

<b>Nelux Holdings Intl. N.V. v Dweck</b>
2018 NY Slip Op 32325(U)
September 17, 2018
Supreme Court, New York County
Docket Number: 652562/2015
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Andrea Masley  
JSC

PART 48

NELUX HOLDINGS INTERNATIONAL N.V.,

Plaintiff,

INDEX NO. 652562/2015

-against-

MOTION DATE:

GILA DWECK,

MOTION SEQ. NO. 006 & 007

Defendant.

The following papers, numbered 1 to \_\_\_\_\_ were read on this \_\_\_\_\_.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

In motion sequence number 006, plaintiff moves, pursuant to CPLR 3124 and 3126, for an order compelling defendant to provide plaintiff with all documents obtained by defendant from plaintiff's prior counsel. This motion is denied.

This action seeks to collect under a loan agreement and promissory notes. In November 2015, the parties entered into a stipulation, so ordered by Justice Jeffrey Oing, to limit discovery "to the issue of whether defendant or persons acting on her behalf provided written acknowledgments of indebtedness, including, without limitation, the authority of such persons to act on her behalf" (O' Murchadha aff, exhibit A). Pursuant to the stipulation, the parties agreed to serve document requests and responses pertaining to this limited issue. At that time, plaintiff was represented by Covington & Burling LLP (Covington). Plaintiff asserts that it gathered key documents in its possession and provided them to Covington, but did not keep records of what was provided. Covington, in turn, produced documents to defendant without providing a copy to plaintiff.

In January 2017, Covington filed a motion seeking permission to file its proposed application to withdraw as plaintiff's counsel under seal.<sup>1</sup> Justice Oing granted the motion and sealed the application. On February 17, 2017, Justice Oing granted Covington's motion to withdraw and fixed a retaining lien against plaintiff in the amount of \$105,330, plus accrued interest.

<sup>1</sup> Plaintiff asserts that it discharged the firm after a breakdown in their relationship.

Plaintiff retained its present counsel, Schlam Stone & Dolan LLP (SSD), who requested a copy of Covington's production to defendant; Covington denied this request asserting the retaining lien on the file. SSD then sought a copy of the documents Covington produced from defendant. Defendant denied the request.

Plaintiff will not be permitted to circumvent the retaining lien imposed by Justice Oing. Ordering defendant to produce the documents that plaintiff cannot obtain from its former lawyer due to a judicially ordered retaining lien would be an improper "work around" of such lien" (*Andrade v Perez*, 159 AD3d 593, 594 [1<sup>st</sup> Dept 2018]). For plaintiff's counsel to request this relief, at the very least, borders on frivolity, and thus, defendant is awarded costs and fees in opposing this motion.

In motion sequence number 007, defendant moves, pursuant to CPLR 3212 (c) and CPLR 603, directing a trial on the sole issue of fact identified by the Appellate Division, First Department with respect to defendant's statute of limitations defense. Defendant argues that this court should order a brief trial on the discrete issue of whether nonparty Shibolet LLP (Shibolet) represented defendant in 2009 when Michael Friedman, Esq. of Shibolet sent two emails to plaintiff in late 2009. This motion is granted.

As stated above, this action seeks recovery of unpaid amounts on certain promissory notes executed by defendant in 1999 and 2000 and a related loan agreement executed by defendant in 1999. All principal was to be repaid by May 10, 2004 (*see* complaint ¶¶ 8-15). Plaintiff filed its complaint on July 22, 2015, asserting causes of action for breach of contract and unjust enrichment and seeking monies owed as well as attorneys' fees incurred to collect on the loans. In its complaint, plaintiff alleges that it received written acknowledgments on defendant's behalf of her indebtedness under the promissory notes and loan agreement in "the fourth quarter of 2009" (*id.* ¶ 20).

On March 8, 2016, defendant filed a motion for summary judgment dismissing the complaint on the ground that this action is barred by the six-year statute of limitations. In opposition, plaintiff argued that the two emails it received from Shibolet in 2009 qualify as "acknowledgments" under New York General Obligations Law § 17-101 and those emails revived plaintiff's claims. Justice Oing denied defendant's motion, holding that an issue of fact exists as to whether Shibolet was representing defendant at the time Shibolet sent the emails. Defendant moved to reargue its summary judgment motion, or in alternative, requested an immediate trial on the issue of fact. Justice Oing denied the motion. Defendant appealed Justice Oing's decision on its motion for summary judgment, and the Appellate Division, First Department, affirmed Justice Oing, holding that "[a]n issue of fact arises from the conflicting evidence in the record as to whether the law firm was acting as defendant's agent when it sent the emails to plaintiff" (*Williamson aff*, exhibit 2).

"The ordering of a separate trial of a claim or separate issue under CPLR

603, a discretionary determination, has traditionally been ordered where the separated issue does not touch upon the merits of the main controversy but will, nevertheless, be dispositive of the entire action. Typically, the separate trial device is used to address such nonmerits defenses as statute of limitations, statute of frauds, release and lack of jurisdiction" (*Baseball Office of the Commr v Marsh & McLennan*, 295 AD2d 73, 78-79 [1<sup>st</sup> Dept 2002] [internal quotation marks and citations omitted]).

Here, the discrete issue of whether Shibolet was representing defendant when it sent plaintiff the emails in question does not touch upon the merits of the main controversy of whether defendant owes defendant money under the loan agreement and promissory notes. The statute of limitations issue is ancillary and is not the crux of plaintiff's breach of contract or unjust enrichment claims or defendant's defense that she is entitled to a complete set off. Further, a quick resolution of the statute of limitations issue will dispose of the entire action if defendant is successful at a separate trial.

Although plaintiff asserts that Justice Oing previously rejected defendant's request for a separate trial when he denied defendant's motion to reargue "in its entirety", Justice Oing never opined on this issue and this court will not speculate as to Justice Oing's intentions. This issue is now before this court.

On November 24, 2015, the parties were ordered to conduct discovery on this limited issue. On April 24, 2018, the parties were ordered to complete any outstanding document production. Almost three years have passed since the parties were ordered to conduct discovery on this one issue, and thus, discovery on this limited issue is deemed complete. The parties should be ready to try this discrete issue for a quick resolution.

Accordingly, it is

ORDERED that plaintiff's motion to compel defendant to provide plaintiff with all documents obtained by defendant from plaintiff's prior counsel is denied; and it is further

ORDERED, that plaintiff shall pay defendant's cost and fees in opposing plaintiff's motion. If the parties cannot agree to an amount, then defendant may submit an inquest on papers including an affirmation of services and plaintiff may submit written opposition within one week of defendant's submission; and it is further

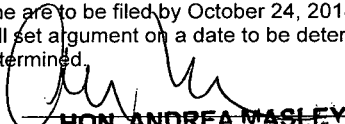
ORDERED that defendant's motion severing the sole issue of fact identified by the Appellate Division, First Department with respect to defendant's statute of limitations defense and granting immediate trial on that issue is granted;

ORDERED that defendant is directed to file a note of issue with a copy of this

decision and order within five days of notice of entry. The note of issue will be limited to the statute of limitations issue and apply only to this immediate trial; and it is further

ORDERED that, if plaintiff is successful at trial, and the parties re-engage in discovery on the merits of this case, upon the filing of a statement of readiness with the court, the note of issue will be reinstated and apply to a second trial on the merits; and it is further

ORDERED that motions in limine are to be filed by October 24, 2018 or are otherwise waived. If filed, the court will set argument on a date to be determined. A trial date will be set on a date to be determined.

Dated: 9/17/18  **HON. ANDREA MASLEY**, J.S.C.

Check one:  CASE DISPOSED  NON-FINAL DISPOSITION

MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER

Check if appropriate:  SETTLE ORDER  SUBMIT ORDER  DO NOT POST

FIDUCIARY APPOINTMENT  REFERENCE