

Iacovacci v Brevet Holdings, LLC

2023 NY Slip Op 30856(U)

March 17, 2023

Supreme Court, New York County

Docket Number: Index No. 158735/2016

Judge: Alexander M. Tisch

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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. ALEXANDER M. TISCH PART 18

Justice

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PAUL IACOVACCI,

Plaintiff,

INDEX NO. 158735/2016

MOTION DATE 02/03/2022

MOTION SEQ. NO. 043

- v -

BREVET HOLDINGS, LLC A DELAWARE LIMITED LIABILITY COMPANY, BREVET SHORT DURATION PARTNERS, LLC F/K/A BREVET CAPITAL PARTNERS III, LLC, A DELAWARE LIMITED LIABILITY COMPANY, BREVET SHORT DURATION HOLDINGS, LLC F/K/A BREVET CAPITAL HOLDINGS III, LLC, A DELAWARE LIMITED LIABILITY COMPANY, BREVET CAPITAL PARTNERS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, BREVET CAPITAL HOLDINGS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, DOUGLAS MONTICCILO, MARK CALLAHAN, JOHN TRIPP,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 043) 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1492, 1493, 1494, 1505, 1506, 1507, 1508, 1509, 1510, 1511, 1513, 1514, 1515, 1516, 1517, 1530, 1537, 1538

were read on this motion to/for

SANCTIONS

Upon the foregoing documents, plaintiff moves pursuant to CPLR 3216 to strike defendants' pleadings, resolving damages issues in plaintiff's favor, and imposing other sanctions for defendants' failure to comply with numerous court orders directing defendants to provide discovery on the net profits of defendants' short-duration loan businesses.¹

Plaintiff claims that defendants continue to withhold "the audited financial statements of the Offshore Fund, investment advisory agreements, and investment management agreements"; a "general ledger detail"; and "tax basis financial statements used by the tax preparer of its K-1

¹ See NYSCEF Doc No. 587, decision and order dated 5/9/2019 resolving motion sequence no. 18; NYSCEF Doc No 754, decision and order dated 9/19/2019 resolving motion sequence no. 21; NYSCEF Doc No 1108, order dated 11/2/2020; see also NYSCEF Doc No 1105, 1401, resolving motion sequences nos. 29 and 30.

statements, setting forth actual revenues and expenses for each period” (NYSCEF Doc No 1486 at 13; see NYSCEF Doc No 1513 at 7 [regarding Offshore Fund discovery] and 9-11 [describing the lack of detail of the QuickBook summaries]).² In support of the motion, plaintiff submitted excerpts from the deposition testimony of defendants’ former Chief Financial Officer, who testified, *inter alia*, that she had access to all financial information of the Offshore fund necessary to prepare financial statements, including access to the Offshore Fund’s audited financials (see NYSCEF Doc No 1520 at 237-241).

In opposition, defendants maintain that they complied with the Court orders and any additional information that was not provided is not relevant to the calculation of net profits and/or would be redundant or duplicative of the information that was already provided; and defendants also seem to suggest that there are no other “work papers” or other information that would be useful in calculating net profits (see NYSCEF Doc No 1505 at 20; NYSCEF Doc No 1510, defense counsel letter dated 2/16/2021).

After this motion was fully briefed, the First Department, Appellate Division rendered its decision on the appeals taken from some of the orders at issue. Specifically, the court held in relevant part:

The documents from other entities that were affiliated or provided fees and revenue to defendants were not outside the scope of discovery, where they have a “bearing on the controversy which will assist in the preparation for trial” (*Anonymous v High School for Envtl. Studies*, 32 AD3d 353, 358 [1st Dept 2006] [interpreting “material and necessary” language in CPLR 3101]).

While defendants could have raised the argument about their lack of control over nonparty Offshore Fund on the original motion, that is not fatal to a motion to

² There does not appear to be an official response to the defendants’ letter dated 2/16/2021, which would have clarified the scope of this motion. Thus, the Court presumes, based on plaintiff’s memorandum of law, that the foregoing is the outstanding discovery at issue.

renew where necessary to provide substantive fairness (*see Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376-377 [1st Dept 2001]).

Here, fund counsel, who had personal knowledge of Offshore Fund's structure and governance, averred that it was controlled by an independent board of directors, and was outside defendants' control. As such, defendants could not be compelled or sanctioned for failure to produce documents from Offshore Fund (*see Argo v Queens Surface Corp.*, 58 AD3d 656, 657 [2d Dept 2009]).

Defendants' efforts to limit the scope of discovery relating to their net profits to their own books and records was not unreasonable, or in bad faith. Moreover, the scope of that discovery was repeatedly expanded and clarified by plaintiff and subsequent court proceedings. As such, defendants were not guilty of the kind of "extreme" conduct that would support sanctions (*see Ray v Ray*, 180 AD3d 472, 474 [1st Dept 2020], *lv dismissed* 35 NY3d 1007 [2020]).

(Iacovacci v Brevet Holdings, LLC, 202 AD3d 570, 570-71 [1st Dept 2022]).

CPLR 3126 provides that "[i]f any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just." "A court may strike an answer as a sanction where the moving party establishes that the failure to comply was 'willful, contumacious or in bad faith'" (Fish & Richardson, P.C. v Schindler, 75 AD3d 219, 220 [1st Dept 2010], quoting Rodriguez v United Bronx Parents, Inc., 70 AD3d 492, 492 [2010]). "Upon such showing, the burden 'shifts to the nonmoving party to demonstrate a reasonable excuse'" (Fish & Richardson, P.C., 75 AD3d at 220, quoting Reidel v Ryder TRS, Inc., 13 AD3d 170, 171 [2004]).

The Court finds that plaintiff did not meet his burden with respect to the alleged withholding of "tax basis financial statements used by the tax preparer of its K-1 statements, setting forth actual revenues and expenses for each period" because, to the extent that this was part of the order(s) (e.g., item no. 2 directing defendants to provide "statements reflecting income

and expenses for each fiscal year”), it is unclear whether it has already been provided.

Specifically, plaintiff noted the deficiency in its 2/2/2021 letter (NYSCEF Doc No 1509, third item) and defendants responded in their letter dated 2/16/2021 stating that they would provide the statements (see NYSCEF Doc Nos. 1510, item no. 3). Plaintiff’s counsel’s affirmation does not address what happened after those letters were exchanged.

The Court finds that plaintiff met his burden showing that defendants’ withholding of the court-ordered “general ledger detail” information (see NYSCEF Doc No 1486 at 13) was willful. However, based upon the record in the motion papers and the Appellate Division’s ruling, there is an insufficient basis to impose sanctions for the failure to produce it because it is unclear whether such information exists in the form or manner requested (see, e.g., Iacovacci, 202 AD3d at 571, citing Argo v Queens Surface Corp., 58 AD3d 656, 657 [2d Dept 2009]; see NYSCEF Doc No 1508 at 5, defense counsel affirmation in support of motion sequence no. 29 with exhibits [“As Defendants and Management Company do not keep general ledgers, they will be producing financial information through Quickbooks”]; id. at 243, Callahan affidavit dated 3/10/2020 [“General Ledgers: Brevet is producing relevant and irrelevant contents of its computer accounting system, called QuickBooks”]).³

The Court further finds that plaintiff met his burden for sanctions with respect to defendants’ withholding of the audited financial statements, investment advisory agreements, and investment management agreements of the Offshore Fund. Although the Appellate Division held that the defendants cannot be sanctioned “for failing to produce documents from Offshore Fund” (see Iacovacci, 202 AD3d at 571; see also NYSCEF Doc No 1530), the deposition

³ The Court again refers to its decision and order on motion sequence no. 30, where it noted how defendants had an opportunity to submit a counter order or objections to plaintiff’s proposed order, but they chose to not honor the agreed-upon procedure (see NYSCEF Doc No 1401 at 5).

testimony of defendants' former chief financial officer was not part of the record before the appellate court. Plaintiff submitted the transcript in support of this motion, and used it to argue that Brevet did, in fact, have access to financial documents of the Offshore Fund. Defendants failed to address the evidence in their opposition papers. Accordingly, the Court finds that defendants' failure to comply with the Court orders directing them to disclose the audited financial statements, investment advisory agreements, and investment management agreements of the Offshore Fund is subject to sanctions as the evidence shows that the withholding was and continues to be willful and those documents were within defendants' control to produce.

"The nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court's discretion. The general rule is that the court will impose a sanction commensurate with the particular disobedience it is designed to punish and go no further than that" (Crupi v Rashid, 157 AD3d 858, 858-59 [2d Dept 2018]).


Here, the Court finds that striking of the answer or resolving the issue of damages in plaintiff's favor would be disproportionate to the offense, given the substantial compliance of the remaining items of the orders, as well as defendants' contention that the Offshore Fund information is redundant and/or not relevant to plaintiff's calculation of damages. As the Appellate Division agreed that the requested information was within the scope of appropriate discovery, the Court will direct defendants' to provide it within 30 days or otherwise be subject to an adverse inference instruction, which may be sought at plaintiff's election at the time of trial (see Horizon Inc. v Wolkowicki, 55 AD3d 337, 337-38 [1st Dept 2008] ["a discovery sanction was warranted, given defendants' failure, despite four orders, to produce checks and other financial documents essential to proving the claim for piercing the veil However, because the party seeking discovery is also the party bearing the burden of proof on the issue, and

because the evidence is peculiarly within defendants' custody, we find that an adverse inference charge is a more appropriate sanction" rather than preclusion]). The Court finds that Pattern Jury Instruction (PJI) 1:77 is particularly appropriate because it provides the finder of fact an opportunity to consider defendants' contentions that, e.g., this specific information is redundant and/or not necessary to the issue of calculating plaintiff's alleged damages.

Accordingly, it is hereby ORDERED that plaintiff's motion for sanctions pursuant to CPLR 3216 is granted in part to the extent of granting a conditional adverse inference instruction; and it is further

ORDERED that defendants shall exchange the audited financial statements, investment advisory agreements, and investment management agreements of the Offshore Fund within 30 days after service of a copy of this order with notice of entry; and defendants' failure to do so will result in an adverse inference instruction (PJI 1:77) at the time of trial.

This constitutes the decision and order of the Court.

<u>3/17/2023</u> DATE	 _____ ALEXANDER M. TISCH, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE