

Wimbledon Fin. Master Fund, Ltd. v Bergstein

2023 NY Slip Op 30455(U)

February 14, 2023

Supreme Court, New York County

Docket Number: Index No. 150584/2016

Judge: Jennifer G. Schechter

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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: COMMERCIAL DIVISION

PRESENT: HON. JENNIFER G. SCHECTER PART 54

Justice

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INDEX NO. 150584/2016

WIMBLEDON FINANCING MASTER FUND, LTD.,

MOTION SEQ. NO. 033

Petitioner,

- v -

DAVID BERGSTEIN, GRAYBOX LLC, ISKRA ENTERPRISES LLC, WESTON CAPITAL ASSET MANAGEMENT LLC, ASIA CAPITAL MARKETS LIMITED LLC, GEROVA MANAGEMENT INC., K JAM MEDIA, INC., HENRY N JANNOL, SPILLANE WEINGARTEN LLP, VENABLE, LLP,

DECISION + ORDER ON MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 033) 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1173, 1174, 1175, 1176

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

By order dated January 11, 2023, the court granted, without opposition, petitioner's motion to compel respondent David Bergstein to fully respond, without objection, to petitioner's information subpoena and produce, without objection, all documents responsive to petitioner's subpoena duces tecum (Dkt. 1143 [January 11 Order]). By order dated January 18, 2023, the court denied a request by Bergstein's counsel (Mr. Hantman) to conference his failure to respond to the motion as his proffered grounds for defaulting appeared baseless (Dkt. 1145 [January 18 Order]). One day after changing counsel (see Dkt. 1146), Bergstein filed this motion to vacate the January 11 Order, arguing that he has a valid excuse for defaulting and meritorious opposition to the motion, namely objections under the Fifth Amendment to responding to the portions of the information subpoena seeking information about his assets prior to September 18, 2018. Bergstein does not make any arguments about why he should not have to produce documents responsive to the subpoena duces tecum. Petitioner opposes the motion. For the reasons that follow, the court finds that Bergstein's default was not excusable and that he has no meritorious opposition to the underlying motion.

An attorney's "perfunctory and unsubstantiated explanation" of law office failure is not a reasonable excuse for defaulting (Hertz Vehicles LLC v Westchester Radiology & Imaging, PC, 161 AD3d 550 [1st Dept 2018]; see Pichardo-Garcia v Josephine's Spa Corp., 91 AD3d 413, 414 [1st Dept 2012]). "Such an excuse must be supported by a detailed and credible explanation" (HSBC Bank USA, N.A. v Joseph, 209 AD3d 633, 634 [2d Dept 2022]).

Here, after the court already explained in the January 18 Order why Mr. Hantman's excuses were unconvincing, Bergstein's moving papers did not include an affirmation from Mr. Hantman elaborating on his "perfunctory and unsubstantiated explanation." The affirmation submitted for the first time on reply by Mr. Hantman (Dkt. 1174) does not include any meaningful new information. Thus, the record on this motion suggests that Mr. Hantman simply ignored all of the communications by petitioner and the emails regarding the motion sent by NYSCEF because he recklessly assumed the motion had nothing to do with his client (*see Perez v New York City Hous. Auth.*, 47 AD3d 505 [1st Dept 2008]; *see also Cato v City of New York*, 70 AD3d 471, 472 [1st Dept 2010]). It is unreasonable for an attorney registered as counsel of record to ignore communications from the court and opposing counsel by simply blindly assuming that they do not affect their client. Petitioner posits that since the communications made clear that they were addressing matters involving Mr. Hantman's client, and in light of the discovery history of the related cases, that it is hard to believe the default was not willful (*see Imovegreen, LLC v Frantic, LLC*, 139 AD3d 539, 540 [1st Dept 2016], *accord Stewart v Petrolite Inc.*, 210 AD3d 546 [1st Dept 2022]).

Moreover, even if there was a basis to permit Bergstein to oppose the motion, his papers do not set forth meritorious Fifth Amendment objections. While "the giving of truthful testimony on [a] second occasion could surely trigger investigation of whether the original testimony was false" (*United States v DeSalvo*, 26 F3d 1216, 1222 [2d Cir 1994]), "the right not to answer potentially incriminating questions in a civil or criminal proceeding [] is not absolute" and thus "the prohibition against compelling the testimony of a witness in any setting is predicated upon there being a **real danger** that the testimony might be used against the witness in later criminal proceedings" (*Andover Data Servs. v Stat. Tabulating Corp.*, 876 F2d 1080, 1082 [2d Cir 1989] [emphasis added]). Bergstein does not cite any caselaw supporting the proposition that once a party makes financial representations under penalty of perjury that he may plead the Fifth in response to all subsequent questions on the same topic on the theory that he might get caught in a lie that could result in his prosecution. Indeed, this portion of Bergstein's moving brief is not supported by any caselaw (*see* Dkt. 1148 at 10-12). Nor do the cases cited in reply support his arguments. Bergstein's attempt to distinguish the cases cited by petitioner is unavailing, as he had the burden of demonstrating the validity of his Fifth Amendment objections (*see United States v Edgerton*, 734 F2d 913, 919 [2d Cir 1984]). The invocation of the Fifth Amendment in civil enforcement proceedings after a criminal conviction is surely not an occurrence without precedent. Yet, Bergstein did not cite cases supporting the validity of his assertion of a real danger of prosecution in this context.

Bergstein, notably, does not argue that any time a criminal defendant makes representations to the court or the Probation Department in connection with criminal proceedings (or, indeed, in any forum under oath) about his assets, any related civil judgment-enforcement efforts may always be stifled by pleading the Fifth. That is an unconvincing notion which is not supported by any caselaw. On the contrary, the party pleading the Fifth must "show

a 'real danger,' and not a mere imaginary, remote, or **speculative possibility of prosecution**" (*In re Morganroth*, 718 F2d 161, 167 [6th Cir 1983] [emphasis added], quoting *United States v Apfelbaum*, 445 US 115, 128 [1980]; see *United States v Sharp*, 920 F2d 1167, 1171 [4th Cir 1990] [subjective fear of prosecution is insufficient]; see also *Hansen v Wwebnet, Inc.*, 2017 WL 1032268, at *2 [SDNY Mar. 16, 2017]).

Here, all Bergstein proffers are unconvincing subjective concerns about how responding to petitioner's information subpoenas might result in prosecution based on speculation that petitioner "will attempt to use these proceeding[s] to further impair Mr. Bergstein's freedom" and that "an innocent mistake or oversight could be used against him" (Dkt. 1148 at 11). Bergstein does not cite any cases holding, nor did the court's research indicate, that merely articulating such tenuous concerns are sufficient to demonstrate a real, rather than speculative possibility of prosecution (see *New York State Natl. Org. for Women v Terry*, 886 F2d 1339, 1356 [2d Cir 1989] ["a witness' sincere belief is not enough to foreclose his answering or making a disclosure—his say-so does not of itself establish the hazard of incrimination"]).

In fact, as petitioner notes, Bergstein did not even submit the details of what was represented on his behalf during the Fatico hearing or his financial disclosures to the Probation Department, and thus there is no basis on this record for the court to assess whether the scope of what he actually previously represented under penalty of perjury corresponds with the questions in the information subpoena (see *Access Capital, Inc. v DeCicco*, 302 AD2d 48, 51 [1st Dept 2002] ["While a party may not be compelled to answer questions that might adversely affect his criminal interest, the privilege does not relieve the party of the usual evidentiary burden attendant upon a civil proceeding; nor does it afford any protection against the consequences of failing to submit competent evidence"]). It was petitioner that actually submitted the Fatico hearing transcripts and explains why what was addressed at that hearing does not raise Fifth Amendment concerns (see Dkt. 1151 at 23). And "because Bergstein also has not produced *in camera* the statements made by Bergstein to the Probation Department or provided any detail whatsoever as to their content in either Bergstein's affidavit or his main brief, their incriminatory nature is impossible to discern on this record" (*id.*)

For these reasons, Bergstein has not demonstrated a meritorious basis to oppose the underlying motion to compel, which in any event is academic in light of the lack of an excusable default (*Hertz*, 161 AD3d at 550).

Finally, as noted, Bergstein did not proffer an argument as to why the Fifth Amendment provides a basis to withhold documents. As petitioner explains, such an argument would be contrary to the court's prior rulings. Rather, Bergstein has been withholding documents based on his instance that petitioner agree to certain confidentiality restrictions (see Dkts. 1171, 1172).

If there was actually a meritorious basis to insist on confidentiality it should have been raised in opposition to the underlying motion. In any event, Bergstein does not cite any legal basis to compel petitioner to be bound by confidentiality restrictions that would apply during litigation discovery, as the rules governing judgment-enforcement discovery are very different. For instance, the court would never restrict the use of documents produced in response to an article 52 subpoena in other proceedings or in furtherance of judgment-enforcement efforts, as such uses are the very reasons for obtaining the documents. That said, the parties might consider agreeing to a notice protocol whereby, for instance, documents designated as confidential would be provisionally filed under seal so Bergstein could have the opportunity to make a motion to seal in the action in which they are filed. After all, it would be for the court in which such an action is filed, and not this court, to determine whether sealing is appropriate. Moreover, even in the absence of any agreement, some of the sensitive information, such as social security numbers, must always be redacted in publicly filed documents. Absent a showing that there is a reason to believe petitioner intends to do anything untoward with the documents, the court will not compel petitioner to be bound by the terms of a confidentiality agreement as a condition of obtaining the subpoenaed documents.

Bergstein is again urged to come into immediate, complete compliance with the January 11 Order.

Accordingly, it is ORDERED that Bergstein's motion to vacate the January 11 Order and his request that the court enter a confidentiality order governing his production are DENIED.

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JENNIFER G. SCHECTER, J.S.C.

2/14/2023
DATE

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
		<input type="checkbox"/>	OTHER