D & R Global Selections, S.L. v Bodega Olegario Falcon Pineiro
2018 NY Slip Op 31879(U)
August 6, 2018
Supreme Court, New York County
Docket Number: 603732/2007
Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

D & R GLOBAL SELECTIONS, S.L.,

Plaintiff,

-against-

BODEGA OLEGARIO FALCON PINEIRO,

Defendant.

INDEX NO. 603732/2007
MOTION DATE 07-25-18
MOTION SEQ. NO. 012
MOTION CAL. NO.

The following papers, numbered 1 to 15 were read on this motion: Pursuant to CPLR §221(a)(d) to reargue or renew and Cross-Motion to modify and for sanctions:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits _____cross motion _____	5 - 8, 10 - 13
Replying Affidavits _____	14 - 15

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendant's motion pursuant to CPLR §2221(a) and (d), for leave to renew or reargue this Court's Decision and Order dated April 16, 2018 filed under Motion Sequence 011, is denied. Plaintiff's cross-motion seeking to modify the April 16, 2018 Decision and Order of this Court and seeking $1,750.00 in legal fees as sanctions against the defendant, is granted as stated herein. The remainder of the relief sought in the cross-motion, is denied.

Defendant, Bodega Olegario Falcon Pineiro, is a winery located in Pontevedra, Spain. It is alleged that in March of 2005 the defendant entered into an oral agreement with the plaintiff, D & R Global Selections, S.L., a Spanish limited liability company also based in Pontevedra, Spain. Plaintiff alleges that pursuant to an oral agreement, it located a distributor to import the defendant's wine into the United States in exchange for the defendant paying commissions at a specified rate on wine sales made to the distributor. In May of 2005 plaintiff introduced the defendant to Kobrand Corp., a New York wine importer and distributor. Defendant subsequently entered into an exclusive distribution agreement with Kobrand Corp., and paid plaintiff commissions through November of 2006. It is alleged that In January of 2007 defendant stopped paying plaintiff's commissions, even though Kobrand Corp. continued to purchase defendant's wines. Defendant claims that the obligation to pay commissions expired after one year under the oral agreement.

Plaintiff commenced this action seeking to recover unpaid commissions, asserting causes of action for breach of contract, quantum meruit, unjust enrichment and for an accounting. In June of 2008 plaintiff obtained a default judgment against the defendant.

Defendant sought summary judgment dismissing this action for lack of jurisdiction. This Court's Decision and Order filed on August 26, 2013, denied the motion. The Supreme Court Appellate Division, First Department reversed this Court finding there was "no substantial nexus" for jurisdictional purposes (D & R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 128 A.D. 3d 489, 9 N.Y.S. 3d 234 [1st Dept., 2015]). The Court of Appeals reversed the Supreme Court Appellate Division, First Department, finding that defendant failed to present "any compelling reason why the exercise of jurisdiction is unreasonable" and that the defendant "availed itself of the privilege of conducting business in New York by promoting its wine here, soliciting a distributor here and selling wine to that New York based distributor" (D & R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 29 N.Y. 3d 292, 78 N.E. 3d 1172, 56 N.Y.S. 3d 488 [2017]).

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

This Court's April 16, 2018 Decision and Order filed under Motion Sequence 011, denied defendant's motion for an Order pursuant to CPLR §327 dismissing this action for forum non conveniens, and to bar plaintiff from introducing evidence at trial of the video deposition of Maria Falcon, defendant's representative.

Plaintiff's cross-motion under Motion Sequence 011, sought relief: (a) granting sanctions pursuant to CPLR §3126 and granting an adverse inference against the defendant with respect to telephone records, electronic records and/or e-mails records lost or destroyed by defendant; (b) an extension of time under CPLR §2004 and CPLR §2005: (i) permitting plaintiff to retroactively exchange the CDs and to file them with the Clerk of the Court pursuant to Rule 202.15[g][1] or alternatively, order a viewing of the videotapes in accordance with Rule 202.15[g][2] of the Uniform Rules for the Supreme Court and Civil Court; and (ii) permitting plaintiff to seek discovery of invoices from Kobrand Corp. to defendant dating from March 17, 2014 to the date of trial of this matter, and/or ordering defendant to produce such invoices; and (iii) granting plaintiff the costs of this cross-motion and $1,750.00 in legal fees for the portion pertaining to spoliation.

The April 16, 2018 Decision and Order granted the cross-motion except for the relief seeking costs and legal fees.

Defendant seeks leave, pursuant to CPLR §2221(a) and (d), to renew or reargue this Court's Decision and Order dated April 16, 2018 that denied its motion filed under Motion Sequence 011.

Defendant argues that this Court overlooked, glossed over, and misunderstood that the factors identified as applied on a forum non conveniens motion favor resolution of this action in the Courts of Spain. Defendant claims that both parties are located in Spain, that witnesses are located in Spain, France and Portugal, evidence is located in Spain, and that the agreement was payable in Euro currency and that plaintiff's counsel seeks to have New York Courts apply the law of Spain, which warrants a determination that the forum for this action is appropriately Spain. Defendant also argues that this Court overlooked and misunderstood that plaintiff substantially delayed in providing copies of the video deposition of Maria Falcon. Defendant alleges that copies of the video discs of the deposition conducted on July 3, 2014 was not provided by plaintiff until November 16, 2017, over three years later warranting preclusion for chronic noncompliance with deadlines. Defendant claims that preclusion of the use of the video deposition will not prevent plaintiff from producing competent evidence at trial because the written transcripts can be used.

Renewal applies to the submission of new evidence not available at the time the original motion was submitted (Laura Vazquez v. JRG Realty Corp., 81 A.D. 3d 555, 917 N.Y.S. 2d 562 [1st Dept. 2011]). A motion that is described as one for leave to renew and reargue may be treated exclusively as a motion to reargue, where it is not based upon new facts unavailable at the time of the prior motion and does not offer a reasonable justification for failure to present the new facts at the time of the original motion (Navarette v. Alexiades, 50 A.D. 3d 873, 855 N.Y.S. 2d 649 [2nd Dept. ,2008] and Onglingswan v. Chase Home Finance, LLC, 104 A.D. 3d 543, 104 N.Y.S. 2d 149 [1st Dept., 2013]). Renewal is not available to parties that seek a "second chance" because of failure to exercise due diligence (Galisia v. Espinal 149 A.D. 3d 544, 50 N.Y.S. 2d 266 [1st Dept. 2017]).

Defendant has not argued that new evidence exists and was unavailable at the time Motion Sequence 011 was submitted and this motion shall be treated as exclusively seeking reargument.

A Court has discretion to grant a motion to reargue upon a showing that it, "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. " (Foley v. Roche, 68 A.D. 2d 558, 418 N.Y.S. 2d 588 [1st Dept., 1979]). Reargument is not intended to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present new arguments that are different from those originally asserted in the motion. (Foley v. Roche, 68 A.D. 2d 558, supra and Mangine v. Keller, 182

A.D.2d 476, 477, 581 N.Y.S.2d 793 [1st Dept.,1992] and Phoenix Four v. Albertini, 245 A.D. 2d 166, 655 N.Y.S. 2d 893 [1st Dept. 1997]).

The April 16, 2018 Decision and Order of this Court properly determined that defendant identified factors to be taken into consideration but failed to meet the heavy burden on a motion to dismiss on forum non conveniens grounds. The Court took into consideration the facts and arguments stated by the defendants in denying the motion and stated, "It is not enough that some factors weigh in the defendants' favor, the motion for forum non conveniens should be denied if the balance is not strong enough to disturb the choice of forum made by the plaintiffs (Elmaliach v. Bank of China Ltd., 110 A.D. 3d 192, 971 N.Y.S. 2d 504 [1st Dept., 2013] and Coelho v. Grafe Auction Co., 128 A.D. 3d 615, 11 N.Y.S. 13 [1st Dept., 2015])." This Court further cited the Court of Appeals determination that defendant failed to present "any compelling reason why the exercise of jurisdiction is unreasonable" as supporting plaintiff's choice of New York as the proper forum.

The April 16, 2018 Decision and Order noted that defendant's motion for dismissal on forum non conveniens grounds was made after discovery was conducted and after approximately ten (10) *years* of litigation. Defendants delay in seeking dismissal on forum non conveniens grounds amounts to waiver of that relief and is grounds for denial of the motion (see Corines v. Dobson, 135 A.D.2d 390, 521 N.Y.S.2d 686 [1st. Dept. 1987] twenty-one (21) months after commencement of action and after discovery substantial delay waiving dismissal on ground of forum non conveniens; Creditanstalt Investment Bank AG, v. Chadbourne & Parke LLP, 14 A.D.3d 414, 788 N.Y.S.2d 104 [1st. Dept. 2005] twenty (20) months substantial delay waiving dismissal on ground of forum non conveniens; Bacon v. Nygard, 160 A.D. 3d 565, 76 N.Y.S. 3d 27 [1st Dept., 2018] fourteen (14) months delay counsels against dismissal).

A movant's heavy burden remains despite the plaintiff's status as a non-resident (see Bank Hapoalim (Switzerland)Ltd., v. Banca Intensa S.P.A., 26 A.D.3d 286, 810 N.Y.S.2d 172 [1st. Dept. 2006]; Mionis v. Bank Julius Baer & Co., Ltd., 9 A.D.3d 280, 780 N.Y.S.2d 323 [1st. Dept. 2004]; Anagnostou v. Stifel, 204 A.D.2d 61, 611 N.Y.S.2d 525 [1st. Dept. 1994]).

Defendant did not meet the heavy burden and is seeking successive opportunities to reargue previously decided issues, warranting denial of the reargument relief sought on forum non conveniens grounds.

This Court did not misunderstand or overlook plaintiff's delay in exchanging the videotaped deposition. Plaintiff's delay was a result of a misunderstanding of the Appellate Division First Department determination, it was not intentional, willful or contumacious. There was no prior pattern of delay in providing discovery by the plaintiff or any hardship or prejudice to the defendant. Defendant is also seeking successive opportunities to argue previously decided issues and has failed to establish that reargument should be granted or that preclusion of plaintiff's use of the videotaped deposition is warranted. Defendant's argument that this Court overlooked that spoliation sanctions were not warranted because of an affidavit from Maria Falcon stating that she was unable to provide the telephone records because they were destroyed by the telephone company, was not raised on the prior motion and reargument of the spoliation sanctions, is also denied.

Plaintiff's cross-motion seeks an Order : (a) pursuant to the Uniform Rules of Trial Courts §202.5-b (d)(7) modifying the April 16, 2018 Decision and Order to allow plaintiff to retain all of the remaining copies of the deposition CDs (with the exception of the copy provided to the defendant on November 16, 2017) and present them at trial; (b) modifying the April 16, 2018 Decision and Order to allow plaintiff to seek invoices from Defendant to Kobrand Corp. dated after March 17, 2014; (c) compelling defendant to produce the amount of Kobrand Corp.'s payments to defendant or the amounts paid on invoices after March 17, 2014; (d) grant plaintiff leave to serve a subpoena duces tecum upon Kobrand Corp. seeking copies of Kobrand Corp.'s records pertaining to such invoices post March 17, 2014 and the amount of Kobrand's payments to defendant thereon; (e) compelling the

defendant to, pursuant to plaintiff's Letter to defendant dated December 21, 2017: (I) Provide OL - 055 through OL-90, or alternatively indicate that said documents do not exist and (ii) clarify the number of pages of OL-063, alternatively provide the same with each page consecutively bates stamped; (f) vacate the Note of Issue filed on June 18, 2018, modifying this Court's Order dated April 8, 2015 that all "discovery is complete" and extending the date to file the Note of Issue to such date as to the Court is appropriate under the circumstances hereof, and (g) granting costs and sanctions in the amount of $1, 750.00 for defendant's filing of a meritless reargument or renewal motion.

Plaintiff has shown that modification is warranted pursuant to the Uniform Rules of Trial Courts §202.5-b (d)(7) modifying the April 16, 2018 Decision and Order to allow plaintiff to retain all of the remaining copies of the deposition CDs (with the exception of the copy provided to the defendant on November 16, 2017) and present them at trial. The clerk's office has advised plaintiff and this Court that it is not equipped to store the CD's in question prior to trial. Defendant objects to this relief arguing that the videotaped deposition should not be used at trial. This objection restates defendant's arguments on the underlying motion and does not warrant denial of this portion of the cross-motion.

The April 16, 2018 Decision and Order directed that "defendant provide plaintiff with invoices from Kobrand Corp. to defendant starting from March 17, 2014 to the present, within thirty days of the date of entry of this Order" and "defendant shall provide plaintiff with copies of invoices from Kobrand Corp. to defendant starting from March 17, 2014 to the present within thirty (30) days of the date of entry of this Order and will continue to provide them until the date of trial." Plaintiff seeks to modify the language to state that invoices are "from defendant to Kobrand Corp." because Kobrand Corp. did not provide invoices to defendant. The language in the April 16, 2018 Order is modified to state "from defendant to Kobrand Corp.."

Defendant correctly argues that pursuant to CPLR §2302(a) and §2303 (a) there is no need for this Court to direct modification for service of a subpoena. Plaintiff's counsel can serve the subpoena.

Plaintiff seeks clarification in writing or additional bates stamped documents, this relief was not previously sought in the cross-motion filed under Motion Sequence 011. Defendant in opposition to the motion states that documents were produced and the bates stamp numbers were not in strict numerical order. Modification of the April 16, 2018 Decision and Order for this discovery is not warranted.

Plaintiff previously sought to extend the time to file the Note of Issue and is now seeking entirely different relief, modifying to vacate the Note of Issue filed on June 18, 2018 (NYSCEF Document # 113) and extend the deadline for filing "to permit the defendant to provide the foregoing documents." This relief is not warranted, and will not be provided.

Frivolity as defined by 22 NYCRR 130-1.1, requires conduct which is continued when its lack of legal or factual basis should have been apparent to counsel or the party. The imposition of sanctions requires a pattern of frivolous behavior (Sarkar v. Pathak, 67 A.D. 3d 606, 889 N.Y.S. 2d 184 [1st Dept. 2009]).

Plaintiff is not entitled to the costs of making this cross-motion, defendant has not engaged in a pattern of intentional frivolous behavior, warranting denial of this relief.

Accordingly, it is ORDERED that defendant's motion pursuant to CPLR §2221(a) and (d), for leave to renew or reargue this Court's Decision and Order dated April 16, 2018 filed under Motion Sequence 011, is denied, and it is further,

ORDERED, that Plaintiff's cross-motion is granted to the extent of modifying the April 16, 2018 Decision and Order filed under Motion Sequence 011 which is Amended to read as follows:

"ORDERED that plaintiff retain all of the remaining copies of the deposition CDs, with the exception of the copy provided to the defendant on November 16, 2017, for presentation as evidence at the time of trial, and it is further,"

"ORDERED that defendant shall provide plaintiff with copies of the invoices from defendant to Kobrand Corp. starting from March 17, 2014 to present within thirty days of August 10, 2018 to the extent not already provided and will continue to provide them until the date of trial, and it is further,"

ORDERED, that the remainder of the relief sought in plaintiff's cross-motion is denied.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: August 6, 2018

MANUEL J. MENDEZ
J.S.C

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE