SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

GEM HOLDCO, LLC and GEM VENTURES, LTD.,

Plaintiffs,

-against-

CHANGING WORLD TECHNOLOGIES, L.P, CWT CANADA II LIMITED PARTNERSHIP, RESOURCE RECOVERY CORPORATION, JEAN NOELTING, RIDGELINE ENERGY SERVICES, INC., DENNIS DANZIK, DOUGLAS JOHNSON, and KELLY SLEDZ,

Defendants.

----------X

CWT CANADA II LIMITED PARTNERSHIP, RESOURCE RECOVERY CORPORATION, and JEAN NOELTING,

Third-Party Plaintiffs,

-against-

CHRISTOPHER BROWN, EDWARD TOBIN, ELIZABETH J. DANZIK, and DEJA II, LLC.,

Third-Party Defendants.

----------X

Index No.: 650841/2013

DECISION & ORDER

JENNIFER G. SCHECTER, J.:

Dennis Danzik and Ridgeline Energy Services, Inc. (RDX) (collectively, the RDX Parties) move, pursuant to CPLR 5015, to vacate the judgment entered against them in this action. CWT Canada II Limited Partnership and Resource Recovery Corporation (collectively, the CWT Parties) oppose and cross-move for sanctions against the RDX Parties and their counsel and for a litigation injunction. The motion and cross-motion are denied.

Background

Familiarity with the extensive history of this action, recounted in the court's numerous decisions,[1] is presumed. As relevant here, on November 4, 2015, the court (Kornreich, J.) struck the RDX Parties' defenses due to their persistent violations of court orders (*see* Dkt. 562). Those violations included, among other things, repeated failure to produce electronically-stored information (ESI) in accordance with an agreed-upon protocol and failure to comply with court orders to produce bank records. Subsequently, by order dated June 3, 2016 (Dkt. 614), the court held the RDX Parties in civil and criminal contempt for violating orders dated March 18, 2015 (Dkt. 358) and May 5, 2015 (Dkt. 426), which required the RDX Parties to remit the millions of dollars that they stole from the CWT Parties.[2] The contempt finding was made after an extensive hearing (*see* Dkts. 597-599), which the RDX Parties continually attempted to upend with frivolous tactics (e.g., counsel changes and bankruptcy filings) to no avail. In the end, the court found, beyond a reasonable doubt, that Danzik stole the money and refused to comply

[1] *See* Dkts. 120, 201, 280, 358, 592, 614, 664, 739. References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing system.

[2] The RDX Parties' underlying fraud claim regarding falsified testing records (which they want to prosecute after vacating the judgment) is not a new allegation; rather it was very much a part of this case when the court issued the March 18, 2015 preliminary injunction (*see* Dkt. 358 at 5 n 1). The court explained that even if the RDX Parties' fraud claim had merit, they still were not entitled to the tax credits (*see id.* at 5 ["The money either belongs to the CWT Parties or the federal government" and thus "regardless of the outcome of this litigation, [RDX] will not keep the money"]). Indeed, a federal bankruptcy court agreed with this assessment by finding that the tax credits were not part of RDX's bankruptcy estate (*see* Dkt. 614 at 9, citing Dkt. 605 at 7). Even Danzik seemed to recognize the impropriety of his keeping the tax credits because, as noted herein and discussed in the June 3, 2016 contempt decision, he deposited the tax credits into a secret bank account.

with the court's orders to return it – even after being given one last opportunity to purge (*see* Dkt. 614 at 8, 13-14). The court issued a warrant for Danzik's arrest, which remains outstanding (*see* Dkt. 778). The Appellate Division affirmed (164 AD3d 1132 [1st Dept 2018] ["we find no support in the record for the claim that the motion court deprived appellants of due process by continuing the contempt hearing after counsel for appellants informed the court that his clients, believing the proceedings were stayed when they filed for bankruptcy, instructed him to provide no further representation"]).[3]

After the RDX Parties' answer was stricken and the rest of the case settled, the CWT Parties moved for a default judgment on their cross-claims against the RDX Parties. The RDX Parties, who were represented by counsel, *did not* oppose the motion. By order dated August 4, 2016, the court granted the motion and directed entry of a judgment in excess of $7 million against the RDX Parties (Dkt. 664). Judgment was entered on September 7, 2016 (Dkt. 673). The RDX Parties attempted to collaterally challenge the judgment in other jurisdictions to no avail (*see, e.g., CWT Canada II Ltd. Partnership v Danzik*, 2018 WL 571797, at *13 [D Ariz Jan. 26, 2018] [dismissing RDX Parties' claims based on res judicata]). Having failed, they come back before this court and seek to vacate the judgment two years after its entry on the ground of "newly discovered evidence" that supposedly excuses their failure to comply with court orders.

[3] "Danzik chose to forego the opportunity to cross-examine Ms. Blazar at the contempt hearing … when he instructed his lawyer not to move forward, contrary to the court's instructions, based on his filing of a personal bankruptcy proceeding in Wyoming that was later dismissed as a bad-faith filing" (Dkt. 921 at 2 n 1). While the RDX Parties are not currently seeking to vacate the contempt order, they intend to do so if the court vacates the judgment (*see* Dkt. 811 at 5 n 1).

They rely on CPLR 5015(a)(2), which provides that a judgment may be vacated based upon "newly-discovered evidence which, if introduced at the trial, would probably have produced a different result." Danzik now contends that he could not produce ESI years ago because certain computers that were the sources of the ESI were surreptitiously taken by a former employee, Candie Blazar--the whistleblower who exposed Danzik's misdeeds in the contempt proceeding--who then placed RDX's files in a "secret" storage unit in Joplin, Missouri.

The RDX Parties' Discovery Violations

During the summer of 2015, the court required the RDX Parties to produce two critical categories of discovery: (1) financial records, including all of RDX's bank statements (*see* Dkt. 501); and (2) ESI pursuant to a stipulated protocol (*see* Dkt. 827). The RDX Parties were ordered to complete their ESI and financial production by September 2015 (*see* Dkts. 501, 535). It was imperative that the CWT Parties were timely provided with the RDX Parties' production prior to the contempt depositions in October 2015 (*see* Dkt. 535). That did not occur (*see* Dkt. 819 at 8).[4]

As the date of the contempt hearing, November 4, 2015, drew closer, the court held numerous telephone conferences with the parties during which the RDX Parties were repeatedly urged to comply with discovery orders (*see* Dkt. 819 at 8). During those conferences, the RDX Parties' counsel **never** claimed that Danzik lacked access to any of

[4] There was serious concern that not only was Danzik withholding critical bank records but that he was also refusing to disclose all of RDX's bank accounts (*see id.* at 7). The concerns proved to be well founded as Danzik failed to disclose the very account in which he deposited the tax credits (*see* Dkt. 614 at 11).

RDX's records nor did he indicate that anyone, such as Blazar, was impeding his ability to gather, review, and produce responsive ESI. Rather, the RDX Parties' attorney, who does not appear to be at fault for his clients' actions, repeatedly insisted that he was doing the best he could to get Danzik to comply.

Danzik--almost three years after discovery was to be completed--now claims that Blazar was responsible for RDX's noncompliance and that, but for her actions, RDX's ESI would have been timely produced. This contention is inconsistent with the record and, even if it were true, would not be a basis for vacating the judgment. Blazar was not the reason for all of the repeated disclosure violations. Danzik does not explain, for example, why he failed to produce ESI that was not controlled by Blazar, such as ESI not stored on RDX's local servers or information that could have been obtained from any computer such as information from Gmail or emails stored on a server in Danzik's home.[5] Danzik also fails to explain why he did not raise this issue as a defense to his failure to produce ESI until now. Of course, if anyone was interfering with his ability to comply, he could have alerted the court at any of the numerous conferences and appropriate action could have been taken to obtain the discovery at that time. The RDX Parties never complained that they were unable to gather court-ordered discovery.

[5] A local server is a physical device that plausibly could have been taken by Blazar. A third-party server that was never in RDX's physical possession, however, could have easily been accessed remotely by someone with proper login credentials (such as Danzik) (*see* Dkt. 818 at 20 ["Danzik used multiple email accounts that were not stored on the RDX servers, including a Gmail account, and a private email stored on a server in his home - danzik@danzik.pro. I know about these email accounts because my firm attempted to collect emails from them when we were representing RDX, but Danzik refused to allow us access. He likewise failed to produce emails from these accounts in response to the CWT Parties' document requests"]).

Danzik, moreover, does not explain how Blazar prevented him from obtaining RDX's bank records directly from the banks (*see* Dkt. 819 at 9 ["Danzik/RDX's refusal to produce the Wells Fargo checks is particularly egregious because my partner, Bradley Nash, wrote to Danzik/RDX's counsel, Michael Finkelstein, and showed him exactly how the account holder could obtain copies of the checks online. Mr. Finkelstein responded that he saw 'no reason the checks cannot be produced.' The only reason the checks were never produced is because Danzik did not want them produced"]).[6] Danzik has not established that the RDX Parties' noncompliance was only attributable to Blazar.

Moreover, even if Blazar was the reason why some of the RDX Parties' ESI was not timely produced in September 2015, Danzik does not explain why he did not personally ensure RDX's compliance with the ESI protocol in October 2015. The RDX Parties were warned well in advance of the November 4 hearing that there would be serious ramifications for noncompliance with the protocol (*see* Dkt. 819 at 8). This was not merely a gratuitous warning or insistence on strict adherence to deadlines; rather, it was based on the severe prejudice to the CWT Parties of having to proceed without the RDX Parties' discovery. RDX's counsel explained that he had communicated the admonition to Danzik and that he was urging him to comply. Danzik--individually and as the head of RDX--was ultimately responsible for ensuring that all of the RDX Parties' ESI was properly gathered and produced.

---

[6] When Danzik's counsel previously tried to excuse his failure to produce bank records because they were allegedly destroyed by one of the CWT Parties, he was told to "[g]et them from the bank" (*see* Dkt. 526 [7/31/15 Tr. at 21]).

Danzik's belated attempts to blame others is all the more uncompelling when his actions are viewed in the context of his overall conduct during the litigation. Danzik's ESI and financial discovery violations were not isolated incidents. By the time the RDX Parties began violating their discovery obligations in the Summer and Fall of 2015, Danzik already had a history of violating court orders. For instance, the day after the court issued a TRO on May 5, 2015, Danzik formed a new corporate alter ego of RDX to evade the attachment order (*see* Dkt. 614 at 10). Danzik also engaged in a variety of dilatory strategies, such as filing frivolous bankruptcy actions (*see id.* at 4-5), constantly changing counsel (*see id.* at 3) and making baseless disqualification motions.[7]

Nonetheless, Danzik steadfastly maintains that his discovery violations were caused by Blazar and that if she had not deceived him and absconded with so much evidence, he would have produced more discovery.[8]

---

[7] The RDX Parties yet again argue that the CWT Parties' counsel, Schlam Stone, was conflicted (*see* Dkt. 803 at 3) despite the Appellate Division's affirmance of this court's conclusion that a conflict waiver precluded them from seeking disqualification (46 Misc3d 1207[A] [Sup Ct, NY County 2015], *affd* 130 AD3d 506 [1st Dept 2015]). Interestingly, even as far back as when Schlam Stone withdrew from representing the RDX Parties, "Danzik [had] refused to cooperate with his counsel in the e-discovery process, and would not allow [counsel] to collect emails to be searched pursuant to the ESI protocol we negotiated with [plaintiff]" (Dkt. 819 at 9). That Danzik continued to be less than cooperative with his successor counsel was simply par for the course. Indeed, while the RDX Parties' (first) change in counsel occurred in August 2014 (*see* Dkt. 196), they managed to forestall the entire ESI process until the following summer by filing a meritless disqualification motion (*see* Dkt. 280). The RDX Parties then kept delaying the case by changing counsel multiple times (*see* Dkt. 614 at 3).

[8] It is incredible that Danzik would have actually provided all of the required discovery based on his failure to produce whatever was already in his possession, custody or control.

Conflicting Accounts Related to Danzik's Knowledge of the Storage Unit

The CWT Parties submit evidence, such as communications between Danzik and another RDX employee, Monica Garcia, suggesting that Blazar did not secretly open the storage unit and that Danzik was always aware of it (Dkts. 847 [text messages], 851 [emails]; *see* Dkt. 846 [Blazar Aff.]). The CWT Parties submitted an affidavit from an RDX employee, James Saxton, who attests that, in June 2015 – ***five months before the court struck the RDX Parties' defenses*** – he "personally transported most of the documents and computers that were stored in the Storage Unit from Joplin to Scottsdale, Arizona and delivered them to Danzik" (Dkt. 844 at 2). In fact, a storage unit had been addressed by John Shaw in his ***May 5, 2015*** affidavit (*see* Dkt. 414 at 2 ["I am told that [Danzik] and his remaining staff have begun moving some of the company's files ***to a storage unit*** or to one employee's house, while abandoning other files that had been stored at the plant and at the company's main office"] [emphasis added]). The CWT Parties, therefore, contend that Danzik has long known about the storage unit and that he did not, in fact, first become aware of it in August 2017 (*see Molina v Chladek*, 140 AD3d 523, 524 [1st Dept 2016] ["defendant's submission does not warrant relief under CPLR 5015(a)(2) because he failed to explain why the letter agreement 'could not have been discovered previously by the exercise of due diligence'"]).

The RDX Parties, however, raise questions about the veracity of the CWT Parties' contention that Danzik knew about the storage unit back in 2015. For instance, while Saxton claims to have personally met with Danzik to deliver the records in mid-June

2015, another witness, Anthony Calim, claims to have met with Saxton on that day and attests that Danzik was not present (*see* Dkt. 902 at 2-3). Danzik claims to have been in New York at the time (*see* Dkt. 898 at 9) and submits an airline itinerary indicating that he was out of town between June 16 through June 20, 2015 (*see id.* at 98-99). Danzik avers that since "Saxton rented the Budget truck on June 15, 2015 at 9AM [in Missouri]" ... [t]here is no physical way he could have traveled to Scottsdale[, Arizona] to 'meet' me, by June 16th before I left" and that "Saxton also could not have met me with the truck sometime after I returned on June 20th because [Calim] returned the Budget truck that [Saxton] drove to Scottsdale sometime during the work week, between June 17th and June 19th" (*id.* at 9).[9] Danzik claims that Saxton did not deliver all of the contents of the storage unit and that he did not find about the unit or obtain possession of the remainder of its contents until the week of August 28, 2017 (*see id.* at 2-3).

Saxton responds that he "drove through the night and arrived in Scottsdale in the afternoon on June 16", and submits evidence that he "checked into a hotel in Phoenix, Arizona on June 16" (*see* Dkt. 922 at 2). He maintains that he "delivered the contents of the truck to RDX and met personally with Danzik on that same day" (*id.*). He notes that "although Danzik claims that he took a flight from Phoenix to Newark on June 16, the ticket attached to his affidavit shows that the flight did not leave Phoenix until 9:55 p.m.

[9] According to Google maps, the drive from Joplin to Scottsdale spans more than 1,100 miles and takes approximately 17.5 hours.

[and t]hus, even if he did take that flight, there was plenty of time for him to have met . . . in Scottsdale on June 16 before the flight – which he in fact did" (*id.*).[10]

Discussion

The RDX Parties contend that they have an absolute right to a hearing to resolve the parties' conflicting accounts regarding when Danzik became aware of the storage unit and its contents. They do not (*Ryan v Zherka*, 140 AD3d 500 [1st Dept 2016]; *see Shomron v Fuks*, 147 AD3d 685, 686 [1st Dept 2017] ["The evidence is thus insufficient even to raise an issue of fact for resolution at a fact-finding hearing."]). Regardless of whether Danzik knew about the storage unit or not, there is no basis for vacating the judgment. The issue of when he became aware of the unit is immaterial to the validity and soundness of the judgment. The RDX parties do not get a do-over because now they belatedly want to begin to produce discovery. They failed to provide discovery when it was required several years ago in response to numerous court orders and they also failed to assert **at that time**--when the issues could have been addressed--that they were unable to do so through no fault of their own.

Indeed, even if Danzik did not know about the storage unit until August 2017, he could have alerted the court to items that were not in his possession or control despite a

[10] *See also id.* at 2-3 ("Danzik's suggestion that following my trip to Scottsdale, 'there were many items left in the storage unit,' including some fifty boxes of documents, is false. I loaded most of the contents of the storage unit into the rental truck and transported these items – which included paper files, computer servers and individual computers – to Scottsdale. When I left Joplin, on June 15, 2015, the storage unit was mostly empty. It had nowhere near the volume of documents and equipment Danzik claims to have discovered there in 2017"). It should be noted that the court has considered, without objection by the CWT Parties, Danzik's sur-reply affidavit filed on November 9, 2018 (Dkt. 925).

diligent search and he could have produced the discovery that he had. He did neither. His failure to produce ESI not controlled by Blazar and his failure to disclose the Hometown Bank account, where he deposited the tax credits that he stole from the CWT Parties, had absolutely nothing to do with the storage unit and make the issues that he belatedly raises wholly academic (*see* Dkt. 614 at 11, Dkt. 554 at ¶¶ 27-29; *see also Olwine, Connelly Chase, O'Donnell & Weyher v Valsan*, 226 AD2d 102, 103 [1st Dept 1996] [party moving for vacatur pursuant to CPLR 5015(a)(2) must show that the newly discovered evidence is material such "that it would probably change the result previously reached"]).

The default judgment was the product of Danzik ignoring countless court orders with absolutely no regard for the court's authority.[11] As the court explained, Danzik "is the epitome of a recalcitrant, contemptuous, and incorrigible litigant whose pleadings deserved to be stricken" (Dkt. 614 at 12). The ultimate sanction was necessary, under the circumstances, to preserve the integrity of the court (*see* Dkt. 597 [11/4/15 Tr. at 71] ["What I really am concerned with is the power of the court. If this court's orders are ignored repeatedly, we can't have a viable court system. ... It undermines the power the court, which is a very serious problem. This court just can't stand by and watch that

[11] Danzik also refused to return stolen money and the RDX Parties were held in contempt in June 2016. By that point, defendants' answer had already been stricken based on the numerous discovery violations. Though Danzik now contends that he did not have the money and that his contempt should be excused, if that were the case, he could have made that argument on appeal. As the contempt order was affirmed, Danzik can no longer seek to collaterally challenge whether it was properly issued (especially since the "new evidence" concerning ESI has nothing to do with the reasons Danzik was held in contempt).

happen"]). The Appellate Division has repeatedly held that such conduct cannot be countenanced (*Herman v Herman*, 134 AD3d 442 [1st Dept 2015], citing *CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 318 [2014]; *see also Anderson & Anderson LLP-Guangzhou v N. Am. Foreign Trading Corp.*, 165 AD3d 511 [1st Dept 2018]) and there is no basis for vacating the judgment because Danzik wants another chance.

The CWT Parties' cross-motion for sanctions and a filing injunction is denied. Though the relief sought is unwarranted, sanctions are not warranted either. Nothing in the record suggests, moreover, that Danzik's current counsel has any reason to doubt the veracity of his assertions. Likewise, it is not for this court to opine on what courts in other jurisdictions should do under the circumstances. So far, every court outside New York that has been faced with one of Danzik's collateral attacks on this court's proceedings and judgment--such as the bankruptcy courts and the federal court in Arizona--has refused to countenance his tactics and found his positions meritless. To the extent that those courts find further recourse appropriate, that is left to their sound discretion. On this record, the drastic remedy of a litigation injunction is not appropriate.

Accordingly, it is

ORDERED that the RDX Parties' motion to vacate the judgment is denied; and it is further

ORDERED that the CWT Parties' cross-motion for sanctions and a litigation injunction is denied.

Dated: February 4, 2019

ENTER:

Jennifer G. Schecter, J.S.C.