Knopf v Esposito
2019 NY Slip Op 33468(U)
November 27, 2019
Supreme Court, New York County
Docket Number: 150315/2019
Judge: Gerald Lebovits
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

----------X

MICHAEL KNOPF and NORMA KNOPF,

Plaintiffs,

- v -

FRANK ESPOSITO, DORSEY & WHITNEY, LLP, NATHANIEL AKERMAN, EDWARD FELDMAN, MICHAEL SANFORD, and SP VOYAGER FUND, LLC,

Defendants.

----------X

INDEX NO. 150315/2019

MOTION DATE N/A

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147

were read on this motion for LEAVE TO FILE ADDITIONAL PAPERS.

BerryLaw PLLC, New York City (Eric W. Berry of counsel), for plaintiffs.
Esposito Partners PLLC, New York City (Frank Esposito of counsel), for defendant Frank M. Esposito, Esq.
Dorsey & Whitney LLP, New York City (Nathaniel H. Akerman and Anthony P. Badaracco of counsel), for defendants Dorsey & Whitney LLP and Nathaniel H. Akerman.
Feldman & Associates, PLLC, New York City (Edward S. Feldman of counsel), for defendant Edward S. Feldman, Esq.

Gerald Lebovits, J.:

Plaintiffs, Norma and Michael Knopf, bring this motion in an action related to the long-running litigation between them and defendant Michael H. Sanford—an action the Knopfs brought to hold Sanford and the other defendants accountable for what they allege to be a conspiracy to commit acts of fraud, deception, and other wrongdoing to help Sanford evade a large money judgment. Defendants have moved to dismiss this action. The motion now before this court considers whether the Knopfs may file the transcript of Sanford's recent deposition, which the Knopfs argue constitutes yet more evidence of a conspiracy among Sanford and the other defendants, for the court's consideration on those motions to dismiss.

BACKGROUND[1]

[1] The factual background relevant to this action is discussed in much greater detail in this court's July 18, 2019, order deciding several motions relating to post-judgment discovery served by the Knopfs in a related action. (*See* Revised Decision & Order, *Knopf v Sanford*, Index No.

A. The Prior Litigation Between the Knopfs and Sanford

In 2006, the Knopfs made two multi-million-dollar loans to Pursuit to purchase several apartments in New York County, one of which is a penthouse condominium unit (or PHC). The Knopfs made these loans in exchange for Pursuit's commitment to execute mortgage liens on the property in the Knopfs' favor. Pursuit failed to repay the loans or to execute the mortgage liens.

The Knopfs sued Pursuit and Sanford for breach of contract in Supreme Court, New York County. In December 2014, the Appellate Division, First Judicial Department, granted summary judgment in the Knopfs' favor on their breach-of-contract claim. The First Department left it to Supreme Court to determine the Knopfs' damages. (*See Knopf v Sanford*, 123 AD3d 521, 521 [1st Dept 2014].)

In October 2015, First Department Justice John Sweeny, Jr., ordered that any proceeds from the sale of the PHC be put into escrow. Sanford moved to vacate this escrow order. In December 2015, a full panel of the First Department issued an order denying Sanford's motion to vacate this escrow requirement. (*See* Index No. 113227/2019, NYSCEF No. 164, at Attachments A and C.)

Two weeks after the Court denied Sanford's motion to vacate—while the Knopfs and Sanford were litigating the amount of the Knopfs' damages before a judicial hearing officer—Sanford retained a new attorney (Frank M. Esposito, Esq.). Esposito is a transactional lawyer, not a litigator. But Esposito's wife (Melissa Ringel, Esq.) was then a First Department special master and a former Principal Appellate Law Clerk for three years to then-Justice James McGuire.

The same day that Sanford retained Esposito (January 11, 2016), he directed other attorneys representing him (Nathaniel H. Akerman, Esq., and Edward S. Feldman, Esq.) to call the First Department—without counsel for the Knopfs present on the call or aware that the call had been made—regarding the meaning of the Court's December 2015 Order, and in particular whether the October 2015 escrow order remained in place. Sanford did not wish to sell the PHC with an escrow requirement in place, and Sanford's buyer was reluctant to close the sale without greater clarity as to title.

Akerman and Feldman called the Court the next day, January 12, and spoke for several minutes with Ringel. Both Akerman and Feldman later gave deposition testimony in a related federal action that they called the general line for the First Department Clerk's Office and were transferred by the Clerk's Office to Ringel. The Court's telephone records, however, reflect that Akerman placed the call directly to Ringel.[2] Ringel told Akerman and Feldman that the October

---

113227/2009, NYSCEF No. 449, reported at *Knopf v Sanford* (65 Misc 3d 463 [Sup Ct, NY County 2019].) This summary is provided for the reader's convenience.

[2] After Akerman was made aware of the telephone records contradicting his deposition testimony, he submitted a declaration in the federal action withdrawing his claim that he had called the main number for the First Department's Clerk's Office and been transferred to Ringel

2015 escrow order had been vacated by a November 2015 First Department order—entered on a separate motion—and therefore that the Court's December 2015 *denial* of the motion to vacate the October 2015 order had no effect.

Akerman and Feldman each prepared memorandums memorializing their call with Ringel and provided their memos to Sanford, on Pursuit's behalf, and to the prospective purchaser of the PHC. These memos allowed the PHC sale to close on February 1, 2016.

On February 8, one week after the sale closed, a judicial hearing officer found Pursuit liable to the Knopfs for $8,336,488 in damages.[3] (*See* Index No. 113227/2009, NYSCEF No. 164, at 5 n 12.)

When the Knopfs became aware that Sanford had sold the PHC without escrowing the proceeds, they immediately brought a motion in the First Department, seeking among other things to have the proceeds returned to escrow. On February 25, 2016, now-retired First Department Justice Karla Moskowitz ordered that the "[m]oney remaining as of today at 3:45 pm" from the PHC sale "shall be placed in escrow as had been directed by Justice Sweeny in his 10/22/15 interim order, vacatur of which was denied by this Court's 12/29/2015 Order." (Index No. 113227/2009, NYSCEF No. 164, at 5 n 13 [quoting order].)

Between February 1 and February 24, 2016, Sanford paid $214,000 to Esposito, by a series of checks written to Esposito's firm's escrow account. Esposito transferred $100,000 from that sum to a *personal* account and appears to have used at least $50,000 of the $100,000 to pay an American Express credit-card bill. When Justice Moskowitz issued her order directing the return of PHC-sale proceeds to escrow, Esposito transferred approximately $159,000 back to Sanford, who paid it into escrow.[4]

Justice Moskowitz's February 25, 2016, escrow order led in total to putting approximately $430,000 into escrow. (*See* NYSCEF No. 100, at 2.) That sum was less than 15 percent of the total PHC sale proceeds of $3 million — *all* of which, under the First Department's October 2015 Order, should have been put into escrow immediately at closing.

(as opposed to calling Ringel directly). (*See* Decl. of Nathaniel H. Akerman, reproduced at NYSCEF No. 140.)

[3] Supreme Court (Braun, J.) initially declined to confirm the judicial hearing officer's report on purely procedural grounds relating to service. The First Department reversed the court's denial of the motion to confirm. (*See Knopf v Sanford*, 150 AD3d 608 [1st Dept 2017].) Justice Braun subsequently recused himself and the case was transferred to the undersigned. On remand from the First Department, this court confirmed the judicial hearing officer's report in part in February 2018. (*See Knopf v Sanford*, Index No. 113227/2009, 2018 NY Slip Op 30611 [U] [Sup Ct, NY County Feb. 9, 2018].)

[4] $50,000 of the remaining $55,000 is the subject of a related turnover proceeding brought by the Knopfs. This court ordered on July 11, 2019, that Esposito turn over the $50,000 to Pursuit's federal Chapter 7 bankruptcy trustee. (*See Knopf v Feldman & Assocs. PLLC*, Index No. 153821/2019, 2019 NY Slip Op 51145 [U] [Sup Ct, NY County July 11, 2019].) Esposito's appeal from that order is pending before the First Department.

On February 22, 2018, the Knopfs obtained a judgment against Pursuit in the *Knopf v Sanford* action for nearly $10 million. The Knopfs have since collected only $500,000 or so of that judgment. (NYSCEF No. 1, at 2.)

In May 2018, the Knopfs served post-judgment deposition and document subpoenas on Akerman, Akerman's law firm (Dorsey & Whitney), and Sanford. Each subpoena recipient moved to quash; the Knopfs cross-moved to enforce. In July 2019, this court largely granted the Knopfs' cross-motion to enforce and denied the motions to quash—finding among other things that the wrongful-act exception to the attorney-client privilege applied. (*See Knopf v Sanford*, 65 Misc 3d at 514-517.)

On November 1, 2019, Eric Berry, counsel for the Knopfs, took Sanford's deposition pursuant to the May 2018 deposition subpoena enforced by this court's July 18, 2019, order.[5] (*See* Deposition Transcript, Index No. 113227/2009, NYSCEF No. 532.)

B. This Action

In January 2019, while the post-judgment discovery motions were pending before this court, the Knopfs also brought this action. As amended in June 2019 (*see* NYSCEF No. 14), the Knopfs' complaint brings a series of allegations against Esposito, Akerman, Feldman, Dorsey and Whitney, Sanford, and an LLC controlled by Sanford, SP Voyager Fund.

The complaint contends principally that the defendants' conduct relating to the sale of the PHC (and in the several ensuing lawsuits in state and federal court) constituted a fraud on the courts and a completed conspiracy to commit "deceit and collusion" in violation of Judiciary Law § 487. The complaint asserts that this illicit conduct caused a range of injuries to the Knopfs—most notably, millions of dollars in damages due to the sale of the PHC closing without the proceeds being put into escrow—and seeks treble damages under Judiciary Law § 487.

Esposito, Akerman and Dorsey & Whitney, and Feldman have each separately moved to dismiss (motion sequences 001, 002, and 003). (*See* NYSCEF Nos. 21, 35, 37.) Those three motions are fully submitted and were calendared in October 2019 to be argued together before this court on December 3. On November 13, 2019, the Knopfs brought on a motion by order to show cause under CPLR 2214 (c) for leave to supplement the record on these motions with the

---

[5] Sanford, consistent with the terms of the July 18 order, also produced certain attorney-client communications to this court for in camera review. This court gave searching scrutiny to those communications in light of additional evidence of Sanford's wrongdoing that had come to light after the July 18 order; ultimately, though, the court concluded that, with one limited exception, Sanford did not have to produce the communications at issue. (*See Knopf v Sanford*, Index No. 113227/2009, 64 Misc 3d 1238(A) [Sup Ct, NY County Sept. 10, 2019] [holding that Sanford was entitled to withhold the bulk of the attorney-client communications at issue]; *see also* Index No. 113227/2009, NYSCEF No. 467 [directing production with redactions of one attorney-client email].) The Knopfs and Sanford later reached agreement on what other written material Sanford would produce to the Knopfs.

transcript of Sanford's deposition (motion sequence 004). (*See* NYSCEF No. 126 [order to show cause].)

The Knopfs' motion to supplement, motion sequence 004, was initially calendared to be heard on December 3 along with the three motions to dismiss. On November 18, 2019, though, the Knopfs and Sanford stipulated to an extension of time until February 2020 to permit Sanford to answer or move in this action. (NYSCEF No. 129.) The other defendants then proposed that in light of the stipulation, it would be appropriate to delay argument on the extant motions to dismiss until February 2020 as well. This court agreed. Thus, the only matter now fully presented to this court and ready for decision is the motion to supplement the record.

DISCUSSION

The Knopfs' motion to supplement relies on excerpts from Sanford's deposition transcript.[6] (*See* Mem. of Law, NYSCEF No. 124; Transcript Excerpts, NYSCEF No. 114 [transcript excerpts].) Their motion reflects that, among other things, Sanford testified that he rejected the suggestion of his appellate counsel to move for reargument of the First Department's December 29, 2015, order denying his motion to vacate the October 2015 escrow order.[7] Instead, Sanford asked Esposito—whom Sanford had just retained and whom Sanford knew to be married or related to someone working at the First Department—whether there was someone at the First Department whom Sanford could call to obtain clarification about the status of the October 2015 escrow order. (NYSCEF No. 124, at 8-10.) Esposito told Sanford that it was possible to call First Department staff to find out the answer about the escrow order, and gave Sanford the phone number of Ringel, his wife. (*Id.* at 16.) After Sanford asked Akerman to call the First Department for him, Akerman asked Sanford which number to call—knowing that the point of the call was to help close the sale of the PHC—and Sanford gave Akerman Ringel's direct line, rather than the general line for the First Department Clerk's Office. (*Id.* at 13-16.)

The Knopfs argue that these excerpts offer new and powerful support for their allegations of a conspiracy among Sanford, Akerman, Feldman, Esposito, and Ringel to get Ringel to render an improper ex parte opinion that the October 2015 escrow order was no longer in place. The Knopfs also assert that this testimony, if credited, demonstrates that Akerman gave knowingly false deposition testimony about the circumstances of his ex parte call to Ringel in an attempt to cover up this conspiracy. And they further argue that the excerpts support the Knopfs' argument that the call constituted state action implicating Judiciary Law § 487. (NYSCEF No. 124, at 21-27.) Therefore, the Knopfs contend, this court should exercise its discretion under CPLR 2214 (c) to supplement the record on the motions to dismiss with their proffered transcript excerpts.

Defendants hotly contest both the relevance and the propriety of the motion to supplement the record. Esposito, for example, argues that the transcript excerpts are not relevant

---

[6] The record does not reflect why the Knopfs have filed the full deposition transcript in their action against Sanford (*see* Index No. 113227/2009, NYSCEF No. 532), yet rely only on excerpts from the transcript in this action.

[7] Sanford was then being represented in the First Department by attorneys from Holwell Shuster & Goldberg LLP, rather than by Akerman.

in that they fail to address the (asserted) central failing of the Knopfs' action—that their claims are barred by a later order issued by the First Department in June 2016 that stated that the October 2015 escrow order was not in effect when the PHC sale closed. (*See* NYSCEF No. 135, at 5-6.) Akerman and Dorsey & Whitney also attack the Knopfs' motion papers as, in substance, an improper attempt to submit a lengthy surreply to which defendants will be unable to respond properly before the scheduled oral argument. (*See* NYSCEF No. 136, at 2-6.)

This court concludes, though, that it need not decide these questions now, because the transcript excerpts are currently inadmissible—and thus would not now be a proper part of the record—regardless.

It is undisputed that Sanford's deposition transcript, though certified by the court reporter, has not yet been signed by him and returned to the Knopfs. It is also undisputed that Sanford notified this court (by email to the court and all parties) that upon an initial review he has "noticed innumerable instances where [his] words were inaccurately transcribed." And as Akerman and Dorsey & Whitney point out, the First Department permits consideration of a certified-but-unsigned deposition transcript only when the deponent does not challenge the transcript's accuracy (or where the dependent has submitted the transcript). (*See Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543, 543 [1st Dept 2013].) That is not the case here.

On reply, the Knopfs suggest, in effect, that a different rule should govern the deposition in this case because it was taken after judgment under CPLR 5224 (e), rather than before trial under CPLR 3116 (a). (*See* NYSCEF No. 138, at 3 n 1.) This court disagrees. By its terms, CPLR 5224 (e), too, contemplates that a deponent will have a reasonable opportunity to review the transcript and make any necessary corrections. That CPLR 5224 (e), unlike CPLR 3116 (a), does not specify the time period for that review should not be construed as requiring a deponent to go over what may be a lengthy deposition transcript in undue haste. (*Cf.* Richard C. Reilly, Practice Commentaries to CPLR 5224, C5224:3 [suggesting that "[i]t would seem reasonable . . . to deem the CPLR 3116 procedure" for correcting and signing deposition transcripts "applicable as well to the CPLR 5224 deposition"].)

Here, the Knopfs have indicated that Sanford received the transcript only on November 12. In these circumstances, Sanford has not yet had a reasonable opportunity to review and correct the transcript, an opportunity to which he is entitled under CPLR 5224. And since Sanford has already indicated that he believes the transcript to be inaccurate in a number of places, the unsigned transcript may not be considered as part of the record on the motions to dismiss. This court leaves for another day the question whether Sanford's deposition transcript, if admissible, should be considered in adjudicating the three motions to dismiss.

Accordingly, for the foregoing reasons it is hereby

ORDERED that plaintiffs' motion to supplement the record with excerpts from the transcript of Michael Sanford's November 1, 2019, deposition is denied without prejudice.

11/27/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE