

ATX Debt Fund 2, LLC v Paul

2023 NY Slip Op 30809(U)

March 16, 2023

Supreme Court, New York County

Docket Number: Index No. 650728/2020

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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ATX DEBT FUND 2, LLC,	INDEX NO.	<u>650728/2020</u>
Plaintiff,		N/A, N/A, N/A,
- v -	MOTION DATE	<u>N/A, N/A, N/A,</u>
NATIN PAUL,		012 013 014
Defendant.	MOTION SEQ. NO.	<u>015 016 017</u> <u>018 019</u>

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 400, 401, 402, 403, 404, 430, 436, 457, 458

were read on this motion to/for ORDER OF PROTECTION

The following e-filed documents, listed by NYSCEF document number (Motion 013) 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 431, 452, 453, 454, 455, 456

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 014) 423, 424, 425, 426, 427

were read on this motion to/for PRO HAC VICE

The following e-filed documents, listed by NYSCEF document number (Motion 015) 437, 438, 439, 440, 441, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488

were read on this motion to/for MODIFY

The following e-filed documents, listed by NYSCEF document number (Motion 016) 432, 433, 434, 435, 442, 443, 444, 445, 446, 447, 448, 449, 459, 460, 461, 489, 490, 491, 492, 493

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 017) 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474

were read on this motion to/for PUNISH FOR CONTEMPT

The following e-filed documents, listed by NYSCEF document number (Motion 018) 494, 495, 496

were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 019) 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533

were read on this motion to/for AMEND/MODIFY DECISION/ORDER/JUDGMENT.

Based on the foregoing documents and for the reasons set forth on the record (3.15.23), the motions are decided as follows:

1. The Plaintiff’s motion (Mtn. Seq. No. 016) to dismiss the counterclaim for a declaratory judgment that this action is fraudulent must be denied. This is expressly what the Appellate Division authorized (NYSCEF Doc. No. 351).
2. The Defendant’s cross-motion (Mtn. Seq. No. 016) to file a second amended answer with counterclaims must be granted. Leave to amend should be freely given and only denied where (i) there is prejudice or surprise resulting from the delay, or (ii) the proposed amendment is palpably insufficient as a matter of law (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]). The Appellate Division authorized the Defendant to assert (i) affirmative defenses based on fraudulent conduct that occurred after the execution of the guaranties, and (ii) a counterclaim for a declaration that this action is fraudulent, because such defenses and counterclaim were contemplated by the waiver carveout provision in the guaranties (NYSCEF Doc. No. 351, at 2). This carveout provision negates the waiver in the guaranties with respect to, among other things, post-closing claims or defenses sounding in fraud (*id.*). The carveout provision also contains carveouts for acts or omissions constituting gross negligence or willful misconduct. The second amended answer seeks to add allegations of exactly this kind of conduct and to assert causes of action arising therefrom. This is clearly permissible. The Defendant indicates that discovery has adduced a factual predicate that was not originally known when his answer

with counterclaim was originally filed that grounds these additional counterclaims and defenses against these additional defendants. The Defendant shall file his second amended answer with counterclaims on NYSCEF by March 16, 2023.

3. The Defendant's motion (Mtn. Seq. No. 018) to strike the Plaintiff's reply papers or to permit the Defendant to file reply papers in support of his cross-motion is denied as moot.
4. The Defendant's motion (Mtn. Seq. No. 019) (i) for commissions to third parties for discovery in connection with the Defendant's second amended answer with counterclaims, (ii) for an extension of time in connection with such discovery, and (iii) to modify the ESI protocol is granted solely to the extent that the Court will sign commissions for additional discovery and discovery will proceed as set out below. The Defendant is not entitled to modification of the ESI protocol. By way of background, this is the ESI protocol that the Defendant proposed for use. The Court rejected the Plaintiff's proposal.
5. Ladder Capital Finance, LLC's (**Ladder**) motion (Mtn. Seq. No. 012) for an order of protection against certain subpoenas served on various of its executives by the Defendant and the Defendant's motion (Mtn. Seq. No. 013) to compel Ladder to produce documents were withdrawn without prejudice. Because the Defendant is entitled to file his second amended complaint that, among other things, adds Ladder as a counterclaim defendant, Ladder is now a party to this case. Party discovery shall proceed as outlined below, and the parties are directed to meet and confer as to how such discovery will be conducted. If they are unable to agree as to the discovery and depositions sought from Ladder, the parties are granted leave to renew their motions.

6. The Plaintiff's motion (Mtn. Seq. No. 015) to modify the search terms and list of custodians for discovery in this case is denied. The motion is wholly devoid of merit. When the parties were unable to agree, the Court directed each party to email their proposed ESI protocol to Part 53 so that the Court could choose the most appropriate protocol. The Appellate Division's decision places at issue the Plaintiff's and the counterclaim defendants' fraudulent conduct and the Defendant is entitled to broad discovery in support of its theory. Thus, the motion is denied and the Plaintiff shall pay the costs that the Defendant incurred in connection with the motion.
7. The Defendant's motion (Mtn. Seq. No. 017) to hold the Plaintiff in contempt for its failure to comply with the Court's order (NYSCEF Doc. No. 422) is denied because the Plaintiff executed the ESI stipulation. All parties are directed to produce documents on a rolling basis.
8. The Defendant's motion (Mtn. Seq. No. 014) to admit Menachem Marc Hirschfeld *pro hac vice* must be granted.

The Plaintiff is directed to order a copy of the transcript (3.15.23) and have it uploaded to NYSCEF.

It is hereby ORDERED that Ladder's cross-motion (Mtn. Seq. No. 016) for leave to file a second amended complaint and the Defendant's motion (Mtn. Seq. No. 014) to admit Menachem Marc Hirschfeld *pro hac vice* are granted; and it is further

ORDERED that Ladder's motion (Mtn. Seq. No. 019) for commissions for third-party discovery and to modify the ESI order is granted to the extent of opening commissions for discovery but denied to the extent it seeks to modify the ESI order; and it is further

ORDERED that Ladder's motion (Mtn. Seq. No. 012) for a protective order and the Defendant's motion (Mtn. Seq. No. 013) to compel Ladder to produce documents are denied without prejudice; and it is further

ORDERED that the Plaintiff's motion (Mtn. Seq. No. 015) to modify the search terms and custodian list, its motion (Mtn. Seq. No. 016) to dismiss the Defendant's counterclaim, the Defendant's motion (Mtn. Seq. No. 017) to hold the Plaintiff in contempt, and his motion (Mtn. Seq. No. 018) to strike the Plaintiff's reply papers on Motion 016 are denied; and it is further

ORDERED that the motion for leave to appear *pro hac vice* is granted and Menachem Marc Hirschfeld, Esq. is permitted to appear and to participate in this action on behalf of the Defendant, and it is further

ORDERED that he shall at all times during this action be associated with counsel who is a member in good standing of the Bar of the State of New York and is attorney of record for the aforesaid party; and it is further

ORDERED that all pleadings, briefs, and other papers filed with the court shall be signed by the attorney of record, who shall be responsible for such papers and for the conduct of this action; and it is further

ORDERED that, pursuant to Section 520.11 of the Rules of the Court of Appeals and Section 602.2 of the Rules of the Appellate Division, First Department, the attorney hereby admitted *pro hac vice* shall be familiar with and abide by the standards of professional conduct imposed upon members of the New York Bar, including the rules of the courts governing the conduct of attorneys and the Rules of Professional Conduct; and it is further

ORDERED that he shall be subject to the jurisdiction of the courts of the State of New York with respect to any acts occurring during the course of his participation in this matter; and it is further

ORDERED that said counsel shall notify the court immediately of any matter or event in this or any other jurisdiction that affects his/her standing as a member of the bar; and it is further

ORDERED that the Plaintiff shall bear the Defendant's costs incurred in connection with Motion 015; and it is further

ORDERED that, within 14 days of the date of this order, the Defendant shall provide a bill of such costs to the Plaintiff; and it is further

ORDERED that if the parties are unable to agree on the costs owed by the Plaintiff to the Defendant, the parties shall promptly notify the Court (sfc-part53@nycourts.gov) and the matter shall be referred to a JHO/Special Referee; and it is further

ORDERED that any motion to dismiss shall be brought in accordance with the following schedule: moving papers by May 15, 2023, opposition papers by July 7, 2023, and reply papers by July 24, 2023; and it is further

ORDERED that document discovery shall be completed by July 31, 2023; and it is further

ORDERED that depositions shall be completed by November 30, 2023; and it is further

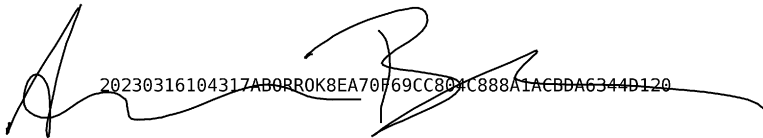
ORDERED that fact discovery shall be completed by December 15, 2023; and it is further

ORDERED that expert discovery shall be completed by March 15, 2024; and it is further

ORDERED that Note of Issue shall be filed by March 29, 2024 and that any dispositive motion shall be filed within 30 days of the filing of Note of Issue; and it is further

ORDERED that the parties shall appear for a **status conference on September 6, 2023, at 11:30am**, and the parties shall provide a deposition schedule with all names and dates; and it is further

ORDERED that the Defendant shall order a copy of the transcript (3.15.23) and shall cause it to be uploaded to NYSCEF.



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3/16/2023

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE