

Paramount Mgt. Group, LLC v Tareb

2023 NY Slip Op 33418(U)

September 28, 2023

Supreme Court, New York County

Docket Number: Index No. 653218/2021

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART 42

Justice

PARAMOUNT MANAGEMENT GROUP, LLC, Plaintiff, - v - FARWAZ TAREB and WAFAZ CORP., Defendants. INDEX NO. 653218/2021 MOTION DATE 05/30/2023 MOTION SEQ. NO. 005 006 007 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 149, 150, 151, 173, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 208, 209, 210, 220, 221, 222, 223, 224, 238, 239, 241, 242

were read on this motion to/for AMEND CAPTION/PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 006) 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174, 176, 177, 178, 179, 180, 183, 184, 185, 186, 187, 188, 189

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS

The following e-filed documents, listed by NYSCEF document number (Motion 007) 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 175, 200, 201, 202, 203, 204, 205, 206, 225, 226, 227, 228, 229, 230, 231

were read on this motion to/for EXTEND - TIME

The following e-filed documents, listed by NYSCEF document number (Motion 008) 211, 212, 213, 214, 215, 216, 217, 218, 219, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS

I. INTRODUCTION

This is a breach of contract action to recover monies allegedly due under an asset purchase agreement executed by the plaintiff, Paramount Management Group, LLC, a provider of automated teller machine products and services (ATMs), and the defendants, Wafaz Corp., a provider of ATM machines, and Fawaz Tareb, its principal. The plaintiff purchased from

defendant Wafaz Corp. the right to process ATM transactions at approximately 41 merchant locations, mostly small delis and grocery stores throughout New York City. The action was commenced on May 17, 2021, by a complaint alleging causes of action for breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, tortious interference with a business relationship, common law fraud and fraud in the inducement. The defendants answered on July 23, 2021. Four discovery motions remain and are decided herein.

Notably, there is a prior action pending in this court, commenced by the plaintiff on July 21, 2020, against defendant Fawaz Tareb, as well as Fifth Avenue Gourmet Deli, Morshad Nagi, Alhassan Nagi, a/k/a Ali Nagi, Aziz Tareb, ATM Access, Inc. and ATM Access Group, Inc. (*Paramount Management Group, LLC v Fifth Avenue Gourmet Deli et al*, Index No. 653240/2020). In that action, which arises from an alleged breach of a similar contract between the plaintiff and the Nagi defendants, the complaint also asserts causes of action against Fawaz Tareb, Aziz Tareb, ATM Access, Inc. and ATM Access Group, Inc. for tortious interference and unjust enrichment. A Note of Issue was filed in that action on June 8, 2023. In that action, the court (Bluth, J.) denied two motions by the defendants to quash subpoenas that are also the subject of two motions to quash in this case (MOT SEQ 006, 008) addressed below. No motion to consolidate the two actions or motion to dismiss on the ground of prior action pending was made.

II. BACKGROUND

In the instant action, discovery was commenced in July 2021 and continued through May 5, 2023, the final Note of Issue filing deadline set per the status conference order dated February 2, 2023. The preliminary conference order had set to the Note of Issue date as September 23, 2022. In a compliance conference order dated August 11, 2022, the court ordered that the defendants were to supplement their discovery responses or submit a Jackson affidavit on or before September 9, 2022, and all depositions, of parties and non-parties, were to be conducted on or before January 30, 2023, the final Note of Issue date.

By an order dated November 28, 2022, the court granted two motions by the plaintiff to compel compliance with subpoenas duces tecum served upon two non-parties, ATM Access, Inc. and Switch Commerce (Payments) Ltd., competing business to whom the defendants are alleged to have diverted business in violation of the agreement with the plaintiff (MOT SEQ 001,

002). Those subpoenas sought documents relating to the ATM processing fees generated for a particular time period at each of the merchant locations identified in the complaint.

By a status conference order dated December 1, 2022, the court, *inter alia*, extended the Note of Issue deadline to February 28, 2023, to allow for post-deposition discovery and allow time for compliance with the two non-party subpoenas. The Note of Issue date was marked "Final 2X".

By an order dated December 12, 2022, the court denied the plaintiff's motion to compel the defendants' compliance with the August 11, 2022, discovery order, and denied the defendant's cross-motion for sanctions, while cautioning the plaintiff against unnecessary discovery motions (MOT SEQ 003). Despite that caution, the plaintiff again moved, on the eve of a discovery conference, to compel discovery on February 21, 2023, seeking tax records and bank records, which it later withdrew (MOT SEQ 004).

By a status conference order dated February 23, 2023, the court extended the Note of Issue date a final time to May 5, 2023, and marked the date "Final 3X, No extension absent motion practice." In that order, the court directed that all outstanding non-party depositions be conducted by May 5, 2023, and again cautioned the plaintiff's counsel against filing discovery motions on the eve of a discovery conference and in violation of the Part 42 rules and prior orders of the court, at the risk of sanctions under 22 NYCRR 130.1-1(a).

In MOT SEQ 005, filed on March 30, 2023, the plaintiff seeks leave to serve an amended complaint to add parties, causes of action, and allegations. The plaintiff claims that recent discovery revealed that defendant Tareb's wife, Amal A. El Tareb, and brother, Aziz Tareb, engaged in business transactions as part of a scheme to divert revenue in contravention of defendant Wafaz Corp.'s contractual obligations to the plaintiff. The plaintiff seeks to add Amal A. El Tareb, EL Tareb Enterprises, Inc., and ATM Access, Inc. to the amended causes of action for unjust enrichment, alter ego liability and tortious interference with business relationship. The defendants oppose that motion, alleging, *inter alia*, that the amendments are meritless and noting the prior action pending.

In MOT SEQ 006, filed on April 3, 2023, the defendants move pursuant to CPLR 2304 and 3103(a) to quash non-parties subpoenas served upon Amal A. El Tareb and EL Tareb Enterprises, Inc., on or about March 15, 2023. The plaintiff opposes that motion.

In MOT SEQ 007, file on April 7, 2023, the plaintiff moves pursuant to CPLR 2004 and 22 NYCRR 202.21(d) to extend all discovery deadlines and the Note of Issue filing deadline. The defendants oppose that motion.

In MOT SEQ 008, filed on May 12, 2023, the defendants move pursuant to CPLR 2304 and 3103(a) to quash non-parties subpoenas served upon Chase Bank and Ponce Bank on or about April 21, 2023, seeking bank records of defendant Wafaz Corp. and non-party EL Tareb Enterprises, Inc. After the motion was submitted, Chase Bank complied, per plaintiff's counsel, thus rendering that portion of the motion moot. The plaintiff opposes the motion as it concerns the subpoena served on Ponce Bank, alleged to hold an account belonging to defendant Wafaz Corp. to which funds were purportedly diverted.

III. DISCUSSION

MOT SEQ 005

The plaintiff correctly cites the long established rule that leave to amend is to be freely given absent prejudice or surprise resulting directly from the delay and where the evidence submitted in support of the motion indicates that the amendment may have merit. See CPLR 3025(b); McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp., 59 NY2d 755 (1983) JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013).; 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552 (1st Dept. 2011). Thus, a court must examine the merit of the proposed amendment in order to conserve judicial resources.” 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552, 553 (1st Dept. 2011). The burden is on the party opposing the motion to establish substantial prejudice or surprise if leave to amend is granted. See Forty Cent. Park S., Inc. v Anza, 130 AD3d 491 (1st Dept. 2015).

Here, the court finds no basis to grant the motion and clear prejudice should it be granted. The amendments are sought at the end of the years long discovery process conducted in this and the related action under Index No, 653240/2020, demonstrating that the plaintiff had knowledge of these additional parties for years prior. Furthermore, this action is one for breach

of a contract between the plaintiff and defendant Wafaz, Inc. There are no other parties to that contract, although the plaintiff seeks to hold the principal of the corporation liable upon a theory of fraud. The additional parties and nature of allegations asserted against them in the proposed amended complaint may be relevant in a post-judgment proceeding, should the plaintiff prevail, be awarded a judgment and seek to enforce it pursuant to the post-judgment remedies provided in CPLR article 52. In that regard, CPLR 5223 provides that “[a]t any time before a judgment is satisfied or vacated, the judgment creditor may compel the disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena.” That is, “[a] judgment debtor is entitled to discovery from either the judgment debtor or a third party in order ‘to determine whether the judgment debtor[] concealed any assets or transferred any assets so as to defraud the judgment creditor or improperly prevented the collection of the underlying judgment’ [Young v Torelli, 135 AD2d 813, 815 (1987)].” Technology Multi Sources, S.A. v Stack Global Holdings, Inc., 44 AD3d 931 (2nd Dept 2007).

MOT SEQ 006

A motion to quash a subpoena may should be granted when the futility of uncovering anything legitimate is obvious or the information sought is “utterly irrelevant to any proper inquiry.” Kapon v Koch, 23 NY3d at 32 (2014). A subpoena may be challenged if it encompasses materials that are privileged or “clearly irrelevant” or palpably overbroad and in need of pruning. Grotallio v Soft Drink Leasing Corp., 97 AD2d at 383 (1st Dept. 1983). Nor may a subpoena be used as a tool of harassment or for a proverbial “fishing expedition to ascertain the existence of evidence.” Reuters Ltd. v Dow Jones Telerate, Inc., 231 AD2d 337, 342 (1st Dept. 1997); see Law Firm of Ravi Batra, P.C. v Rabinowich, 77 AD3d 532 (1st Dept. 2010). Moreover, “[w]here disclosure is sought against a nonparty, more stringent requirements are imposed on the party seeking disclosure.” Velez v Hunts Point Multi-Serv. Ctr., Inc. 29 AD3d 104, 108 (1st Dept. 2006). Here, the subpoenas served upon non-parties Amal A. El Tareb, the wife of defendant Farwaz Tareb and EL Tareb Enterprises, Inc., her company, on or about March 15, 2023, are quashed as they are not parties to the contract, not parties to this action and the plaintiff’s motion to amend the complaint to add them as parties has been denied. As stated previously, the nature of the proposed claims against them are more appropriately addressed in a post-judgment proceeding under CPLR article 52, should the plaintiff prevail in this action. Furthermore, in the related action under Index No. 653240/2020, the court (Bluth, J.), by an order dated May 1, 2023, granted the same motion by defendants in that case to quash the same subpoenas. Notably, the plaintiff’s opposition is dated May 3, 2023, two days

after that decision was rendered. That plaintiff moved for the same relief in two actions to begin with, and then failed to withdraw the remaining motion when one was decided, subjects the plaintiff to sanctions for frivolous conduct under 22 NYCRR 130-1.1. While the defendants seek attorney's fees as sanctions in reply to MOT SEQ 008, the court would entertain such relief upon separate motion of the defendants on MOT SEQ 006 and 008, if they are so advised.

MOT SEQ 007

The plaintiff motion pursuant to CPLR 2004 and 22 NYCRR 202.21(d) to extend all discovery deadlines and the Note of Issue filing deadline is granted only to the extent that the Note of Issue deadline is extended to October 15, 2023, and otherwise denied. In considering a motion seeking to extend the time to file a Note of Issue, the court "may properly consider factors such as the length of the delay, whether the opposing party has been prejudiced by the delay, the reason given for the delay [and] whether the moving party was in default before seeking the extension." Grant v City of New York, 17 AD3d 215, 217 (1st Dept. 2005) *quoting* Tewari v Tsoutsouras, 75 NY2d 1,12 (1989). Considering these factors, the plaintiff's motion is denied upon its failure to establish entitlement to that relief. The arguments raised by the plaintiff in the motion papers were considered and addressed at the various discovery conferences. Moreover, any additional discovery now sought by the plaintiff is precluded upon the filing of a Note of Issue absent unusual or unanticipated circumstances, not shown here. See 22 NYCRR 202.21(d). Indeed, in light of this court's prior orders and rulings herein on other motions, no other discovery is directed or permissible. Should the plaintiff fail to file a Note of Issue by October 15, 2023, it will not get on any trial calendar.

MOT SEQ 008

The defendants' motion pursuant to CPLR 2304 and 3103(a) to quash non-party subpoenas served upon Chase Bank and Ponce Bank on or about April 21, 2023, is granted as to the subpoena served on Ponce Bank. As noted, as Chase Bank responded to the subpoenas, that portion of the motion is denied as moot. The plaintiff has not shown that any documents sought from Ponce Bank are material and relevant to this prosecution of this action and the defendants have met their burden on that portion of the subpoena. Indeed, as with MOT SEQ 006, in the related action under Index No. 653240/2020, the court (Bluth, J.), by an order dated June 5, 2023, granted the same motion by defendants in that case to quash the same subpoenas. As discussed herein, the plaintiff is subject to sanctions for this frivolous conduct pursuant to under 22 NYCRR 130-1.1.

IV. CONCLUSION

Accordingly, upon the foregoing documents, it is

ORDERED that the plaintiff’s motion pursuant to CPLR 3025(b) for leave to serve an amended complaint (MOT SEQ 005), is denied, and it is further

ORDERED that the defendants’ motion pursuant to CPLR 2304 and 3103(a) to quash non-party subpoenas served upon Amal A. El Tareb and EL Tareb Enterprises, Inc., on or about March 15, 2023 (MOT SEQ 006), is granted, the subpoenas are quashed and the subpoenaed parties need not respond to the subpoenas, and it is further

ORDERED that the plaintiff’s motion pursuant to CPLR 2004 and 22 NYCRR 202.21(d) to extend all discovery deadlines and the Note of Issue filing deadline (MOT SEQ 007) is granted to the extent that the Note of Issue filing deadline is extended to October 15, 2023, and the motion is otherwise denied, and it is further

ORDERED that the defendants’ motion pursuant to CPLR 2304 and 3103(a) to quash non-party subpoenas served upon Chase Bank and Ponce Bank on or about April 21, 2023, (MOT SEQ 008) is granted to the extent it concerns Ponce Bank, and otherwise denied as moot, and the subpoenaed parties need not respond to the subpoenas.

This constitutes the Decision and Order of the court.

Nancy M. Brown
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9/28/23
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<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"/>	DENIED	<input checked="" type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE