UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG and FACEBOOK, INC.,

Defendants.

PLAINTIFF'S OBJECTION TO THE MAGISTRATE JUDGE'S APRIL 6, 2012 ORDER

1:10-cv-00569-RJA

Table of Contents

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

Pursuant to 28 U.S.C. Section 636(b)(1)(A) and Federal Rule of Civil Procedure 72(a), Plaintiff Paul D. Ceglia objects to Magistrate Judge Leslie G. Foschio's April 6, 2012 Order ("Stay Order") [Dkt. No. 348] granting in part Defendants' Motion to Stay Discovery Pending a Ruling on Their Dispositive Motions ("Motion to Stay Discovery") [Dkt. Nos. 322-23]. The Stay Order deprives Plaintiff of discovery necessary to respond to Defendants' Motion to Dismiss [Dkt. Nos. 318-19], which Defendants characterize as a sanctions motion, but which actually challenges the merits of Plaintiff's claims by raising matters outside the pleadings, including voluminous expert reports purporting to opine on key factual disputes [Dkt. Nos. 324-35]. By presenting this information to the Court in the context of a sanctions motion, Defendants seek to bypass the application of Federal Rules of Civil Procedure 12 and 56, which entitle non-moving parties to appropriate discovery and require courts to "construe the evidence in the light most favorable to the non-moving party." *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 113 (2d Cir. 2005). Likewise, Defendants seek to bypass application of Federal Rule of Evidence 1008, which requires that a jury determine the authenticity of a disputed document.

No matter how styled, the Court must assess the evidence presented with Defendants' Motion to Dismiss on a balanced record where both sides are afforded discovery.[1]

I. BACKGROUND

A. Plaintiff's Claims

Plaintiff asserts claims[2] against Defendants Mark Elliot Zuckerberg and Facebook, Inc. ("Facebook") for declaratory relief, breach of fiduciary duty, constructive fraud, fraud, breach of

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[1] Plaintiff incorporates by reference all of argument and authority included in Plaintiff's Opposition to Defendants' Motion to Stay Discovery [Dkt. No. 345].

contract, and breach of the implied covenant of good faith and fair dealing. *Id*. Plaintiff alleges that on April 28, 2003 he entered into a contract with Zuckerberg (the "Ceglia-Zuckerberg Contract") pursuant to which Plaintiff contributed funds towards the development of Facebook in exchange for an interest in the company, as described below. *Id*. at ¶¶ 22-29.

In 2003, Plaintiff was developing a website with the domain name StreetFax.com, which sought to provide insurance adjusters photographic information about traffic intersections. *Id*. at ¶ 13. Plaintiff placed an advertisement on Craigslist seeking a programmer to develop the search engine feature for StreetFax.com. *Id*. at ¶ 15. Zuckerberg responded to the advertisement, and discussed with Plaintiff performing that work while also receiving funding for the development of Facebook, which Zuckerberg was then cultivating. *Id*. at ¶ 17.

Plaintiff and Zuckerberg ultimately entered into the Ceglia-Zuckerberg Contract, which provided that: (1) Plaintiff would pay Zuckerberg $1,000 to perform work "directly for the Streetfax Database and the programming language"; and (2) Plaintiff would pay Zuckerberg an additional $1,000 "for the continued development of the software, program and for the purchase and design of a suitable website for the project [Zuckerberg] has already initiated that is designed to offer the students of Harvard university access to a website similar to a live functioning yearbook with the working title of 'The Face Book.'" *Id*. at ¶¶ 23-28. The Ceglia-Zuckerberg Contract further provided that in exchange for funding the development of Facebook, Plaintiff "will own a half interest (50%) in the software, programming language and business interests derived from the expansion of that service to a larger audience." *Id*. at ¶ 23.

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[2] Plaintiff filed this action on June 30, 2010 in the New York Supreme Court, Allegany County. Defendants removed the action to this Court on July 9, 2011. *See* Notice of Removal [Dkt. No. 1]. Plaintiff filed an Amended Complaint [Dkt. No. 39] on April 11, 2011.

B. Defendants' Forgery Defense

Defendants contend that the Ceglia-Zuckerberg Contract is a fraud. *See* Motion to Dismiss [Dkt. Nos. 318-19]. They concede that Zuckerberg entered into a contract with Plaintiff, but they argue that it related only to StreetFax and bore no mention of Facebook. Specifically, Zuckerberg submitted a declaration describing that "[i]n or about April 2003, I entered into a written contract with StreetFax, pursuant to which I agreed to provide limited website services solely in connection with the development of StreetFax's website. . . . The written contract I signed concerned only the development of StreetFax's website. It did not mention or concern Thefacebook.com or any related social networking service or website." *See* Declaration of Mark Elliot Zuckerberg in Support of Defendants' Motion for Expedited Discovery ¶¶ 7, 9 [Dkt. No. 46].

The authenticity of the Ceglia-Zuckerberg Contract is the key issue in this case.

C. The Court Awards Defendants Expedited "One Sided" Discovery of Plaintiff

On June 2, 2011, Defendants filed a Motion for Expedited Discovery [Dkt. Nos. 44-53], arguing that "one-sided" expedited discovery of Plaintiff was necessary to determine if his claims are fraudulent. *Id.* Plaintiff opposed that motion and cross-moved for "mutual" expedited discovery of all parties [Dkt. Nos. 57-66].

On July 1, 2011, the Court issued an unprecedented Order awarding Defendants broad expedited discovery of Plaintiff, but limiting Plaintiff to discovery of a limited number of Zuckerberg's emails and handwriting samples. *See* Order [Dkt. No. 83]. Pursuant to the Order, Plaintiff produced directly to Defendants' expert *all of his computers during the relevant time period, his parents' computers, several hard drives, hundreds of floppy disks, and the contents of numerous email accounts.* *See* Declaration of Paul D. Ceglia [Dkt. No. 176-1]. The Court

ordered an Electronic Asset Inspection Protocol, which gave Defendants' experts carte blanche to search and review these electronic media for relevant information. *See* Electronic Asset Inspection Protocol [Dkt. No. 85]. Meanwhile, Plaintiff was denied any meaningful discovery of Defendants, much less reciprocal discovery.

D. Defendants Move to Dismiss, Raising Extensive Matter Outside the Pleadings

On March 26, 2012, Defendants filed a Motion to Dismiss [Dkt. Nos. 318-19][3] arguing that the Court should exercise its inherent power to dismiss Plaintiff's claims because they are purportedly fraudulent. Defendants argue that the sanction of dismissal is warranted because the Ceglia-Zuckerberg Contract is a fraud and a different contract exists between Plaintiff and Zuckerberg -- the same arguments that form the basis for Defendants' purported forgery defense.

Defendants' so-called "Motion to Dismiss" is supported by more than 31 exhibits, including six expert declarations that were prepared with the benefit of and rely upon the information Plaintiff produced to Defendants as well as information within Defendants' exclusive possession that has never been produced to Plaintiff. Below is a list of the expert reports submitted by Defendants:

- The 55-page Report of Digital Forensic Analysis [Dkt. No. 325] submitted by Stroz Friedberg, Defendants' digital forensics expert. The Stroz Report attempts to use digital forensic analysis to prove that the Ceglia-Zuckerberg Contract is not authentic.

[3] Defendants also filed a Motion for Judgment on the Pleadings [Dkt. No. 320-21] raising arguments based on the statute of limitations and laches.

- A report submitted by Gerald M. LaPorte [Dkt. No. 326], a forensic chemist and document dating specialist, who opines that pages 1 and 2 of the Ceglia-Zuckerberg Contract were not created contemporaneously.
- A report submitted by Frank J. Romano [Dkt. No. 327], an expert in typeface and printing technology, who opines that page 1 of the Ceglia-Zuckerberg Contract is a forgery.
- A report submitted by Albert H. Lyter, III [Dkt. No. 328], an ink and paper examiner, who opines that the Ceglia-Zuckerberg Contract is too damaged to be tested.
- A report submitted by Gus R. Lesnevich [Dkt. No. 329], a forensic document examiner, who opines that Plaintiff has produced more than one version of the Ceglia-Zuckerberg Contract.
- A report submitted by Peter V. Tytell [Dkt. No. 330], a forensic document examiner, who opines that pages 1 and 2 of the Ceglia-Zuckerberg Contract were not created contemporaneously.

These reports seek to prove the merits of Defendants' forgery defense, which is *the* key factual dispute at issue in this case. Although Defendants' motion is styled as a "Motion to Dismiss" and characterized by Defendants as seeking sanctions, in substance it presents matters outside the pleadings to attack the merits of Plaintiff's claims.

E. Magistrate Judge Foschio Directs Plaintiff to Submit Expert Reports Without Affording Plaintiff Fact Discovery

Concurrently with their Motion to Dismiss, Defendants filed the Motion to Stay Discovery [Dkt. Nos. 322-23], arguing that the purported strength of their dispositive motions warranted a stay of discovery and urging that discovery would be costly, but submitting no

information as to cost or burden. Plaintiff opposed the Motion to Stay Discovery [Dkt. No. 345], arguing that the Court should not decide Defendants' dispositive motions on a one-sided record and noting that Plaintiff needed discovery to respond to the voluminous information submitted by Defendants outside the pleadings.

After a hearing on April 4, 2012, Magistrate Judge Foschio ruled that:

> (1) Plaintiff must submit expert reports in 60 days *without being provided any fact discovery or discovery of the materials Defendants' experts relied upon*;
>
> (2) within two months of Plaintiff submitting expert reports, the parties must depose each others' experts, *with Defendants having the benefit of the unlimited discovery Plaintiff previously produced, but with Plaintiff having no discovery of Defendants*;
>
> (3) Plaintiff shall have two months after the conclusion of the expert depositions to oppose Defendants' Motion to Dismiss.

See Stay Order [Dkt. No. 348]; *see also* Transcript of Hearing [Dkt. No. 350].

The Stay Order improperly directs the parties to begin expert discovery on an incomplete record prejudicial to Plaintiff. Defendants had the benefit of full fact discovery in preparing their expert reports, but the Stay Order directs Plaintiff to submit expert reports without first conducting any fact discovery. This disparity significantly hinders Plaintiff both in preparing his expert reports and addressing the matters outside the pleadings raised by Defendants.

Accordingly, Plaintiff objects to the Stay Order pursuant to Rule 72(a). *See* Fed. R. Civ. P. 72(a).

II. STANDARD OF REVIEW

Rule 72(a) provides that "[t]he district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed.

R. Civ. P. 72(a).[4] "Under a clearly erroneous standard, a district court can reverse a magistrate judge's order only if the court 'is left with the definite and firm conviction that a mistake has been committed.'" *Lavigna v. State Farm Mut. Auto. Ins. Co.*, 736 F. Supp. 2d 504, 509-10 (N.D.N.Y 2010) (quoting *Gualandi v. Adams*, 385 F.3d 236, 240 (2d Cir. 2004). "Under a contrary to law standard, a district court can reverse a magistrate judge's order only if the order fails to apply the relevant law." *Id*.

As discussed below, Magistrate Judge Foschio's Stay Order was both clearly erroneous and contrary to law.

III. ARGUMENT

A. Defendants Cannot Bypass the Procedural and Due Process Safeguards of Rules 12 and 56 By Characterizing Their "Motion to Dismiss" As Seeking Sanctions

Magistrate Judge Foschio's Stay Order permits Defendants to bypass application of Rules 12 and 56 by characterizing their Motion to Dismiss as seeking sanctions. This is error.

"Rule 12(d) links Rule 12 with Rule 56 to provide *the exclusive means* for federal courts to use to rule upon a pretrial motion to adjudicate a case on the merits based on matters outside the complaint, whether the motion is labeled a 'motion to dismiss,' a 'motion for judgment on

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[4] Rule 72(a) applies to a magistrate judge's discovery order. Fed. R. Civ. P. 72(a). As to dispositive motions, a magistrate judge only has authority to make a recommendation to the District Judge, subject to *de novo* review. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(A); *see also American Stock Exchange, LLC v. Mopex, Inc.*, 215 F.R.D. 87, 92 (S.D.N.Y. 2002) ("A ruling is 'dispositive' if it resolves substantive claims for relief rather than mere issues in the litigation."); *Weeks Stevedoring Co. v. Raymond Int'l Builders, Inc.*, 174 F.R.D. 301, 303-04 (S.D.N.Y. 1997) ("[T]he imposition of sanctions is reviewable under the 'clearly erroneous or contrary to law' standard *unless the sanction itself can be considered dispositive of a claim*.") (emphasis added); *Zises v. Dept. of Social Services*, 112 F.R.D. 223, 226 (E.D.N.Y. 1986) ("[I]t seems apparent under the Constitution that a magistrate does not have Article III authority to effect an involuntary dismissal of an action brought in district court.").

the pleadings,' a 'motion for summary judgment,' a 'speaking motion,' or anything else." *3M Co. v. Boulter*, No. 11-1527, 2012 U.S. Dist. LEXIS 12860, at *31 (D.D.C. Feb. 2, 2012) (rejecting "special motion to dismiss" raising issues outside the pleadings because "the actual operation and effect of the motion, rather than its label, is what really matters") (emphasis added); *see also Jasco Tools, Inc. v. Dana Corp.*, 574 F.3d 129, 145 (2d Cir. 2009) (applying Rule 56 because "although . . . Objection was not labeled a motion for summary judgment [it] explicitly requested summary judgment"); *Gen. Tire & Rubber Co. v. Jefferson Chem. Co.*, 46 F.R.D. 607, 609 (S.D.N.Y. 1969) ("Due to the parties' reliance on depositions, affidavits, and exhibits obtained during discovery, the motion *despite the labels used by counsel*, must be treated as one for summary judgment under Rules 12(b) and 56.") (emphasis added); 5C Wright & Miller § 1366 at 148 (3d ed.) ("The element that triggers the conversion is a challenge to the sufficiency of the pleader's claim supported by extra-pleading material. As many cases recognize, it is not relevant how the defense actually is denominated in the motion.").

Rule 12(d) provides that where a party supports a motion to dismiss with matters "outside the pleadings," "the motion *must* be treated as one for summary judgment," and "[a]ll parties *must* be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d) (emphasis added). Likewise, Rule 56(d) provides that on a motion for summary judgment, the non-moving party should be permitted time to take discovery to respond to the motion. Fed. R. Civ. P. 56(d). Presumably, Defendants seek to avoid application of these Rules to deprive Plaintiff of the discovery necessary to refute Defendants' arguments and because, as Defendants well know, *the* material factual dispute at issue in this case is the authenticity of the Ceglia-Zuckerberg Contract, which likely cannot be resolved on a motion for

summary judgment. *See* Fed. R. Civ. P. 56(a) (providing that summary judgment is only appropriate "when there is no genuine dispute as to any material fact").

As described by the Second Circuit, the Rule 12(d) conversion requirement "deters trial courts from engaging in factfinding when ruling on a motion to dismiss and ensures that when a trial judge considers evidence dehors the complaint, a plaintiff will have an opportunity to contest defendant's relied-upon evidence by submitting material that controverts it." *Global Network Communs., Inc. v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006) (reversing because "district court consider[ed] external material in its ruling" and "relied on those materials to make a finding of fact that controverted the plaintiff's . . . factual assertions . . . in its complaint"); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007) ("[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder."); *Courtenay Communs. Corp. v. Hall*, 334 F.3d 210, 213-14 (2d Cir. 2003) (reversing dismissal where "the court . . . . failed to view the allegations in [the] complaint in a light most favorable to [the plaintiff], and engaged in premature fact-finding - thereby depriving [plaintiff] of an opportunity to present evidence to support its claims").

Courts may not bypass the Rule 12(d) conversion procedure in the interest of expediency. *Kopec v. Coughlin*, 922 F.2d 152, 155 (2d Cir. 1991) ("We decline to uphold bypassing that procedure for the sake of expedience.").

B. Plaintiff is Entitled to Discovery to Refute Defendants' Arguments and to Demonstrate the Existence of Material Factual Disputes

As discussed above, when a motion to dismiss (no matter how labeled) raises matters outside the pleadings, "the motion *must* be treated as one for summary judgment under Rule 56" and "all parties *must* be given a reasonable opportunity to present all the material that is pertinent

to the motion." Fed. R. Civ. P. 12(d) (emphasis added). Rule 12(d) does not provide courts discretion in this regard.

In turn, summary judgment is appropriate "only when a review of the entire record demonstrates 'that there is no genuine issue as to any material fact.'" *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 444 (2d Cir. 1980); *see also* Fed. R. Civ. P. 56(a). When there remain factual disputes, "the procedural weapon of summary judgment is inappropriate. Indeed, *it is the very purpose of the trial to establish which party's version of the contested circumstances best comports with reality*." *Quinn*, 613 F.2d at 445 (emphasis added).

The respective functions of judge and jury are further delineated by Federal Rule of Evidence 1008, which provides that "the jury determines . . . any issue about whether (a) an asserted writing . . . ever existed; (b) another one produced at the trial or hearing is the original; or (c) other evidence of content accurately reflects the content." Fed. R. Evid. 1008; *see also* Order ¶ 6 [Dkt. No. 272] ("In anticipation of Defendants' stated intention to file a motion to dismiss, based on Defendants' position that the alleged contract at issue is fraudulent, the court requests that the parties consider the effect, if any, of the second sentence of Fed. R. Evid. 1008, on any such motion.").

"[B]y its very nature, the summary judgment process presupposes the existence of an adequate record." *Doe v. Abington Friends School*, 480 F.3d 252, 257 (3d Cir. 2007). "Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery." *Miller v. Wolpoff & Abramson, LLP*, 321 F.3d 292, 304 (2d Cir. 2003); *see also Quinn.*, 613 F.2d at 444 ("[S]ummary judgment should not be granted when [the nonmovant] is denied reasonable access to potentially favorable information.").

Allowance of discovery is particularly important where "the information could not have been obtained previously because the discovery period has not yet begun," such as here, where discovery was stayed as to Plaintiff but not Defendants. *Holmes v. Lorch*, 329 F. Supp. 2d 516, 529 (S.D.N.Y. 2004); *see also Miller*, 321 F.3d at 304 (reversing dismissal based on matter outside the pleadings where "facts were exclusively within defendants' possession and [plaintiff] had no previous opportunity to develop the record through fact discovery").

These considerations apply with equal, if not greater, force where a litigant must defend against an accusation of fraud on the court. Notably, the cases cited by Defendants in support of their Motion to Stay Discovery are procedurally distinguishable. *See* Def. MOL in Support of Motion to Stay at 7-8 [Dkt. No. 323]. For example, in *Richards v. North Shore Long Island Jewish Health System* and *Chrysler Capital Corp. v. Century Power Corp.*, discovery was stayed at the pleading stage and as to all parties after the respective defendants in those cases filed a Rule 12(b) motion to dismiss. *See Richards v. North Shore Long Island Jewish Health Sys.*, No. 10-4544, 2011 U.S. Dist. LEXIS 106319, at *2 (E.D.N.Y. Sept. 21, 2011); *Chrysler Capital Corp. v. Century Power Corp.*, 137 F.R.D. 209, 210 (S.D.N.Y. 1991). *Chrysler Capital* is further distinguishable in that the plaintiff in that case had already been afforded discovery in related litigation. In *Donald v. Arrowood Indem. Co.*, the court granted a stay, but noted that plaintiff had already obtained "ample" discovery and that a motion to amend the complaint was pending. *See Donald v. Arrowood Indem. Co.*, No. 10-227, 2011 U.S. Dist. LEXIS 84633, at *4 (S.D. Miss. Aug. 1, 2011). In contrast to those cases, Defendants' Motion to Dismiss is not limited to the pleadings, but includes voluminous evidentiary materials that Defendants obtained through one-sided discovery. As such, the cases cited by Defendants do not support a stay in this case.

C. Plaintiff Must Be Afforded Fact Discovery In Order For Expert Discovery to Be Meaningful

Plaintiff previously filed expert declarations, cited in Plaintiff's opposition to the Motion to Stay Discovery, to support Plaintiff's argument that there is no indication of fraud on the court. *See* Plaintiff's Expert Declarations [Dkt. Nos. 194, 209, 226]. In contrast, Defendants' experts opine that the Ceglia-Zuckerberg Contract is not authentic. *See* Defendants' Expert Declarations [Dkt. Nos. 325, 326, 327, 328, 329, 330].

This is a classic case of dueling experts. However, this is more importantly a case of dueling underlying facts, and in order for expert discovery to be meaningful, *both sides* must have discovery of the underlying facts in dispute. This is supported by Rule 26, which provides that expert testimony is typically disclosed *after* fact discovery. *See* Fed. R. Civ. P. 26(a)(2)(D) (providing that unless otherwise ordered, expert testimony is to be disclosed no later than 90 days before trial).

Plaintiff is entitled to propound discovery requests to explore relevant facts that will inform any analysis in expert discovery. For example, Plaintiff's claims involve the origins and funding of Facebook – issues that Facebook has already litigated in other cases and regarding which evidence remains under seal. *See ConnectU, Inc. v. Facebook, Inc.*, No. 07-10593 (D. Mass.); *Thefacebook, LLC v. Saverin*, No. 05-039867 (Cal. Super. Ct.). Plaintiff should be entitled to obtain relevant testimony and documents produced in those cases. Similarly, given the extent to which Defendants were permitted to review all of Plaintiff's computers and email accounts, Plaintiff should likewise be afforded discovery of Defendants' relevant electronic media.

The Stay Order, however, puts in place a procedure whereby Plaintiff must submit expert reports, unsupported by fact discovery from Defendants, after Defendants have submitted their

expert reports with the benefit of full discovery from Plaintiff. Any expert reports based upon such a one-sided record will be necessarily biased in favor of Defendants and prejudicial to Plaintiff, whether Defendants' "Motion to Dismiss" is viewed as a motion for summary judgment or a sanctions motion. There is no principled basis for ordering expert discovery on such an unbalanced fact record.

IV. CONCLUSION

For the foregoing reasons, the Court should vacate the Stay Order [Dkt. No. 348] as clearly erroneous and contrary to law and direct the parties to conclude fact discovery so that Plaintiff may address the arguments outside the pleadings raised in Defendants' "Motion to Dismiss."

Local Rule 72 Certification

I hereby certify that this Objection does not raise new arguments.

Dated: April 18, 2012

Respectfully submitted,

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