SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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INDEX NO. 160490/2021

NICOLAS GOUREAU, STEPHANIE MENKIN, GOOBERRY CORPORATION,

MOTION DATE N/A, N/A

Plaintiff,

MOTION SEQ. NO. 012 013

- v -

NBCUNIVERSAL MEDIA LLC,A DELAWARE LIMITED LIABILITY COMPANY, MACHETE CORPORATION, A CALIFORNIA CORPORATION, MARCUS LEMONIS, ML RETAIL, LLC,A DELAWARE LIMITED LIABILITY COMPANY, MARCUS LEMONIS, LLC,A DELAWARE LIMITED LIABILITY COMPANY, ROBERTA RAFFEL, MLG RETAIL, LLC A DELAWARE LIMITED LIABILITY COMPANY, ML FASHION, LLC,A DELAWARE LIMITED LIABILITY COMPANY,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 012) 200, 201, 211, 212 were read on this motion to/for ATTORNEY - FEES.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 202, 203, 204, 205, 206, 207, 208, 210, 213 were read on this motion to/for SANCTIONS.

Upon the foregoing documents, it is

This is one of at least seven lawsuits from all over the country arising out of the parties' business dealings in the fashion industry and also related to a reality television series named "The Profit." This case serves as a cautionary tale of what can happen when parties over-litigate.

On February 7, 2023, this court dismissed nearly the entirety of plaintiff's 160-page complaint with the exception of the 23rd cause of action for dissolution of Gooberry Corporation. That decision included dismissal of plaintiff's claims for defamation on the merits.

In motion seq. 12, all defendants move for costs and attorneys' fees under New York's Anti Slapp statute, N.Y. Civil Rights Law § 70-a. This statute allows for attorneys' fees for the successful defense of a defamation claim when that claim was without a substantial basis in law or in fact and concerns a matter of public interest. The statute takes broad aim at "public

interest" defining it as "any subject other than a purely private matter." (Id. § 1[d]). For example, the recent case of *215 W. 84th St Owner LLC v Bailey* (2023 WL 3957363 [1st Dept June 13, 2023]), involved "public petition and participation" (*id.* at *1). This was because the defendants' statements about "a landlord/tenant dispute between a large real estate developer and a sole holdout tenant" were an issue of public interest, rather than a purely private matter. In *Lindberg v Dow Jones & Co.*, 2021 Wl 3605621 at *8 (SDNY August 11, 2021), the court discussed that, under New York law, matters of "public concern" encompass "reports of improper business practices."

Here, Plaintiffs' claims involve the practices of a public-facing business on a nationally televised reality show. Therefore, the case involves matters "of public interest" (*see also Mirza v Amar*, 513 F Supp 3d 292, 300 [E.D.N.Y. 2021] ["New York interprets matters of public concern very broadly. Defendant's reviews of plaintiffs' public business qualify as commenting on a matter of legitimate public concern and render plaintiffs limited purpose public figures."]).

Moreover, the action was "without a substantial basis in fact and law," as the court's dismissal of the complaint for failure to state a claim demonstrates (*see* NYSCEF Doc 186 at 20). Accordingly, the court grants the motion of all defendants for an Order awarding Defendants' their attorneys' fees and costs pursuant to N.Y. Civil Rights Law § 70-a, limited to those reasonable attorney's fees and costs expended defending against the defamation claims only.

The court also grants motion 13 for sanctions. On June 18, 2020, plaintiffs commenced an action against defendants both in Delaware (*Goureau v Lemonis*, et al., C.A. No. 2020-0486-MTZ [Del. Ch.]) and in federal district court for the Southern District of New York (SDNY) (*Goureau v Lemonis, et al.*, Case No. 1:20-cv-04691-MKV]). In the Delaware action, plaintiffs asserted both individual and derivative claims on behalf of ML Fashion itself, while in the SDNY case, they asserted both individual and derivative claims on behalf of the corporation both sides had owned before appearing on The Profit. The Delaware court stayed that action in favor of the action in SDNY finding that plaintiffs had violated the rule against claim splitting (*see* 2022 WL 1197531 at *8 [March 30, 2021]).

The case then proceeded in SDNY. On September 2, 2021, the SDNY court dismissed several of Plaintiffs' claims on the merits pursuant to Federal Rule of Civil Procedure 12(b)(6) and declined to exercise supplemental jurisdiction over others (NYSCEF Doc. No. 84). On

October 15, 2021, upon a motion for reconsideration that PLAINTIFFS filed, the SDNY court determined that it actually did have jurisdiction over the state-law claims. It then dismissed those remaining claims pursuant to Rule 12(b)(6), with the exception of Plaintiffs' claim for corporate dissolution of Gooberry (NYSCEF Doc. No. 85). The court gave Plaintiffs until November 19, 2021 to file a motion for leave to amend (*id.*).

Rather than seek leave to amend, on the day before their November 19, 2021 deadline, Plaintiffs attempted to dismiss their claims in the SDNY voluntarily. They also simultaneously commenced this action. Plaintiff's attempt at voluntary dismissal in SDNY was too little, too late as the court had already dismissed the claims with prejudice and plaintiffs never took advantage of the SDNY's court's invitation to move to amend. Accordingly, on November 22, 2021, the SDNY court entered an order and judgment closing the case (NYSCEF Doc. Nos. 86, 87).

Plaintiffs then filed a motion asking the SDNY court to either: (1) state its dismissal was without prejudice; or (2) amend the judgment to render it without prejudice (NYSCEF Doc. No. 89). Plaintiffs expressly stated that they made the motion in order to "re-assert the claims in New York state court" (*id.* at 11). Thus, plaintiffs recognized that they could not proceed in state court without the SDNY court changing its dismissal to be without prejudice.

SDNY declined. On December 14, 2021, the SDNY court denied Plaintiffs' motion (NYSCEF Doc. No. 90). **The SDNY confirmed that "the operative complaint was dismissed with prejudice and on the merits**" (NYSCEF Doc 90 at 2). The SDNY Court specifically stated:

> "The Court now affirms that, with the exception of Count 13 in the Amended Complaint seeking dissolution of the Nominal Defendant Gooberry Corporation (with respect to which the Court abstained), the claims asserted by Plaintiffs in the Amended Complaint were dismissed with prejudice. The Court denies Plaintiffs' request to alter the judgment under Federal Rule of Civil Procedure 59(e) or 60(b)"

(*id.* at 5).

The SDNY also rejected Plaintiffs' attempt to dismiss their claims voluntarily and then proceed in this Court:

> "Plaintiffs essentially ask that, despite ignoring a Court-imposed deadline to seek leave to amend, they be allowed to voluntary dismiss their claims after adjudication on the merits of their operative complaint. Allowing such

> maneuvering would be a manifest waste of judicial resources and would permit prospective plaintiffs to dismiss with impunity a fully litigated complaint when they do not like the result. Such a result would be untenable and contrary to notions of fair play and judicial economy"

(*id.* at 4).

Plaintiffs have known all along that their claims in this action arise from the same facts and circumstances as the action dismissed, on the merits and with prejudice, in SDNY. Yet, they still brought their blunderbuss 160-page complaint containing 23 causes of action. This court ultimately found on February 7, 2023 that Plaintiffs' claims, other than one claim for corporate dissolution, were indeed barred by res judicata.

What is most egregious (and sanctionable) is that plaintiffs **knew** they should not have proceeded on any claim except for the Gooseberry dissolution claim, but did so anyway. The proof is in the record before the various courts in which plaintiffs have continued to drag out these claims. First, as stated earlier, the motion to the SDNY court to change its decision to be without prejudice indicates that plaintiffs were well aware the claims were dismissed with prejudice. At no point after receiving the December 14, 2021 SDNY decision confirming the prior dismissal with prejudice, did Plaintiffs withdraw this action. Instead, they forged ahead.

In addition, on April 26, 2022, Plaintiffs filed their opening brief in the Second Circuit in support of their appeal of the SDNY's dismissal. **In that brief, Plaintiffs repeatedly admitted that the SDNY's decision was "with prejudice" and "on the merits" (***see Goureau v Lemonis*, Case No. 22- 62, Docket No. 72 at 7-8 [2d Cir. April 26, 2022] ["(T)he District Court held that since Appellants had not amended the complaint by November 19, 2021, the September 2, 2021 and October 15, 2021, rulings became the judgment of the District Court, dismissing the case on the merits with the exception of the corporate dissolution claim."]); *see also id.* at 51 [expressly stating that the SDNY "DISMISS[ED] THE CLAIMS WITH PREJUDICE"]). Thus, plaintiffs were well aware the same claims they asserted here were already dismissed by the SDNY court on the merits. They proceeded anyway.

To make matters worse, despite their arguments to the Second Circuit, plaintiffs insisted the opposite to this court, i.e., that the dismissal was NOT with prejudice. Plaintiffs' counsel repeatedly represented to the Court at the hearing that the same decision was not on the merits (*see* NYSCEF Doc 184 at 20:4-6 ["Your Honor, as I addressed just now we do not believe the dismissal under -- no law was actually on (the) merits."]). Also, in their briefing, plaintiffs

misleadingly suggested that the SDNY dismissal was not final and on the merits, but dismissed for a mere pleading defect (*see* NYSCEF Doc 131 at 4-5), hiding that they did not move to amend as the SDNY court had required which resulted in the merits dismissal with prejudice remaining in place (NYSCEF Doc 146 at 3-4).

Incredibly, in opposition to this very motion for sanctions, plaintiffs fail to acknowledge that they spoke out of both sides of their mouths, and double down that the decision in SDNY was not on the merits. To proceed knowingly with barred claims is sanctionable and Plaintiffs' repetition of their bogus legal arguments from their response to the motion to dismiss underscores the need for sanctions.

Moreover, plaintiffs were on notice that sanctions could ensue for this sort of gamesmanship. Notably, many of the defendants here were sanctioned in federal court in Connecticut, on yet another related case, for almost the same conduct (*see ML Fashion, LLC, & ML Retail, LLC, Plaintiffs, v Nobelle GW, LLC, Stephanie Menkin, Sarit Maman Nagrani, & Nicolas Goureau,* No. 3:21-CV-00499 (JCH), 2022 WL 313965, at *10 [D. Conn. Feb. 2, 2022] ["Plaintiffs here (defendants in this action) have no such "sound basis" for initially filing this action in Illinois. Indeed, plaintiffs' decision to file in the Northern District of Illinois – and then to split part of that action off into Cook County state court, before filing it again in New York after it was dismissed, . . . – has played a large part in causing the 'litigation between the parties [to] metastasize[ ] and spread across the country.' "]).

Accordingly, for the foregoing reasons, the court sanctions plaintiffs who can pay, in addition to the costs and attorneys' fees for defending the defamation claims, that portion of reasonable legal costs and attorneys' fees that went to defend the claims that the SDNY court already decided and dismissed with prejudice.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that the court grants motion 12 for those REASONABLE attorneys' fees and costs related to defending the defamation claims only under N.Y. Civil Rights Law § 70-a; and it is further

ORDERED that the court grants motion 13 and plaintiffs must reimburse defendants for their reasonable costs and attorneys' fees related to defending against claims the SDNY already decided (other than defamation to the extent SDNY dismissed those claims); and it is further

ORDERED that the court will hold the inquest on attorney fees on papers only, pursuant to Part Rule 9. Initial submission by August 31, 2023; opposition by October 8, 2023. Please email the court at SFC-Part60@nycourts.gov once fully submitted.

7/18/2023
DATE

MELISSA A. CRANE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE