS AGAINST KATZ

Plaintiffs also move to reargue or renew (motion #013) defendants' motion to dismiss plaintiffs' claims against defendant Katz (motion #009), which the court granted in a decision and order dated March 23, 2022. NYSCEF Doc. No. 200. Plaintiffs contend that the court overlooked their allegations that Katz was involved in hiring decisions and personally funded Skytop Strategies' payroll and that the court failed to consider defendants' admission that plaintiffs obtained through their investigation.

A motion for reargument, as discussed above, must be based on relevant facts or law offered on the prior motion that the court overlooked or misunderstood. C.P.L.R. § 2221(d)(2). A motion for renewal must be based on new facts or law that would change the prior determination. C.P.L.R. § 2221(e)(2). Although plaintiffs sporadically refer to a specific type of relief, their current motion does not effectively identify and separate their grounds for the two separate forms of relief, as required by

C.P.L.R. § 2221(f).

Plaintiffs maintain that the court failed to consider all their allegations in concluding that the allegations against Katz were insufficient, referring in particular to the court's consideration of plaintiffs' claims under the Labor Law and whether their allegations qualified Katz as plaintiffs' employer. While the court did not specifically recite every allegation of Katz's involvement in Skytop Strategies, plaintiffs do not point to any relevant allegations not specifically discussed in the underlying decision and order. Many allegations that plaintiffs rely on are vague and conclusory, thus insufficient to survive a motion to dismiss the alleged claims, and therefore irrelevant. Sultan v. City of New York, 176 A.D.3d 554, 555 (1st Dep't 2019); Jones v. Voskresenskaya, 125 A.D.3d 532, 534 (1st Dep't 2015). Even as to the more specific allegations, Katz's contribution of funds to Skytop Strategies, for employee salaries or any other purpose, his payments to plaintiffs, his image on the Skytop Strategies website, or any other allegations, plaintiffs cite no law that these allegation render Katz liable as plaintiffs' employer or the alter ego of Skytop Strategies. Plaintiffs nowhere allege that Katz is a member or manager of this limited liability company (LLC). Therefore plaintiffs fail to meet their burden to show that the court overlooked or misapprehended relevant facts.

Plaintiffs also claim the court erroneously assumed that

defendants had provided required disclosure, when the court concluded that an email by defendant Skroupa was inadmissible, observing that plaintiffs failed to show that defendants provided the email in response to a disclosure demand by plaintiffs. The court simply determined that the email was unauthenticated and thus inadmissible, but pointed out that showing defendants produced it in response to plaintiffs' disclosure demand would have authenticated it. C.P.L.R. § 4540-a. The court further held that the email was inadmissible because it recounted Skroupa's understanding of Katz's priorities, of which Skroupa lacked personal knowledge. Decision and Order dated March 23, 2022, at 10-11. Finally, the court held that, even if it considered Skroupa's email as evidence that Katz wanted to ensure Skytop Strategies employees were paid, Katz's desire for employees to be paid did not render Katz plaintiffs' employer. In sum, plaintiffs again fail to meet their burden to show that the court overlooked or misapprehended relevant facts.

Plaintiffs also seek renewal of this part of the underlying motion based on their authentication of the email now through the affidavit by plaintiff Murphy that she received the email. Aff. of Maura Murphy, NYSCEF Doc. No. 204, ¶ 2. As discussed above, even were the court were to consider this email authenticated, it still would be inadmissible and fail to establish Katz's liability. Since plaintiffs present no new evidence that would change the underlying determination, the court denies this part

of their motion seeking renewal. C.P.L.R. § 2221(e)(2).

Finally, plaintiffs contend the court erred in holding that the email lacked probative value. The court interprets this contention as part of a motion for reargument, claiming the court overlooked or misunderstood New York Partnership Law § 22, which provides that: "An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this chapter is evidence against the partnership." First, no partnership is involved here. Skytop Strategies is an LLC. Even if it were a partnership, plaintiffs sought to use the email not as evidence against the partnership, but as evidence against Katz. Plaintiffs fail to present any LLC or partnership law allowing that use. Nor does any such contention address the email's inadmissibility due to Skroupa's lack of personal knowledge about Katz's priorities. Therefore the court denies plaintiffs' motion to reargue or renew defendants' motion to dismiss plaintiffs' claims against Katz in all respects. C.P.L.R. § 2221(d) and (e).

IV. DEFENDANTS' MOTION TO VACATE THE NOTE OF ISSUE

Defendants move to vacate the note of issue filed on May 23, 2022, claiming it misstates that additional disclosure is not required, when in fact disclosure is far from complete (motion # 014). Defendants insist that they have not received responses to their disclosure demands and that plaintiffs' production was missing documents and point out that defendants have not deposed

plaintiffs, nor obtained nonparty disclosure or disclosure regarding the counterclaims filed after the note of issue was filed.

A motion to vacate the note of issue requires a showing of how the action is not ready for trial. 22 N.Y.C.R.R. § 202.21(e). The court may vacate the note of issue if a material fact in the note of issue is incorrect.

As far as defendants claim they have lost the opportunity for disclosure regarding their counterclaims, defendants chose to interpose their counterclaims against plaintiffs LoFaso and Hendrickson after the note of issue already was filed, even though the second amended complaint, filed March 2, 2021, joined LoFaso and Hendrickson as plaintiffs. NYSCEF Doc. 75. The counterclaims against these plaintiffs, alleging that they were employed elsewhere or otherwise failed to attend their full-time jobs at Skytop Strategies, are equally responsive to that complaint's allegations as to allegations in the fourth amended complaint, filed November 25, 2021, NYSCEF Doc. 165, and substituted as the operative complaint by the decision and order dated March 23, 2022. NYSCEF Doc. 200. That decision ordered defendants to file their answer within 20 days after the decision and order was filed March 25, 2022, yet defendants did not file their answer and counterclaims until June 13, 2022.

Meanwhile, in the stipulated Status Conference Order dated November 9, 2021, defendants stipulated to the filing of the note

of issue by May 27, 2022. Moreover, they had ample opportunity between November 9, 2021, and May 23, 2022, when plaintiff filed the note of issue, to seek an extension of that deadline at a further Status Conference or by a motion.

As for the disclosure defendants claim they need to support their counterclaims, defendants fail to articulate what documents, depositions, or other evidence, not in defendants' control and not already demanded, defendants now need solely due to their counterclaims. Plaintiffs point out that defendants' prior demands, to which plaintiffs responded with Lofaso's employment contract effective after his employment at Skytop Srategies and Hendrickson's calculations of his claimed commissions, already encompassed evidence relating to defendants' counterclaims.

Plaintiffs also show they have produced all the documents defendants claim plaintiffs have not produced and stipulated at oral argument to produce them yet again. Defendants never moved to compel the depositions, nonparty disclosure, or other evidence they now claim to need, seemingly content to allow disclosure to founder. Therefore they have waived further disclosure. Bagley v. 1122 E. 180th St. Corp, 203 A.D.3d 502, 504 (1st Dep't 2022); Aikanat v. Spruce Assoc., L.P., 182 A.D.3d 437, 437-38 (1st Dep't 2020); Alvarez v. Feola, 140 A.D.3d 596, 597 (1st Dep't 2016); Perez De Sanchez v. Trevz Trucking, 124 A.D.3d 527, 528 (1st Dep't 2015).

Consequently, the court perceives no grounds to vacate the note of issue or to allow more disclosure unless the parties consent, particularly in light of defendants' delays and lack of diligence, and denies their motion to vacate the note of issue. Bagley v. 1122 E. 180th St. Corp, 203 A.D.3d at 504; Aikanat v. Spruce Assoc., L.P., 182 A.D.3d at 437-38.

V. CONCLUSION

To recapitulate, for the reasons explained above, the court denies plaintiffs' motion to renew (motion #011) their prior motion for penalties due to defendants' noncompliance with plaintiffs' disclosure demands (motion #006). C.P.L.R. § 2221(e). The court adheres to its prior decision, rendering the relief awarded by that decision available. Any documents, testimony, or other evidence that plaintiffs sought in disclosure, but was not produced in compliance with the Status Conference Order dated November 9, 2021, is precluded.

The court denies plaintiffs' motion for reconsideration or modification (motion # 012) of the decision and order granting defendants' prior motion to quash nonparty subpoenas duces tecum (motion #004) and denying plaintiff's prior cross-motion for attorneys' fees and expenses. The court also denies plaintiffs' motion to renew or reargue (motion #013) defendants' prior motion to dismiss plaintiffs' claims against defendant Katz (motion #009). C.P.L.R. § 2221(d) and (e).

Finally, the court denies defendants' motion to vacate the

note of issue (motion # 014). 22 N.Y.C.R.R. § 202.21(e). This action remains on the trial calendar.

DATED: December 22, 2022

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.