

Andejo Corp. v South St. Seaport LP

2012 NY Slip Op 32925(U)

October 12, 2012

Sup Ct, New York County

Docket Number: 603707/2004

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN
Justice

PART 60 / 57

ANDEJO CORP. et al.

INDEX NO. 603707/2004

-against-

MOTION DATE _____

SOUTH STREET SEAPORT LIMITED PARTNERSHIP, et al.

MOTION SEQ. NO. 045

MOTION CAL. NO. _____

OSC to stay trial

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
for random reassignment FOR THE FOLLOWING REASON(S):
THIS was a Part 57 case which must be transferred. The case is in Part 40 for trial on 11-7-12.

The court declines to sign this OSC for the reasons set forth in this court's accompanying decision/order dated 10/12/12

FILED
NOV 19 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/12/12

Marcy S. Friedman
MARCY S. FRIEDMAN, J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
to Part 60/57
 DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

ANDEJO CORP., et al.,

Plaintiffs,

Index No.: 603707/2004

- against -

SOUTH STREET SEAPORT LIMITED
PARTNERSHIP, et al.,

DECISION/ORDER

Defendants.

FILED

NOV 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

_____ x
The court declines to sign plaintiffs' order to show cause for an order staying the trial of this action pending: 1) receipt by plaintiffs' incoming counsel, Hill Rivkin, LLP (Hill Rivkin or incoming counsel), of the entire case file from outgoing counsel, Rosenberg Feldman Smith, LLP (RFS); 2) receipt by incoming counsel of "privilege logs referable to the redacted discovery material provided by defendants"; and 3) the reclassification by defendants of discovery documents designated "confidential– outside counsel only," pursuant to a protective order, dated June 19, 2006, to which the parties' stipulated (confidentiality order).¹ At the time the parties entered into the confidentiality order, plaintiffs were represented by RFS.

By order dated April 2, 2012, this court granted RFS' motion to be relieved as attorneys for plaintiffs. In the transcript of the oral argument on April 2, which was so ordered on April 4,

_____ x
¹At the time the order to show cause was presented for signature, the trial was scheduled for September 11, 2012. The court's computer records show that the matter has been adjourned in Part 40 for a pre-trial conference on October 31 and for trial on November 7, 2012.

2012, the court also rejected a cross-motion that Hill Rivkin, LLP, which had not yet formally appeared for plaintiffs, sought to file for an order “discharging RFS for cause.” After formally appearing for all but two of the plaintiffs, Hill Rivkin moved to reargue the court’s prior declination to accept the cross-motion to discharge RFS for cause. In a decision on the record on June 19, 2012, the transcript of which was so ordered on July 13, 2012, the court adhered to its prior decision that the cross-motion was untimely and that a limited appearance by Hill Rivkin for the purpose of opposing RFS’ motion to withdraw was inappropriate. (June 19, 2012 Tr. at 27.) The court also directed incoming counsel to bring a motion for an order directing RFS to turn over the file, noting that the motion would set up the parties’ positions on whether or not the termination was for cause, and that the issue could be sent to a Special Referee for hearing if it could not be decided on papers. (Id. at 28.)

Incoming counsel then moved by order to show cause for an order directing RFS to turn over the file. In a decision of that motion on the record on August 16, 2012, the transcript of which was so ordered on September 11, 2012, the court reasoned that it had not in fact proved necessary, in order to resolve RFS’ claim for a retaining lien on the file, to make a finding as to whether RFS had been discharged for cause, because RFS had offered at the time of its motion to withdraw to make the files available for copying upon payment of the copying costs. (Aug. 16, 2012 Tr. at 16-17.) By written order dated August 16, 2012, the court directed RFS to turn over the file upon payment of copying costs, and provided: “Nothing in this order shall be construed as determining whether, or to what extent, RFS is entitled to recover the attorney’s fees it claims, or whether plaintiffs have a meritorious defense that RFS was terminated for cause. These issues shall be resolved between the parties in a separate action or proceeding.”

In the instant motion requesting a stay of the trial pending receipt of the “entire case file,” plaintiffs are claiming that RFS has not turned over all of plaintiffs’ documents, and that they are missing approximately 63 boxes of documents and various deposition transcripts. The papers do not, however, indicate that all of the parties – incoming counsel, RFS, and defense counsel – have met and conferred in an effort to close any gaps in the production. Such a meeting must be expeditiously held in order to ensure that the case is trial ready on November 7.

To the extent that incoming counsel’s statement that they have not received the “entire case file” is based on a claim that they are entitled to, and have not received, documents produced by defendants subject to the confidentiality order, this claim will not be entertained by the court. Incoming counsel’s entitlement to such documents was addressed in the court’s determination of incoming counsel’s prior motion for an order directing RFS to turn the case file over to plaintiffs. At the hearing of the motion, incoming counsel indicated that they would not sign off on the confidentiality order. (Aug. 16, 2012 Tr. at 20.) The court expressly ruled: “If you are not going to sign off on the confidentiality agreement, then the order of the Court is that the documents that were produced, subject to the confidentiality agreement, will not be produced to you. (Id. at 21.) The written order of the same date directed RFS to turn over the file to plaintiffs but expressly provided: “Nothing in this order shall be construed as requiring RFS to turn over a) attorney-work product or b) documents that were produced by defendants pursuant to a Confidentiality Agreement, unless Mr. O’Kelly [incoming counsel] stipulates with defendants’ attorneys to be bound by such Agreement.”

To the extent that incoming counsel are claiming entitlement to documents produced under the confidentiality order, their order to show cause seeks in effect to reargue the motion

decided by the August 16, 2012 order. It is also an improper attempt by incoming counsel to relitigate the propriety of the confidentiality order and to re-open discovery. The note of issue in this action was filed on March 3, 2008 and, as held in this court's determination of the prior motion, discovery in this case has long been closed. (Aug. 16, 2012 Tr. at 13.)² Incoming counsel, who were retained after the breakdown of settlement negotiations and on the eve of trial, are bound by the prior proceedings. (See Greenfield v Philles Records, Inc., 160 AD2d 458, 459 [1st Dept 1990][“Substitution of attorneys does not in and of itself vacate the prior attorney's actions.”].)

Moreover, in arguing against the confidentiality order, incoming counsel misconstrues its scope. Incoming counsel argue that the confidentiality order that RFS entered into with defendants on plaintiffs' behalf, “constitutes malpractice on the part of RFS, warranting a finding that it was discharged for cause,” because it prohibited plaintiffs from reviewing discovery material and thereby severely impacted their ability to assist in their own case. (O'Kelly Aff., dated July 12, 2012, In Support of Prior Motion for Order Directing RFS to Turn Over Case File, ¶ 71.) The confidentiality order in fact permitted material to be designated confidential only if the producing party “reasonably believes” it constitutes or contains trade secrets or other commercially sensitive information. (Confidentiality Order, ¶ 2.) It permits material to be designated as “confidential, outside counsel only,” only if it is both confidential and contains “extremely sensitive information.” (Id., ¶ 3.) It also provides a procedure for the party receiving a discovery response or document designated confidential or confidential, outside counsel only,

²Hearing of summary judgment motions was delayed for a substantial period of time by defendant's bankruptcy filing.

to object and to obtain a court ruling on the propriety of the designation. (Id., ¶ 6.)

This is therefore not a case in which RFS entered into a “draconian” confidentiality order that permitted the defendant “to unilaterally designate any document it chose as confidential.”

(Compare Mann v Cooper Tire Co., 33 AD3d 24 [1st Dept 2006], lv denied 7 NY3d 718, rearg denied 8 NY3d 956 [2007].)

In any event, even assuming, without suggesting, that the confidentiality order was overbroad, plaintiffs’ remedy, at this late juncture in this action, is not for their new counsel to “re-do” all the prior discovery proceedings, but to pursue their asserted claims against RFS if there is a good faith basis to do so.

The court reaches a similar conclusion as to plaintiffs’ request to stay the trial pending receipt of a privilege log. A privilege log must ordinarily be produced. (Ural v Encompass Ins. Co. of Am., 97 AD3d 562 [2d Dept 2012].) RFS should produce any privilege logs previously served by defendants or, if it has already turned over the files containing any such privilege logs, defendants’ counsel should produce copies of the logs to incoming counsel. However, to the extent that logs have not been produced – and the court makes no finding on this issue – incoming counsel is bound by RFS’ failure, if any, to demand logs. (Compare Anonymous v High Sch. for Envtl. Studies, 32 AD3d 353 [1st Dept 2006], rearg denied 2006 NY App Div Lexis 12890.)

Finally, as to the branch of incoming counsel’s motion that seeks reclassification of documents produced pursuant to the confidentiality order, any requests for reclassification should be resolved with the trial judge, preferably at a pre-trial conference.

It is accordingly hereby ORDERED that this court declines to sign the order to show

cause brought by plaintiffs' incoming counsel, Hill Rivkin, LLC, for a stay of the trial; and it is further

ORDERED that incoming counsel, outgoing counsel, and defendants' counsel shall promptly meet and confer with respect to outgoing counsel's document production, in an effort to ensure that it is complete and that the November 7, 2012 trial is not delayed; and it is further

ORDERED that outgoing counsel shall, within five days of the date of entry of this order: 1) produce to incoming counsel any privilege logs received from defendants that are still within their possession, and identify the logs that are produced by date; and 2) If outgoing counsel have no such logs, they shall so notify incoming counsel and defense counsel. In such event, defense counsel shall promptly provide copies to incoming counsel of any privilege logs that they previously served; and it is further

ORDERED that this action shall be transferred to the Clerk of the Court for random reassignment, as it was a Part 57 case, not a Commercial Division case; and it is further

ORDERED that further motions are strongly discouraged. Provided that: If any further motion is made, it shall be brought by order to show cause to be presented for signature to the Justice to whom the case is assigned, subject to any rules of such Justice.

This constitutes the decision and order of the court.

Dated: New York, New York
October 12, 2012

FILED
NOV 19 2012
NEW YORK
COUNTY CLERKS OFFICE
Marcy S. Friedman
MARCY S. FRIEDMAN, J.S.C.
MARCY S. FRIEDMAN, J.S.C.