

Beach v Touradji

2023 NY Slip Op 30002(U)

January 2, 2023

Supreme Court, New York County

Docket Number: Index No. 654426/2019

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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GENTRY BEACH and ROBERT VOLLERO,

Plaintiffs,

- v -

PAUL TOURADJI, PEGAH TOURADJI, TOURADJI
 CAPITAL MANAGEMENT, LP, TOURADJI CAPITAL GP,
 LLC, TOURADJI CAPITAL PARTNERS, LLC, TOURADJI
 GLOBAL RESOURCES MASTER FUND, LP, TOURADJI
 GLOBAL RESOURCES FUND, LP, TOURADJI GLOBAL
 RESOURCES INTERMEDIATE FUND, LTD, TOURADJI
 GLOBAL RESOURCES OFFSHORE FUND, LTD,
 TOURADJI INDEX PLUS I, LP, TOURADJI PRIVATE
 EQUITY MASTER FUND, LTD, TOURADJI PRIVATE
 EQUITY INTERMEDIATE FUND, LTD, TOURADJI
 PRIVATE EQUITY OFFSHORE FUND, LTD, and
 TOURADJI PRIVATE EQUITY ONSHORE FUND, LTD,

Defendants.

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INDEX NO. 654426/2019

MOTION DATE _____

MOTION SEQ. NO. 004

**SUPPLEMENTAL DECISION
 + ORDER ON MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 169, 178, 181, 182, 183, 184, 185, 186

were read on this motion to/for _____

DISCOVERY

Upon the foregoing documents, it is

Plaintiffs filed this motion on March 14, 2022, to compel the production of documents requested in plaintiffs' January 6, 2022, document demands (Document Demands) and for reimbursement of legal fees and a preclusion order. In its decision and order dated September 22, 2021 (NYSCEF Doc. No. [NYSCEF] 136, Decision and Order [mot. seq. no. 003]), the court ordered defendants to supplement their prior production with additional searches of documents by October 20, 2021. Defendants produced documents after the court's deadline, and after subsequent review of the production, plaintiffs identified several categories of documents that were not produced.

(NYSCEF 159, Stolper aff ¶ 10.) Plaintiffs served the Document Demands seeking the missing documents. (*Id.*) On February 2, 2022, after the parties submitted alternate revised discovery schedules, the court ordered defendants to complete their production of documents by February 14, 2022. (NYSCEF 144, Order.) Defendants subsequently failed to produce any documents (NYSCEF 159, Stolper aff ¶ 11), and plaintiffs filed this motion.

In a decision and order dated April 18, 2022, the court granted motion sequence number 004, directing defendants to produce the requested documents by April 25, 2022. (NYSCEF 178, Decision and Order [mot. seq. no. 004].) Based on defendants' failure to provide a reasonable excuse for their failure to comply with their discovery obligations (NYSCEF 211, tr at 2:24-3:8 [mot. seq. no. 004]), the court further ordered that the failure to comply would result in a preclusion order with adverse inferences. (*Id.*) The court also awarded attorneys' fees. (*Id.*)

On May 2, 2022, plaintiffs informed the court that defendants did not meet the production deadline and submitted a proposed preclusion order with adverse inferences. (NYSCEF 182, Proposed Order.) Plaintiffs' counsel also submitted an affirmation of services. (NYSCEF 181, Stolper Aff of Services.) On May 9, 2022, defendants submitted their objection to plaintiffs' request for attorneys' fees and plaintiffs' proposed preclusion order with a redlined version. (NYSCEF 183, Dolan Aff; NYSCEF 184, Redlined Order.) Defendants did not dispute their failure to comply with the court's order, other than their sending plaintiffs' counsel a list of passwords for password-protected documents.

Attorneys' Fees

Plaintiffs seek \$13,012.50 in attorneys' fees. (NYSCEF 181, Stolper Aff ¶ 2.) In support of plaintiffs' application, plaintiffs' counsel, Michael Stolper, Esq., submits an affirmation containing a chart of the hours expended on this matter, the tasks performed, the hourly rates for the attorneys involved in this litigation, along with the experience of the attorneys. (*Id.* ¶¶ 4-7.)

To determine the reasonableness of the requested fee, the court is guided by the following factors: (1) "the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented;" (2) "the lawyer's experience, ability, and reputation;" (3) "the amount involved and benefit resulting to the client from the services;" (4) "the customary fee charged by the Bar for similar services;" (5) "the contingency or certainty of compensation;" (6) "the results obtained;" and (7) "the responsibility involved." (*Matter of Freeman*, 34 NY2d 1, 9 [1974].) These factors apply in commercial cases. (Commercial Litigation in New York, 4th ed., 2015, § 53:7, Court-Awarded Attorneys' Fees.) The court also relies on its own knowledge of hourly rates charged by private firms who practice in the Commercial Division, New York County. (See *Miele v New York State Teamster Conference Pension & Retirement Fund*, 831 F2d 407, 409 [2d Cir 1987].)

Stolper's affirmation contains two paragraphs describing his and Priya Lehal's legal experience. (NYSCEF 181, Stolper Aff ¶¶ 3, 10.) Stolper's hourly rate of \$650 as a partner is reasonable based on his experience as a commercial litigator, and defendants do not object to this rate. (NYSCEF 181, Stolper Aff ¶¶ 6, 10; NYSCEF 183, Dolan Aff ¶ 16.) However, defendants do object to the type of work performed by

Stolper. Defendants contend that the 8 hours Stolper billed on March 14, 2022 should be reduced by half because gathering exhibits was a task that should have been assigned to a paralegal and time spent drafting the 4-page affirmation was protracted. The court agrees that an associate could have gathered exhibits. Stolper billed eight hours for a total of \$5,200 on March 14, 2022. (NYSCEF 181, Stolper Aff ¶ 6.) This shall be reduced to 4 hours for a total of \$2,600, bringing Stolper's amount for total hours bills to \$5,687.50.

Additionally, Lehal billed 13.5 hours on this matter. Lehal's associate class year or years of experience was not provided; thus, the court cannot determine if the hourly rate of \$350 is reasonable. (*Id.* ¶¶ 3, 5.) Defendants argue Lehal's hourly rate should be reduced to \$250. (NYSCEF 183, Dolan Aff, ¶ 15.) As the court is unaware of Lehal's legal experience, the court will apply the hourly rate of \$300 for Lehal. Further, defendants argue that 11.5 hours to draft a 6-page motion to compel is unreasonable. (*Id.*) Lehal charged \$4,025 to research and draft the motion to compel. (NYSCEF 181, Stolper Aff, ¶ 6; see NYSCEF 158, Plaintiffs' Motion to Compel.) The court again agrees. The motion to compel was not overly complex and could have reasonably been researched and drafted in six hours. The court will reduce Lehal's hours by 5.5, bringing the new total to 8 hours. Thus, the new total for Lehal's contribution on this matter is \$2,400.

Accordingly, plaintiffs are awarded \$8,087.50 (\$13,012.50-2,600-2,325) in attorneys' fees.

Preclusion Order with Adverse Inferences

In their proposed preclusion order, plaintiffs identify six specific items that plaintiffs requested and defendants failed to produce prior to the court's deadline of April 25, 2022: (1) passwords to protected email attachments that had been produced without passwords; (2) defendants' correspondence with the IRS in which plaintiffs assert the IRS inquired about plaintiffs' action for breach of contract against defendant Touradji Capital Management, LP (TCM) (*Beach v Touradji Capital Management, LP*, et al., Index No. 603611/2008 [the Underlying Action]) in the context of a 2013 audit of TCM; (3) TCM's correspondence with its insurer or its broker relating to TCM's claim for coverage in the Underlying Action (including letters dated May 21, 2009 and July 30, 2009, that defendants assert were referenced in produced correspondence); (4) TCM's general ledger (which defendants refer to as "summary spreadsheets") for 2012, 2013 and 2016 through 2019 which plaintiffs assert are similar in substance to the those produced for 2011, 2014 and 2015 (bates numbers TOURADJI000420696-717, TOURADJI00090098, TOURADJI000338833, TOURADJI000280877 and TOURADJI000420694); (5) Schedule E to TCM's tax returns from 2009 through 2019; and (6) emails concerning particular TCM transfers.¹

¹ Plaintiffs identified ten transfers in their proposed preclusion order (the Identified Transfers).

1/12/2012	\$2,000,000
1/15/2016	\$20,000,000
4/18/2016	\$10,000,000
9/14/2016	\$7,000,000
9/14/2016	\$250,000
12/30/2016	\$425,000
6/7/2017	\$200,000
6/9/2017	\$200,000

In their proposed order, plaintiffs seek reimbursement for “the use of a forensic firm to identify each password protected document in Defendants’ production and apply the provided passwords or otherwise unlock the documents” that defendants failed to identify prior to May 16, 2022. (NYSCEF 182, Plaintiffs’ Proposed Order.) Plaintiffs further seek to preclude defendants from “offering evidence at trial” “with respect to the 2013 IRS audit,” “with respect to the [sic] TCM’s insurance claim in the [Underlying Action],” “with respect to both the missing and produced general ledgers,” “to suggest that any of the contested distributions from TCM to Defendant Paul Touradji was not, in fact, a distribution for which there was underlying consideration,” and “to suggest that any of the [Identified Transfers] was not (i) a distribution for which there was underlying consideration, or (ii) intended to limit Plaintiffs’ ability to collect on their breach of contract claim.” (*Id.*) Plaintiffs also seek to preclude defendants from “objecting to or contradicting” “Plaintiffs’ evidence of the 2013 IRS audit,” “Plaintiffs’ evidence of TCM’s insurance claim,” and “Plaintiffs’ use of the general ledgers.” (*Id.*)

Plaintiffs further seek instructions to the jury permitting them to presume that (1) statements made to the IRS about the Underlying Action were important and defendants acknowledged in those communications that TCM’s risk of liability was material; (2) statements made to TCM’s insurance carriers and brokers about the Underlying Action were important and defendants acknowledged in those communications that TCM’s risk of liability was material; (3) TCM’s general ledgers are important and TCM was rendered insolvent after distributions to Paul Touradji; (4)

4/23/2018	\$2,833,000
12/31/2018	\$535,000

missing schedules to TCM's tax returns were important and would not have supported defendants' "position that payments by TCM in a given year were not distributions to Defendant Paul Touradji for which there was no underlying consideration;" (5) the lack of emails concerning the Identified Transfers are important and "would not have supported Defendants' position that each transfer was not a distribution to Defendant Paul Touradji and/or was not intended to limit Plaintiffs' ability to collect on their breach of contract claim." (*Id.*) Finally, plaintiffs seek an instruction to the jury that it may "draw the strongest inference against Defendants that the opposing evidence permits" on certain elements of plaintiffs' claims. (*Id.*)

Defendants argue that preventing defendants from offering evidence as to the elements of the fraudulent conveyance claims in this action would effectively preclude a defense. Defendants also argue that plaintiffs have made no showing as to how the categories of documents they seek would have any bearing on the issues. Defendants also argues that plaintiffs have sought certain of the documents from third parties or that plaintiffs have not demonstrated the documents are not available from other sources. Finally, defendants do not object to reimbursing plaintiffs for the reasonable costs of identifying the password protected documents and applying passwords, but request that quotes for services be provided up front so that defendant can find such services at lower cost.

Defendants' counsel asserts that Paul Touradji informed him that "he conducted further searches and did not find any further documents . . ." (NYSCEF 183, Dolan aff. ¶ 7.) Defendants' counsel states that Touradji had one additional place to look for the documents, other than correspondence related to the Identified Transfers, "but had not

been able to do so due to extenuating personal circumstances that he did not specify.” (*Id.*) On June 3, 2022, defendants updated the court as to defendants’ compliance, but admittedly still did not produce the requested documents. (NYSCEF 189, Letter to Court.) On June 14, 2022, defendants informed the court that defendants had produced “(a) 122 unlocked password protected documents in native form; (b) the May 21, 2009, and July 30, 2009, letters concerning certain insurance claims; and (c) Schedule E to TCM’s tax returns for the years 2012, 2015, 2016, and 2017.” (NYSCEF 190, Letter to Court.) On June 21, 2022, defendants wrote that they were “making a significant production of documents that hit on keywords targeting three categories of documents: (a) documents concerning the 2013 IRS Audit; (b) documents related to a specific type of spreadsheet from the years 2012, 2013, and 2016 through 2019; and (c) e-mails concerning certain transfers in 2012, 2016, 2017 and 2018.” (NYSCEF 194, Letter to Court.) Defendants further informed the court that, after this production, defendants would have produced all documents in their possession responsive to the six categories identified in plaintiffs’ proposed order. (*Id.*)

The trial court has the discretion to determine the appropriate penalty for failure to disclose discovery under CPLR 3126. (*Spira v Antoine*, 191 AD2d 219, 219 [1st Dept 1993] [citations omitted].) A willful refusal to comply with numerous discovery orders warrants sanctions pursuant to CPLR 3126. (*Yes Contr. Inc. v CLST Enterprises LLC*, 193 AD3d 535 [1st Dept 2021].) “Generally, ‘willfulness’ can be inferred from a party’s repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for its defaults.” (*DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41, 52 [2d Dept 1998] [citations omitted].)

As an initial matter, defendants' productions after the court's final April 25, 2022, deadline, particularly in light of defendants' failure to comply with this court's prior orders, will not be considered. Accordingly, defendants are precluded from using at trial the documents they failed to produce by the April 25, 2022 deadline, as set forth more specifically in the order language below. The court, however, narrows plaintiffs' proposed preclusion order to only those documents that defendants did not produce prior to the April 25 deadline, because preventing defendants from presenting any evidence on the elements of plaintiffs' causes of action, contained in documents that defendants had already produced would be too harsh a penalty and unwarranted under these facts.

CPLR 3126 provides that if a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed ..., the court may make such orders with regard to the failure or refusal as are just." "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply, or a failure to comply with court-ordered discovery over an extended period of time." (*Johnson v Ortiz Transp., LLC*, 205 AD3d 699, 700 [2d Dept 2022] [internal quotation marks and citations omitted]; see also *Jones v Green*, 34 AD3d 260, 261 [1st Dept 2006][complaint dismissed after long and continued pattern of noncompliance.) Where such conduct is willful, the relevance of the evidence is presumed. (See *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012].)

Defendants do not challenge the relevance of the documents at issue except as to the IRS communications. Defendants assert that plaintiffs have not demonstrated the relevance of the communications with the IRS concerning a 2013 audit and emails concerning the Identified Transfers to the issues in this case. However, the burden to rebut the presumption of relevance is on defendants. (See *VOOM HD Holdings LLC*, 93 AD3d at 45.) The court rejects defendants' argument that the potential or actual availability of information from other sources rebuts the presumption of relevance or precludes the application of adverse inferences here. (See *id.* at 47.) Accordingly, as to all documents, the court applies adverse inferences in accordance with PJI 1:77.2. As to the Schedule E's, though, the court agrees that an adverse inference instruction as to these documents should be limited to distributions, as such documents would not reflect consideration or lack thereof given to TCM in exchange for any transfers to Paul Touradji.

The court has considered the parties' remaining arguments and finds them unavailing without merit or otherwise not requiring an alternate result.

Accordingly, it is

ORDERED that plaintiffs are awarded \$8,087.50 in attorneys' fees which defendants shall pay plaintiffs within 10 days of the date of this decision and order; and it is further

ORDERED that defendants will reimburse plaintiffs for the cost of a forensic firm to identify any password protected document in defendants' production and apply the provided passwords or otherwise unlock any documents, for which defendants did not provide a list of passwords and corresponding bates numbers on or before May 16,

2022. Plaintiffs are directed to provide defendants with invoices for services rendered. Defendants shall pay plaintiffs within 10 days of service of the invoices; and it is further

ORDERED that plaintiffs are precluded from offering as evidence at trial the following documents that were not produced on or before April 25, 2022: (1) defendants' correspondence with the IRS concerning the underlying action, *Beach v Touradji Capital Management, LP*, et al., Index No. 603611/2008 (Underlying Action) in the context of a 2013 audit, (2) defendant Touradji Capital Management, LP's correspondence with its insurer or broker relating to its claim for coverage in the Underlying Action (including letters dated May 21, 2009 and July 30, 2009), (3) Touradji Capital Management, LP's general ledgers for 2012, 2013, and 2016 through 2019, (4) Schedule E to Touradji Capital Management, LP's tax returns from 2009 through 2019, and (5) emails concerning the Identified Transfers; and it is further

ORDERED that the jury shall be instructed with Pattern Jury Instructions 1:77.2:

"Before this trial began, the court decided that defendants willfully failed to produce

-defendant Touradji Capital Management, LP's correspondence with its insurance carrier or broker relating to its claim for coverage in the Underlying Action;

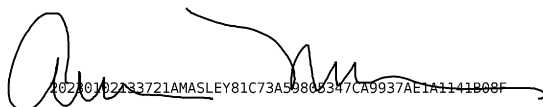
-defendants' correspondence with the IRS concerning the underlying action *Beach v Touradji Capital Management, LP*, et al, Index No. 603611/2008 in the context of a 2013 audit;

-Touradji Capital Management, LP's general ledgers for 2012, 2013, and 2016 through 2019;

-Schedule E to Touradji Capital Management, LP's tax returns from 2009 through 2019;

-emails concerning the Identified Transfers.

and that the evidence would have been important on the issue of whether (a) the risk of defendants' liability for breach of contract in the Underlying Action was material, (b) each Identified Transfer was a distribution to defendant Paul Touradji, (c) was intended to limit plaintiffs' ability to collect on their breach of contract claim in the Underlying Action, and (d) after distributions at issue in this action, Touradji Capital Management LP was insolvent. You should therefore presume that had it been produced, the evidence would have been against defendants' position that (1) defendants' liability for breach of contract in the Underlying Action was immaterial, (2) after distributions, Touradji Capital Management, LP was solvent, (3) each Identified Transfer was not a distribution to defendant Paul Touradji, and (4) each Identified Transfer was not intended to limit plaintiffs' ability to collect on their breach of contract claim in the Underlying Action



1/2/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: