SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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RESURGENCE ASSET MANAGEMENT, LLC, RESURGENCE GP III, LLC, and M.D. SASS INVESTORS SERVICES, INC.,

Plaintiffs,

-against-

STEVE GIDUMAL,

Defendant.

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DECISION AND ORDER
Index No. 651737/12
Mot. Seq. No. 016

Hon. James E. d'Auguste

In Motion Sequence No. 016, plaintiff Resurgence Asset Management, LLC ("RAM") moves for an order, pursuant to CPLR 3212, seeking partial summary judgment dismissing defendant Steve Gidumal's ("Gidumal") counterclaim for breach of contract. Gidumal cross-moves for an order, pursuant to CPLR 3124, seeking to compel the deposition of a RAM witness with knowledge of RAM's accounting practices and profit calculations. For the reasons stated herein, RAM's motion for partial summary judgment is granted and Gidumal's counterclaim is dismissed, and Gidumal's cross-motion is denied.

Factual and Procedural Background

Familiarity with the factual and procedural background of this action is presumed and will only be repeated to the extent necessary to the determination of the instant motion. In 2008, Gidumal was employed by RAM, a private equity firm, as a managing director and co-chief investment officer. RAM and Gidumal entered into an agreement dated September 28, 2008 whereby both parties agreed to terminate Gidumal's employment effective July 31, 2008 ("the Termination Agreement"). NYSCEF Doc. No. 395.

The instant action was commenced on May 18, 2012, when plaintiffs filed their complaint, which alleged that, *inter alia*, Gidumal breached the Termination Agreement by failing to comply with the Termination Agreement's clawback provision. In his counterclaim, Gidumal alleged that RAM breached the Termination Agreement by failing to pay him a share of the profits, as agreed, and therefore owes him monetary damages.

By decision and order dated September 2, 2014, this Court (Singh, J.) granted RAM partial summary judgment on its breach of contract claim, finding that Gidumal had failed to remit his clawback obligation in the amount of $419,499 (Mot. Seq. No. 005). NYSCEF Doc. No. 112. Gidumal appealed this decision. The Appellate Division, First Department reversed this Court's grant of summary judgment on the ground that "material issues of fact exist with respect to how RAM calculated [Gidumal's] pro rata share of the clawback obligation," and found that Gidumal was "entitled to depose a witness who can provide a full explanation as to how the pro rata share was determined, including an explanation of how RAM determined the persons who were subject to the clawback obligation and the persons who were not." *Resurgence Asset Mgmt., LLC v. Gidumal*, 134 A.D.3d 462, 463 (1st Dep't 2015); NYSCEF Doc. No. 412.

In the approximately six years since the First Department's decision, the parties have engaged in substantial discovery and Gidumal deposed Phil Sivin ("Mr. Sivin"), the Chief Financial Officer and Senior Managing Director of M.D. Sass Investors Services, Inc. ("SASS" or "MD SASS"), the entity that owns RAM and other associated companies, and Martin D. Sass ("Mr. Sass"), Chairman and Chief Executive Officer of SASS. *See* NYSCEF Doc. Nos. 404, ¶ 14; 269, Ex. 5, at 1; 293, ¶ 1. Gidumal also subpoenaed records from the accounting firms

Berdon LLP ("Berdon") (NYSCEF Doc. No. 419) and Deloitte & Touche LLP ("Deloitte")[1] that audited RAM's parent company, SASS, and funds managed by RAM, respectively. Finally, Gidumal served RAM with a Notice of Deposition for the deposition testimony of Jonathan Chen ("Mr. Chen"), an employee of SASS. NYSCEF Doc. No. 420; *see* NYSCEF Doc. Nos. 404, ¶ 17; 393, ¶ 1. Mr. Chen was not deposed, but, instead, submitted an affidavit in which he stated that he is an employee of SASS, "which has provided management and related services to [RAM];" that he "reviewed the financial documents produced by RAM . . . and cannot attest to the authenticity or meaning;" that he did not participate in preparing the financial documents at issue; and that he "did not participate in [any] decision-making concerning the break out of indirect expenses for affiliates of MD SASS in 2008." NYSCEF Doc. No. 393, ¶¶ 1-3.

On November 2, 2018, this Court (d'Auguste, J.) issued a decision and order in Motion Sequence Nos. 012-015 ("November 2018 decision")[2] that denied Gidumal's motion for summary judgment, dismissing the complaint, and granted RAM's cross-motion for partial summary judgment as to liability only. NYSCEF Doc. No. 379. The decision also directed that damages due to RAM from Gidumal will be determined at trial. *Id.*

The Termination Agreement

The Termination Agreement provides, in relevant part, the following:

> 1. The Companies will pay you 20.588% of the Profits (as defined below) from August 1, 2008 through July 31, 2009, 10.294% of the Profits from August 1, 2009 through July 31, 2010 and nothing thereafter (in each case subject to (i) clawback obligations and escrow set forth below and (ii) prior period draws and/or losses in excess of profit share, if any), ... The Companies will pay such amounts to you within 10 business days after the Companies have closed their books for

[1] This Court notes that Gidumal fails to include the subpoena sent to Deloitte as an exhibit annexed to the instant cross-motion.

[2] The November 2018 decision states the facts of this litigation in great detail. NYSCEF Doc. No. 379, at 2-8.

> the year ending . . . December 31, 2010 . . . . In connection with such payments, the Companies with [sic] provide you, upon reasonable request, with full year unaudited 2009 and 2010 financial statements (which such statements shall be conclusive) so you can review the manner in which the Companies have allocated revenue and expenses for the portions of the respective fiscal years for which you are entitled to payment.
>
> In addition, the Companies agree to pay to you, within five business days following the Effective Date of the General Release (as defined below), an amount equal to $838,662 (representing accrued and unpaid Profits as of the Termination Date [July 31, 2008]).
>
> For purposes of this letter, "Profits" means the net cash flows of the Companies taking into account revenues actually received for services rendered by the Companies to investment funds and separate accounts managed by the Companies as of the Termination Date and all accrued and actual expenses of the Companies as well as reasonable reserves (including, without limitation, reasonable expenses allocated to the Companies by [SASS] and an annual preferential payment to MD SASS of $300,000). . . .
>
> 2. You agree to serve as a consultant to the Companies upon request for a period of two months after effective the Effective Date. In connection with such services the Companies agree to pay to you . . . $233,719 (the "Consulting Fee"). . . .
>
> 3. You agree to be responsible for your pro rata share of clawback obligations from any private equity funds managed by the Companies. "Pro rata share" of clawback obligations with respect to a private equity fund shall be determined based on the ratio of Profits from incentive fees or allocations from such fund received by you over the aggregate Profits from incentive fees or allocations from such fund received by persons who share in clawback obligations for such fund, in each case regardless of whether such Profits were received prior to or after the Termination Date.

NYSCEF Doc. No. 395, ¶¶ 1-3 (emphasis in original).

RAM paid Gidumal $838,662 pursuant to the Termination Agreement and now seeks to recover his pro rata share of the clawback funds. NYSCEF Doc. No. 379, at 6. RAM alleges

that Gidumal breached his obligation to pay his share of the clawback obligations in violation of paragraph 3 of the Termination Agreement. *Id.*

Gidumal, in opposition and in support of his cross-motion, argues that RAM cannot prove any damages because RAM failed to submit any proof that its calculation of the clawback obligation and profits were based on reasonable accounting practices. NYSCEF Doc. No. 403, at 13-14. Instead, RAM impermissibly attempts to shift the burden to Gidumal to prove that its calculations were unreasonable. *Id.* at 15. In part, Gidumal contends that RAM changed the expenses that are used to calculate "profits" and that if RAM continued to use the method of accounting it relied upon prior to the termination letter, Gidumal would be entitled to retain at least $280,000 of the clawback funds. *Id.* at 15-17. Specifically, Gidumal contends that RAM's unreasonable calculations inflated expenses, thereby decreasing its profit and increasing the amount of his pro rata clawback obligation owed. While Mr. Sivin testified, at his deposition, that RAM's expense categories were not identical in the financial statements for each of the years 2008, 2009, and 2010 (NYSCEF Doc. No. 411, Tr. 465:13-466:8), Mr. Sass denied that he determines which expenses are "reasonable," and that such determinations are left "to the accounting department" (NYSCEF Doc. No. 410, Tr. 340:15-341:7). Based upon this testimony, Gidumal argues that a reasonable calculation of expenses would entitle him to profits upwards of $280,000, including an additional $92,181.83 in profit allocation for the year 2010. NYSCEF Doc. No. 403, at 16-17. Finally, Gidumal argues that the change in allocation of expenses constitutes "bad faith" by RAM that mandates a denial of summary judgment. *Id*. at 20. However, RAM claims that, based upon a review of its own unaudited financial statements for the years 2007 through 2010, "Gidumal would have to prove more than $850,537 in disallowable

expenses before he would [be entitled to] receive any share of Profits under the [Termination] Agreement." NYSCEF Doc. No. 394, ¶ 7.

Finally, Gidumal contends that RAM should be compelled to provide additional discovery regarding calculation of profits under the Termination Agreement. NYSCEF Doc. No. 403, at 21-23. Although Mr. Gidumal has already deposed two witnesses and has received documents concerning the calculation of profits and clawbacks from RAM and its accounting firms, he argues that additional information is needed to make a prima facie case for his counterclaim.

Discussion

To obtain summary judgment, the movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). If the movant fails to make this showing, the motion must be denied. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). "[T]o defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.'" *Zuckerman*, 49 N.Y.2d at 562 (quoting CPLR 3212(b)).

The Termination Agreement provides that the payment of profits from August 1, 2008 through July 31, 2010 are subject to clawback obligations, as defined therein. NYSCEF Doc. No. 395, ¶¶ 1-3. In connection with such payments, RAM and its associated companies shall provide Gidumal, upon reasonable request, with full year unaudited 2009 and 2010 financial statements, and such statements shall be conclusive of the manner in which RAM has allocated

revenue and expenses for that time period. *Id.* RAM paid Gidumal $838,662, representing accrued and unpaid profits, under the Termination Agreement prior to any clawback obligations.[3]

As noted in a supplemental affidavit of Sam Friedman ("Mr. Friedman"), the Chief Financial Officer of SASS, dated April 24, 2019, Gidumal's calculations are flawed by reason of his confusion between the accrual-based accounting used by the accounting firm Berdon, as required "for all non-governmental and for-profit entities," and the cash-based accounting used by RAM in crafting its financial statements and for calculating the amounts in the Termination Agreement. NYSCEF Doc. No. 428, ¶¶ 4, 5. The difference between these two accounting systems can be significant. *See, e.g.*, *Bailey v. Fish & Neave*, 30 A.D.3d 48, 51 (1st Dep't 2006).[4] Mr. Friedman states that RAM's use of cash-based accounting was appropriate because the Termination Agreement calculates profits taking into account revenues actually received for services rendered, which is a cash-based consideration not used for accrual accounting. *Id.*, ¶ 5. There are also significant errors in how Gidumal misread RAM's financial documents, specifically that Gidumal confused amounts reported as losses to be gains. *Id.*, ¶ 8. Further, Mr. Friedman noted that Gidumal did not submit any opinion from an accounting expert in support of his argument. *Id.*, ¶ 9. This is significant because Gidumal's claim rests on whether or not the accounting decisions allocating expenses were reasonably made.

Accordingly, Gidumal has failed to meet his prima facie burden to show that he was not fully compensated by RAM. The explanation offered in Mr. Friedman's affidavit indicates that Gidumal has failed to make a prima facie showing that RAM owes him additional compensation in excess of what he has already been paid. Since RAM has already demonstrated that it is

[3] Mr. Gidumal was also provided with the unaudited financial statements.

[4] The accrual-based accounting appears to include "an unrealized appreciation on RAM's direct investment in certain investment companies managed by RAM," which is "a non-cash item that would not be included in a report prepared on [cash-based accounting]." NYSCEF Doc. No. 428, ¶ 6.

entitled to partial summary judgment with respect to liability on its claim for breach of contract of the clawback provision pursuant to this Court's November 2018 decision, the specific amount of pro rata clawback obligation that Gidumal owes RAM is subject to proof at trial. As such, RAM's motion for partial summary judgment to dismiss Gidumal's counterclaim has demonstrated an entitlement to summary judgment as Gidumal has not presented any evidence indicating that he is owed any additional amount over the $838,662 in profits as compensation under the Termination Agreement that RAM already paid him and thus cannot prove that RAM breached said agreement.

Finally, this Court will address Gidumal's argument that RAM's motion for summary judgment should be denied, pursuant to CPLR 3212(f), because he lacks necessary discovery, including critical information regarding his counterclaim, and because he needs this Court to compel the deposition of an additional witness. In essence, this is a reassertion of the argument accepted by the Appellate Division, First Department in its December 8, 2015 decision reversing this Court's grant of summary judgment (Mot. Seq. No. 005). The parties engaged in discovery for several years after the First Department's decision, and Gidumal's motion to compel discovery of plaintiffs' accountants (Mot. Seq. No. 014) was granted in part in this Court's November 2018 decision. Gidumal's requested deposition testimony from Messrs. Sivin and Sass was provided.

"A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant." *Morales v. Amar*, 145 A.D.3d 1000, 1003 (2d Dep't 2016) (citing CPLR 3212(f)). Relief from summary judgment under CPLR 3212(f) is especially appropriate "where the opposing party has

not had a reasonable opportunity for disclosure prior to the making of the motion." *Global Minerals & Metals Corp. v. Holme*, 35 A.D.3d 93, 103 (1st Dep't 2006).

As stated above, Gidumal had a reasonable opportunity for disclosure prior to the filing of the instant motion and his cross-motion seeking additional discovery. The original witness whose deposition Gidumal sought,[5] Jonathan Chen, submitted an affidavit in support of RAM's motion for partial summary judgment demonstrating that he did not participate in creating the financial documents in question and is unlikely to provide material information. NYSCEF Doc. No. 393. After several years of failing to depose a witness with firsthand knowledge, it appears, from Gidumal's papers, that he is now seeking to depose an unidentified RAM witness with personal knowledge of the accounting used to calculate its profits. Gidumal, however, has had a reasonable opportunity, over several years, to depose an individual with firsthand knowledge of RAM's accounting practices. Ultimately, Gidumal could have retained his own accounting expert to refute the testimony of the witnesses he deposed on behalf of plaintiffs or the affidavits submitted in support of plaintiffs' motions, he also could have sought depositions of any additional witnesses in the approximate six years since the First Department's reversal of this Court's prior grant of summary judgment, but has failed to do either of the above. Accordingly, there is no basis to either deny RAM' motion for partial summary judgment as premature based upon purportedly outstanding discovery or grant Gidumal's cross-motion to compel discovery, pursuant to CPLR 3124.

Any other contentions not specifically addressed have been reviewed by this Court and found unavailing. Accordingly, based upon the foregoing, it is hereby

[5] Prior to the instant cross-motion, Gidumal attempted to depose Mr. Chen. *See* NYSCEF Doc. Nos. 420, 421.

ORDERED that plaintiff RAM's motion for partial summary judgment, pursuant to CPLR 3212, is granted, and defendant Gidumal's counterclaim is dismissed; and it is further,

ORDERED that defendant Gidumal's cross-motion to compel discovery, pursuant to CPLR 3124, is denied; and it is further,

ORDERED that plaintiff RAM shall serve and file a note of issue within thirty (30) days of service of a copy of this decision and order with notice of entry.

This constitutes the decision and order of this Court.

1/7/2021
DATE

JAMES EDWARD D'AUGUSTE, J.S.C.

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