NexBank, SSB v Soffer
2018 NY Slip Op 30974(U)
May 18, 2018
Supreme Court, New York County
Docket Number: 652072/2013
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 652072/2013
NEXBANK, SSB.,
vs.
SOFFER, JEFFREY
SEQUENCE NUMBER : 006
OTHER RELIEF

INDEX NO. _____
MOTION DATE 4/19/18
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 271-277
Answering Affidavits — Exhibits _____ No(s). 278-307
Replying Affidavits _____ No(s). 308-309

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

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

Dated: 5/18/18

SHIRLEY WERNER KORNREICH, J.S.C.

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 54

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NEXBANK, SSB,

Index No.: 652072/2013

Plaintiff,

DECISION & ORDER

-against-

JEFFREY SOFFER and JACQUELYN SOFFER,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Familiarity with this action is assumed.

By order dated October 18, 2017, the court decided the parties' competing motions for partial summary judgment. *See* Dkt. 262 (the October 2017 Decision).[1] In that decision, the court held, *inter alia*, that there are material questions of fact regarding the encumbered value of the Property. *See id.* at 5. In reaching this conclusion, the court rejected plaintiff's contention that the $276.5 million credit bid is definitive proof of value. *See id.* at 5-8 (explaining concerns regarding sale process and reliability of credit bid). The court, therefore, noted that plaintiff would need expert evidence at trial to establish the encumbered value. *See id.* at 7.

It is undisputed that plaintiff did not, prior to the July 20, 2016 deadline for serving expert reports[2] or its filing of a Note of Issue on November 11, 2016, serve an expert report of the sort contemplated in the October 2017 Decision. On December 8, 2017, plaintiff moved by

[1] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing system (NYSCEF). Capitalized terms not defined herein have the same meaning as in the October 2017 Decision.

[2] This deadline was extended on numerous occasions.

order to show cause for leave to supplement its expert disclosure. *See* Dkt. 309 (reply affirmation attaching proposed supplemental expert reports). Defendants opposed the motion on December 22, 2017, and the court reserved on the motion after oral argument. *See* Dkt. 311 (2/7/18 Tr.). For the reasons that follow, plaintiff's motion is denied.

It is well settled that this "court is vested with broad discretion to control its calendar and supervise disclosure in order to facilitate the resolution of cases." *Alveranga-Duran v New Whitehall Apts., L.L.C.*, 40 AD3d 287, 289 (1st Dept 2007). Enforcement of court ordered discovery deadlines is essential to maintain the court's credibility and "the integrity of our judicial system." *Kihl v Pfeffer*, 94 NY2d 118, 123 (1999). It is uncontroverted that these principles are applicable to expert discovery.

Commercial Division Rule 13 requires a plaintiff who intends to call an expert at trial to submit a report after the close of fact discovery, but before the filing of the Note of Issue. *See* 22 NYCRR § 202.70. "Expert disclosure provided after [the filing of the Note of Issue] ***without good cause*** will be precluded from use at trial." *Id.* (emphasis added).

Here, plaintiff proposes serving new expert reports more than a year after the deadline. Whether the court should grant leave to do so is a matter of discretion. *Ramsen A. v New York City Hous. Auth.*, 112 AD3d 439 (1st Dept 2013); *see LaFurge v Cohen*, 61 AD3d 426 (1st Dept 2009) ("Here, plaintiff failed to timely serve her supplemental expert disclosure or provide an adequate explanation for the delay."). As defendants correctly observe, this court and others in the Commercial Division have precluded expert reports served well after the court ordered deadline. *See* Dkt. 278 at 17 (collecting cases). The Appellate Division has approved of this practice. *See 1861 Capital Master Fund, LP v Wachovia Capital Markets, LLC*, 95 AD3d 620, 621 (1st Dept 2012) (The court providently exercised its discretion in precluding the use of the

report of [plaintiff's] damages expert to the extent it set forth a new theory of damages. [Plaintiff] failed to timely disclose the new theory and failed to provide an adequate explanation for the delay."), citing *LaFurge v Cohen*, 61 AD3d 426 (1st Dept 2009).

The court agrees with defendants that plaintiff has not proffered good cause to justify its service of late expert reports. The facts, record evidence, and the parties' legal theories were clearly established prior to the filing of the Note of Issue. Plaintiff made the calculated decision[3] to attempt to prove damages exclusively through its credit bid and the unencumbered value of the Property (the latter of which is *res judicata*). "In fact, [plaintiff] has argued extensively in this action that expert testimony would be unreliable and inappropriate. [Plaintiff] instead has argued that its lay witness testimony and documentary evidence is sufficient to prove its damages and in fact is a better, more reliable method of proof than expert testimony." Dkt. 278 at 21.

Plaintiff's strategy ran into a brick wall after the court issued the October 2017 Decision, which made it quite clear that expert testimony was required to prove the Property's encumbered value. The court's holding was foreseeable and, frankly, unremarkable. "New York case law is clear that expert appraisal evidence is the method for proving the value of real property in litigation." *Id.*; *see, e.g., White Knight NYC Ventures, LLC v 15 W. 17th St., LLC*, 110 AD3d 576 (1st Dept 2013), citing *Trustco Bank N.A. v Gardner*, 274 AD2d 873, 874 (3d Dept 2000). It is simply implausible to believe that plaintiff and its counsel, who are extremely sophisticated, were unaware of this rule. Instead, for strategic reasons, they chose not to rely on expert testimony. Now that the court has squarely rejected that approach, plaintiff seeks a second bite

[3] That decision may have been influenced by the court's rejection of plaintiff's expert in the related action concerning defendants' payment guarantee. Dkt. 278 at 25; *see NexBank, SSB v Soffer*, 142 AD3d 911 (1st Dept 2016).

at the apple and proffers new expert reports. Plaintiff cites no commercial case in which such a tactic was approved or found to constitute good cause.[4] This court sees no reason to permit parties to preview the court's view of their trial strategy at summary judgment, and then abandon that strategy if the court signals that it is unlikely to prevail. To hold otherwise would severely prejudice defendants. Summary judgment is an exercise in issue spotting for trial. *Genesis Merch. Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC,* 157 AD3d 479, 481 (1st Dept 2018). It is not, for the unsuccessful movant, an opportunity to reformulate its case.

Plaintiff's stark pivot in its proposed proof is simply too great to permit at this late stage. There is a significant difference between proving encumbered value merely with a credit bid rather than with robust expert evidence. Moreover, the proposed expert who seeks to address the effects of the Nevada litigation is opining on matters well beyond the scope of plaintiff's original expert disclosure. To force defendants to now counter these new expert opinions, which require further rebuttal reports and depositions, is extremely prejudicial on the eve of trial. Under these circumstances, it is simply too late for plaintiff to deviate from the course it has charted. Accordingly, it is

ORDERED that plaintiff's motion for leave to serve supplemental expert reports is denied, and plaintiff may only call experts to testify at trial in accordance with reports served prior to the filing of the Note of Issue; and it is further

[4] By contrast, plaintiff cites various non-commercial cases that are distinguishable for the reasons explained by defendants. *See, e.g.*, Dkt. 278 at 27.

ORDERED that a telephone conference will be held on June 8, 2018 at 3:00 pm.

Dated: May 18, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C