SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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Nelux Holdings International N.V.,

Index No.: 652562/2018

Plaintiff,

-against-

Motion Seq. No. 008

Gila Dweck,

Defendant.

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Masley, J.:

Plaintiff Nelux Holdings International N.V. (Nelux) moves (1) pursuant to 22 NYCRR 202.21 to vacate the Note of Issue and Certificate of Readiness filed by defendant Gila Dweck on September 27, 2018 (e); (2) pursuant to CPLR 2221 (d) for reargument of this court's prior decision on motion sequence numbers 006 and 007; (3) to compel Shiboleth LLP (Shiboleth LLP), Amnon Shiboleth, and Michael Friedman (collectively, Nonparties) to produce all documents in their possession and appear for depositions pursuant to subpoenas served on them by Nelux; and (4) adjourning the trial scheduled to commence on December 10, 2018.

The background and alleged facts of this action are fully set forth in this court's prior decision in motion sequence numbers 006 and 007 dated September 17, 2018 and are incorporated here.

In motion sequence number 006, Nelux moved to compel Dweck to provide all documents obtained by Dweck from Nelux's prior counsel, Covington & Burling LLP (Covington). Nelux allegedly was no longer in possession of these documents and Covington would not return them because of a retaining lien so ordered by Justice Oing. Specifically, Nelux asserted that it "did not keep records of which particular documents

were sent, nor did Nelux keep records of whether originals or copies were sent to Covington." (NYSCEF Doc. No. 138 at 2.) When Nelux sought the documents from Dweck, Dweck allegedly informed Nelux that she would not disclose the documents unless Covington consented. Covington did not consent. Nelux subsequently argued that it was entitled to these documents because they were material and relevant. Nelux also argued that Dweck could not avoid her "production obligation" by "forcing" Nelux to pay the retaining lien in the amount of $105,330.

In motion sequence number 007, Dweck moved, pursuant to CPLR 3212 (c) and 603, for a trial solely on the issue of her statute of limitations defense. She noted, among other things, that Nelux "has not noticed a single deposition in the nearly three years this case has been pending." (NYSCEF Doc. No. 146 at 9.) In opposition, Nelux argued that Justice Oing had previously denied a prior request made by Dweck for an immediate trial on the issue of fact pertaining to the statue of limitations defense, and therefore, pursuant to the law of the case, this court should deny the second request for the same relief. Nelux also argued that a separate trial may not be held on the statute of limitations issue because it is not a peripheral or preliminary issue, but rather, the central question in dispute. Further, Nelux argued that bifurcated cases are generally held only where the two issues to be tried are entirely separate and distinct. Indeed, Nelux maintained that the only two disputed issues are Dweck's two affirmative defenses: (1) the statute of limitations and (2) the offset and release defense. Nelux argued that a bifurcated trial was inappropriate because the evidence required to prove the statute of limitations defense was also relevant for the offset and release defense. For instance, emails from the Nonparties that Dweck wished to repay the loans

allegedly bear on whether the Nonparties were Dweck's agents, but also whether certain payments made between 1994 and 2008 were agreed to offset or retire the loans. According to Nelux, two jury trials would not increase judicial efficiency, but increase expense.

In a September 17, 2018 decision addressing motion sequence numbers 006 and 007, this court denied Nelux's motion to compel Dweck to provide all documents obtained from Covington. The court also ordered Nelux to pay Dweck's costs and fees in opposing motion sequence number 006 on the grounds that it was frivolous. Additionally, the court severed the sole issue of fact with respect to Dweck's statute of limitations defense, and granted an immediate trial on that issue. Dweck was directed to file the note of issue, and the court limited the note of issue to the statute of limitations defense. Therefore, it would only apply to the immediate trial. The court lastly ordered that motions in limine be filed by October 24, 2018 or were otherwise waived.

Here, in motion sequence number 008, Nelux contends that the note of issue must be vacated because it incorrectly certifies that all necessary discovery has been completed. Specifically, Nelux maintains that the documents and depositions requested in the subpoenas[1] served on the Nonparties remain outstanding. According to Nelux, the court should also reconsider its decision to bifurcate these trials. Specifically, Nelux argues that the court overlooked the fact that the statute of limitations issue here is the

[1] The subpoena, dated October 2, 2017, commands that Amnon Shiboleth, Esq., provide certain documents within 20 days of receiving the subpoena. (NYSCEF Doc. No. 166 at 1.) It further commands that Amnon Shiboleth, Esq., appear for a deposition. (*Id.*) Another subpoena, dated October 2, 2017, commands that Michael Friedman, Esq., produce certain documents and appear for a deposition. (*Id.* at 3.) A third subpoena, dated October 2, 2017, also commands that Shiboleth LLP, produce certain documents and appear for a deposition. (Id. at 5.)

central and "most factually complicated" issue in the case. Nelux also contends that there is no disputed issue apart from the statute of limitations defense. Nelux further argues that the court should compel the Nonparties to comply with the subpoenas because their conduct and relationship with Dweck forms the central disputed issue of fact: whether the Nonparties were acting as Dweck's agents when they sent the emails to Nelux. Therefore, disclosure of the documents requested in the subpoenas is warranted according to Nelux.

Nelux contends that it did not waive its right to take depositions or engage in third- party discovery. Specifically, Nelux asserts that it served the required subpoenas on Shiboleth LLP, scheduled and participated in the required meet-and-confers, raised the issue with the court at numerous status conferences, and therefore, the court should not find on this record that Nelux waived discovery. (NYSCEF Doc. No. 209 at 14.)

Nelux urges the court to reconsider its decision to sanction Nelux's attorneys for filing a motion to compel production of its own documents that had come into Dweck's possession. Nelux maintains, *inter alia*, that the court's decision, in motion sequence numbers 006 and 007, stating that Nelux's motion "borders on frivolity," does not satisfy the standards for imposing sanctions.

The Nonparties oppose Nelux's motion to compel their compliance with the subpoenas. They maintain that they were served with subpoenas on two occasions: November 30, 2015 and October 2, 2017 and that they responded within 20 days pursuant to CPLR 3122. Specifically, they responded and objected to the November 30, 2015 subpoena on December 18, 2015 (NYSCEF Doc. No. 238) and they responded and objected to the October 2, 2017 subpoenas on October 20, 2017.

(NYSCEF Doc. No. 239.) They also provided supplemental responses and objections on November 14, 2017 (NYSCEF Doc. No. 243), and met with Nelux to discuss the objections on November 14, 2017. On November 27, 2017, the Nonparties supplemented their responses and incorporated by reference their previous objections. (NYSCEF Doc. No. 244.) Afterwards, however, Nelux allegedly never contacted the Nonparties, indicated that the responses were non-compliant, requested modifications or supplements to the responses, pursued depositions, or made a motion to compel.

The Nonparties further assert that the burden fell upon Nelux to move to compel compliance with the subpoenas once the Nonparties responded. They argue that Nelux failed to move to compel within a reasonable time. Additionally, the Nonparties argue that Nelux has failed to demonstrate the unusual or unanticipated circumstances, and substantial prejudice needed to direct discovery post note of issue.

Discussion

CPLR 2221 (d) (2) provides that "[a] motion for leave to reargue ... shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." "Reargument does not provide a party an opportunity to advance arguments different from those tendered on the original application." (*Rubinstein v Goldman*, 225 AD2d 328, 328 [1st Dept 1996] [internal quotation marks and citation omitted].)

Insofar as Nelux moves to "reargue" motion sequence number 006 in which the court ordered Nelux to pay Dweck's cost and fees, the motion is denied. Preliminarily, Nelux failed to address the propriety of motion sequence number 006, and to the extent

that it attempts to do so now in motion sequence number 008, Nelux advances an argument not tendered on the original application. (*Rubinstein*, 225 AD2d at 328.) Nevertheless, the court previously sanctioned Nelux for moving to compel Dweck to provide documents over which Covington has a retaining lien. A retaining lien "gives an attorney the right to keep . . . all of the papers, documents and other personal property of the client which have come into the lawyer's possession in his or her professional capacity as long as those items are related to the subject representation." (*Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183, 186 [1st Dept 2002].) The idea being that an attorney may retain as security certain documents belonging to the client to induce the client to compensate the attorney for services rendered. As Justice Oing previously so ordered, Covington's retaining lien amounts to $105,330. (NYSCEF Doc. No. 173.) To compel Dweck to produce those same documents before Nelux resolved this retaining lien with Covington would have been an improper "work around" of such lien. (*Andrade v Perez*, 159 AD3d 593, 594 [1st Dept 2018].)

Accordingly, 22 NYCRR Section 130-1.1 (a) empowers courts with discretionary authority to sanction attorneys or parties, in the form of costs and fees, for frivolous conduct. Conduct is frivolous if, *inter alia*, "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law." (22 NYCRR Section 130-1.1[c][1].) "In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place ... and whether or not the conduct was continued when its lack of legal or factual basis ... should have been apparent ... ."

(22 NYCRR Section 130-1.1[c].) Stated simply, Nelux filed motion sequence number 006 to avoid compensating its former counsel, Covington, whom Nelux discharged, and to circumvent a retaining lien in the amount of $105,330 so ordered by Justice Oing. Nelux additionally filed motion sequence number 006 with the hope that this court would rectify Nelux's carelessness specifically because "Nelux did not keep records of which particular documents were sent, nor did Nelux keep records of whether originals or copies were sent to Covington." At the very least, Nelux should have known that its request to circumvent the retaining lien lacked a legal basis because the First Department issued *Andrade v Perez* before Nelux filed motion sequence number 006. Nelux's suggestion that it was otherwise unaware that circumventing a retaining lien was improper is incredible especially in light of appellate division precedent. (*see Law Firm of Ravi Batra, P.C. v Rabinowich*, 77 AD3d 532 [1st Dept 2010]; *Warsop v Novik*, 50 AD3d 608 [1st Dept 2008]; *Artim v Artim*, 109 AD2d 811 [2d Dept 1985].) Ultimately, in filing motion sequence number 006, Nelux engaged in conduct that was not only frivolous, but altogether wrong, unfair, and wasteful.

To the extent that Nelux appears to seek these documents from the Nonparties in motion sequence number 006, Nelux's request to compel is denied. This specific relief was not even requested in motion sequence numbers 006 and 007 and therefore is inappropriate for a motion to reargue. Regardless, insofar as the documents sought are those over which Covington has a retaining lien, the request is denied for the reasons stated above.

Nelux's request that the court reconsider its decision to bifurcate these proceedings because the court allegedly overlooked the fact that the statute of

limitations issue is central to the case is denied. Nelux has advanced no argument previously tendered on the original application that this court overlooked. Again, conduct that is altogether wasteful of judicial resources. Nevertheless, as this court previously noted, the discrete issue of whether Shiboleth LLP was representing Dweck when it sent Nelux the emails in question does not touch upon the merits of the main controversy of whether Dweck owes Nelux money under the loan agreement and promissory notes. (*see* NYSCEF Doc. No. 183.) Indeed, the statute of limitations issue is ancillary and is not the crux of Nelux's breach of contract or unjust enrichment claims or Dweck's defense that she is entitled to a complete set off. (*Id.*) Should Dweck succeed at the separate trial of the statute of limitations issue, the entire action will be disposed. (*Id.*) Accordingly, under these circumstances, this separated trial is precisely what CPLR 603 contemplates because CPLR 603 provides the separated trial device "to address such nonmerits defenses as statute of limitations" that nevertheless may be dispositive. (*Baseball Office of the Commr v Marsh & McLennan*, 295 AD2d 73, 78-79 [1st Dept 2002].)

Nelux's argument that bifurcated trials are generally held only where the two issues to be tried are entirely separate and distinct is a mischaracterization. Indeed, for this proposition, Nelux cites to certain personal injury cases where a bifurcated trial was improper because the issues of liability and damages were inseparable. (*see e.g. Carbocci v Lake Grove Entertainment, LLC*, 64 AD3d 531 [2d Dept 2009]; *Mignott v Sears, Roebuck & Co.*, 101 AD2d 731 [1st Dept 1984.) Similarly, Nelux's argument that a bifurcated trial is inappropriate because the evidence required to prove the statute of limitations defense is also relevant for the offset and release defense is unavailing.

Bifurcated trials may involve evidence that is relevant for more than one issue, however, in determining whether to fragment trials, the inquiry is whether there are complex issues that are intertwined. (*Shanley v Callanan Indust., Inc.*, 54 NY2d 52, 57 [1981].) Here, the issues are not intertwined such that a joint trial is required. Regardless, requiring two separate trials instead of one is a matter for the court's discretion. (*Id.*) On balance, the benefit of the possibility of speedily disposing of this action on statute of limitations grounds outweighs the cost of Nelux introducing into evidence the same emails at both trials.

To the extent Nelux moves to vacate the note of issue on the grounds that depositions of and documents sought from the Nonparties are outstanding, the motion is denied. Again, the relief sought here is inappropriate in a motion to reargue as these arguments were not advanced on the original application. Regardless, CPLR 3122 (a)(1) provides that once a subpoenaed party responds to the subpoena within 20 days, "[t]he party seeking disclosure . . . may move for an order under rule 3124 or section 2308 with respect to any objection to . . . the notice or subpoena duces tecum... ." "[T]here is no prescribed time limit in CPLR 3122 (a)(1) for moving to compel disclosure." (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3122:1.) However, "[i]f a party fails to make a motion to compel within a reasonable time, she may forfeit the right to obtain the items sought." (*Id.*) Here, it is undisputed that the Nonparties responded to the subpoena within 20 days. As the Nonparties note, they responded and objected to the October 2, 2017 subpoenas on October 20, 2017, provided supplemental responses and objections on November 14, 2017, and met with Nelux to discuss the objections on November 14, 2017. However,

Nelux did not move to compel compliance with the subpoenas until the filing of motion sequence number 008 on October 17, 2018, nearly one year later and after this court ordered an immediate trial of the statute of limitations issue. Significantly, Nelux failed to cross-move to compel such compliance when Dweck moved in motion sequence number 007 for a trial solely on the issue of her statute of limitations defense. Further, Nelux failed to move to compel such compliance with the subpoenas despite seeing fit to move in motion sequence number 006 to compel Dweck to produce documents as a means of circumventing the retaining lien. Moving to compel compliance with the subpoenas, now, after the court has ordered the filing of the note of issue, set a date solely for the trial of the statute of limitations issue, and has received the parties' documents with respect to the trial is simply untenable, and will not be countenanced. The delay is inexcusable.

Accordingly, it is hereby,

ORDERED that plaintiff Nelux Holdings International N.V.'s motion is denied in its entirety.

Dated: 12/3/18

ENTER:

HON. ANDREA MASLEY