

Ferolito v Vultaggio

2012 NY Slip Op 33152(U)

December 17, 2012

Supreme Court, New York County

Docket Number: 600396/08

Judge: Martin Shulman

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

PRESENT: Shulman
Justice

PART 1

Ferolito, John

INDEX NO. 600396/08

MOTION DATE _____

- v -

Vultassio, Domenick

MOTION SEQ. NO. 037

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits 1-7

Answering Affidavits - Exhibits A-G

Notice of Motion - Affidavit - Exhibits Order

Replying Affidavits - Exhibits

Answering

PAPERS NUMBERED

- 1 _____
- 2 _____
- 3,4 _____
- 5 _____

Cross-Motion: Yes No


Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

MAR 21 2013

NEW YORK COUNTY CLERK'S OFFICE

Dated: Dec. 17, 2012


MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X

JOHN M. FEROLITO, et al.,
Plaintiffs,

Index No. 600396/08

-against-

DOMENICK J. VULTAGGIO, et al.,
Defendants.

-----X

DOMENICK J. VULTAGGIO, et al.,
Counterclaim and Third Party Plaintiffs,

Index No. 590967/08

-against-

JOHN M. FEROLITO, et al.,
Counterclaim and Third Party Defendants.

FILED

MAR 21 2013

-----X

In the Matter of the Application of John M. Ferolito,
Petitioner,

NEW YORK
COUNTY CLERK'S OFFICE
Index No. 100568/11

For the Dissolution of Beverage Marketing USA, Inc.,
a Domestic Corporation.

-----X

SHULMAN J.:

Before this court is motion sequence number 037 by plaintiff Ferolito. The factual and procedural background of these consolidated actions has been summarized at length in this court's prior memorandum decisions and orders and will not be repeated herein.

By unfiled¹ notice of motion dated September 19, 2012 (the "reargument motion"), Ferolito moves "pursuant to CPLR 2221, 3103, and 2304 to quash or

¹ This court received courtesy copies of the motion and supporting papers by letter dated September 20, 2012. Although the motion indicates that it was to be returnable in the Motion Submissions Part on October 10, 2012, court records contain no record of it having been filed with the Motion Support Office.

limit the subpoena *duces tecum* issued to non-party State Bank of Long Island...” This motion essentially seeks renewal and reargument of this court’s decision and order dated September 6, 2012 (the “9/6/12 order”) which granted in part and denied in part Ferolito’s prior motion for a protective order quashing the subpoena AriZona/Vultaggio served upon SBLI in connection with the valuation proceedings now before this court.² Ferolito specifically challenges the portion of the 9/6/12 order pertaining to demands 2, 4, 6, 7, 8 and 9. AriZona/Vultaggio oppose the reargument motion.

In motion sequence 037, Ferolito moves by order to show cause (“OSC”) for a preliminary injunction enjoining SBLI, BMU and defendants “from obtaining, disclosing, or assisting in discovery of any information voluntarily or in response to the [subpoena] . . .” The OSC simultaneously sought a temporary restraining order (“TRO”) which had the effect of staying SBLI’s time in which to comply with the subpoena. Counsel for the parties appeared before this court on October 18, 2012 for the TRO application, at which time both the unfiled reargument motion³ and the OSC were argued.⁴ As both the reargument motion and the OSC were fully briefed and argued and are factually related, they are consolidated for disposition under motion sequence 037.

² The defined terms used in the 9/6/12 order are incorporated herein.

³ Vultaggio had submitted opposition to the reargument motion by letter dated October 12, 2012.

⁴ The parties agreed to stay SBLI’s time to respond to the subpoena pending determination of the reargument motion. Accordingly, this court did not sign the OSC at that time.

CPLR 2221 states as follows:

Motion affecting prior order.

(a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it ...

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *Foley v Roche*, 68 AD2d 558 (1st Dept 1979). Motions for leave to reargue are not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 (1st Dept 1984); *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 (1st Dept 1992).

With respect to renewal, CPLR 2221(e) requires, *inter alia*, that a motion for leave to renew “shall be based upon new facts not offered in the prior motion . . . and shall contain reasonable justification for the failure to present such facts on the prior motion.”

Requests 2 and 4

Ferolito seeks reargument with respect to subpoena demands 2 and 4, which Vultaggio contended were relevant to proving Ferolito's ability to finance his 2011 offer to purchase Vultaggio's shares.⁵

⁵ Request 2 directs SBLI to produce “[a]ll Documents and Communications concerning any entity controlled by, owned by, operated by, or associated with Ferolito . . .” Request 4 seeks “Documents and Communications concerning

A. Request 2

Ferolito opposed request 2 on the grounds that his personal and other business accounts were irrelevant to valuation because Tata was financing the purchase. This court's order rejected Ferolito's argument because his motion lacked any proof of Tata's alleged financing and further found that, even with Tata's contribution, "Ferolito would still require substantial capital to complete the transaction."⁶

In support of reargument, Ferolito argues this court overlooked his testimony admitting that he does not have two billion dollars to purchase Vultaggio's shares. As such, he now claims there is no basis to allow inquiry into his bank records because at best, they would confirm what he has already admitted.

Ferolito also seeks renewal as to demand 2, submitting transcripts from the Nassau trial which were unavailable at the time he filed his motion to quash. Specifically, investment banker Rita Keskinian⁷ testified that Tata, which has \$70 billion in annual sales, was financing the entire \$2 billion dollar transaction.

Cardinal Family Investments LLC."

⁶ The order granted Ferolito's motion to the extent of restricting the category of documents to be produced to account statements and narrowing the time period for production of these records.

⁷ Vultaggio contends Keskinian is "Ferolito's own banker and agent" who "stands to make a sizable commission on a sale of BMU . . ." Memorandum in Opp. to Motion to Reargue or Renew, at p. 5.

Both reargument and renewal are denied. This court's 9/6/12 order considered and rejected Ferolito's claims regarding Tata "backstopping" his offer. The newly available transcript of Keskinyan's testimony from the Nassau County trial merely corroborates Ferolito's testimony which this court found insufficient to warrant quashing the SBLI subpoena. Ferolito's claims continue to lack documentary support. Accordingly, reargument and renewal are denied as to demand 2.

Request 4

As to request 4 seeking Cardinal Family Investments LLC's⁸ bank records concerning Patriarch's 2008 purchase of Ferolito's shares and the corresponding transfer of funds to Cardinal's account, Ferolito bases his request for reargument on his claim that SBLI provided that specific transfer information to BMU in 2008. However, Ferolito failed to raise this specific argument in support of his underlying motion to quash, focusing instead on the relevancy of Cardinal's bank records. As stated above, it is improper to present new arguments on a reargument motion. *Pro Brokerage, Inc. v Home Ins. Co., supra; William P. Pahl Equip. Corp. v Kassis, supra*. For the foregoing reasons, reargument is denied as to demand 4.

⁸ AriZona/Vultaggio alleged that Cardinal is the entity Ferolito used "in furtherance of his attempt to sell his BMU shares to third parties, including Patriarch Partners LLC . . ."

Requests 6-9

The documents sought in demands 6 through 9 pertain to Ferolito's attempt(s) in 2008 and/or 2009 to withdraw funds from AriZona accounts at SBLI, which resulted in the bank freezing the accounts and Vultaggio/BMU commencing a separate action (now resolved) against Ferolito.⁹ Vultaggio contends BMU incurred legal fees due to Ferolito's improper conduct, thus reducing its value. In opposition, Ferolito argued *inter alia* that Vultaggio paid the legal fees in question, not BMU. This court's order notes that Ferolito failed to submit any proof to that effect.

In support of reargument, Ferolito now argues that BMU could not incur legal fees without violating this court's March 13, 2009 directive that each side going forward was to bear its own fees. The legal fees in question were incurred five months thereafter. Assuming Vultaggio has not violated the directive, Ferolito contends the materials sought are irrelevant because BMU did not pay these fees. Alternatively, if BMU violated the directive, its misconduct vitiates any claims that valuation should be reduced on this basis. Again, Ferolito failed to raise this specific argument and cannot do so now. In any event, even if Vultaggio paid the legal fees in question, he would likely be entitled to

⁹ Specifically, the subject demands request documents and communications concerning: attempts by Adonailo to withdraw funds from AriZona accounts (sixth), funds actually withdrawn by Adonailo (seventh), occasions when AriZona accounts were frozen or funds were inaccessible (eighth) and attempts to unfreeze AriZona accounts or make previously inaccessible funds available (ninth).

reimbursement from BMU, thereby affecting BMU's value. Accordingly, reargument is denied as to requests 6 through 9.

In light of the denial of Ferolito's reargument motion, it is unnecessary for this court to sign the OSC as no basis exists to stay compliance with the subpoena.

This court has considered Ferolito's remaining arguments and finds them lacking in merit. For all of the foregoing reasons, it is hereby

ORDERED that Ferolito's motion for renewal and reargument of this court's 9/6/12 order is denied.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been provided to counsel for the parties.

Dated: New York, New York
December 17, 2012



Hon. Martin Shulman, J.S.C.

FILED
MAR 21 2013
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COUNTY CLERK'S OFFICE