

Beach v Touradji Capital Mgt., LP

2023 NY Slip Op 31182(U)

April 13, 2023

Supreme Court, New York County

Docket Number: Index No. 603611/2008

Judge: Andrea Masley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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 48

-----X

GENTRY T. BEACH, ROBERT A. VOLLERO,
Plaintiff,

- v -

TOURADJI CAPITAL MANAGEMENT, LP, PAUL
TOURADJI, VOLLERO BEACH CAPITAL PARTNERS,
VOLLERO BEACH CAPITAL FUND, VOLLERO BEACH
ASSOCIATES LLC, VOLLERO BEACH CAPITAL
OFFSHORE, LTD., GARY BEACH, DEEPROCK
VENTURE PARTNERS, LP,

Defendants.

INDEX NO. 603611/2008

MOTION DATE _____

MOTION SEQ. NO. 056

**DECISION + ORDER ON
MOTION**

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 056) 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1267

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Plaintiffs move pursuant to CPLR 3211(a)(7), 3211(b), 3013 and 3018(b) to

(1) dismiss TCM’s “faithless servant” or “faithless fiduciary” affirmative defense and breach of fiduciary duty counterclaim insofar as they are predicated upon the allegation that Plaintiff Gentry Beach sent or received certain improper e-mails

(2) in the alternative, pursuant to CPLR 603, severing the defense and counterclaim relating to the e-mails from the impending trial of this action and directing that the issue of the e-mails be determined and if necessary tried separately

(3) in the alternative, granting Plaintiffs’ counsel leave to withdraw from representing Plaintiff Gentry T. Beach on the ground that a conflict has arisen between his interests and those of Plaintiff Robert A. Vollero, and staying the trial as to Plaintiff Gentry T. Beach to allow him time to retain separate counsel in this action

(4) in the alternative, staying the trial of this action pending appeal.¹

¹ This is plaintiffs’ fourth application to stay the trial since December 16, 2023 when the court denied plaintiffs’ request to stay the trial unless the court would allow consolidation of the 2019 fraudulent conveyance case with this 2008 case.

For the reasons stated on the record on February 1, 2023, plaintiffs' motion is granted to the extent that the NSFW emails may not form the basis of a breach of fiduciary duty. The motion is otherwise denied. This part of the decision is supplemented by the court's January 29, 2023, decision. (NYSCEF 1256, Jan. 29, 2023 J. Richard Supple aff; 1275, Jan. 31, 2023, J. Richard Supple Supplemental aff.)

The court now expands on its reasons for denying motion 056, plaintiffs' counsel's request for leave to withdraw from representing Beach on the ground that a conflict has arisen between his interests and those of Vollero.

Rule 1.7(a)(1) of New York's Rules of Professional Conduct (hereafter, "NY Rules") provides: "a lawyer shall not represent a client if a reasonable lawyer would conclude that the representation will involve the lawyer in representing differing interests." Rule 1.16(b) of the NY Rules provides that "a lawyer shall withdraw from the representation of a client when . . . the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law."

"[D]iffering interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests ...") (*Baker v Comprehensive Mental Assessment and Medical Care P.C.*, 2012 WL 1681365, 2012 N.Y. Slip Op. 31228(U), *6 (Sup. Ct. Nassau Cty. 2012).) In *Baker*, "the crux of the adversarial interests concern Minkin's purported authority to approve settlements on behalf of the [other defendant] Medical Providers." (*Id.*) The court

found an “inherent conflict between Minkin's desire to minimize his indemnity obligations and the Medical Providers' desire to maximize their recovery and, as such, disqualification is warranted under the circumstances.” (*Id.*)

In support of this branch of their motion, plaintiffs rely on J. Richard Supple, Jr., professional responsibility counsel to plaintiffs' counsel who opines that the NSFW emails create a conflict for plaintiffs' counsel because “Counsel may be ethically obliged to explain, rebut or contextualize the emails to protect and promote Mr. Beach's interests even though Counsel's co-client Mr. Vollero might prefer a very different strategy that distances him from the emails and distinguishes him from Mr. Beach in terms of his own personal character, and he could even tell the jury that had he known about the emails, he would not have associated himself in litigation with Mr. Beach.” (NYSCEF 1275, Supple Supplemental Aff ¶ 4.) Thus, Supple asserts, that even though “plaintiffs' litigation interests remain generally aligned,” “Vollero might reasonably argue that, even if Mr. Beach's emails establish misconduct, he should not suffer in terms of his own claims merely because of his association with Mr. Beach” while Beach will not want counsel to admit the NSFW emails “constitute a form of ‘misconduct.’” (*Id.* ¶ 6.) Counsel opines that the jury “might not be reasonably able to disassociate Mr. Vollero from the Beach Emails, even with a limiting instruction.” (NYSCEF 1256, Supple aff ¶ 6.) Plaintiffs' counsel argue that this conflict has counsel presenting divergent litigation strategies at the expense of one of their clients.

The court sees no conflict here. It is in the best interest of both parties to downplay the NSFW emails. Vollero has the added advantage that he can also distance himself from the emails since he is not on any of them. There is certainly not

the inherent conflict seen in *Baker* or any of the criminal cases² cited by plaintiff. Nor are plaintiffs' interests "discordant" as they were in *O'Reilly*, an employment discrimination case, where the lawyer sought to terminate its representation of an employee in favor of the employer where the employee may have engaged in misconduct about which the employer had no notice. (*O'Reilly v Executone of Albany, Inc.*, 135 AD2d 999, 1000 (3d Dep't 1987].)

Since 2008, plaintiffs have been represented by the same counsel. "Joint representation of multiple parties to a litigation or concurrent representation of multiple parties involved in the same investigation often involves a conflict of interest because there is a significant risk that the clients will differ as to, for example, litigation strategy or cooperation and resolution." (N.Y. City Eth. Op. 2017-7 n.3 [2019].) During these past 15 years, plaintiffs have surely had their differences. Likewise, there is unfavorable evidence about both plaintiffs. While the NSFW emails are certainly more inflammatory than any other evidence, they are no different than unfavorable evidence about one or the other plaintiffs. (See, e.g., *Beach v Touradji Capital Mgt., LP*, 179 AD3d 474 (1st Dep't 2020) ("The court's order precluding appellants from . . . making any reference during trial to Vollero's alleged destruction of evidence, warrants reversal and a new trial").

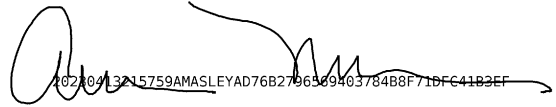
² Plaintiffs' reliance on *Bruton v United States* for the proposition that a limiting instruction will be ineffectual, is misplaced. (391 US 123, 126 [1968] ["because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment."] *Burton* was a criminal case where one co-defendant confessed ensuring conviction of both defendants in violation of the non-confessing defendant's constitutional rights.

Plaintiffs' argument is further undermined by taking quotes out of context: "See *Donnelly v DeChristoforo*, 416 U.S. 637, 644 (1974) ("some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect")." (NYSCEF 1275, Supple Supplemental aff ¶10.) In *Donnelly*, the US Supreme Court upheld the conviction where a co-defendant had to the jury's knowledge pled guilty. (*Donnelly v DeChristoforo*, 416 US 637 [1974].) "[T]he trial court took special pains to correct any impression that the jury could consider the prosecutor's statements as evidence in the case. The prosecutor, as is customary, had previously told the jury that his argument was not evidence, and the trial judge specifically re-emphasized that point. Then the judge directed the jury's attention to the remark particularly challenged here, declared it to be unsupported, and admonished the jury to ignore it. Although **some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect**, the comment in this case is hardly of such character."

Guided by the U.S. Supreme Court, the court offered to give a limiting instruction. (NYSCEF 1253, Decision [mot. seq. no. 053] at 9.) The court rejects plaintiffs' position that "the risk that Mr. Vollero will be personally tainted by emails he never sent or received is substantial and may not be remediated by a limiting instruction." (NYSCEF 1275, Supple Supplemental aff ¶11.) In terms of Vollero distancing himself from the NSFW emails, the court's limiting instruction will do just that.

Finally, the court finds Professor's Simon's conclusion most compelling: "[T]he ethics rules are meant to serve as a shield to protect clients from unethical attorneys, not as a sword to be wielded by clients to delay a trial that has already begun. If the Court grants Plaintiffs' late-breaking request in this case, it will risk inviting the same

gamesmanship in many future joint representations, since few joint clients will see eye to eye on every piece of evidence, every witness, every legal theory, and every strategy in a complex trial.” (NYSCEF 1267, Prof Roy D. Simon Feb. 1, 2023 Proffer at 2.)



4/13/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE