Wimbledon Fin. Master Fund, Ltd. v Weston Capital Mgt. LLC
2017 NY Slip Op 31961(U)
September 15, 2017
Supreme Court, New York County
Docket Number: 653468/2015
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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WIMBLEDON FINANCING MASTER FUND, LTD., Index No: 653468/2015

Plaintiff, **DECISION & ORDER**

-against-

WESTON CAPITAL MANAGEMENT LLC, WESTON CAPITAL ASSET MANAGEMENT LLC, PBCWESTON HOLDINGS, LLC, ALBERT HALLAC, JEFFREY HALLAC, KEITH WELLNER, JASON GALANIS, JOSEPH BIANCO, GARY HIRST, EUGENE SCHER, MARSHALL MANLEY, ARIE JAN VAN ROON, LEONARD DE WAAL, ARIE BOS, KEITH LASLOP, KIA JAM, PAUL PARMAR, ALEX WEINGARTEN, DAVID BERGSTEIN, DPRE ENTERPRISES LLC, GION FUNDING SETTLEMENTS, INC., KAMBE ASSET MANAGEMENT GROUP INC., CYRANO GROUP INC. f/k/a GRAYBOX LLC, ADVISORY IP SERVICES INC. f/k/a SWARTZ IP SERVICES, INC., ISKRA ENTERPRISES, LLC, ASIA CAPITAL MARKETS LIMITED, LLC s/h/a ASIA CAPITAL MARKETS, LTD., GENERAL HEALTH TECHNOLOGIES, LLC s/h/a GENERAL HEALTH TECHNOLOGIES, LIMITED, LLC, K JAM MEDIA, INC., GEROVA MANAGEMENT, INC. and JOHN DOE(S) 1-10,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

I. Introduction

Motion sequence numbers 041 and 043 are consolidated for disposition.

By order dated July 17, 2017, the court decided nine motions to dismiss and three motions for default judgments. *See* Dkt. 1069 (the July 17 Decision).[1] The court assumes familiarity with the July 17 Decision, which extensively sets forth the factual background and allegations against the defendants in this action. Capitalized terms not defined herein have the same meaning as in the July 17 Decision.

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

Currently before the court is Wimbledon's motion, pursuant to CPLR 3215, for a default judgment against defendant Keith Laslop. Seq. 041. Laslop opposes and cross-moves to dismiss pursuant to CPLR 306-b or, in the alternative, for leave to file a late response to the AC. Wimbledon opposes the cross-motion. The court reserved on the motion and cross motion after oral argument. *See* Dkt. 1162 (8/10/17 Tr.). Also before the court is a motion, pursuant to CPLR 3211, by defendant Marshall Manley to dismiss the claims asserted against him in the AC. Seq. 043. Wimbledon opposes. The motion is fully submitted and is decided on the papers. For the reasons that follow, Wimbledon's motion for a default judgment against Laslop is denied, Laslop's cross-motion is granted only to the extent of permitting a late response to the AC, and Manley's motion is granted in part and denied in part.

II. Laslop

Laslop was a member of Gerova's board from 2008 through February 2011, and was its Chief Operating Officer from June 2010 through February 2011. Laslop, like Gerova's other board members, allegedly aided and abetted the fraud committed on Wimbledon by Galanis and Hirst by approving the misrepresentations made to Wimbledon (e.g., about Gerova being a bona fide reinsurance company) despite being aware of their falsity. In the July 17 Decision, the court held that similar allegations made against other officers and board members suffice to state a claim for aiding and abetting fraud.

While Laslop does not move to dismiss under CPLR 3211, and thus a detailed review of the allegations against him is premature, the apparent merit of the claims against Laslop would suffice to entitle Wimbledon to a default judgment were there no service issues. Likewise, despite such issues, as discussed in the July 17 Decision, the First Department has held that the AC's merit warrants granting Wimbledon "interest of justice" service extensions under CPLR

306-b. That said, as this court held in the July 17 Decision, it is improper to grant a motion for a default judgment against a defendant when such motion was filed prior to the court granting a *nunc pro tunc* service time extension.

In seeking a default judgment, Wimbledon contends that it duly served the AC on Laslop in Canada in accordance with the Hague Convention. *See* July 17 Decsion at 31-32, citing *Mut. Benefits Offshore Fund v Zeltser*, 140 AD3d 444, 445-46 (1st Dept 2016). However, while "Laslop is a Canadian citizen, ... since February 2016, Laslop has worked and lived in the Bahamas on a full-time basis." *See* Dkt. 941 at 8. Indeed, "Laslop's move from Canada to the Bahamas was made public in a press release issued on February 22, 2016, by Laslop's former employer." *Id.* The question, therefore, of whether the manner in which Laslop was served with the AC in Canada comports with the Hague Convention is of no moment.[2] Wimbledon only attempted to serve Laslop in Canada, but not in the Bahamas. *See id.* at 9-10. While Laslop has clearly been aware of this action for some time, Wimbledon cites no authority for the proposition that it may serve Laslop in a jurisdiction where he did not work or reside.

The court, therefore, denies Wimbledon's motion for a default judgment, grants Wimbledon a *nunc pro tunc* service time extension in the interest of justice, *sua sponte* grants it leave to serve Laslop by alternative service,[3] and deems the AC served on Laslop by e-filing as of the date this decision is entered on NYSCEF. Laslop has 30 days to respond to the AC.

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[2] Notwithstanding Laslop's counsel's contention that "[w]e're going to write a Civil Procedure course on this case when we get done" [*see* Dkt. 1162 (8/10/17 Tr. at 27)], the court sees no reasons to tackle complex procedural issues that are of no dispositive consequence.

[3] Given the difficulty Wimbledon had in effectuating service and given Laslop's apparent evasion of service (e.g., he claims to live in the Bahamas but cites no address), and since Laslop is represented by counsel and has long been aware of this action, service by e-filing is sufficient to provide Laslop with notice. Courts have increasingly recognized the wisdom of permitting electronic service that is "reasonably calculated to apprise defendant that he is being sued," even

III. Manley

As discussed in the July 17 Decision, the Appellate Division's interest of justice ruling with respect to Manley is why his motion to dismiss was not briefed and decided with the others. His motion, however, breaks little new ground. His jurisdictional arguments fail for the same reasons as those of his co-defendants. The court rejects his forum non conveniens argument because this action is not better adjudicated elsewhere (i.e., Florida). *See Thor Gallery at S. DeKalb, LLC v Reliance Mediaworks (USA) Inc.*, 131 AD3d 431, 431-33 (1st Dept 2015). Depriving Wimbledon of its chosen forum and forcing it to litigate piecemeal against Manley in Florida would waste judicial resources and create the possibility of inconsistent judgments.

With respect to the merits, Wimbledon has stated a direct claim against Manley for fraud and aiding and abetting fraud. As discussed in the July 17 Decision, Manley was touted to Wimbledon as a reinsurance expert who would oversee Gerova's purported reinsurance business. *See id.* at 8-9. Indeed, at the time, Manley was both Gerova's CEO and chairman of its board. Given his role, the AC permits a reasonable inference of Manley's fraudulent intent. Nonetheless, for the reasons discussed in the July 17 Decision, Wimbledon has not pleaded a claim under Cayman Islands law for breach of fiduciary duty and aiding and abetting breach of fiduciary duty. The claim is dismissed without prejudice and with leave to replead. The unjust enrichment claim asserted against Manley, like those asserted against his co-defendants, is dismissed as duplicative of the fraud claim (i.e., the predicate of Manley being unjustly enriched

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on social media networks [*see Baidoo v Blood-Dzraku*, 48 Misc3d 309, 312 (Sup Ct, NY County 2015)]; notice to a party represented via NYSCEF is surely sufficient by comparison. Nonetheless, the court directs Laslop to provide his residential address to all parties and update the information should he move.

by his Gerova compensation is his participation in the fraud).[4] Likewise, Manley's argument that an alleged contractual release bars the claims asserted against him is rejected as premature for the reasons explained in the July 17 Decision.[5] Accordingly, it is

ORDERED that Wimbledon's motion for a default judgment against Laslop is denied, Wimbledon is granted a *nunc pro tunc* service time extension in the interest of justice and is deemed to have served Laslop with the AC as of the date this decision is entered on NYSCEF, and Laslop's cross-motion is granted only to the extent of permitting him to respond to the AC within 30 days of the entry of this decision on NYSCEF and is otherwise denied; and it is further

ORDERED that Manley's motion to dismiss is granted only to the extent that the claims against him for breach of fiduciary duty and aiding and abetting breach of fiduciary duty are dismissed without prejudice and with leave to replead, and the unjust enrichment claim asserted against him is dismissed as duplicative; Manley's motion is otherwise denied.

Dated: September 15, 2017

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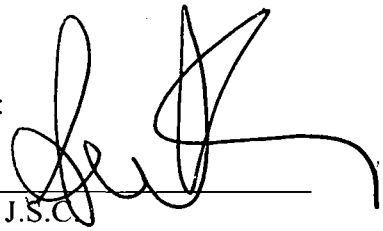

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C

[4] While this holding obviates the need to address the parties' statute of limitations arguments, it should be noted that, although "a claim for unjust enrichment accrues upon the occurrence of the alleged wrongful act giving rise to restitution" [*see Kaufman v Cohen*, 307 AD2d 113, 127 (1st Dept 2003)], there appears to be a split between the First and Second Departments over whether a claim for unjust enrichment based on a claim for monetary damages has a three or six year statute of limitations. *See Deutsche Bank, AG v Vik*, 142 AD3d 829 (1st Dept 2016), citing *Ingrami v Rovner*, 45 AD3d 806, 808 (2d Dept 2007).

[5] The parties did not brief the negligence claims because they were previously withdrawn.