Wilson v Dantas
2017 NY Slip Op 31143(U)
May 30, 2017
Supreme Court, New York County
Docket Number: 650915/2012
Judge: Charles E. Ramos

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
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ROBERT E. WILSON III,

Plaintiff, Index No. 650915/2012

- against -

DANIEL VALENTE DANTAS, OPPORTUNITY EQUITY PARTNERS, LED. (a/k/a CAC/OPPORTUNITY EQUITY PARTNERS, LED.), OPPORTUNITY EQUITY PARTNERS, L.P. (a/k/a CAC/OPPORTUNITY EQUITY PARTNERS, L.P.) and OPPORTUNITY INVEST II, INC.,

Defendants.
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Hon. C. E. Ramos, J.S.C.:

In motion sequence 008, plaintiff Robert E. Wilson III moves pursuant to CPLR 3126 for sanctions against defendants Daniel Valente Dantas, Opportunity Equity Partners, LED. and Opportunity Invest II, Inc. (collectively, the "Opportunity defendants"). In motion sequence 009, the Opportunity defendants move pursuant to 22 NYCRR § 130-1.1 for costs and sanctions.

Background

This action arises out of an alleged agreement between Wilson and Dantas to enter into a profit participation joint venture to purchase controlling positions in privatized Brazilian companies. Most of these positions were divested in 2008 as part of a settlement agreement which resolved a business dispute between Dantas and Citibank, with Dantas purportedly agreeing to honor Wilson's profit participation from the proceeds of that settlement agreement. Since this action was filed, several of

the portfolio company investments were embroiled in litigation or arbitration disputes, in which the Opportunity defendants asserted claims for damages, including a $15 billion arbitration in Paris against Telecom Italia (Paris II arbitration), a billion dollar option litigation involving portfolio company Vale, and a control contest over portfolio company Santos Brasil.

The parties have been engaged in document production since June 2015 (Affirmation of Koroglos ["Koroglos Aff."], ¶ 2). Wilson alleges that Dantas has consistently stonewalled and refused to provide him with any financial details of Dantas' negotiations with Citibank as they were conducted, and thereafter concealed the 2008 settlement agreement from Wilson until directed by this Court to disclose it in 2015.

The Opportunity defendants have objected to many of Wilson's demands on the ground that the profit participation venture was limited to the shared profits actually payable by Citibank to the general partner of the joint venture, which were never actually paid because they were subject to a release under the terms of the settlement agreement. This Court has overruled that objection.

On January 14, 2016, the parties attended a compliance conference, wherein this Court ordered Wilson to serve specific document demands relating to the Paris II arbitration, and ordered the Opportunity defendants to (1) respond within 45 days

of receiving such demands and (2) produce documents relating to their contacts with New York within 45 days (the "January 2016 Order") (NYCEF Doc. No. 102).

In February 2016, Wilson moved to compel the production of responsive documents to Wilson's first set of requests for production. On May 25, 2016, this Court granted Wilson's motion to compel and overruled all of the Opportunity defendants' objections to the interrogatories (the "May 2016 Order")(Transcript, 5/25/2016, 17:12-13, 27:5-6). In addition, this Court ordered the Opportunity defendants to (1) produce exhibits from the Paris II arbitration for an in camera review (*id.* at 13:12-26), (2) answer outstanding interrogatories by July 1, 2016 (*id.* at 17:12-13, 27:6-7), and (3) produce non-confidential documents and a privilege log for all documents withheld on the basis of privilege (*id.* at 17:13-18).

The parties held a three-day meet and confer in an attempt to narrow their discovery disputes, followed by a production by the Opportunity defendants. In August 2016, Wilson made a second motion to compel the production of responsive documents to Wilson's second set of document demands, and listed nine categories of documents that remained outstanding.

On September 19, 2016, this Court granted Wilson's motion to compel (Transcript, 9/19/2016, 26:3, 29:11-12), finding that the Opportunity defendants waived attorney client privilege in the

Paris II arbitration (*id.* at 18:21), and further ordered the Opportunity defendants to produce any outstanding documents within a week, unless they obtained a stay from the Appellate Division (the "September 2016 Order")(*id.* at 28:2-7).

Subsequently, the Opportunity defendants obtained an interim stay from the Appellate Division, First Department, which was thereafter vacated on November 3, 2016 (Transcript, 12/13/2016, 3:8-13). On the same day that the stay was vacated, the Opportunity defendants produced two expert reports and seven exhibits that were submitted to the arbitrators in the Paris II arbitration (Reed Aff., ¶ 30).

The Court notes that the two expert reports and seven exhibits from the Paris II arbitration that were recently produced reference a number of underlying documents that Wilson claims were never identified or produced in discovery (Reed Aff., ¶¶ 30, 46). The Opportunity defendants maintain that this Court did not hear argument on or grant the other relief sought in Wilson's second motion to compel, beyond the exhibits and reports from the Paris II arbitration.

Presently, the Opportunity defendants represent by affidavit testimony that they have fully complied with all of the Court's prior discovery orders by responding to interrogatories, and producing "additional," "extensive," and "substantial" documents in their possession, custody, or control, with the exception of a

privilege log (Koroglos Aff., pp. 4-9; Faoro Aff., ¶ 2). They do not represent that they have made a complete production of all responsive documents.

Discussion

Under CPLR 3126, a court has discretion to strike a pleading or prohibit a party from supporting or opposing designated claims or defenses if that party refuses to comply with an order for disclosure, where willful and contumacious character of its failure to produce is manifested by repeated noncompliance with court orders without credible excuses (*see Excise Bond Underwriters v Zurich Am. Ins. Co.*, 103 AD3d 560 [1st Dept 2013]; *Santini v Alexander Grant & Co.*, 245 AD2d 30 [1st Dept 1997]. For instance, a party's year-long pattern of noncompliance with the court's repeated compliance conference orders gives rise to an inference of willful and contumacious conduct (*Goldstein v CIBC World Mkts. Corp.*, 30 AD3d 217, 217 [1st Dept 2006]).

Nonetheless, a party's good faith effort to resolve discovery issues raised by a discovery motion will not be a basis for a finding of willful or bad faith noncompliance with a prior discovery order (*Molyneaux v City of New York*, 64 AD3d 406, 407 [1st Dept 2009]).

Ae court may award a party "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct,"

which includes "(1) [conduct that] is completely without merit in law...; (2) [conduct] is undertaken primarily to delay or prolong the resolution of the litigation...; (3) [conduct that] asserts material factual statements that are false" (22 NYCRR § 130-1.1).

With respect to documents pertaining to the Opportunity defendants' New York contacts, the Opportunity defendants appear to have attempted to comply in good faith with this Court's January 2016 order, and represent that they have produced all documents relating to their New York contacts (Faoro Aff., ¶ 6). Moreover, they state, under oath and unequivocally, that they do not maintain a Brown Brothers Harriman account in New York (which is maintained in Luxembourg), and there is no Safra or Citibank account maintained in New York (Faoro Aff., ¶¶ 7-10). Wilson does not respond to this testimony in his reply, but repeats, in conclusory fashion, that the Opportunity defendants continue to withhold their New York banking information. However, a party cannot produce that which does not exist. Unless Wilson identifies specific categories of document demands which remain outstanding, or has a good faith basis to reject the Opportunity defendants' testimony that they do not utilize New York banking institutions, this portion of Wilson's motion is denied.

With respect to documents from the Paris II arbitration, Wilson acknowledges that the Opportunity defendants have produced the expert reports and exhibits from the Paris II arbitration, in

compliance with the January 2016 Order (Transcript, 5/25/2016, 13:12-20). As for the unproduced financial documents that Wilson discovered were referenced in those reports, counsel for the Opportunity defendants represent that he was unaware of the existence of any unproduced documents, as he does not represent Dantas in those proceedings and accepted the representation of Dantas' Paris II arbitration counsel that all documents had been produced (12/13/16 Tr 5-7, 9:7-8). It appears that the failure to disclose these financial documents was not willful, and if so, the failure to disclose does not warrant the extreme sanction of striking the Opportunity defendants' pleadings at this stage (*compare Sage Realty Corp. v Proskauer Rose LLP*, 275 AD2d 11 [1st Dept 2000]).

With respect to documents pertaining to the various legal proceedings in which the Opportunity parties are currently participating in relating to named companies still being divested or operating, the "Vale option" litigation and the Santos Brasil sale proceedings (and which largely correspondent to categories three to nine on the list of documents sought in second motion to compel), the Opportunity defendants maintain that this Court never ordered them to produce the documents as it was not addressed during oral argument on the motion.

In the absence of a clear order directing production, it cannot be concluded that the Opportunity defendants have behaved

willfully. Therefore, to the extent not already produced, the Opportunity parties are hereby directed to produce the following:

(1) a privilege log for all documents withheld on the basis of privilege;

(2) documents pertaining to the retained investments showing the actual payments for interests in Vale, S.A., Santos Brasil and Sanepar S.A., and internal investment reports from 2011 to the present;

(3) documents pertaining to the divestment (sale) of any "portfolio company" including profits realized, proceeds obtained, rate of return and distribution of proceeds, internal valuations, financial reports or memoranda, and calculations of profits;

(4) Documents relating to Dantas' New York bank account in which $400 million was purportedly recently unfrozen;

(5) The entire transcripts of the depositions of Veronica Dantas and Arthur Carvalho from the SDNY Litigation.

If any of these documents have already been produced to Wilson, the Opportunity defendants shall state so, in writing, under oath, and with a list of corresponding bates numbers. If any other documents ordered herein to be produced either do not exist, are no longer in the possession of the defendants, or were destroyed, the Opportunity defendants shall state so by affidavit testimony, and indicate either in which entity or individual has

possession/custody/control of the documents, or describe in detail the circumstances under which the documents came to be destroyed. In addition, once all documents as ordered herein have been either been produced or an affidavit testifying as to their non-existence has been supplied to Wilson, the Opportunity parties shall submit an affidavit affirming that document production is complete.

Finally, the Court rejects the Opportunity defendants' contentions that Wilson's motion to compel is frivolous and should be denied outright for failure to attend a meet and confer. At this point, Wilson has moved to compel on three prior occasions following numerous meet-and-confers; another meet-and-confer would be futile.

Accordingly, it is

ORDERED that plaintiff's motion for sanctions is conditionally denied, subject to the defendants' full compliance with the above directives, within 30 days of the filing of this order with notice of entry. In the event that the defendants do not comply with the Court's directives as outlined above, defendants shall be precluded from offering any evidence in support of their defenses which pertain to the unproduced documents, and an adverse inference will be granted against them with respect to those issues as a result of violating this Court's order, upon plaintiff's renewal of the motion with costs;

and it is further

ORDERED that defendants' motion for costs and sanctions is denied.

Dated: May 30, 2017

ENTER:

CHARLES E. RAMOS