

320 West 13th St., LLC v Wolf Shevack, Inc.
2013 NY Slip Op 31136(U)
May 16, 2013
Sup Ct, New York County
Docket Number: 603730/07
Judge: Joan M. Kenney
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SCANNED ON 5/22/2013

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

PRESENT: JOAN M. KENNEY
J.S.C. *Justice*

PART 8

Index Number : 603730/2007
320 WEST 13TH STREET
vs.
WOLF SHEVACK, INC.
SEQUENCE NUMBER : 017
RENEWAL

INDEX NO. 603730/07
MOTION DATE 3/22/13
MOTION SEQ. NO. 17

The following papers, numbered 1 to 95, were read on this motion tofor Renew

Notice of Motion/Order to Show Cause — Affidavits — Exhibits + Memo of Law | No(s). 1-65

Answering Affidavits — Exhibits + Memo of Law | No(s). 66-83

Replying Affidavits + Memos of Law | No(s). 84-95

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

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

FILED

MAY 21 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: May 16, 2013

JMK, J.S.C.
JOAN M. KENNEY

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

-----X

320 WEST 13TH STREET, LLC,

Plaintiff,

Index No. 603730/07

-against-

WOLF SHEVACK, INC., WOLF GROUP
INTEGRATED COMMUNICATIONS, LTD.,
WOLF ADVERTISING LIMITED, WOLF
GROUP NEW YORK INC., MELDRUM &
FEWSMITH COMMUNICATIONS, INC.,
WOLF NATIONAL YELLOW PAGES, WOLF
GROUP (U.S.A.) INC., SYMPHONI
INTERACTIVE LLC, WOLF FAMILY
HOLDINGS LIMITED, VIADUCT
TECHNOLOGIES, INC., LAWRENCE H.
WOLF, MARY WOLF, JAY A. WOLF,
DAVID J. WOLF, STARVOX ACQUISITION,
INC., STARVOX, INC., STARVOX
COMMUNICATIONS, INC.,
AMALGAMATED TECHNOLOGIES, INC.,
TRINAD MANAGEMENT LLC, TRINAD
ADVISORS GP, LLC, INFOSEARCH MEDIA,
INC., OPTIO SOFTWARE INC., SHELLS
SEAFOOD RESTAURANTS, INC., and
ATLANTIS EQUITIES, INC.,

FILED

MAY 21 2013

COUNTY CLERK'S OFFICE
NEW YORK

Defendants.

-----X

Joan M. Kenney, J.:

In this action involving the enforcement of a stipulation of settlement, and allegations of fraudulent transfers, two motions are here addressed: the motion brought by defendants Lawrence H. Wolf (Lawrence), Mary Wolf (Mary), Jay A. Wolf (Jay) and David J. Wolf (David) (together, Individual Wolf Defendants) to renew and vacate the order of this court, dated July 23, 2012 (July 23 Order)

(mot. seq. no. 017); and the motion brought by the Individual Wolf Defendants, defendants Wolf Shevack (WS), Wolf Group Integrated Communications, Ltd. (WGIC), Wolf Group New York, Inc., Meldrum & Fewsmith Communications, Inc. (M&F), Wolf National Yellow Pages, Wolf Group (U.S.A.) Inc. and Wolf family Holdings Limited (together, the Corporate Wolf Defendants) and Amalgamated Technologies, Inc. (Amalgamated) and Optio Software, Inc. (Optio) (all movants together, Moving Defendants¹) for summary judgment dismissing the complaint as against them (mot. seq. no. 019). The motions are hereby consolidated for disposition.

The facts in this case have been addressed in previous decisions of this court. Familiarity with those facts is presumed.

A. Motion to Renew

In a compliance order dated April 7, 2011 (Compliance Order), this court directed the Individual Wolf Defendants to produce, among other things, the Individual Wolf Defendants' "bank account statements, including checking and savings accounts," for the period January 1, 2003 to January 31, 2005, in accordance with an earlier demand made by plaintiff for said bank statements. When the Individual Wolf Defendants failed to produce any bank statements, on the ground that they could not be produced because they had been destroyed as a matter of course by the Individual

¹The Moving Defendants refer to themselves as the "BES Defendants." It is not clear why.

Wolf Defendants, plaintiff made a motion to strike the answer of the Individual Wolf Defendants and the Wolf Company Defendants (together, the Wolf Defendants), on the ground of spoliation of evidence. In the July 23 Order, this court held that, as a result of the spoliation of evidence, no matter how inadvertent, the court, in a exercise of discretion, would issue a negative inference charge at trial as to the contents of the bank statements, rather than strike the Wolf Defendants' answer.

In the motion to renew, defendants Lawrence and Mary have finally produced bank statements from a single joint account belonging to Lawrence and Mary with TD Bank in Canada, for the applicable time period. The Individual Wolf Defendants maintain that they had not realized the import of obtaining the statements until they received the July 23 Order, and that, upon receiving the July 23 Order, Mary traveled in person from Florida to Canada to obtain copies of the bank statements. The Individual Wolf Defendants now request that this court grant renewal of the July 23 Order to allow them to produce the bank statements, and avoid the negative inference charge. The Individual Wolf Defendants have also produced redacted copies² of their income tax returns for the applicable period (which were not requested by plaintiff, nor required by the court), so as to provide plaintiff and this court

²Apparently, the copies of the tax returns produced to plaintiff are not redacted.

with a more complete financial record.

Plaintiff objects to renewal, arguing that the Individual Wolf Defendants had plenty of time to produce the records previous to the July 23 Order, and that their efforts to finally comply with the disclosure request are untimely, and prejudicial to plaintiff. Despite the presence of the bank statements, plaintiff would still have this court give a negative inference charge at trial, on the basis that no bank statements had been provided.

A motion to renew under CPLR 2221 "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]), and "shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221 (e) (3).

It has been recognized that the rules expounded in CPLR 2221 (e) (3) may be relaxed to allow for a motion to renew even if the "new" evidence was actually evidence within the possession of the movant on the prior motion. See *Garner v Latimer*, 306 AD2d 209, 209 (1st Dept 2003) (the requirements in CPLR 2221 [e] [3] are "not inflexible and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts known to the movant at the time the original motion was made"). Such relief can be granted "so as not to 'defeat substantive fairness.'" *Id.* at 210, quoting *Metcalf v City of New York*, 223 AD2d 410, 411 (1st Dept 1996).

There is a split in the Appellate Divisions as to the rule which applies to the grant of renewal in the discretion of the lower courts. The Appellate Division, Second Department, has made a bright line rule that, although courts have discretion to grant renewal motions based on evidence which could have been presented on the original motion, the motion to renew must be denied if there is no showing of a "reasonable justification" for the failure to present such facts on the original motion." *Aronov v Shimonov*, __AD3d__, 2013 NY Slip Op 02363, *1 (2d Dept 2013); see also *Empire State Conglomerates v Mahbur*, __AD3d__, 2013 NY Slip Op 02537 (2d Dept 2013); *Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585 (2d Dept 2012). However, as noted in *Poag v Atkins* (3 Misc 3d 1109[A], 2004 NY Slip Op 50524[U] [Sup Ct, NY County 2004]), the Appellate Division, First Department, has opted to allow renewal based on previously available facts in the lower court's discretion, even if the movant lacks a reasonable justification for failing to provide the facts previously. See *Vega v Restani Construction Corp.*, 98 AD3d 425, 426 (1st Dept 2012) ("[a]lthough defendants failed to comply with the requirements of CPLR 2221 [e] [3] by not providing a reasonable justification for their failure to present the alleged new facts on the prior motion, under the circumstances, these failures do not require denial of the motion to renew"); see also *Mejia v Nanni*, 307 AD2d 870, 871 (1st Dept 2003) (Court granted renewal "in the interest of justice" even where

movants "suggested no excuse for their failure to offer the newly submitted evidence in support of the initial motion"); *Garner v Latimer*, 306 AD2d at 209 (motion court erred in denying renewal "on the basis of delay").

The Individual Wolf Defendants have a weak excuse for their failure to provide the statements on the previous motion: that they did not realize the harsh implications of failing to produce the records, causing them to make the cross-country trip to obtain the statements from Canada upon release of the July 23 Order. However, following the Appellate Division, First Department, this court grants renewal in the interests of "substantive fairness" (*Garner v Latimer*, 306 AD2d at 210), and, on renewal, denies plaintiff's motion for a sanction against the Individual Wolf Defendants for failing to provide the bank statements in question.

The court comes to this decision based on the fact that (1) the statements are no longer missing; and (2) plaintiff had ample opportunity to depose Lawrence, line by line, on the bank statements, and did so, thus taking advantage of the very records it would punish defendants for not producing in the first place. Plaintiff should not be accorded the benefit of exploring the bank statements at length in Lawrence's deposition, and still treat the bank statements as missing documents. As such, there is no prejudice to plaintiff in having the records before the jury, and a negative inference charge is no longer necessary as to the TD

Bank statements.

The court notes that Lawrence and Mary admit that another, supposedly small, bank account exists, which they used only for their vacation home expenses, which account statements have not been produced, for the same reason that these parties did not produce the TD Bank statements, that they destroyed them. The negative inference still applies to this account, and the Individual Wolf Defendants must divulge the bank and account number for this account to plaintiff. The negative inference charge also stays in effect for any other financial document required of the other Wolf Defendants, which were alleged to be destroyed. However, what these documents may be is unclear.

Plaintiff argues that the TD Bank statements do not account for the over \$2 million payment made to Mary on her debenture, proving that there must be other bank accounts which the Individual Wolf Defendants have not revealed. Plaintiff expresses its disbelief that the Individual Wolf Defendants have come forward with all bank statements, and complains that the tax returns do not answer its questions as to possibly fraudulent conveyances made to the Individual Wolf Defendants from WS or the other Corporate Wolf Defendants. However, the Individual Wolf Defendants have revealed that Mary and Lawrence have brokerage accounts, statements from which have not been produced in discovery, and that the \$2 million payment went into Mary's brokerage account.

Unfortunately, a review of the discovery requests and orders of this court shows that plaintiff never asked for statements from brokerage accounts, only from bank accounts. This is not just a matter of semantics, or gamesmanship on the part of Individual Wolf Defendants (as they obviously knew that plaintiff would want the brokerage account statements).³ Brokerage accounts are simply not bank accounts. Bank accounts, held by banks, hold funds for savings. Brokerage accounts, held in brokerage firms, hold funds strictly for trading on public markets. Brokerage accounts are governed by different rules and regulations than are banks.⁴

Upsetting though it might be to plaintiff, the fact is that plaintiff has, thus far, failed to ask for any brokerage account statements. The Individual Wolf Defendants were simply not required to provide documents which were not requested by plaintiff.

The Individual Wolf Defendants insist that the tax returns that have been provided (and which were also explored at length in Lawrence's deposition), give a fuller account of their finances than would the brokerage accounts and bank statements together.

³In plaintiff's opposition to the Moving Defendants' motion for summary judgment, plaintiff claims that it asked for all movants' "financial records, including bank statements." Aff. of Hummell, at 24. However, this broad statement is disingenuous, in that it does not comport with plaintiff's actual discovery requests.

⁴As one difference, brokerage accounts are not federally insured.

However, the brokerage statements would provide a clearer image of when certain transfers were made in those accounts, than is available on the tax returns. As this court is fully aware that plaintiff will want the brokerage account statements, an order shall issue herein requiring all of the Individual Wolf Defendants to produce statements from any and all brokerage accounts, or be subject to a negative inference charge.

B. Moving Defendants' Motion for Summary Judgment

The Moving Defendants move for summary judgment, claiming that "the undisputed record reveals that no fraudulent transfers occurred, that the specific alleged fraudulent transfers referred to in the Complaint either did not occur, were not objected to by plaintiff after counsel's review, or were normal business transactions." Moving Defendants' Memo. of Law, at 1.

It is oft noted that summary judgment is a "drastic remedy." *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 (2012). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 (1st Dept 2010), quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Once the proponent of the motion meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in

admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v Rozbruch*, 91 AD3d 147, 152 (1st Dept 2012), citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

All of the evidence the Moving Defendants have mustered on this motion will be available to them to defend against plaintiff's claims at trial, subject to the negative inference charge applicable to any documents which might reflect on the Moving Defendants' defenses. It is not appropriate here to determine, issue by issue, whether there might or might not have been documents in existence which would have thrown light on each claim, or whether the Moving Defendants do not need documents to prove their defenses. Thus, summary judgment is inappropriate.

Accordingly, it is

ORDERED that the motion brought by defendants Lawrence H. Wolf, Mary Wolf, Jay A. Wolf and David J. Wolf to renew and vacate the order of this court, dated July 23, 2012 (July 23 Order) (mot. seq. no. 017) is granted, and, on renewal, this court lifts the negative inference charge as to the bank statements from the joint bank account with TD Bank, and otherwise adheres to the prior

decision, invoking a negative inference charge on all missing documents; and it is further

ORDERED that the motion brought by defendants Lawrence H. Wolf, Mary Wolf, Jay A. Wolf, David J. Wolf, Wolf Shevack, Inc., Wolf Group Integrated Communications, Ltd., Wolf Group New York, Inc., Meldrum & Fewsmith Communications, Inc., Wolf National Yellow Pages, Wolf Group (U.S.A.) Inc. and Wolf Family Holdings Limited, Amalgamated Technologies, Inc. and Optio Software, Inc. for summary judgment dismissing the complaint is denied; and it is further

ORDERED that defendants Lawrence H. Wolf, Mary Wolf, Jay A. Wolf, David J. Wolf are directed to provide copies of all brokerage account statements, and any statements for other accounts through which monies are collected and transferred, for the period January 2003 to January 2005, to plaintiff 320 West 13th Street, LLC within 30 days of receipt of a copy of this order with notice of entry, or be subjected to a negative inference charge as to such statements; and it is further

ORDERED that the parties proceed to mediation and/or trial forthwith.

Dated: May 16, 2013

ENTER:



JOAN M. KENNEY J.S.C.
J.S.C.

FILED

MAY 21 2013

COUNTY CLERK'S OFFICE
NEW YORK