

Lawizekry v Zekry

2012 NY Slip Op 31809(U)

July 6, 2012

Supreme Court, New York County

Docket Number: 102550/08

Judge: Deborah A. Kaplan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAPLAN
HON. DEBORAH A. KAPLAN *Justice*

PART 20

ZEKRY, NICOLE (LAW)

INDEX NO. 102550/08

MOTION DATE _____

MOTION SEQ. NO. 28

MOTION CAL. NO. _____

- v -
PINHAS ZEKRY, ET AL.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION(S) AND CROSS-MOTION(S) DECIDED
IN ACCORDANCE WITH THE ANNEXED
DECISION/ORDER OF EVEN DATE.

FILED
JUL 11 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/6/12

Deborah A. Kaplan
HON. DEBORAH A. KAPLAN *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

At the Matrimonial Term, Part 20, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, New York, on the 6th day of July, 2012

PRESENT: HON. DEBORAH A. KAPLAN

-----X
NICOLE LAWI ZEKRY

Plaintiff,

-against-

Decision and Order
Motion Seq.: 028--030
Index No. 102550/2008

PINHAS ZEKRY and
DAVID BEN BAROUCK, CORP.,

Defendants.

-----X

DEBORAH A. KAPLAN, J.:

FILED

JUL 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence nos. 028, 029 and 030 are consolidated for disposition. In

motion sequence no. 028, plaintiff Nicole Lawi Zekry (Lawi) moves for an order, inter alia, precluding defendant Pinhas Zekry (Zekry) from testifying at trial in this matter, or alternately requiring him to appear for a deposition in advance of the trial in this matter, and precluding him from testifying at trial concerning any other matters in this case that were not contained in his errata sheet dated July 6, 2011 (the Errata Sheet). In motion sequence no. 029, Lawi moves, pursuant to CPLR 2221(d), for leave to reargue that branch of this court's decision and order dated January 10, 2012 (the January 2012 Order), which denied her application for partial summary judgment on her second, third and fourth causes of action for breach of contract, breach of fiduciary duty and conversion, respectively. Defendants Zekry and R. David Ben Barouck, Corp. (Barouck Corp.) cross-move, pursuant to CPLR 3212 (a), for leave to move for summary

judgment dismissing the complaint after the filing of the note of issue, for good cause shown. In Motion Sequence No. 30, Lawi moves for an order compelling Zekry to take all necessary steps to reinstate Eliaho Corporation, R. David B.B. Corp. and Meme Rachel Corp. as corporations (the Salon Corporations), or alternatively, provide suitable substitute security; and, pursuant to 22 NYCRR 130.1. awarding her costs and attorneys' fees.

The background of this acrimonious divorce proceeding has been set forth in this court's prior decisions in this action, and will not be repeated here, except as necessary to address the issues in the instant motion.

The parties executed an agreement on April 20, 2004, wherein they created a partnership for the purpose of operating a hair salon, spa and cosmetology business at 428 Columbus Avenue, New York, NY (the Shareholders Agreement), under Barouck Corp. Pursuant to the Shareholders Agreement, the shares, and the net profits and losses were to be divided 40% to Lawi and 60% to Zekry.

In February 2008, Lawi commenced this action against Barouck Corp. and Zekry, as its President, Treasurer and 60% shareholder, asserting the following causes of action: reformation of the Shareholder Agreement (first); breach of contract (second); breach of Zekry's fiduciary duties (third); conversion (fourth); and fraud in the inducement (fifth). Lawi essentially alleges that she did not receive her proper share of the corporation's profits as a result of Zekry's manipulation of the corporation's books and records, diversion of cash and other assets of the corporation, and false claims of grossly inflated expenses incurred by the corporation.

This court shall first address Lawi's motion for leave to reargue that portion of the January 2012 Order, which denied her motion for partial summary judgment as to liability on her

second, third and fourth causes of action, by finding there were triable issues of fact (motion seq. no. 29).

A motion for leave to reargue, pursuant to CPLR 2221, is addressed to the sound discretion of the court, and may be granted only upon a showing that the court overlooked or misapprehended any relevant facts or misapplied any controlling principles of law in its earlier decision (CPLR 2221 [d] [2]; *Beverage Mktg USA, Inc. v South Beach Beverage Co., Inc.*, 58 AD3d 657 [2d Dept 2009]; *see also Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

“Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted” (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept], *lv dismissed in part, denied in part*, 80 NY2d 1005 [1992]) (citations omitted).

In support of her application, Lawi claims that this court improperly relied upon statements made by Zekry in his opposing papers to find triable issues of fact. Contrary to Lawi’s argument, this court found that her own deposition and exhibits raised questions of fact relating to her claims, and she, thus, failed to make a prima facie showing of entitlement to summary judgment. While this court, in its decision, set forth Zekry’s opposing arguments, and noted his submission of certain documentation for the purpose of denying summary judgement, it also stated that consideration of his opposing papers was not necessary in light of the absence of a prima facie showing of entitlement to summary judgment by Lawi. Thus, Lawi fails to show that the court overlooked or misapprehended any relevant facts or misapplied any controlling principles of law (CPLR 2221(d)(2); *Foley v Roche*, 68 AD2d 558, *supra*). Her motion for leave to reargue the January 2012 Order is, therefore, denied in its entirety.

Zekry cross-moves for leave to move, pursuant to CPLR 3212 (a), for summary judgment in his favor. He acknowledges that the note of issue was filed in June 2011, and that his application, filed more than 120 days thereafter, is untimely. He, however, seeks that this court excuse his untimeliness for good cause shown. He claims that his application is based upon findings in the report issued on February 15, 2012 (the Report), by Robert Brill (Brill), the receiver appointed by the court regarding Barouck Corp. Zekry argues that he could not have filed his application earlier, because the Report was issued more than nine months after the filing of the note of issue. He uses the reported findings of Barouck Corp.'s revenues and expenses, which were generated when Brill controlled the business from June 2008 to December 2008, to calculate an income to expense ratio, which he determines to be 74% of the gross annual income. He applies this ratio to the annual income and expenses found by Lawi's expert, Anthony P. Valenti, for the period prior to June 2008¹, when Zekry controlled the business, concluding that it would result in a negative income. He maintains that this calculation establishes the business did not generate any surplus funds that could be stolen. He, therefore, argues that Lawi's allegation that he stole money from the business, which is the basis of her claims against defendants, could not be supported, and the complaint against defendants should be dismissed.

Lawi opposes Zekry's application, arguing that his motion for summary judgment is untimely, and that he fails to make the required showing of good cause. She contends that, if the court accepts Zekry's proffered excuse, he does not establish a prima facie entitlement to summary judgment as a matter of law because (1) the documentary evidence he submits is barred

¹Without conceding the determination of annual gross income of \$841,856 for 2003 opined by Valenti, Zekry uses this amount in his calculation.

by an order of preclusion; (2) he cannot offer testimony on issues in which he has invoked his Fifth Amendment privilege against self-incrimination; and (3) Zekry erroneously analyzes the Report's findings.

CPLR 3212 (a) requires that a summary judgment motion "be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Good cause requires the moving party to show "a satisfactory explanation for the untimeliness" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]).

Here, Zekry's cross motion for summary judgment was filed on March 19, 2012, more than nine months after the filing of the note of issue on June 1, 2011, and more than five months after the expiration of the 120-day deadline. Since Zekry's motion for summary judgment primarily relies on findings in the Report issued more than eight months after the filing of the note of issue, his argument that he could not have made the application earlier is a satisfactory excuse for his lateness. Thus, this court shall consider his motion.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once a prima facie showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists, warranting a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The drastic remedy of summary judgment should be granted only if there are no triable issues of fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]).

Here, Zekry fails to make a prima facie showing of entitlement to summary

judgment as a matter of law. Zekry fails to proffer an appropriate basis for applying an income to expense ratio calculated from 2008 data, compiled by Brill during his receivership, to the annual gross income determined for 2004 by Lawi's expert, during the period that Zekry operated the business. Further, a review of the Report fails to disclose any relevant basis for applying such ratio; there are no findings therein that conclude that the financial circumstances were similar during these two distinct periods. Additionally, Brill, in the Report, found that the business's operations were greatly affected as a result of Zekry's obstruction of his role as the receiver, and Zekry's failure to turn over accurate and complete records and monies of the business. He stated that Zekry's conduct resulted in Brill having to create his own template of operating the business, which included remedying certain conditions of its premises, consisting of, inter alia, changing locks, aggressively cleaning the filth and grime thereat, eliminating mice infestation, restoring the air conditioning system, replacing equipment, compensating the stylists for hourly wages not paid, and establishing the objective industry standard for their compensation. Brill also asserted that the revenues of the business were affected by, inter alia, the departure of some employees who admittedly left the business at Zekry's behest, the recession commencing in 2008, and unpaid bills incurred by Zekry prior to Brill's appointment. Thus, there is no relevant basis in the record for applying the income and expense ratio calculated by Zekry from Barouck Corp.'s finances during May 2008 through December 2008 to determine the absence of revenues for the period of Zekry's control of the business pre-2008. Thus, Zekry fails to make a prima facie showing of entitlement to summary judgment dismissing the complaint.

In view of the foregoing, this court need not address the remaining arguments raised by Lawi in opposition to Zekry's application for summary judgment. Therefore, Zekry's

motion for summary judgment is denied.

In motion sequence no. 28, Lawi moves for an order precluding Zekry from testifying at trial, or alternately requiring him to appear for a deposition in advance of trial to testify as to responses given in his Errata Sheet, and precluding him from testifying as to any other matters that were not contained therein. In support of her application, she alleges that, due to Zekry's failure to comply with his discovery obligations, there has been a series of discovery-related motions in this action, resulting in, inter alia, orders directing his compliance and an order of preclusion. She further states that Zekry was deposed on two occasions, i.e., January 30, 2009 and April 29, 2011, and that on both occasions, he invoked his Fifth Amendment privilege, refusing to answer any questions concerning the subject matter of this litigation (see Lawi's Exhibits 2 & 3, Excerpts from Zekry's depositions held on 4/29/11 and 1/30/09, respectively). She notes that the Errata Sheet submitted as to the April 2011 deposition reflects a waiver of his previously invoked privilege to some of the questions posed to him and his brief written answers in response thereto (Lawi's Exhibit 2, errata sheet dated 7/6/11). Additionally, she notes that as to the remaining questions regarding the substantive issues of the litigation, he continued to maintain his privilege (*id.*). Based upon the aforementioned, Lawi argues that it would be prejudicial to allow Zekry to testify at trial on any matters in which he originally invoked the privilege and has now waived, without allowing her, in advance of trial, to depose him on those responses included in the errata sheet. She, thus, requests that her application for an order precluding him from testifying at trial, or alternatively, directing him to appear for a limited deposition in advance of trial, be granted.

Zekry opposes this application in its entirety.

The Fifth Amendment privilege against self incrimination cannot be used as both a sword and a shield (see, e.g. *People v Cassidy*, 213 NY 388 [1915]). “Since the sole purpose of the privilege is to shield a witness against the incriminating effects of his testimony, the courts will not permit its use as a weapon to unfairly prejudice an adversary” (*Steinbrecher v Wapnick*, 24 NY2d 354, 362 [1969]; see also *Lagin v Lagin*, 57 AD2d 774 [1st Dept 1977]), e.g., in situations where a party attempts to “use the privilege as a device to foreclose examination into facts which he himself had put in issue” (*Steinbrecher v Wapnick*, 24 NY 2d at 364).

The record discloses Zekry’s continuous failure to comply with Lawi’s discovery requests and court discovery orders, which led to, inter alia, an order of preclusion to the extent of precluding Zekry and Barouk Corp. “from offering any evidence other than [Barouk Corp’s] 2003 income tax return to establish Zekry’s initial investment into Barouk Corp. and/or Barouk’s Corp’s revenues” (Lawi’s Exhibit 1, Decision and Order dated 1/7/11 at 7). Further, while he invoked his Fifth Amendment privilege to all substantive questions during his two depositions (see Lawi’s Exhibits 2 & 3, Excerpts from Zekry’s depositions held on 4/29/11 and 1/30/09, respectively), Zekry, for the first time, selectively waived his privilege in the Errata Sheet to certain questions. Although Zekry has the right to invoke his Fifth Amendment privilege against self-incrimination, he may not utilize this privilege as a tactical strategy, by initially invoking it at his depositions, and then waiving it, to preclude Lawi from examining him on those facts that he now chooses to put into issue.

Thus, Lawi’s application is granted to the extent of directing Zekry to appear for a deposition limited to the re-examination of those issues for which he waived his privilege, as reflected in the Errata Sheet, and his failure to appear at said deposition shall be deemed a

preclusion from allowing him to offer any evidence on those issues. Lawi's request for an order precluding Zekry from testifying at trial on any other matters in which he asserted his privilege is also granted.

That branch of Lawi's application for an order directing that Zekry pay all costs of the aforementioned deposition is denied, since she has not asserted any legal basis upon which such an award can be made.

In motion sequence no. 30, Lawi moves for an order compelling Zekry to take all necessary steps to reinstate the Salon Corporations, as corporations, or alternatively provide suitable substitute security, and awarding her costs and attorneys' fees, pursuant to 22 NYCRR 130.1.

By order dated July 2, 2010, this court granted Lawi's motion for an order of prejudgment attachment. On August 9, 2010, an order was issued directing the Sheriff of the City of New York to levy upon "any interest of Mr. Zekry in personal or real property or any debt owed to Mr. Zekry situated in the State of New York" to satisfy a judgment in the amount of \$1.2 million (Lawi's Exhibit 3, Order of Attachment at 3). Part of the assets to be attached included his interests in the Salon Corporations. Zekry did not surrender the stock certificates of the Salon Corporations. On June 2, 2011, this court granted Lawi's motion for an order of contempt for failing to comply with the order of attachment to the extent of directing him to turn over the stock certificates for the Salon Corporations within fifteen days of the service of the order with notice of entry. On June 23, 2011, Zekry surrendered stock certificates to the Sheriff.

Lawi claims that she has recently discovered that the stock certificates surrendered are worthless, since Zekry permitted the Salon Corporations to be dissolved by his failure to

maintain their corporate existence. She submits notifications reflecting that proclamations of dissolutions² were filed against two of the Salon Corporations on July 28, 2010, and the third, on April 27, 2011 (Lawi's Exhibit 9, Notifications dated 2/8/12). She notes that the stock certificates were issued on June 22, 2011, after each of the corporations had been legally dissolved. In correspondence dated February 8, 2012, Lawi's counsel advised Zekry's counsel of the aforementioned information, and requested that Zekry provide evidence that he filed for reinstatement of the Salon Corporations and that he is not operating the underlying businesses under other names or through other entities. Since Lawi's counsel did not receive a response to the correspondence, this application ensued.

Lawi alleges that enormous amounts of time, effort and monies were spent to effectuate the order of attachment and secure the levy against Zekry's ownership interest in the Salon Corporations. She argues that he intentionally permitted the Salon Corporations to be dissolved in order to frustrate her attempts to levy against his ownership. She bases this argument upon the fact that, although he permitted the Salon Corporations to be dissolved, another business entity, i.e., R.Jacob.Z LLC, which has not been levied against, is still listed as active (Lawi's Exhibit 11, Notification dated 2/13/12). Further, she claims that Zekry's failure to inform her or this court, at the time of her prior application for contempt, of the dissolution of the Salon Corporations was frivolous and deceptive.

Specifically, she notes that, in his affidavit in opposition to her previous application, he maintained that he could not locate the stock certificates, but yet made no mention

² Under Tax Law 203-a, the Secretary of State must dissolve a corporation that has not filed a corporate franchise tax report or paid franchise taxes for two consecutive years.

of the fact that two of the Salon Corporations had already been dissolved and that the dissolution of the third was imminently pending due to his failure to comply. Based upon Zekry's foregoing conduct, Lawi seeks an order compelling reinstatement of the Salon Corporations, or alternately, suitable substitute security, and sanctions, consisting of costs and her counsel fees.

Zekry opposes Lawi's application, arguing that sanctions should not be imposed because he did not have an obligation to make an affirmative statement as to the value of the corporations. He further acknowledges that he had been having difficulties with the Salon Corporations for years, but claims that his failure to maintain their corporate existence was not directed at frustrating Lawi's prejudgment order of attachment. He also contends that Lawi could have discovered the information earlier.

The record discloses an existing order of attachment, which clearly and unambiguously provided for the property to be levied against and the amount to be secured (*see Bayamon Steel Processors, Inc. v Platt*, 191 AD2d 249 (1st Dept 1993)). It is undisputed that the Salon Corporations have been dissolved, pursuant to Tax Law § 203-a. However, Lawi fails to demonstrate any legal authority for the issuance of an order directing Zekry to reinstate the Salon Corporations as corporations. Nonetheless, if the assets already levied upon by the Sheriff do not sufficiently secure a judgment of \$1.2 million, Lawi may attach Zekry's other assets, interests in personal or real property, or any debt owed to him, as granted by the order of attachment, to substitute for the worthless stock certificates previously levied upon.

With respect to Lawi's application for sanctions, the Rules of the Chief Administrator of the Courts Part 130, as set forth in 22 NYCRR 130-1.1, authorize the court, in its discretion, to impose financial sanctions upon any party in a civil matter who engages in

frivolous conduct (*see Watson v City of New York*, 178 AD2d 126 [1st Dept 1991]). In order to impose sanctions, the court must find that Zekry's conduct was "completely without merit in law," was "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another"; or involved assertions of "material factual statements that [were] false" (22 NYCRR 130-1.1 [c]; *see Premier Capital v Damon Realty Corp.*, 299 AD2d 158 [1st Dept 2002]).

Here, a review of the record discloses statements made by Zekry in his opposing papers on the instant motion, as well as Lawi's prior motion for contempt, which raise credibility issues as to whether his actions in failing to disclose that the decrease in the value of these corporations were undertaken primarily to harass Lawi. Although Zekry did not have an affirmative duty to make such disclosure, there are indications that he was in possession of information that indicated that the Salon Corporations had been or were being dissolved at the time of Lawi's prior motion. He also was clearly aware at that time that Lawi had incurred and was continuing to incur great efforts, time and expense to secure the attachment of potentially worthless stock certificates. While he claims that his failure to maintain the corporate existence of the Salon Corporations were unrelated to Lawi's attachment remedy, he admits to having had difficulties with these entities for some considerable time prior to the Lawi's application, and that he probably received notifications of the dissolutions from the Secretary of State. The record clearly raises material issues of fact as to whether Zekry's conduct in remaining silent regarding the dissolution and value of his ownership in the Salon Corporations at the time of Lawi's prior motion for contempt which requires a hearing (*see, First Deposit Natl. Bank v Van Allen*, 277 AD2d 858 [3d Dept 2000]). Thus, Lawi's application for sanctions against Zekry is granted to

the extent of deferring the issue of sanctions to the trial of this action.

All matters not specifically addressed are denied.

Accordingly, it is

ORDERED that Lawi's motion, in motion sequence no. 028, is granted to the extent of directing Zekry to appear for a deposition limited to the re-examination of those issues to which he waived his privilege, as reflected in the Errata Sheet dated July 6, 2011, and further precluding him from testifying at trial concerning any other matters in which he asserted his privilege. Such deposition is to be scheduled within 45 days from service of this order with notice of entry; and it is further

ORDERED that the parties' respective motion and cross-motion, in motion sequence no. 029, are denied; and it is further

ORDERED that Lawi's motion, in motion sequence no. 30, is granted to the extent of deferring to the trial of this action the issue as to whether sanctions, if any, should be imposed upon Zekry pursuant to 22 NYCRR 130.1, and it is further

ORDERED, that the parties are directed to appear on September 20, 2012, in Part 40, 60 Centre Street, New York, NY 10007, at 9:30 A.M. for trial, and it is further

ORDERED that counsel for Plaintiff is directed to serve the within order, with Notice of Entry, within ten days of entry, upon counsel for Defendant.

FILED

JUL 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:



HON. DEBORAH A. KAPLAN
J.S.C.

Deborah A. Kaplan
J.S.C.