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| Harry Weiss, Inc. v Moskowitz |
| 2014 NY Slip Op 33462(U) |
| January 28, 2014 |
| Supreme Court, New York County |
| Docket Number: 109435/09 |
| Judge: Geoffrey D. Wright |
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APP. 022

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

PRESENT: GEOFFREY D.S. WRIGHT
Justice

PART 62 *47*

CUM#6

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|--|----------------------------------|
| <u>HARRY WEISS, INC.,</u> | INDEX #109435/09 |
| Plaintiff/Petitioner | MOTION DATE _____ |
| -v- | MOTION SEQ. NO. _____ |
| <u>MENDEZ MOSKOWITZ, BMW DIAMONDS, INC.,</u> | MOTION CAL. NO. _____ |
| Defendant/Respondent(s) | <u>DECISION</u> |

The following papers, numbered 1 to 2 were read on this motion to/for preclude the Plaintiff.

| | | |
|---|--|----------------------|
| <u>NUMBERED</u> | FILED JAN 30 2014 NEW YORK COUNTY CLERK'S OFFICE | <u>PAPERS</u> |
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | | 1 |
| Answering Affidavits — Exhibits | | |
| Replying Affidavits _____ | | |
| Other _____ | | |
| Cross-Motion: X Yes No | | 2 |

Upon the foregoing papers, it is ordered that this motion/petition by the Defendants for an order *in limine* si denied, a/p/o. The parties are directed to appear in Part 47, for jury selection on February 6, 2014, for jury supervised jury selection.

January 28, 2014,

[Signature]
GEOFFREY D. WRIGHT
 J.S.C.
 AJSC

Check one: **FINAL DISPOSITION** X **NON-FINAL DISPOSITION**

Check if appropriate: **DO NOT POST**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 62

-----X
HARRY WEISS, INC. and E.W. INTERNATIONAL, Index #109435/09
DIAMONDS, INC., Motion Cal. #
Plaintiff-Petitioner(s), Motion Seq. #
DECISION/ORDER
-against- Pursuant To Present:
Hon. Geoffrey Wright
MENDEZ MOSKOWITZ, BMW DIAMONDS, INC., Judge, Supreme Court
Defendant-Respondent(s),
-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to: grant Defendants' motion *in limine*

| PAPERS | NUMBERED |
|--|----------|
| Notice of Petition/Motion, Affidavits & Exhibits Annexed | 1 |
| Order to Show Cause, Affidavits & Exhibits | 2 |
| Answering Affidavits & Exhibits Annex | |
| Replying Affidavits & Exhibits Annexed | |
| Other (Cross-motion) & Exhibits Annexed | |
| Supporting Affirmation | |

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Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The Defendants seek, pre-trial, an order limiting the scope of the Plaintiff's proof on its case in chief, and in defense of the asserted defenses and counterclaims.

The main action involves the alleged conversion of one or more diamonds commended to the custody of Mr. Moskowitz for the purpose of resale by Mr. Moskowitz in his capacity as sales agent. The complaint alleges that Moskowitz sold or pawned a specific diamond, as well as others for much less than their true worth, and pocketed the proceeds. The answer, in addition to a denial of the main claim, asserts counterclaims for sales commissions earned but not paid. During pretrial discovery and motion practice, it was determined that certain records relating to the dealings between Moskowitz and Weiss, had been destroyed by Weiss' accountant, and that the computer on which the records were generated had itself been damaged and then destroyed before forensic attempts at recovery could be tried. This led to an order by Justice Kenny that "prohibited and precluded" the Plaintiff "from offering any evidence and/or testimony upon the trial of the ...action in opposition/defense to defendant Mendez Moskowitz and BMW DIAMONDS, INC.'s answer

with defense and counterclaims.”

To enforce that order, the defense now asks that I, in essence go beyond what Justice Kenny ordered, and strike the complaint. Without the moving papers before me, and guided only by the wording of the order (there was no memorandum decision), I hold the Plaintiff may not call any witness or offer any document in defense of the counterclaims and defenses. The Plaintiff is free to cross-examine any witness called by the defense and impeach that witness with whatever evidence has been entered. The counterclaims have, by virtue of Justice Kenny’s order, been advanced to assessments of damages, with liability all but assured, assuming that the defense can meet the requirements of pleading. I note specifically that the counterclaim for defamation is pleaded in conclusory language, which does not seem to comply with CPLR 3016(a) [“In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally.”] Nothing in the order appears to prevent the successful assertion of a demurrer, since the burden of proof will still be with the Defendants, and their failure to meet statutory standards of pleading will not save an improperly pled claim. This would require no evidence or testimony from the Plaintiff.

Justice Kenny’s order does not, as the motion seeks to imply, strike the complaint, its language is limited to addressing the affirmative defenses and counterclaims, not the main claim, because the order does not dismiss the complaint or prohibit its prosecution. Too, the order does not preclude the use of the Defendants’ evidence for the sake of argument on any issue.

The Defendant next asks that he be treated as the Plaintiff, in light of Justice Kenny’s decision; in essence asking that he be permitted to present his case first. This request is denied. Since the main claim has not been dismissed, and the Plaintiff has not been precluded from proceeding with the claim, the Defendant must await conclusion of the Plaintiff’s *prima facie* case.

The request to present to the jury the circumstances leading to the preclusion order is denied. There is no need for there to be an opening on pre-trial orders. The Plaintiff will present his case, and then the defense will proceed with its claim.

The Defendant asks for a preclusion order against the Plaintiff on the following issues:

- 1- In essence prohibiting the Plaintiff from proceeding with his *prima facie* case, and allowing Moskowitz to proceed as though he were the Plaintiff.

This application is denied. Nothing in Justice Kenney’s order addresses the Plaintiff’s right to prosecute his main claim. It is the defense of the counterclaims, and rebuttal of the defenses that are precluded.

- 2- Moskowitz requests that the Plaintiff be precluded from raising his criminal

prosecution during the trial.

Only criminal convictions are relevant in a subsequent civil proceeding. Therefore, this request to limit the Plaintiff is granted.

- 3- Moskowitz asks for a protective order as to any possible admission of or discussion of criminal conduct by Moskowitz.

This application must be denied. The Fifth Amendment shield does not apply to testimony in a civil proceeding. The witness may invoke his Fifth Amendment privilege to spare himself possible criminal prosecution, but the trade off is a permitted inference in favor of the opposing party in a civil proceeding.

- 4- Moskowitz requests that there be no mention of a civil judgment against him in favor of Global Diamond Group, Ltd.

No cogent reason for the granting of this request is given. A judgment is a public record. To the extent that it becomes relevant, its existence may be used for any legitimate purpose.

- 5- Moskowitz asks the court to instruct the jury, at the outset of the trial, to instruct the jury as to the existence of the preclusion order, and to further to give the jury instructions as to what evidence will be presented.

This application is denied. There is no need to discuss the preclusion order unless it becomes necessary during the trial.

- 6- Moskowitz asks that the Plaintiff be precluded from using his deposition during the trial.

This application is denied. The basis for the application is an apparent language problem, in that Moskowitz is not comfortable with the English language. Moskowitz, as revealed by the record before, was at all times represented by counsel, who could have requested a translator prior to the deposition, or even during the course of the deposition. It appears also that this option was offered during the deposition. Therefore, it is too late to challenge the use of the deposition.

- 7- Moskowitz asks that the Plaintiff be precluded from mentioning certain witness as a result of the preclusion order; and that the Plaintiff be precluded from discussing "short sales" engaged in by these parties, and from reading deposition testimony.

This application is denied. As mentioned above, there is no preclusion directed at the prosecution of the main claim. The reading of deposition testimony, and the discussion of certain individuals and their actions may well be necessary to proving the main claim.

The Defendant is reminded that nothing in Justice Kenny's order precludes cross-examination of the Defendant or his witnesses [*CONTEH v HAND*, 234 A.D.2d 96, 650 N.Y.S.2d 723; *ROKINA OPTICAL Co., INC. v. CAMERA KING, INC.*, 63 N.Y.2d 728, 469 N.E.2d 518, 480 N.Y.S.2d 197, granting to a defaulting party "a full opportunity to cross-examine witnesses... in mitigation of damages."

This constitutes the decision and order of the court.

Dated: January 28, 2014


GEOFFREY D. WRIGHT

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