COMMERCIAL DIVISION ONLINE LAW REPORT

2023-2024

ST. JOHN'S UNIVERSITY SCHOOL OF LAW

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City of Hialeah Employees' Retirement Sys. v. Teladoc Health, Inc.

150834/2022, 2023 WL 5493833 (N.Y. Sup. Ct. 2023)

Joseph Alfonzetti

Staff Member

Plaintiffs brought action against Teladoc Health, Inc. ("Teladoc" or "Company") for violations of sections 11, 12(a)(2), and 15 of the Securities Act of 1933. *City of Hialeah Employees' Retirement Sys. v. Teladoc Health, Inc.* No. 150834, 2023 WL 5493833, at *2 (N.Y. Sup. Ct. 2023). Teladoc was a "provider of virtual healthcare services," contracting with professional associations who contract with physicians to provide virtual healthcare and services on the Company's platform. *Id.* at *1. The Plaintiffs in the case were all persons who purchased or acquired shares of Teladoc common stock in connection with their merger with Livongo Health, Inc., ("Livongo") on October 30, 2020. *Id.* at *2.

Teladoc generated revenue by selling access to its platform and services. *Id.* Teladoc charged clients a per-month fee; their revenue was "driven primarily by how many clients and members it had under contract." *Id.* Most of their revenue was from the United States, thus "US membership is one of the most important metrics in assessing the Company's success and future prospects." *Id.* In 2020, the Company saw a surge in demand as a result of the COVID-19 pandemic. *Id.* In August 2020, the Company issued a press release indicating that they "agreed to merge with Livongo in a deal valued at $18.5 billion." *Id.* at *3. The release stated that Livongo shareholders would receive 0.592 Teladoc shares for each Livongo share they owned. *Id.* It also stated that after the merger "Teladoc shareholders would own 58% and Livongo shareholders would own 42% of the combined Company." *Id.* The merger "required Livongo shareholder approval." *Id.*

Plaintiffs alleged that the Company "continued to report significant US membership growth in the lead up to the Merger and otherwise indicated that there was still a lot of opportunity for continued growth." *Id.* However, the Plaintiffs alleged that "despite these assurances, the Company's pipeline was virtually depleted, that the rebuilding process would take more than a year following the Merger, and that US memberships would grow as little as 1% in the 18 months following the merger." *Id.*

The Company filed a registration statement in connection with the merger on September 3, 2020, and it was declared effective on September 15, 2020. *Id.* Teladoc also filed a joint proxy statement and prospectus on September 15, 2020, incorporating various financial reports and other SEC filings for the Company. *Id.* While the registration statement did not make any projection about membership growth, it did make a projection about 2021 revenue. *Id.* Plaintiffs alleged the registration statement was materially misleading because it did not disclose that the "extraordinary growth in membership tied to the COVID-19 pandemic had been pulled forward to be booked prior to the merger." *Id.* at *3. The Plaintiffs then alleged that a press release by the Company on February 24, 2021, detailed a low membership outlook for 2021. *Id.* This low membership growth for 2021 resulted in the stock price of the company falling substantially. *Id.* The Plaintiffs alleged that this negative trend in memberships was known at the time of the merger. *Id.*

Defendant moved to dismiss the complaint because it was time-barred and because the Plaintiff failed to state a cause of action. *Id.* at *1. This type of claim is time-barred if it is brought over a "year after the discovery of" untrue statements or omissions, or "after such discovery should have been made by the exercise of reasonable diligence." *Id.* at *3 (citing 15 U.S.C. § 77(m)). In this case, a previous lawsuit by the Plaintiff in Illinois alleged that on January 11, 2021, the Company made a "'Bombshell' Disclosure" when they disclosed facts that indicated the registration statement was materially misleading. *Id.* at *4. The case at issue here was filed on January 26, 2022, over a year after this bombshell disclosure. *Id.* Therefore, the case is time-barred and dismissed because "it was filed outside of the time period provided for in the 1933 Act." *Id.*

The case was also dismissed for failure to state a claim. *Id.* On a motion to dismiss, the court "must afford the pleading a liberal construction and accept the facts as alleged in the complaint as true." *Id.* Section 11 of the Securities Act of 1933 "imposes liability based on the contents of a registration statement, both for what it includes and for what it omits." *Id.* at *5. Whether a statement is "materially false or misleading" is viewed at the time the statement is made. *Id.* Section 12 imposes liability on "any person who offers or sells securities pursuant to a prospectus containing material misstatements or omissions of material fact." *Id.* When determining "whether a misstatement or omission is material, it must be viewed in the context of all of the Defendants' representations taken together and whether it would have misled a reasonable investor." *Id.* Here, the registration statement disclosed accurate data and projected the 2021 revenue that they

met. *Id.* Furthermore, the Company's "membership did not decrease during the relevant time period." *Id.* It could not be said that any statements in the registration statements became misleading or that any alleged "omission" would have affected the "'total mix of information'" available to investors. *Id.*

Lacewell v. Rocky Mtn. Int'l. Ins. Ltd.

655328/2019, 2023 WL 5008020 (N.Y. Sup. Ct. 2023)

Shirin Benyaminpour

Staff Member

The Superintendent of Insurance of the State of New York and his successors in office, as appointed Liquidator ("Liquidator") of Ideal Mutual Insurance Company ("Ideal"), sought recovery of at least $8,479,094.81, plus interest, for reinsurance proceeds allegedly owed to Ideal. *Lacewell v. Rocky Mtn. Int'l. Ins. Ltd.*, No. 655328/2019, 2023 WL 5008020, at *1 (N.Y. Sup. Ct. 2023). Defendants Rocky Mountain International Insurance Ltd. ("Rocky Mountain") and United Insurance Company ("United") (collectively "Defendants") moved for orders to seal portions of motion papers and exhibits. *Id.* Additionally, Rocky Mountain moved for leave to amend its answer. *Id.*

Ideal was a property and casualty insurer that issued primary and excess liability insurance policies to Johns-Manville Corporation ("Johns-Manville"), a manufacturer of asbestos-containing products. *Id.* On August 26, 1982, Johns-Manville filed for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code. *Id.* Thereafter, Ideal contracted with Defendants to reinsure a portion of the risk Ideal assumed under the Johns-Manville policies. *Id.* On February 7, 1985, Ideal was placed into liquidation pursuant to an Order of the New York State Supreme Court. *Id.* Under the commercial general liability policies issued by Ideal to Johns-Manville, "Ideal incurred pre- and post-liquidation obligations on claims asserted by Johns-Manville's successor in interest, the Johns-Manville Personal Injury Trust ("Trust")." *Id.* at *2. Liquidator alleged that Defendants breached their contract under their reinsurance agreements and sought "recovery of at least $8,479,094.81, plus interest . . . for certain underlying claims against Ideal's insured, Johns-Manville." *See id.*

Here, Rocky Mountain moved for leave to amend its answer, pursuant to CPLR § 3025(b), to include "a tenth affirmative defense barring Liquidator's claims due to an alleged prior injunction." *Id.* In its motion, Rocky Mountain referred to "an injunction contained in the Confirmation Order issued . . . in the bankruptcy proceedings . . . of Rocky Mountain's parent, Johns-Manville." (NYSECF No. 107). Defendants also moved "for an order sealing and/or redacting exhibits and portions of motion papers it filed" pursuant to the attorney-client privilege and

work product protection. *Lacewell*, 2023 WL 5008020, at *2. Defendants sought to (1) withhold the amount that Liquidator settled for and (2) "redact correspondence between plaintiff's counsel to plaintiff and to a referee involved in the settlement." *Id.*

To rule on Rocky Mountain's motion for leave to amend, the Court noted that "motions for leave to amend the pleadings are to be freely granted, as long as there is no prejudice or surprise to the adversary." *Id.* (citing CPLR § 3025(b)). Trial courts may exercise discretion when ruling on a motion for leave to amend, but they should consider "how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom." *Id.* (citing *Branch v. Abraham & Strauss Dept. Store*, 632 N.Y.S.2d 168, 169 (N.Y. App. Div. 1995)). Here, the Court determined that the amendment sought was "not palpably insufficient nor clearly devoid of merit, and the other parties would not be prejudiced." *Id.* Thus, the Court granted Rocky Mountain's motion for leave to amend its answer. *Id.*

As for Defendants' motion to seal or redact information, the Court consulted statutory and case law. *Id.* A court "may seal a filing 'upon a written finding of good cause . . . [determined by considering] the interests of the public as well as of the parties.'" *Id.* (quoting N.Y. Comp. Codes R. & Regs. tit 22, § 216.1(a)). Furthermore, because the public is entitled to access judicial proceedings and court records, an order to deny the public access must be "narrowly tailored to serve compelling objectives." *Id.* The party moving for an order to seal bears the burden of producing "compelling circumstances to justify restricting public access." *Id.* (quoting *Maxim, Inc. v. Feifer*, 43 N.Y.S.3d 313, 315 (N.Y. App. Div. 2016) (internal quotation marks omitted)). Additionally, "conclusory claims" that settlement agreements should be kept confidential are insufficient to justify sealing a court record. *Id.* at *3 (citing *Matter of Hofmann*, 727 N.Y.S.2d 84, 85 (N.Y. App. Div. 2001)).

The Court noted that "good cause exists to seal redactions of attorney work product and communications protected by the attorney client privilege." *Id.* (citing *Mono Enterprises, Inc. v Metropolitan Life Ins. Co.*, No. 652486/2013, 2019 WL 632345, at *2 (N.Y. Sup. Ct. 2019)). The portions of the motion papers and exhibits Defendants sought to seal contained "references to litigation strategy, motion practice and internal communications between a client and counsel." *Id.* Furthermore, upon review, the Court found Defendants' proposed redactions were "narrowly tailored." *Id.* (citing *Danco Laboratories, Inc. v. Chemical Works of Gedeon Richter, Ltd.*, 711 N.Y.S.2d 419, 423 (N.Y. App. Div.

2000)). Accordingly, the Court granted Defendants' motion to seal the unredacted NYSCEF Docket Entries containing "the communications between plaintiff and their counsel, as well as correspondence to the referee in the underlying settlement" to the public, excluding "the parties, attorneys of record, and court personnel." *Id.*

On the other hand, the Court stated that Liquidator's settlement amount was "a matter of legitimate public concern, owing to the asbestos related claims the settlement would resolve." *Id.* Defendants thus bore the burden of establishing a compelling circumstance to justify redacting the settlement amount, but they failed to establish a "substantial privacy right that outweighs the customary and constitutionally embedded presumption of openness in judicial proceedings." *Id.* For lack of good cause to rule otherwise, the Court denied Defendants' motion to redact the settlement amount. *Id.* (requiring Defendants to "file redacted NYSCEF Docket Entries 127, 132-136, 167 and 170 with the settlement amount unredacted and publicly accessible").

West 87 LP v. Paul Hastings LLP

651263/2021, 2023 WL 5008024 (N.Y. Sup. Ct. 2023)

Julianne Buff

Staff Member

West 87 LP brought an action on its own behalf and as assignee of QSB 267 Property Co. LLC, QSB 267 Holdings LLC, Simon Brown Development LLC, and JSMB 267 LLC (Plaintiff) against Paul Hastings, LLP (Defendant), for legal malpractice. *West 87 LP v. Paul Hastings LLP*, No. 651263/2021, 2023 WL 5008024 at *1 (N.Y. Sup. Ct. 2023). Plaintiff was a group of real estate development companies who employed Defendant to represent them for the execution of lease agreements. *Id.* Plaintiff alleged that Defendant "failed to properly analyze and draft a rent escalation clause" in the lease of one of their developments. *Id.* During discovery, Plaintiff moved for a protective order pursuant to CPLR 3103 to prevent the production of communications between Plaintiff and entities they hired for legal representation. *Id.* Defendant challenged this protection regarding 32 of the documents. *Id.* The Court granted Plaintiff's protective order for all documents except invoices, retention letters, and engagement letters. *Id.* at *3–4.

During the discovery process, Plaintiff produced communications between Defendant and Plaintiff's entities Quadrum Global and Simon Baron Development Inc. *Id.* at *1. But Plaintiff made 87 privilege designations regarding communications with other entities hired to be their legal representation, claiming "the communications [were] protected by the attorney client privilege, the attorney work product privilege, and the litigation privilege." *Id.* Defendant responded by challenging 82 out of the 87 designations. *Id.*

The Court began its review of applicable law by referencing CPLR 3101 which "requires full disclosure of all matter material and necessary in the prosecution or defense of an action." *Id.* The test for determining what constitutes "material and necessary" is "one of usefulness and reason." *Id.* (quoting *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968)). While New York favors liberal discovery, "the CPLR establishes three categories of protected materials: privileged matter, attorney work product and trial preparation materials." *Id.* (quoting *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 381 (1991)). The attorney client privilege applies when there are communications made for the purpose of obtaining legal advice between the attorney and client. *Id.* (citing CPLR 4503(a)(1)). Once information is shared with a

third party, this privilege no longer exists. *Id.* at *3 (citing *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016)). However, under the common interest doctrine, the communications shared with the third party may remain privileged if the parties share "common legal interest[s] in pending or anticipated litigation." *Id.* at *2.

Plaintiff admitted that most of the communications did not include legal counsel as the senders or recipients of the documents. *Id.* However, Plaintiff argued that the senders were joint businesspersons who referenced the legal advice that was allegedly given by counsel and believed this should be covered by the attorney client privilege. *Id.* The Court agreed, as it found that several documents included legal instruction or legal advice. *Id.* at *3. However, there were also documents that included legal advice but were subsequently shared with third parties. *Id.* While this would usually destroy the privilege, the Court found that these documents fell within the common interest doctrine exception because they "were made for the purpose of discussing the pending litigation, [the] strategies for addressing the litigation, or . . . [the] preparation of relevant materials for the litigation." *Id.* And with respect to work product privilege, the Court noted that only some of the materials being withheld by the Plaintiff were made for the purpose of preparing for anticipated litigations, and others were simply engagement letters and invoices. *Id.* The Court found that the engagement letters and invoices did not fall within the work product exception and were required to be turned over to the defense. *Id.*

Ultimately, the Court ordered the Plaintiff to turn over correspondence that pertained to "invoices, and retention and engagement letters." *Id.* However, the Plaintiff's motion for protective order was otherwise granted. *Id.*

Clingerman v. Ali

N.Y. Slip Op. 23237 (N.Y. Sup. Ct. 2023)

Conor A. Carman

Staff Member

In this action, Plaintiff, acting as the receiver for Silk Road M3 Fund, sued several Defendants for allegedly fraudulently misappropriating $10 million invested by M3. *Clingerman v. Ali*, N.Y. Slip Op. 23237 at *1 (N.Y. Sup. Ct. 2023). The Defendants included Alisher Ali of Eurasia Capital Ltd. and Eurasia Capital Ltd. as an entity ("ECL"), Eurasia Capital ("Eurasia") LLC ("Eurasia Mongolia")(collectively, the "Eurasia Defendants"); Silk Road Management Limited ("Silk Road Management"), and Silk Road Finance Inc. ("Silk Road Finance") (collectively, the "Silk Road Defendants"). *Id.*

In February 2019, both the Eurasia Defendants and Silk Road Defendants were incorporated in the Cayman Islands. *Id.* That same year, Plaintiff initiated this lawsuit, filing a summons with notice pursuant to Cayman rules for service. *Id.* Eurasia and Silk Road defendants and defendant Asher Ali did not appear. *Id.* Plaintiff moved for default judgment against these defendants. *Id.* These defendants cross-moved to extend time to answer the complaint. *Id.* Parties resolved motions by stipulation, extending Defendants' time to answer Plaintiff's complaint to September 4, 2020. *Id.* On September 4, 2020, both Eurasia and Silk Road defendants moved to dismiss the action "based on lack of personal jurisdiction and/or forum non conveniens." *Id.* This motion was denied by the Court. *Id.* Subsequently in 2022, Defendants filed a timely answer to Plaintiff's filing of the order of the complaint with notice of entry. *Id.* at *2.

The issue before the Court concerned the corporate status of the defendants and their ability to be sued and/or bring affirmative defenses.

Plaintiff contended that the Eurasia and Silk Road Defendants "had been dissolved when the parties signed the stipulation and therefore had no authority to stipulate or otherwise participate in this litigation." *Id.* They argued that this dissolution rendered these defendants' answer to the complaint a "nullity as it applies to them." *Id.* Specifically, Plaintiff noted that KamoliddonTalipov, director and sole shareholder of Silk Road Defendants and ECL, acquired other Eurasia Defendants, dissolving them in the process. *Id.* Further, Silk Road Management was struck in October 2019 for a failure to pay taxes. *Id.* Therefore, Plaintiff

contended that because the Eurasia and Silk Road defendants "did not exist when they filed their answer," the answer is not effective and default judgment should be brought against them. *Id.* Plaintiff also relied on the notion that "a dissolved corporation lacks capacity to sue or be sued." *Id.*

In opposition, the Eurasia and Silk Road defendants argued that the Silk Road defendants and ECL had not abandoned the action. *Id.* Talipov presented documents from May 2023, indicating that the businesses would be reinstated upon the payment of restoration fees. *Id.* Furthermore, they highlighted the legal principle that when a dissolution is annulled, the entity's corporate status is retroactively validated and "that an entity's ability to sue and be sued is restored nunc pro tunc." *Id.* at *3.

In his reply, Plaintiff adhered to his original argument: "a stricken corporation may only litigate a matter related to its winding up process." *Id.* In addition, he stated that "defendants' argument that corporate status is retroactively restored upon the payment of taxes lack merit, because New York State's tax laws are inapplicable here." *Id.*

The Court denied Plaintiff's motion for default judgment for various reasons. First, the Court held that a company's dissolution does not affect its capacity to defend existing lawsuits or assert viable defenses and affirmative claims. *Id*. (citing *Matter of Ford v. Pulmosan Safety Equip. Corp.*, 52 A.D.3d 710, 711 (2d. Dep't 2008)).

The Court also noted that nothing in the law of the Cayman Islands contradicts this principle. *Id*.

Second, the Court held that the capacity to sue and be sued are intertwined. *Id*. at *4. The Court highlighted how Plaintiff's case, based on Plaintiff's argument, should "be nullified due to the companies' dissolutions." *Id.* Otherwise, any interpretation in-line with Plaintiff's reasoning would leave companies "defenseless against all pending lawsuits"—an untenable position. *Id.*

Thus, the Court ultimately held that even dissolved companies maintain the capacity to participate in legal proceedings related to winding up their affairs. *Id*.

According, the Court denied the motion for default judgment. It ordered an amendment to the caption to reflect the dismissal of certain defendants from the lawsuit so that the new caption would only reflect Alisher Ali, Eurasia Mongolia, Silk Road Management, and Silk Road Finance. *Id*.

LW Holdco V LCC v. Puls

654747/2021, 2023 WL 4876276 (N.Y. Sup. Ct. 2023)

Jessica Dimattia

Staff Member

On July 31, 2023, the New York County Supreme Court decided on four consolidated motions in *LW Holdco V LLC v. Puls*. *LW Holdco V LLC v. Puls*, No. 654747/2021, 2023 WL 4876276 *1–5 (N.Y. Sup. Ct. 2023). The Plaintiff was LW Holdco V LLC ("LW Holdco"), and the Defendants were Kelly Puls, Mark Haney, and Chris Lyster, all former owners of the now-dissolved law firm Puls Haney PLLC (the "Law Firm"). *Id.* at *1. The motions before the Court were (1) a motion for default judgment made by LW Holdco against Defendant Mark Haney, (2) a motion for sanctions made by LW Holdco against Defendant Kelly Puls, (3) a motion by Defendant Chris Lyster to amend his answer, and (4) a motion by Defendant Kelly Puls to amend his answer. *Id.* The Court granted the motion for default, the motion for sanctions, and Defendant Lyster's motion to amend. *Id.* at *2–4. The Court denied Defendant Puls' motion for leave to amend his answer. *Id.* at *5.

This case concerned LW Holdco's $3.2 million investment into the Law Firm which was made in exchange for an interest in potential fees earned in future prosecutions of oil and gas claims. *Id.* at *1. LW Holdco alleged that Defendants failed to prosecute the oil and gas claims in a timely fashion and then dissolved the Law Firm. *Id.* Seeking to recover its investment, LW Holdco brought this action against Defendants as guarantors of the funding agreement. *Id.*

I. Motion for Default Against Defendant Haney

The Court considered the first motion in determining whether to grant default judgment against Defendant Haney. *Id.* at *1–2. Citing N.Y. CPLR § 3215, the Court stated that to succeed on a motion for default, the Plaintiff must submit proof of: (1) service of the summons and complaint, (2) the facts, and (3) the default. *Id.* at *1. The Court found that LW Holdco provided proof of service of the summons and complaint via certified mail to an address agreed upon in the guaranty agreement. *Id.* at *1–2. Additionally, the Court found that the affidavit of service comported with the requirements of N.Y. CPLR § 308(4) permitting the summons to be mailed to the Defendant's "last known residence or actual place of business." *Id.* at *2. The Court then turned to the

merits and reasoned that the sum of the documentary evidence provided sufficient proof of the claims. *Id.* Lastly, the Court accepted proof submitted in accordance with the federal and state Soldiers' and Sailors' Civil Relief Act that Defendant Haney was not an active servicemember. *Id.* at *2. The Court granted Plaintiff's motion for default judgment against Defendant Haney. *Id.*

II. Motion for Sanctions Against Defendant Puls and Puls' Motion to Amend

The Court next considered Plaintiff's motion for sanctions which sought the "ultimate penalty" of having Defendant Puls' answer stricken for failing to comply with court-ordered deadlines. *Id.* at *3. The motion was based on Defendant Puls' failure to fully respond to discovery demands with responsive documents even after court orders and multiple extended deadlines. *Id.* Pursuant to N.Y. CPLR § 3126, it is only appropriate to strike a party's pleading when the moving party has demonstrated that "the non-disclosure was willful, contumacious, or due to bad faith." *Id.* at *3 (quoting *McGilvery v. N.Y.C. Transit Auth.*, 624 N.Y.S.2d 158, 160 (N.Y. App. Div. 1995)). Repeatedly failing to comply with discovery demands and orders can indicate willful and contumacious conduct. *Id.* (citing *Commisso v. Orshan*, 925 N.Y.S.2d 612, 614 (N.Y. App. Div. 2011)).

The Court reasoned that willful and contumacious intent could be inferred from Defendant Puls' failure to respond to discovery despite multiple warnings, his failure to abide by court orders to respond, and his failure to interpose any opposition to the motion for sanctions. *Id.* at *4. The Court granted LW Holdco's motion to strike Defendant Puls' answer and consequently denied Puls' request to amend his answer as "futile." *Id.*

III. Motion to Amend Defendant Lyster's Answer

Lastly, the Court addressed Defendant Lyster's motion to file an amended answer to add additional affirmative defenses of "repudiation and/or anticipatory breach" and Lyster's counterclaim for breach of contract against LW Holdco. *Id.* at *4. According to Defendant Lyster, the information forming the basis for these claims was unknown to him prior to discovery. *Id.* at *4. LW Holdco opposed the motion as "untimely" and lacking merit, however, the Court stated that to overcome the presumption in favor of permitting amendment, LW Holdco would have to demonstrate "prejudice or surprise or that the proposed amendment is palpably insufficient or patently devoid of merit." *Id.* (quoting *MBIA Ins. Corp. v.*

Greystone & Co., Inc., 74 A.D.3d 499, 499 (N.Y. App. Div. 2010)). The Court reasoned that Defendant Lyster's cause of action for breach of contract was properly pleaded and rebutted Plaintiff's contention that Lyster was required to demonstrate the merit of his proposed claim. *Id.* at *5. Therefore, the Court granted leave to Defendant Lyster to amend his answer. *Id.*

Lanaras v. Premium Ocean, LLC

655585/2020, 2023 WL 4876285 (N.Y. Sup. Ct. 2023)

Alexis Fishman

Staff Member

In *Lanaras v. Premium Ocean, LLC*, Plaintiff, Maria Lanaras ("Lanaras"), through the entity Chrisma S.A., allegedly lent $3.4 million to Defendants, Premium Ocean, LLC ("Premium"), Out of the Blue Wholesale, LLC ("OOTBW"), and Out of the Blue Seafood, LLC ("OOTBS") (collectively, the "OOTB Entities"). *Lanaras v. Premium Ocean, LLC*, No. 655585/2020, 2023 WL 4876285, at *1 (Sup. Ct., N.Y. Cnty. 2023). Lanaras brought this action against Defendants, Juliana Paparizouu ("Paparizouu"), Ronit Bason ("Bason"), and Mare Vostrum, LLC ("Vostrum"), "asserting claims for fraudulent conveyance and recovery of the amounts purportedly due and owing on the $3.4 million loan." *Id.*

Lanaras moved to compel the production of discovery, which Lanaras contended would aid in asserting "alter ego liability" against Defendants. *Id.* Lanaras argued that previously exchanged discovery revealed that following her issuance of the $3.4 million loan, fraudulent conveyances occurred "wherein Premium Ocean principals, officers, and their relatives received $1.49 million in transfers." *Id.* Thus, Lanaras moved to compel production of the remaining corporate records requested from the OOTB Entities and Mare Vostrum, arguing that to reveal a lack of "corporate formalities," financial and corporate records must be obtained. *Id.* Specifically, Lanaras requested 1) the "general ledgers" for all three LLCs; 2) LLCs filed tax returns for the relevant years; 3) LLCs bank statements for the relevant years; 4) the entirety of Mare Vostrum LLC's corporate and financial records; and 5) "all books and records relating to or reflecting plaintiff's loan." *Id.* Lanaras maintained that the requested documents were "essential to establishing the elements for veil piercing." *Id.*

Premium Ocean, LLC, Out of the Blue Wholesale, LLC, Out of The Blue Seafood, LLC, Mare Vostrum, LLC, and Juliana Paparizouu argued that previous discovery, which included "complete accounting," was sufficient and additional discovery was not needed. *Id.* Lanaras rebutted and argued that the provided profit and loss statements only included an overview of the entity's financial condition for a year, instead of "specific occasions of inadequate capitalization at certain times" which is required for the "alter ego analysis." *Id.*

The Court reasoned that while the request for production of "all documents" in relation to a corporation tends to be "overbroad," this request is acceptable "when the analysis for alter ego liability requires a demonstration of inadequate capitalization and adherence to corporate formalities." *Id.* at *2. In addition, the Court noted that, in this case, the request for tax returns were relevant and "essential to a veil piercing analysis," despite the higher burden they pose for discoverability. *Id.* Lastly, the Court stated that the "absence of certain records is indicative of abuse of the corporate form." *Id.*

Accordingly, the Court granted Lanaras' motion to compel discovery, ordering Premium Ocean, LLC, Out of the Blue Wholesale, LLC, Out of The Blue Seafood, LLC, Mare Vostrum, LLC, and Juliana Paparizouu to produce the requested documents for production "on or before August 21, 2023," with Mare Vostrum's records found to be discoverable. *Id.* In addition, Lanaras alleged that Paparizouu "reported losses and profits from the LCC directly on her personal tax returns," which, if true, would indicate a "lack of independence with the LLC," necessitating the disclosure of these records to reveal the potential lack of independence. *Id.* While Defendants argued that they produced documentation showing payments made to Mare Vostrum and received from Mare Vostrum, to prove Lanaras' veil piercing claims, additional discovery beyond what has been provided thus far is necessary. *Id.*

Davis v. Port

654027/2013, 2023 WL 4778236 (N.Y. Sup. Ct. 2023)

Kathleen Gatti

Staff Member

Plaintiff Paul Davis ("Plaintiff") moved to substitute Defendant Jeffrey Hughes with Bettysue Hughes ("Hughes"), executor for Jeffrey Hughes's estate, as Defendant pursuant to CPLR § 1015(a) and CPLR § 1021(i) in an action for shareholder rights. *Davis v. Port*, No. 654027/2013, 2023 WL 4778236 at *1 (N.Y. Sup. Ct. 2023). Jeffrey Hughes passed away in February 2018, at which point Bettysue Hughes was appointed the executor of his estate via Letters Testamentary from the New York County Surrogates Court. *Id.* CPLR § 1015(a) provides that when a party dies and the claim against him is not settled, the court shall order substitution of the parties. *Id.* Plaintiff provided sufficient evidence to support that Bettysue Hughes was appointed executor of Jeffrey's estate under the laws of New York and thus was the proper party for substitution in this case. *Id.* However, Hughes argued that Plaintiff "failed to institute a timely substitution proceeding." *Id.* She asserted that because of this purported delay, the substitution would be prejudicial and thus Plaintiff's motion should be denied. *Id.* at *1–2.

CPLR § 1021 provides that "[a] motion for substitution may be made by the successors or representatives of a party or by any party." *Id.* at *1. The motion must be made in a timely manner, and the substitution made within a reasonable time. *Id.* "Reasonableness" under CPLR §1021 necessitates consideration of multiple factors, including diligence of the party seeking substitution and whether the party to be substituted has shown that the action or defense has merit. *Id.* (citation omitted). Plaintiff argued that any delay in filing the motion for substitution was not due to neglect, but rather due to the Defendant's dispositive motions as well as Plaintiff's difficulty in locating Jeffrey Hughes' Surrogate Court proceeding. *Id.* at *2. Plaintiff asserted that once he did locate such information, he "diligently" filed the substitution motion. *Id.*

The Court in this case found that Plaintiff's detailed explanation as to the delay was sufficient to "satisfy the requirements as to reasonableness of plaintiff's diligence in making [the motion for substitution] under CPLR 1021." *Id.* Further, the Court held that Hughes's argument that the passage of time demonstrates prejudice to her was an insufficient basis for finding prejudice under the second prong of CPLR § 1021 analysis. *Id.*

(citation omitted). The Court found that the substitution would not prejudice the Defendants, nor would the delay "hinder defendants' ability to represent themselves in this action." *Id.* Additionally, the Court was not persuaded by Hughes's arguments that her advanced age and her attorneys' need for additional testimony created sufficient prejudice warranting dismissal of the motion. *Id.* at *3.

Ultimately, the Court in this case held that the passage of time alone does not constitute prejudice that warrants the dismissal of a motion for substitution, although the passage of time leading to missing witnesses or other evidence might. *Id.* The Court ordered that Plaintiff's motion to substitute Defendant Jeffrey Hughes with Bettysue Hughes was granted. *Id.*

Jun Gao v. Coconut Beach/Hawaii, LLC

654127/2022, 2023 WL 4753852 (N.Y. Sup. Ct. 2023)

Matthew Hanauer

Staff Member

Plaintiff, Jun Gao, commenced an action for breach of contract against multiple Defendants, including Jason Ding. *Jun Gao v. Coconut Beach/Hawaii, LLC,* No. 654127/2022, 2023 WL 4753852 (N.Y. Sup. Ct. 2023). Plaintiff made a motion to the Court requesting alternate service and an extension for the time for service. *Id.* Plaintiff originally attempted to serve Defendant through a private process server. *Id.* Using Defendant's addresses listed on Westlaw Edge, the service company attempted to personally serve Defendant five times at his listed Chicago address before learning he moved to California years earlier, and when the company attempted to serve Defendant in California, they found the residence vacant. *Id.* Unable to personally serve Defendant, Plaintiff sent a demand letter to multiple businesses where they believe Defendant is an officer. *Id.* However, the letters were returned saying "not deliverable as addressed." *Id.* Plaintiff's only form of contact with Defendant has been email. Consequently, Plaintiff emailed a copy of the demand letter to Defendant and subsequently filed a motion for a time extension and for alternate service. *Id.*

The Court determined whether service by email was sufficient by relying on CPLR and 1st Department precedent. Citing CPLR §§ 308 1-2, the Court stated, "a party may perform service by delivering the summons to the person or to a person of suitable age and discretion at the actual place of business." N.Y. C.P.L.R. 308 (McKinney). Additionally, the Court cited CPLR §308 (4) stating if neither of the other options are available service can be performed by affixing notice to the door of their residence or place of business or by mailing the summons. *Id.* Moreover, the Court relied on the holding of *NMR Tailing LLC v. Oak Inv. Parties*that stated that plaintiffs can properly serve a defendant via email. 190 N.Y.S.3d 311, 312 (N.Y. App. Div. 1st Dept. 2023)). Considering Plaintiff's difficulties contacting Defendant, the Court granted Plaintiff motion for alternate service by email. *Jun Gao*, 191 N.Y.S.3d at 926.Furthermore, the Court granted Plaintiff's motion for a time extension to service. *Id.* Relying on CPLR § 306-b, the Court determined that an extension should be granted if Plaintiff could show good cause. N.Y. C.P.L.R. 306-b (McKinney). Citing *Henneberry v. Borstein*, the Court determined if Plaintiff showed reasonable diligence, then good cause could be established. 937

N.Y.S.2d 177, 180 (N.Y. App. Div. 2012). Weighing Plaintiff's and the service company's efforts, the Court determined Plaintiff exercised due diligence. *Jun Gao*, 191 N.Y.S.3d at 926. Consequently, Plaintiff's motion for a time extension was granted. *Id.*

Mavel, a.s. v. Rye Dev., LLC

654191/2022, 2023 WL 4718789 (N.Y. Sup. Ct. 2023)

Ian Holtz

Staff Member

Defendant Rye Development LLC's ("Rye") moved to seal documents that Plaintiff, Mavel, a.s. ("Mavel"), had claimed to contain Mavel's confidential information. *Mavel, a.s. v. Rye Dev., LLC*, No. 654191/2022, 2023 WL 4718789 at *1 (N.Y. Sup. Ct. 2023). Mavel did not oppose Rye's motion. *Id*. at *2. Despite a lack of an opposition, the Court weighed the public's interest in open judicial records against the parties' asserted interest of "confidential or proprietary information" as required by New York law. *Id.* (citing 22 NYCRR 216.1). On July 23, 2023, despite New York law favoring "broad access by the public and the press to judicial proceedings and court records," the Court granted the motion, finding that there was "good cause" to seal the documents. *Id*. at *2–3.

The underlying action commenced in 2022 on allegations that Rye released Mavel's confidential information to Andritz, Inc., one of Mavel's competitors. *Id*. at *1. Rye moved to seal portions of declarations of two of Rye's executives, Ushakar Jha and Paul Jacob. *Id.* at *1–2. Mavel claimed the information in the declarations were confidential. *Id.* at *1. Rye disputed that the documents were confidential, but "contend[ed] that it ha[d] no interest in putting into the public record Mavel's information over which Mavel claim[ed] confidentiality." *Id.*

The Court evaluated the motion to seal under the standard laid out in 22 NYCRR 216.1: the "good cause" standard. *See id.* at *2. New York public policy "presumptively favors broad access" to court documents, and consequently puts the burden on the party moving to seal to show such "good cause" exists. *Id.* The Court stated it will find "good cause" exists if "documents sought to be sealed will disclose confidential or proprietary information, the public disclosure of which would cause harm, and where there is no overriding public interest in disclosure of the documents." *Id*. The Court then noted cases where the information sought to be sealed would be harmful to the business interests of the litigant and the public interest of the open access to the information was comparatively low. *See id.*

The Court ultimately found "good cause" to seal Rye's documents. *Id.* The Court noted that a paragraph of the Jacob declaration revealed "confidential pricing information" and that open access to that information "provide[d] advantages to

competitors." *Id.* at *2-3. Further, the Court noted that exhibits in the Jha declaration "reveal[ed] the identity of a private energy company whose affiliation with Rye's projects [had to] be kept confidential at th[at] time." *Id.* at *3. The Court once again noted that revealing the identity of the company would have "involve[d] current business plans and would [have] provide[d] advantages to competitors." *Id*. The Court also pointed out that the information was sealed by federal courts after the instant New York state court action was removed. *Id.* The Court finished its analysis by stating that there were no countervailing "public interest[s]" that would weigh against sealing the documents. *Id.*

Based on the foregoing analysis, the Court granted Defendant Rye's motion to seal portions of the declarations of Ushakar Jha and Paul Jacob on July 21, 2023. *Id.*

Perl v. Siegelbaum

652038/2021, 2023 WL 4987414 (N.Y. Sup. Ct. 2023)

Sung Jae Hwang

Staff Member

Samuel Perl ("Perl") brought suit against Howard Siegelbaum, Andrew Brooker, Alexander Vitkalov, and Chambers Street Capital Management, LLC (collectively, "Defendants") alleging seven causes of action: (1) breach of fiduciary duty; (2) tortious interference of contract; (3) tortious interference with economic advantage; (4) defamation and slander; (5) breach of contract; (6) breach of covenant of good faith and fair dealing; and (7) fraud. *See Perl v. Siegelbaum*, No. 652038/2021, 2023 WL 4987414 (N.Y. Sup. Ct. Aug. 2, 2023). Defendants challenged the court's personal jurisdiction over them and moved to dismiss each cause of action. *See id.* at *1.

Perl and Siegelbaum began a business relationship in 2017 at the New York City offices of Chambers Street Capital Management, LLC ("Chambers"). *Id.* Perl alleged that Siegelbaum lured him to leave his then current job to go work for Siegelbaum by making false promises, including that Perl would be CEO of Lab Group, a Vietnamese company and one of Siegelbaum's strategic investments. *Id.* at *2. Perl alleged that he was CEO in name only and that Siegelbaum effectively managed Lab Group. *Id.* On November 29, 2017, Perl and Chambers executed a letter agreement ("Chambers Agreement") in which Chambers retained Perl to manage the operations of Lab Group. *Id.* The Chambers Agreement was superseded by a subsequent employment agreement between Perl and Lab Corp, but the former had certain provisions that would continue after termination, including a "Non-Disparagement / No Defamation" clause in which the parties agreed they would not disparage one another. *Id.* at *3, 11.

The Chambers Agreement called for the formation of a Cayman Islands based general partnership, Delphi Healthcare Holdings LP ("Delphi"), to acquire Lab Group. *Id.* at *3. Delphi's general partners were Chambers and another New York based company controlled by Siegelbaum, Chambers Street Advisors, LLC ("GP Entity"). *Id.* at *2-3. After hiring Perl, Siegelbaum allegedly solicited Perl to invest in Delphi by making false promises, including that Perl would have the same rights and privileges as other Delphi investors and that Siegelbaum would clear up issues of Lab Group's alleged bribery of Vietnamese officials. *Id.* at *4. On March 2, 2019, Perl executed an agreement ("Subscription Agreement") to invest in Delphi and an amended limited partnership

agreement of Delphi ("Partnership Agreement"), allegedly relying on the false promises made by Siegelbaum. *Id.* Both the Chambers and Subscription Agreements stipulated that the parties consented to jurisdiction in New York, that New York law governed, and that all disputes were to be litigated exclusively in New York. *Id.* at *3. The Subscription Agreement stipulated that Perl was only relying on statements made in the Subscription and Partnership Agreements and not on any extraneous representations. *Id.* at *4.

In July 2019, Siegelbaum went to Vietnam and began to manage the operations of Lab Group, effectively revoking Perl's authority as CEO. *Id.* Siegelbaum then allegedly misappropriated Lab Group funds to hire an investment analyst to support one of his New York hedge funds. *Id.* On October 15, 2019, without approval from Lab Group's or Delphi's board of directors, Siegelbaum hired his biological brother, John Westcroft, as an executive of Lab Group to manage various technology projects, including the procurement of a complex laboratory information system. *Id.* at *5. Westcroft allegedly was not qualified for this position, mismanaged the technology projects, and charged excessive fees. *Id.* Siegelbaum admitted to Perl that Westcroft's mismanagement was damaging Lab Group and harming the Delphi shareholders. *Id.* Perl also alleged that Booker facilitated the payments to Westcroft and Vitkalov failed to report these activities. *Id.* Booker was the Chief Financial Officer of Chambers and Vitkalov its Managing Director, and both were members of the board of directors of Chambers. *Id.* at *1.

At the end of 2019, Hoan My, another Vietnamese company, expressed an interest in acquiring Lab Group, but Siegelbaum allegedly rejected the offer without discussing it with the Lab Group Board of Directors. *Id.* at *5. On May 19, 2020, Perl began to report Siegelbaum's misconduct to the board members of Lab Group and Chambers and to other Delphi shareholders. *Id.* Subsequently, Siegelbaum allegedly began to slander Perl to the Director of Chambers and other Delphi investors, calling Perl a "traitor" and "incompetent manager" and accusing Perl of "failing to meet imaginary investment commitments." *Id.* During June 23-26, 2020, one of Delphi's main investors, Bain Capital, conducted a risk committee audit of Delphi. *Id.* at *6. During this audit, Siegelbaum and Vitkalov allegedly made false statements that Perl failed to keep his Delphi investment commitments and that he was an untrustworthy co-investor and an incompetent manager. *Id.* On October 19, 2020, Perl resigned as CEO of Lab Group and soon began working for Hoan My as Head of Diagnosis Business, signing an offer letter for a two-year commitment subject to a sixty-day probation period where Hoan My had the right to terminate without

notice. *Id.* Siegelbaum then allegedly slandered Perl to Hoan My's CEO, resulting in Hoan My's termination of Perl. *Id.*

Perl brought suit against the Defendants, alleging (1) Defendants breached their fiduciary duty by hiring Siegelman's unqualified brother, misusing Lab Group's resources to support Siegelbaum's hedge fund, and failing to investigate Siegelbaum's wrongful conduct; (2) Siegelbaum tortiously interfered with Perl's contract with Hoan My by slandering him to Hoan My's CEO; (3) Siegelbaum tortiously interfered with Perl's economic advantage by damaging his employment opportunities with Hoan My; (4) Siegelbaum and Vitkalov defamed and slandered Perl; (5) Chambers breached the Chambers Agreement's non-disparagement clause when Siegelbaum slandered Perl to Hoan My's CEO; (6) Chambers breached the covenant of good faith and fair dealing when it failed to investigate the misconduct of Siegelbaum and when Siegelbaum revoked Perl's authority as CEO; and (7) Chambers and Siegelbaum committed fraud when they induced Perl to invest in Delphi with false promises. *Id.* at *6-7.

The Court as an initial matter found that it had personal jurisdiction over Defendants. *Id.* at *7. Siegelbaum argued the Court lacked personal jurisdiction over him because he was no longer a New York resident (having moved to Vietnam) and the allegations involved conduct after he moved out of New York. *Id.* The Court disagreed. *Id.* at *8. In addition to the written agreements, which expressly stipulated that the parties consented to jurisdiction exclusively in New York, the Court found that it may exercise personal jurisdiction over a non-resident defendant who has minimum contacts with the state, transacts business within the state, and commits a tortious act, which causes injury within the state. *Id.* at *9. The Court held Defendants were subject to New York jurisdiction because the parties negotiated the business agreements in New York and the lawsuit stemmed "from the fallout of those New York based agreements which require suit in New York." *Id.* As a result, the Court denied the branch of Defendants' motion to dismiss for lack of personal jurisdiction. *Id.*

Concerning the seven causes of action brought by Perl, the Court found the following:

1. Dismissal was not appropriate for the breach of fiduciary duty claim because it was a direct, not derivative, claim. *Id.* Siegelbaum argued Perl improperly asserted derivative claims, and that under the Partnership Agreement, only the GP Entity could bring derivative claims and no fiduciary duties were owed to Perl under Cayman law. *Id.* (citing *Dian Kui Su v. Sing Ming Chao*, 51 N.Y.S.3d 407, 407 (N.Y. App. Div. 2017)). The relevant inquiry was to determine whether the alleged

losses caused by Defendants' breach was disproportionately felt by Perl. *Id.* (citing *BML Properties Ltd. V. China Const. America, Inc.*, 657550/2017, 2019 WL 316718, at *9 (N.Y. Sup. Ct. Jan. 24, 2019)). The Court found that Perl was disproportionately affected by Defendants' breach because he did not have the same rights as other Delphi investors and because he did not benefit from the use of funds to support Siegelbaum's hedge fund. *Id.* The Court also held that even if Perl's claims were derivative, he would have standing under Cayman law because of a "fraud on the minority" exception to the general rule that limited partners do not owe fiduciary duties to other partners. *Id.* (citing *Renren, Inc. v. XXX*, 653594/2018, 2020 WL 2564684, at *24 (N.Y. Sup. Ct. May 20, 2020)). To invoke this exception, Perl had to show that Defendants could block the general partnership from bringing suit and that the Defendants committed fraud. *Id.* The Court found that Siegelbaum could block the GP Entity from bringing suit and that the allegations of misappropriation of funds to support Siegelbaum's hedge fund and paying excessive fees to Siegelbaum's unqualified brother were sufficient for a showing of fraud on the minority exception at this stage of litigation. *Id.* at *10.

2. Perl did not sufficiently plead his tortious interference with contract claim because Hoan My did not breach its contract with Perl but merely exercised its right to terminate Perl's employment within the 60-day probation period given in the contract. *Id.*
3. Perl sufficiently pled his tortious interference with economic advantage claim, which required a showing of "'wrongful means' or that the defendant acted for the sole purpose of harming the plaintiff." *Id.* (quoting *Synder v. Sony Music Ent. Inc.*, 684 N.Y.S.2d 235, 239 (N.Y. App. Div. 1999)). Perl's allegation that Siegelbaum retaliated against him by slandering him to Hoan My's CEO, thus interfering with a prospective job offer, was sufficient to plead this claim. *Id.*
4. Perl's defamation and slander claims against Siegelbaum and Vitkalov were actionable and not mere opinions that were too vague or subjective. *Id.* The Court found that Siegelbaum and Vitkalov made "very specific malicious false statements including calling him an 'incompetent manager' to Delphi co-investors" and to Hoan My,

satisfying the specificity requirement under CPLR 3016(b). *Id.*

5. Perl's breach of contract claim against Chambers was not "ripe for dismissal." *Id.* Siegelbaum argued for dismissal because the parties had expressly agreed that the Chambers Agreement would be superseded by a subsequent employment agreement between Perl and Lab Group. *Id.* The Court rejected defendant's argument primarily by pointing to the Non-Disparagement / No Defamation provision, which would continue after the termination of the Chambers Agreement. *Id.*
6. Perl's covenant of good faith and fair dealing claim against Chambers should be dismissed because Chambers was not the proper defendant. *Id.* The employment agreement that superseded the Chambers Agreement was between Perl and Lab Group, not Chambers. *Id.*
7. Perl sufficiently pled his claim of fraud, which required inter alia a justifiable reliance by the plaintiff on material misrepresentations made by the defendant. *Id.* at *12 (citing *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 910 N.E.2d 976, 979 (N.Y. 2009)). The Court cited two First Department cases. *Id.* One case held that parties cannot by law justifiably rely on "extraneous representations" when they agree to rely only on statements made in an agreement, which specifically disclaims reliance on such representations. *Id.* (citing *Avnet, Inc. v. Deloitte Consulting LLP*, 133 N.Y.S.3d 553, 555 (N.Y. App. Div. 2020)). The second case held that despite specific disclaimers made in an agreement, a "plaintiff may not be precluded from claiming reliance on misrepresentation of facts peculiarly within the defendant's knowledge." *Id.* (citing *Basis Yield v. Goldman Sachs Grp., Inc.* 980 N.Y.S.2d 21, 30 (N.Y. App. Div. 2014)). Siegelbaum relied on *Avnet* and argued that dismissal is proper because Perl had agreed that "he was not relying on statements outside of the agreements" he signed with Chambers. *Id.* However, the Court under *Basis Yield* found that dismissal was not proper because Siegelbaum had "peculiar knowledge" about the alleged falsity of statements he made to Perl concerning Perl having the same rights and privileges as other Delphi investors. *Id.*

As a result, the Court denied the branch of Defendants' motion to dismiss the claims for breach of fiduciary duty, tortious

interference with economic advantage, defamation and slander, breach of contract, and fraud. *Id.* The Court granted the branch of Defendants' motion to dismiss the claims for tortious interference with contract and breach of covenant of good faith and fair dealing. *Id.*

Offshore Expl. and Prod., LLC v. De Jong Capital

653659/2021, 2023 WL 4381804 (N.Y. Sup. Ct. 2023)

Merve Kadayifci

Staff Member

This case involved Offshore Exploration and Production, LLC ("Plaintiff"), and De Jong Capital, LLC ("Defendant"), in a disagreement over an alleged stolen business opportunity. *Offshore Expl. and Prod., LLC v. De Jong Capital, LLC*, 190 N.Y.S.3d 923, 2023 N.Y. Slip Op. 50664(U), 2023 WL 4381804 (N.Y. Sup. Ct. 2023). Plaintiff owned a company called Offshore International Group ("OIG"), which it later sold to Ecopetrol and KNOC. *Id.* at 1. Years later, Plaintiff sought to acquire OIG from the sellers, Ecopetrol and KNOC. *Id.* Plaintiff wanted the Defendant to facilitate negotiations during the acquisition process and the parties discussed a potential partnership. *Id.* Prior to the sale, Plaintiff shared proprietary information with Defendant under a confidentiality agreement to facilitate a successful bid on OIG. *Id.* The parties frequently discussed a partnership and its terms, but never formally entered into one. *Id.* The parties submitted a non-binding offer for OIG in November 2020, which included a provision that the parties intended to work together on a deal. *Id.* Subsequently, Defendant submitted another bid without OEP's consent, which prompted Plaintiff to submit an alternative bid to the sellers. *Id.* In January 2021, the sellers announced a sale of OIG to Defendant and another partner. *Id.* Plaintiff was never informed of another partnership with Defendant. *Id.* Plaintiff then accused Defendant of using its confidential information to make a successful bid on OIG. *Id.* Plaintiff moved for a motion to admit and Defendant moved for a protective order against the motion to admit. *Id.* at 2. Plaintiff's motion to admit included admission requests for telephone conversations, the contents of the confidentiality agreement, the transfer of funds, and the sharing of confidential information with third parties. *Id.*

"Pursuant to CPLR 3103 (a), the court, on the motion of any party, can impose a protective order denying, limiting, conditioning, or regulating the use of any disclosure device, including a notice to admit." *Id.* A notice to admit on a matter is proper when the party moving reasonably believes that there can be no dispute. *Id.* (citing *Natural Union Fire Ins. Co. of Pittsburgh, Pa. v Allen*, 232 AD2d 80, 85 [1st Dept 1997]). A notice to admit is improper when it is a request of disputed

information or information uniquely within one party's knowledge. *Id.* (citing *Taylor v Blair*, 116 AD2d 204, 206 [1st Dept 1986]). A notice to admit is not intended to be another means of achieving discovery, and it cannot be used as a discovery device. *Id.* (citing *Hodes v City of New York*, 165 AD2d 168, 170 [1st Dept 1991]).

"Plaintiff's notice to admit contained both proper and improper requests for admissions." *Id.* at 3. Many of the admissions requested were regarding factual matters that were in dispute. *Id.* For example, the Plaintiff had demanded the "substance of telephone conversations, admissions regarding the contents of the parties' confidential agreement, and admissions regarding the transfer of funds and the sharing of information with third parties …." *Id.*

The Court therefore granted the Defendant's protective order against the motion to admit. *Id.* The Court further stated that it "is not obligated to prune the demands and search for those proper requests and order responses." *Id.*

Town New Dev. Sales & Mktg. v. Lex 47th Dev. LLC

653606/2018, 2023 WL 4414501 (N.Y. Sup. Ct. 2023)

Benjamin Kittay

Staff Member

Town New Development Sales & Marketing ("Plaintiff") claimed that Lex 47th Development LLC ("Defendant") breached an exclusive sales agreement. *Town New Dev. Sales & Mktg v. Lex 47th Dev. LLC*, No. 653606/2018, 2023 WL 4414501, at *1 (N.Y. Sup. Ct. 2023). A discovery dispute emerged between the two parties. *Id*. Plaintiff moved for an order compelling Defendant to "produce documents responsive to its discovery demands", and Defendant responded by saying the documents at issue were protected by attorney-client privilege or attorney work product immunity. *Id*. Plaintiff argued that Defendant's "privilege log and redaction log only included 'perfunctory' and 'generic' descriptions of the withheld documents." *Id*. Plaintiff also asserted that any privilege had been waived, as the documents show communications "with third parties outside the attorney-client privilege relationship between [Defendant] and its counsel." *Id*. Defendant countered by contending "that the motion should be denied because its privilege log complies with Commercial Division Rule 11-b." *Id*. They also relied "on the agency and common interest exceptions to waiver." *Id*.

The Court analyzed the relevant statutory authority for discovery and privilege. *Id*. They started with the CPLR 3101(a) and explained how "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." *Id.* However, "[u]pon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable." *Id*. The Court explained that the attorney-client privilege protects disclosure of any confidential communications between an attorney and their client regarding obtaining or facilitating legal advice during their relationship. *Id.* (quoting *Ambac. Assur. Corp v. Countryside Home Loans, Inc.*, 27 N.Y.3d 616, 623 (2016)). But for attorney-client privilege to apply, the communication from the attorney to the client must be primarily of a legal character and made "for the purpose of facilitating the rendition of legal advice or services." *Id*. (citing *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377-378 (1991), quoting Rossi v Blue Cross & Blue Shield of Greater NY, 73 NY2d 588, 593 (1989)).

However, the court then emphasized that communications between a defendant and their counsel made in the presence of a third party are no longer privileged. *Id*. (citing *People v. Osorio*, 75 NY.2d 80, 84 (1989)). But if the client reasonably expects privilege, and the presence of the third party is necessary for the communication between the attorney and client, then the statements receive the blanket of privilege. *Id*. (citing *Spicer v. GardaWorld Consulting (UK) Ltd*., 181 AD.3d 412, 414 (1st Dept 2020), *lv dismissed* 37 NY3d 1084 (2021), quoting *Ambac Assur. Corp*., 27 NY3d at 624).

An exception to the rule in *Osorio* is the common-interest privilege, which is met when: "(1) the underlying material qualify for protection under the attorney-client privilege, (2) the parties to the disclosure have a common legal interest, and (3) the material must pertain to pending or reasonably anticipated litigation for it to be protected." *Id*. at *2 (quoting *Kindred Healthcare, Inc. v. SAI Glob. Compliance, Inc*., 169 AD.3d 517, 517 (1st Dept 2019)).

The Court conducts an in-camera inspection when deciding whether to compel documents. *Id*. Qualifying a document as protected or not protected is a fact-specific determination. *Id*. Because of this, the Court ordered that Defendant "submit unredacted and Bates stamped copies of the documents identified in the privilege log and redaction log filed" with the Court within 14 days for an in-camera inspection. *Id*.

Quinn v. GCB Capital, LLC

652260/2022, 2023 WL 4414509 (N.Y. Sup. Ct. 2023)

Garrity Kuester

Staff Member

Plaintiffs, Brian Quinn and Onorevole Consulting Group, Inc., entered into a settlement agreement with Medipure Holdings, Inc. (MHI) and GCB Capital, LLC (GCB) on July 31, 2018. *Quinn v. GCB Cap., LLC*, 652260/2022, 2023 WL 4414509, at *1 (N.Y. Sup. Ct. 2023). The agreement stipulated that MHI would issue nine percent of its common shares to the plaintiffs. Instead of directly issuing these shares to the plaintiffs, MHI issued a larger number of shares to GCB, with the expectation that GCB would then transfer a portion of those shares to the plaintiffs. *Id*. However, GCB did not transfer any shares to the plaintiffs. *Id*. Plaintiffs' counsel affirmed that he exchanged several emails and telephone calls with GCB's counsel prior to the filing this action in which GCB's counsel indicated that its client had instructed an agent to transfer the common shares GCB owned in MHI to Onorevole, but GCB has not done so. *Id*. The plaintiffs filed a complaint in May 2022, and neither MHI nor GCB responded. *Id*. The issue in this case was whether the plaintiffs provided adequate proof of service for MHI and whether they could substantiate their unjust enrichment claim against GCB.

Regarding MHI, the Court found that the plaintiffs did not provide adequate proof of service. *Id*. The plaintiffs attempted service at MHI's principal place of business but did not clarify if this service complied with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, given that MHI is a Canadian corporation. *Id*.

Regarding GCB, the Court determined that the plaintiffs failed to demonstrate the merits of their unjust enrichment claim against GCB. *Id*. To state a cause of action for unjust enrichment, the plaintiff must plead "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Id* at *2. The Court noted that privity is not required for an unjust enrichment claim; however, such a claim will not be supported unless there is a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part. *Id*. Here, the mere fact that both parties were part of the same settlement agreement did not establish a "sufficiently close relationship" that "could have caused or induced reliance on the

plaintiffs' part." *Id*. Further, Plaintiffs' reliance on email correspondence between their counsel and GCB's counsel was similarly unavailing as the emails did not establish a relationship of reliance or inducement. *Id*. Additionally, the settlement agreement explicitly stated that MHI, not GCB, was obligated to transfer shares to the plaintiffs. *Id*. The Court ultimately decided to deny the motion of plaintiffs Brian Quinn and Onorevole Consulting Group, Inc. for leave to enter a default judgment against defendants Medipure Holdings, Inc. and GCB Capital, LLC. *Id*.

East River Hous. Corp. v. Hillman Hous. Corp.

653984/2021, 2023 WL 4778253 (N.Y. Sup. Ct. 2023)

Stephanie LaPlante

Staff Member

Plaintiff, East River Housing Corporation ("Plaintiff"), commenced an action to compel Defendant, Hillman Housing Corporation ("Defendant"), to "produce four categories of documents that were originally requested" in Plaintiff's first notice of discovery. *East River Hous. Corp. v. Hillman Hous. Corp.*, No. 653984/2021, 2023 WL 4778253, at *1 (N.Y. Sup. Ct. 2023). In September of 2020, Defendant formally ended its ties with Plaintiff after a 60-year business relationship, where the two parties were sister cooperative housing corporations within a larger unincorporated association named Co-Op Village. *Id.*

Upon the severing ties, Defendant began charging Plaintiff $14,000 monthly for use of its basement office space, a rate which Plaintiff considered "grossly excessive." *Id.* In return, Plaintiff began to charge Defendant for administrative fees and real estate taxes associated with Defendant's share of the boiler plant. *Id.* Defendant did not have to pay these fees prior to the severing of business ties. *Id.* Defendant allegedly continued to use the boiler plant without paying the associated charges, which at the commencement of this action, totaled to over a million dollars. *East River Hous. Corp.*, 2023 WL 4778253, at *2. On September 2, 2021, Plaintiff filed its complaint to recover these damages. *Id.* On October 1, 2021, Defendant filed an answer including counterclaims against Plaintiff and the first notices of discovery and inspection was filed on November 23, 2021. *Id.* at *1.

Plaintiff claimed that Defendant had failed to produce four categories of crucial documents. *Id.* at *2. First, Plaintiff claimed that Defendant failed to "produce documents as they were kept in the ordinary course of business, in violation of CPLR 3122(c)." *Id.* Second, Plaintiff claimed that Defendant had produced wholly or partly redacted version of 19 documents, which interfered with their right to discovery. *Id.* at *2. Third, Plaintiff claimed that Defendant was "wrongfully withholding board minutes and resolutions for the period of 2019 through 2021." *Id.* Fourth, Plaintiff claimed that Defendant had not produced various attachments within the produced documents, which may have been relevant to Plaintiff's claims. *Id.*

The Court began by analyzing the first category of documents. According to CPLR 3122(c), "[w]henever a person is

required to such notice or order to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request." N.Y. C.P.L.R. 3122(c) (McKinney). In this case, Plaintiff had been originally responsible for holding and organizing the documents in question until the business ties had been severed. *East River Hous. Corp.*, 2023 WL 4778253, at *2. Because the documents were produced in a manner consistent with how Plaintiff had originally maintained them, the Court held that Defendant did not have to reorganize the documents or produce them in a manner preferred by Plaintiff. *Id.*

As per the second issue, Defendant gave no reason for its partial or wholesale redaction of certain documents. For that reason, the Court directed Defendant "to produce a categorical privilege log – to the extent it has not done so already – identifying the privilege and setting forth the grounds for its withholding of information." *Id.*

Regarding the third issue, Plaintiff contended that Defendant withheld responsive board minutes and documents for such board meetings four various months in 2019 and 2020. *Id.* Instead, Defendant had only produced documents and minutes from board meetings from May 2020 through September 2020. The Court ordered Defendant to "produce the requested board minutes and resolutions in full compliance with plaintiff's demands." *Id.*

Finally, the fourth issue regarding Defendant's failure to produce related attachments to various documents was deemed moot because Defendant produced the requested attachments since the filing of the motion.

The Court approved plaintiff's motion to compel. As per the order, Defendant was required, within thirty days, to provide a categorical privilege log, outlining the reasons for redacting information in specific documents. Additionally, Defendant had to produce all board minutes and related board documents for the months of 2019-2021 that had not yet been submitted. *East River Hous. Corp.*, 2023 WL 4778253, at *2. The Court denied any other remaining grounds within the Plaintiff's motion. *Id.*

East River Hous. Corp. v. Hillman Hous. Corp.

850126/2022, 2023 WL 3727575 (N.Y. Sup. Ct. 2023)

Sarah Leveque

Staff Member

Plaintiff RREF IV - D DLI GS, LLC initiated action on June 17, 2020, seeking to foreclose on a mortgage encumbering real property against HFZ East 51ST Street Retail Owner LLC ("HFZ East") and 11 additional named and 100 unnamed Defendants, including mechanic's lienholders and government entities, alleged to have held interests subordinate to Plaintiff's first priority mortgage lien. *Id.* at *1–2. *RREF IV - D DLI GS, LLC v. HFZ E. 51st St. Retail Owner LLC.*, 850126/2022, 2023 WL 3727575, at *1 (N.Y. Sup. Ct. 2023).

In July 2017, non-party and Plaintiff's predecessor-in-interest Malvern Federal Savings Bank ("Malvern") extended a $20,512,500 loan to Defendant HFZ East secured by a mortgage on the property, with the note and security documents duly recorded. *Id.* at *1–2.

The purpose of the loan was "restructuring the equity ownership of the Property," and proceeds were to be used "to acquire the equity interests in the Premises held by unrelated owners pursuant to agreement." *Id.* at *2. HFZ East granted Malvern an absolute assignment of leases and rents and a security interest in certain "collateral," as defined in the loan agreement, as additional security. *Id.* at *3. Defendant HFZ Capital Group, LLC ("HFZ Capital") executed two guarantees for the loan. *Id.* at *3.

In 2020, the terms were modified three times to allow HFZ East to defer certain payments interest-free. *Id.* at *4. Beginning in November 2020, HFZ East failed to make any further payments. *Id.* In October 2021, Malvern assigned the loan and loan documents to non-party RREF IV D MLVN, LLC. *Id.* In March 2022, the loan and loan documents were assigned to non-party RREF IV D Direct Lending Investments LLC, and in turn, the loan and documents were assigned to Plaintiff the same day. *Id.*

In June 2022, Plaintiff delivered a notice of Default and Acceleration to HFZ East and HFZ Capital Group. *Id* at *5. Although Plaintiff declared that the entire loan amount was due per the "Events of Default" sections of the loan agreement, no payment was made. *Id.*

Plaintiff asserted six of action for (1) mortgage foreclosure; (2) security interest foreclosure; (3) possession of the property and collateral at a foreclosure sale; (4) appointment of a receiver; (5)

breach of the Guaranties; and (6) quiet title under article 15 of the Real Property Actions and Proceedings Law. *Id.* at *5. A request for the appointment of a receiver had been granted ex parte. *Id.* RREF moved for default judgment against 10 Defendants, including HFZ East and HFZ Capital Group. *Id.* at *6.

The Court first addressed the procedural requirements under N.Y. CPLR §§ 3215[f]. *Id.* Plaintiff's motion was supported by an affidavit from a managing director, loan agreements and related documents, evidence of assignments made, and affidavits showing service was made. *Id.* at 7. However, proof of service of the motion on seven defendants, including HFZ East and HFZ Capital Group, was absent from the moving papers. *Id.* As to those defendants, the Court denied the motion without prejudice to renewal. *Id.* at *7. Plaintiff properly served the three remaining Defendants, Board of Managers of Halcyon Condominium ("Board"), Perciballi Industries Inc. ("Perciballi"), and Triton Construction Company LLC ("Triton"). Defendants failed to file an answer nor moved to dismiss the complaint, resulting in their default. *Id.* at *7-8.

The Court held that Plaintiff demonstrated the merits of the first and second cause of action for mortgage and security interest foreclosure against the Board, Triton, and Perciballi. *Id.* at *9. Plaintiff met the burden on the first and second foreclosure claims through an affidavit stating Plaintiff possessed the note and mortgage and attesting to the borrower's default. *Id.* at *8. In addition, Triton, Precibal, and the Board were properly joined as subordinate lienholders under N.Y. Real Prop. Acts. Law § 1311. *Id.* at *9. The mechanic's liens filed by Perciballi and Triton were post-dated and subordinate to the mortgage held by Plaintiff because the loan agreement did not qualify as a building loan mortgage, which would have required Plaintiff to comply with N.Y. Lien Law § 22. *Id.*

However, the Court held that Plaintiff did not establish the merits of the remaining four causes of action against Board, Triton, and Perciballi. *Id.* There was no basis for the third cause of action seeking "possession" of the property because Plaintiff had already received this relief as the court-appointed receiver" had the authority to take immediate possession of the property." *Id.*

As to the fourth cause of action, there was no basis for the appointment of a receiver because it is a provisional remedy regulated by N.Y. C.P.L.R. 6401, not a separate cause of action. *Id.* The fifth cause of action for breach of the guaranty agreements was inapplicable to the Board, Triton, and Perciballi, as they were not the parties to the execution of the guaranties. *Id.* at *10. Finally, for the sixth cause of action to quiet title, the Court held that Plaintiff had not demonstrated that the six-year statute of

limitations to foreclose on the mortgage had expired, which would be required to maintain this claim. Therefore, the Court denied the motion for the remaining four causes of action against these defendants. *Id.*

Dragons 516 Ltd. v. Knights Genesis Inv. Ltd.

653187/2021, 2023 WL 2320212 (N.Y. Sup. Ct. 2023)

Katharine Manganello

Staff Member

The Supreme Court of New York decided *Dragons 516 Ltd. v. Knights Genesis Inv. Ltd.*, a case that involved an action for fraud and conversion. *Dragons 516 Ltd. v. Knights Genesis Inv. Ltd.*, No. 653187/2021, 2023 WL 2320212, at *1. Dragons 516 Limited ("Plaintiff") alleged that Knights Genesis ("Defendants") engaged in an investment scheme to defraud Plaintiff of $30 million dollars. *Id.* With respect to the merits of this claim, the Plaintiff submitted the affirmation of Chan Pui Ying, the authorized signatory for Dragons 516 Limited. *Id.* at *9. Ying avers that he had knowledge of the claims asserted against Defendants Yuan and Chen, and affirmed at a meeting in 2017, that Yuan and Chen represented that a loan from Dragons to GDC SPV would be used to finance the acquisition of certain interests. *Id.* Chen is the alleged managing partner and owner of Knights Genesis; Vincent is the purported director and owner of Knights Genesis; Yuan is the claimed majority owner of Knights Genesis. *Id.* There was a default on the facility/lending agreement and the money was allegedly never used to purchase the interests as intended, and Ying affirms that Plaintiff is owed $30 million. *Id.* The Court held that the Plaintiff has demonstrated the merits of its claim with proper proof and Plaintiff's motion for default judgment as to Defendant Yuan is granted. *Id.*

The Defendants claimed that the Plaintiff did not exhaust all reasonable service options, because they unreasonably delayed in serving Knights Genesis through its registered corporate agent. *Id.* at *3. CPLR 306-b permits the Court to extend the time for service "upon good cause shown or in the interest of justice." *Id.* at *5. Whether to grant an extension of time for service is a matter within the Court's discretion. *Id.* The Court held that the Plaintiff's motion for an extension of time to serve Defendants Knights Genesis and Vincent is granted. *Id.* at *6. The Court reasoned that the Plaintiff has a meritorious claim, and the Court can discern no prejudice that Defendants would suffer as a consequence of the Plaintiff being granted additional time to serve. *Id.* Over a year has passed since this case was commenced and it appears that the parties have not engaged in substantial discovery. *Id.* The Plaintiff has shown that it was able to serve the individual Defendants within the 120-day period – "albeit defectively" – and the Defendants have

failed to proffer sufficient evidence to make a showing of prejudice. *Id.* at *6-7. The Court granted the Plaintiff's motion for an extension of time to effect proper service of the summons and complaint. *Id.* The Plaintiff purportedly served both Defendants by mail and hand delivery. *Id.* at *8. Plaintiff has shown that it served Defendants with the summons and complaint and that Defendant's time to answer or appear in the action has expired. *Id.* at *8-9.

Bankers Conseco Life Ins. Co. v. KPMG LLP

653765/2019, 2023 WL 2605206 (N.Y. Sup. Ct. 2023)

Jenna Marshiano

Staff Member

Plaintiffs Banker Conseco Life Insurance Company and Washington National Insurance Company (collectively, "Plaintiffs") commenced motions against KPMG LLP in New York County to seal court records in this commercial litigation. *Bankers Conseco Life Ins. Co. v. KPMG LLP*, 653765/2019, 2023 WL 2605206, at *1 (N.Y. Sup. Ct. 2023). Plaintiffs filed two motions for an order to show cause pursuant to section 216.1 of the Uniform Court Rules to seal several exhibits. *Id.* In motion sequence number 009, Plaintiffs moved to seal exhibits 1-4 of Joseph L. Buckley's Affirmation, which was filed in opposition to motion sequence number 008, defendant's motion to compel discovery. *Id*. In motion sequence number 010, Plaintiffs moved to seal exhibit 1 from Defendant's reply memorandum to motion sequence number 008, the motion to compel discovery. *Id.* The issue in this case was whether there was good cause for sealing e-filed court records in commercial litigation. On March 17, 2023, the Court granted motion 009 in part, and denied in part, and granted motion 010. *Id.* at *4.

On July 16, 2019, the Court entered a Stipulation and Order for the Production and Exchange of Confidential Information. *Id.* at *2. Afterwards, Defendant filed a motion to compel for the production of documents from the plaintiffs that they withheld based on "professional services" privilege, an Indiana evidentiary privilege. *Id.* Then, on September 1, 2021, Plaintiffs filed restricted copies of their affirmation in opposition on the New York State court electric filing system. *Id.* According to the confidentiality order, these were designated "confidential." *Id.* Within these exhibits were Plaintiffs' privilege log (exhibit 1), redaction log (exhibit 2), emails (exhibit 3), and supplemental privilege log (exhibit 4). *Id.* The exhibit 3 emails contained a confidential URL connecting to a private site containing Plattiffs' document production and a password to access these document production files. *Id.* Plaintiffs filed Motion Sequence No. 009 to permanently seal exhibits 1 through 4. *Id.* Plaintiffs argued that exhibit 3 contains Plaintiffs' private proprietary information, therefore should be sealed from the public. *Id.* at *2–3. For exhibits 1, 2, and 4, Plaintiffs believed that these documents should be sealed because the information they contain were protected by trial preparation

production privilege, work product doctrine, attorney-client privilege, and the insurance examination and professional services privilege in Indiana. *Id.* at *2.

Plaintiffs filed motion 010 in response to Defendant's redacted reply memorandum that had a full copy of a document accidentally disclosed by Plaintiffs attached. *Id.* This document was a draft of an audit plan that the parent company of each Plaintiff, CNO Financial Group, Inc. ("CNO"), had prepared by PricewaterhouseCoopers LLP in 2013. *Id.* Within the document was financial information about the parent company that could be detrimental if released. *Id.* Therefore, Plaintiffs moved to have this document sealed, citing Indiana Code § 25-2.1-14.2 that this plan is confidential and privileged, stated it is covered by the court's confidentiality order, and argued this document is not a matter of public interest or concern. *Id.* at *3–*4.

Under New York law, members of the public presumptively have access to court records and judicial proceedings. *Id.* at *1. Section 216.1(a) of the Uniform Rules for Trial Courts gives a court discretion to seal or redact court records for "written finding of good cause." *Id.* at *1–*2. Courts have previously found sealing to be an appropriate course of action in maintaining confidentiality of materials regarding a party's finances that do not greatly impact public interest. *Id.* at *2. Particularly, information that would reveal a business' trade secrets or potentially harm its competitive advantage are reasons to seal these records. *Id.*

Here, regarding motion 009, the Court found that "the interest in public access to court records would not be served by unsealing [exhibit 3], because the email would . . . allow the public to access information not filed with the Court" and would not reveal any substantive information about this litigation. *Id.* at *3. However, the court did not find good cause for sealing exhibits 1, 2, and 4 because Plaintiffs did not indicate to the Court what specific sensitive information exposed them to harm. *Id.* Under the Court's standards, this alone is "fatal." *Id.*

Additionally, regarding motion 010, Plaintiffs' parent company CNO was not a party to this action. *Id.* at *4. The *Mosallem* court outlined parameters for confidential information, and CNO's financial audit fell within this standard. *Id.* (citing *Mosallem v. Berenson*, 76 A.D.3d 345, 348–50 (N.Y. App. Div. 2010)). Further, the Court did not find a compelling public interest for public access to CNO's private financial information. *Id.*

Accordingly, the Court granted Plaintiffs' motion sequence 009 in part to seal exhibit 3, and denied in part, and granted motion sequence 010. *Id.* at *3–4.

Lakeland Bank v. Beach

102772/2010, 2023 WL 5691311 (N.Y. Sup. Ct. 2023)

Patrick Militti

Staff Member

Dennie Beach ("Defendant") moved to vacate a default judgement in favor of Lakeland Bank ("Plaintiff"). *Lakeland Bank v. Beach*, No. 102772/2010, 2023 WL 5691311, at *1 (N.Y. Sup. Ct. Sept. 1, 2023). The default judgment stemmed from Plaintiff's 2011 action against Defendant in New York County "to recover monies owed . . . on a boat loan." *Id.* In October 2011, the parties reached a stipulation of settlement in which Defendant agreed to pay monthly installments of $750 until the total sum of $117,000 was paid. *Id.* Regarding default judgment, the stipulation provided:

> "in the event that defendant, fails to make any of the said payments on the above due dates, and defendant fails to cure its default within ten days after notice to its attorney by fax and telephone call, the plaintiff may enter judgment herein against the defendant, for the full amount demanded in the complaint together with interests, costs and disbursements, giving upon execution, credit for any monies paid prior to any such default." *Id.* (citing NYSCEF No. 35).

In late 2022, default notice was served upon Defendant and Defendant's counsel for failure "to make the requisite payments in accordance with the settlement terms." *Id.* Plaintiff filed a request for default judgment on January 5, 2023, and a money judgment was entered in favor of Plaintiff on January 30, 2023. *Id.* Defendant's motion to vacate the default judgment relied on three arguments that were each rejected by the Court. *Id.*

First, Defendant argued that the Court "lacked personal jurisdiction and the summons and complaint were not properly served." *Id.* Citing CPLR 3215(i)(1), which "governs when a default judgment for failure to comply with a stipulation of settlement is entered," the Court confirmed that it had properly entered the money judgment because the express terms of the parties' settlement stipulated that "if defendant failed to make any of the said payments on the due dates, and failed to cure its default within ten days after notice, plaintiff may enter judgment against defendant." *Id.* The Court implied that Defendant waived the right to argue personal jurisdiction when Defendant entered a stipulation

of settlement that expressly granted the Court the authority to enter default judgment in the event of nonpayment and proper notice. *Id.* Merely denying "receipt of summons and complaint is insufficient to rebut the presumption of service." *Id.* at *2 n.1 (citing *Gourvitch v. 92nd & 3rd Rest Corp.*, 44 N.Y.S.3d 403 (N.Y. App. Div. 2017)).

Additionally, the Court held that "[a] stipulation of settlement is a contract and is enforceable according to its terms." *Id.* (citing *McKenzie v. Vintage Hallmark, PLC.*, 755 N.Y.S.2d 288, 289 (N.Y. App. Div. 2003)). As such, the Defendant had the evidentiary burden of "establish[ing] cause sufficient to invalidate a contract, such as fraud, collusion, mistake, or accident." *Id.* (citing *Bethea v. Thousand*, 6 N.Y.S.3d 584, 586 (N.Y. App. Div. 2015)). The Defendant's second and third arguments failed to meet the high evidentiary standard, in part, because "[s]tipulations of settlements are favored by courts . . . where the party seeking to vacate the stipulation was represented by counsel." *Id.* (citing *McKenzie*, 755 N.Y.S.2d at 289).

Defendant's second argument that the default was excusable due to "lack of capacity" stemming from family illness was rejected because the Defendant failed to provide specific evidence showing that he was "incapable of comprehending the nature of the transaction." *Id.* (citing *Valsamos v. Valsamos*, 25 N.Y.S.3d 253, 254 (N.Y. App. Div. 2016)). The Court found that the Defendant's affidavit merely provided "self-serving statements" regarding his brother's illness and that such statements were "insufficient to meet the evidentiary burden of establishing diminished capacity." *Id.* Defendant's third argument that the boat was not sold at a "commercially reasonable price" was a "conclusory allegation" because "nothing in [Defendant's] affidavit suggest[ed] that his attorney lack[ed] authority to enter the agreement on his behalf, or that the sale price of the boat was somehow listed improperly or due to fraud or mistake." *Id.* The Court reinforced its conclusions by noting that the stipulation of settlement agreement was "negotiated by sophisticated parties, all of whom were represented by counsel" and that "the default was neither inadvertent nor trivial." *Id.* As such, all three arguments underlying the Defendant's motion were rejected, and the motion to vacate the default judgment was denied. *Id.*

Samson Lending LLC v. Greenfield Mgt. LLC

134457/2022, 2023 WL 5691680 (N.Y. Sup. Ct. 2023)

Maxwell Pitagno

Staff Member

Plaintiff Samson Lending LLC ("Plaintiff"), brought suit against Defendants Greenfield Management LLC, Greenfield Senior Living, Inc., and Greenfield Reflections of Woodstock LLC (collectively "Corporate Defendants"), as well as personal guarantor Mathew Peponis ("Peponis"), for the alleged breach of a loan agreement ("Agreement"). *Samson Lending LLC v. Greenfield Mgt.* LLC, No. 134457/2022, 2023 WL 5691680, at *1 (N. Y. Sup. Ct. 2023). Pursuant to CPLR Rule 3211(a)(1) and CPLR Rule 3211(a)(7), Corporate Defendants and Peponis moved to dismiss the complaint. *Id*. The Court granted the motion to dismiss the complaint and voided the Agreement. *Id.*

Plaintiff and Corporate Defendants entered into an Agreement in which Corporate Defendants "agreed to pay [P]laintiff $1,742,000 over the course of 52 weeks in exchange for a loan of $1,300,000, a stated interest rate of 34%[.]" *Id.* Peponis guaranteed that the Corporate Defendants would comply with the terms of the Agreement. *Id.* at *1–2. This Agreement included a provision for venue and jurisdiction[,] which required that any "action or proceeding to enforce or arising out of this Agreement shall be brought in any court of the State of New York." *Id.* at *2. The Agreement also included a provision for choice-of-law, which stated that the Agreement would be governed by Virginia Law. *Id.*

Corporate Defendants and Peponis moved to dismiss Plaintiff's complaint, asserting that the 34% interest rate violated New York Penal Law §190.40, which prohibits "criminal usury," defined in the statute as any loan for under $2.5 million with an interest rate greater than 25%, and that the 34% interest rate went against the public policy of New York. *Id.* at *2-3. Plaintiff countered that the choice-of-law provision should be honored and Virginia law, which has no prohibition on usurious interest rates, should have governed the Agreement. *Id.* at *2. Alternatively, Plaintiff contended, that if New York law was found to apply, "the [A]greement should be modified according to its terms to allow the maximum interest rate allowable under New York law." *Id.* at *2.

The Court considered New York's long history of prohibiting usury dating back to 1717 and noted that all subsequent changes to such laws "did not alter the 300—year—old rule that, where usury is established, the transaction is entirely void,

preventing recovery of both principal and interest. *Id. at* *3 (quoting *Adar Bays, LLC v. GeneSYS ID, Inc.*, 179 N.E.3D 612, 618 (N.Y. 2021)). Additionally, the Court concluded that though parties have the right to incorporate choice-of-law provisions into agreements, New York courts will not enforce these provisions if they are illegal or violate "some fundamental principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal." *Id.* at *4–5 (quoting *Cooney v. Osgood Mach. Inc.*, 81 N.Y.2d 66, 78 (N.Y. 1993)). The Court additionally found that New York had a sufficient "nexus to the case" for it to consider New York public policy because Plaintiff was located in New York, made the loan in New York, and "made all its business decisions relevant to the Agreement in New York. . . ." *Id.* at *5.

The Court thereby held that due to New York's "deeply-rooted public policy against usury[,]" applying Virginia law to this Agreement would go against fundamental "principles of justice" held by the State of New York. *Id.* at 6. Accordingly, the Court found that the choice-of-law provision was void, and New York law applied to the Agreement. *Id.* at *7.

Upon the Court finding that New York law applied to the Agreement, Plaintiff requested that the Court should "reform the contract in accordance with an 'usury savings clause.'" *Id.* at *7. However, the Court found that due to the Plaintiff charging "criminally usurious interest," they were not entitled to this relief. *Id.* at *7–8 (citing *Fred Schutzman Co. v. Park Slope Advanced Med., PLLC*, 128 AD3d 1007, 1008 (2nd Dept. 2015). The Court therefore concluded that the Agreement was void and granted the motion to dismiss. *Id.* at *8.

Samson Lending LLC v. Greenfield Mgt. LLC

514138/2017, 2023 WL 4627505 (N.Y. Sup. Ct. 2023)

Jack Reilly

Staff Member

Bath & Twenty, LLC, 8629 Bay Parkway LLC, and 85-93 66 Avenue LLC (collectively "the Plaintiffs"), brought suit against the Federal Savings Bank ("FSB") and Dennis Raico (collectively "the Defendants") alleging, in relevant part, fraudulent inducement into a loan. *Bath & Twenty, LLC v Fed. Sav. Bank*, No. 514138/2017, 2023 WL 4627505, *1, *2 (N.Y. Sup. Ct. June 19, 2023). The Supreme Court granted the Defendants' motion to dismiss this action; however, the Appellate Division reversed as to the Plaintiffs' fraudulent inducement claims. *Id.* Thus, the Plaintiffs restored the case to the Supreme Court, and the Plaintiffs filed a note of issue. *Id.* The Defendants moved "for summary judgment dismissing the two claims for fraudulent inducement[,]" while the "[P]laintiffs cross-moved . . . for summary judgment on defendants' liability on the two claims." *Id.*

Pyotr Yadgarov ("Yadgarov"), who represented the Plaintiffs, negotiated a loan with Racio, who represented FSB, for $2.265 million. *Id.* at *1. Based on the language in the agreement, this loan was to be secured by multiple properties owned by the Plaintiffs. *Id.* However, the Plaintiffs alleged that Raico had made "an oral agreement that the mortgage would not be recorded against four of these properties." *Id.* Further, the Plaintiffs alleged that when FSB's counsel informed them that "the mortgage would be recorded against all properties[,]" Raico "reiterated the mortgage would only be recorded against one property" in a recorded phone conversation. *Id.* After the deal closed, FSB "recorded the mortgage against all properties, violating the alleged oral agreement between Yadgarov and Raico." *Id*. at *2. When FSB did not remove the mortgage against the other properties, the Plaintiffs filed this action. *Id.*

The Court first considered the Defendants' summary judgment motion, where the Defendants claimed that the Plaintiffs put forth "no admissible evidence that either FSB or Raico made a false misrepresentation of material fact." *Id.* at *2. The Defendants asserted that the Plaintiffs' audio recording and transcript of their conversation with Racio during the loan closing was "inadmissible because the recording was obtained in violation of CPLR 4506 without Raico's knowledge or consent, and plaintiffs failed to

demonstrate the evidence [was] genuine and that it ha[d] not been altered." *Id.*

The Defendants further argued that even if the phone conversation was deemed admissible, "it was not reasonable or justifiable for plaintiffs to rely upon [the phone call] when the oral misrepresentation directly contradicted the terms of the written agreements executed by plaintiffs[,]" especially when the contract contained a clause that stated that the parties cannot change the loan contract orally. *Id.* The Plaintiffs countered that their recording of the phone conversation followed CPLR 4506(a) and "that they demonstrate the genuineness and authentication of the evidence by providing attestation, and the evidence is also admissible under the party admission exception to the hearsay rule." *Id.* at *3.

In their reply, the Defendants stated that the Plaintiffs' authentication of the phone call evidence has "no basis" of accuracy as "Raico testified that he does not recall this conversation." *Id.* They further argue that under the CPLR 4506, Raico can "move to suppress the contents of the recorded communication because he did not consent to the recording." *Id.* The Defendants also argued that the Plaintiffs signed the documents with full knowledge of the language in the contract and that in signing the tax law section 255 affidavit, the Plaintiffs knew "that the mortgage would, in fact, be recorded." *Id.*

In their cross-motion for summary judgment, the Plaintiffs argued that the Defendants fraudulently induced them into accepting the mortgage agreement "by promising to not record the mortgage against certain properties." *Id.* The Plaintiffs noted several instances of Raico using language that demonstrates his knowledge that the Plaintiffs relied on his statements, including "that Raico referred to the mortgage as being a 'soft second.'" *Id.* at *4. The Plaintiffs viewed their reliance as justifiable "because (a) they negotiated the terms of the loan exclusively with Raico; (b) there were no other means for them to learn of FSB's post-closing practice; and (d) Raico, as a senior vice president and loan officer of FSB, held himself as having superior knowledge concerning FSB's practice." *Id.* The Plaintiffs also proffered an argument that a principal-agent relationship existed between FSB and Raico, and thus, FSB should be held liable under the doctrine of vicarious liability. *Id.* The Defendants opposed this cross-motion on the ground that there was no evidence in the record "that FSB allowed Rico to act on its behalf with respect to the alleged false representations on the loan terms." *Id.* The Plaintiffs replied, asserting that Raico's express and implied authority was "demonstrated by the company emails he used with signature blocks including FSB's logo, address, phone number, and website link." Further, the Plaintiffs pointed to Raico's deposition, where

he confirmed "that he was employed by FSB and his job was to gather information for FSB on prospective borrowers." *Id.*

At the outset of the Court's discussion of these two motions for summary judgment, the Court stated that to prevail on a fraudulent inducement claim, the Plaintiffs "must establish the misrepresentation of a material fact, which was known by the defendant to be false and intended to be relied on when made, and that there was justifiable reliance and resulting injury[.]" *Id.* at *5 (citing *Ventur Group, LLC v Finnerty*, 68 AD3d 638 (N.Y. App. Div. 2009)). The Court denied the Defendants' summary judgment motion, stating that the "defendants failed to conclusively establish that they did not fraudulently induce plaintiffs into entering the contracts by misrepresenting to them that the mortgage would only be recorded against one property." *Id.* The Court concluded that the recorded phone conversation did not violate CPLR 4506, and thus did not constitute the crime of eavesdropping, "because it was obtained with consent of either the caller or receiver of the communication." *Id.* (citing CPLR 4506(1), (2); *People v Powers*, 42 AD3d 816 (N.Y. App. Div. 2007)). Thus, the Court concluded that the Plaintiffs established "that Raico knowingly made a material misrepresentation that FSB would not record the mortgages against certain properties, which plaintiffs relied on and sustained damages as a result." *Id.* The Court also found that Raico and FSB's relationship constituted a principal-agent relationship, as Raico was not only an employee of FSB but also "held himself out as senior vice president of FSB." *Id.* at *6.

The Court then turned to the Plaintiffs' summary judgment motion, in which they asserted that the Plaintiff "established a prima facie claim for fraudulent inducement." *Id*. However, the Defendants raised the issue of whether the Plaintiff's reliance on Raico's oral misrepresentation was justifiable or reasonable. *Id*. As "reasonable reliance is an essential element of a fraud claim and is not subject to summary disposition[,]" the Court denied the Plaintiffs' summary judgment motion as a triable issue of fact existed as to whether the Plaintiffs' reliance on Raico's oral misrepresentations was reasonable or justifiable. *Id.*

Grammercy Park Partners, LLC v. GPH Ground Tenant LLC

652560/2021, 2023 WL 4568750 (N.Y. Sup. Ct. 2023)

Max Rogowsky

Staff Member

In *Gramercy Park Partners, LLC v GPH Ground Tenant LLC*, Gramercy Park, in their capacity as landlord of the property at 2 Lexington Ave, filed a breach of contract action against their tenant, GPH Partners LLC. No. 652560/2021, 2023 WL 4568750, at *1 (N.Y. Sup. Ct. 2023). Gramercy brought this case for five causes of action: ejection, termination of the lease, attorneys' fees, and pre and post lease termination damages. *Id.* On May 25, 2022, the Court issued an order resolving the issue of ejection. *Id.* On June 27, 2022, the Court issued an order to resolve the termination of the lease issue. *Id.* On the remaining three counts, Grammercy filed for summary judgment in search of an award for damages. *Id*. Grammercy filed for summary judgment in search of an award for damages, and the court reviewed this motion here. *Id*.

Gramercy Park, owner of the property situated at 2 Lexington Ave, New York, New York, leased it property to GPH Partners LLC starting in October of 2006. *Id.* The lease was set for a term of 72 years, expiring in 2078. *Id.* The lease and payment due under it went as scheduled from October 2006 to November 2020, when GPH failed to pay base rental fees, rent stabilization fees, property taxes, all liens, and incurred violations in their operation of the property on November 1. *Id.* After this failure to pay under the lease terms, Grammercy Park brought this action in search of relief from the Court. *Id.* The issue Grammercy Park presented was whether summary judgment should be granted on the latter three causes of action: attorneys' fees and pre and post lease termination damages. *Id.*

Grammercy Park submitted evidence including affidavits and rental agreements to support the action for pre and post lease termination damages from GLH Partners, showing that GLH did not make payments under the lease as they were supposed to. *Id.* GLH did not contest that they failed to make payments under the contract after November 1, 2020, and provided nothing to dispute this claim. *Id.* As such, the Court was able to conclude that GPH breached the lease agreement, and there was no dispute over any matter of material fact relating to the breach. *Id.* After this, determination, the Court went on to quantifying the award of damages for Grammercy. *Id.* The Court first determined that the liquidated damages provision of the lease agreement did

not amount to a penalty, and found no issue with the post lease termination damages that were sought. *Id.* This was because Grammercy had included a provision in the lease demonstrating their intention of categories of damages to not be duplicative, allowing Grammercy to collect damages under multiple provisions of the lease. *Id.* The Court determined the liquidated damages provision did not constitute a penalty, and this clause allowed for the damages to be collected. *Id.* After this, while noting the long-standing presumption against the award of attorney's fees, the Court granted them for Grammercy. *Id.* Courts are permitted to award attorneys fees when they see fit and did so here due to the lease agreement here, which indemnified the landlord for losses suffered in surrendering the premises. *Id.* The Court held, "Attorneys' fees [were] precisely such losses incurred in connection with tenant defendants' holdover". *Id.*

The Court granted Grammercy Park's motion for summary judgment on all three counts. *Id.* The Court had already issued orders denying the cause of action for ejection and termination of the lease for GPH, but ruled for Grammercy on these three issues and granted them summary judgment. *Id.* As such, the Court ordered the case to be referred for a hearing and determination for a calculation of damages to a special referee. *Id.*

Mehra v. Morrison Cohen LLP

159868/2023 WL 4537109 (N.Y. Sup. Ct. 2023)

Imrajdeep Sahota

Staff Member

Mehra v. Morrison Cohen LLP concerned attorney-client privilege when it comes to communications regarding information about fees paid by the client. 159868/2023 WL 4537109, at *1 (N.Y. Sup. Ct. 2023). The Defendants, Morrison Cohen LLP, Steven Cooperman, and Danielle Lesser, moved to compel unredacted attorney billing records from the Plaintiffs, Sanjiv and Samrita Mehra, who allegedly "incurred $3.69 million in legal fees in connection with defendants' alleged breach." *Id.*

The relationship between the two parties began when the Defendant Morrison Cohen LLP was retained to represent the Plaintiffs in the preparation of an LLC operating agreement between the Plaintiffs and another entity. *Id*. The Plaintiffs alleged that in the course of that transaction the Defendant breached their fiduciary duty to the Plaintiffs and they filed a suit to "recover damages, including attorneys' fees," for the Defendant's breach. *Id*.

The Plaintiffs alleged that over a 32-month period from October 2019 to May 2022, they incurred $3.69 million in legal fees in relation to the alleged breach. *Id*. The Defendants sought the production of documents and billing records for the fees, but the Plaintiffs produced thoroughly redacted documents that only revealed the "date, attorney rate, time spent, and fees amounts." *Id*. Defendants alleged that the documents were so heavily redacted that they could not tell which matters the hours related to nor could they properly discern time entries and as a result the Defendants could not accurately evaluate whether the alleged fees were related to the purported breach of fiduciary duty. *Id*. The Plaintiffs contend that they have complied with the First Department precedent regarding production of attorney invoices related to the provision of legal services. *Id*. They additionally argued that the fee logs were privileged and that the Defendants should judge the reasonableness of the attorney fees based on the non-privileged documents they provided. *Id*.

The Court reiterated the standard for protecting documents under attorney-client privilege, emphasizing that the party wishing to withhold the documents has the burden to demonstrate that the information within them constitutes a confidential communication between the attorney and client sought for the purpose of obtaining legal advice. *Id*. The Court explained that in New York, not all

communications are protected by attorney-client privilege, and legal invoices, as well as communications regarding information about fees paid by the client, are discoverable. *Id*.

The Court held that the Plaintiffs failed to show that the Defendants sought information that was a confidential communication made for the purpose of securing legal advice. *Id*. The Court additionally held that the Defendants do not have to rely on the Plaintiffs good faith estimates of the invoices and are entitled to challenge that estimation through an in-depth examination of the unredacted billing records. *Id*.

In light of this analysis, the Court granted the Defendants motion to compel unredacted billing records from the Plaintiffs. *Id*.

Belnord Partners LLC v. Green Star Energy Solutions, LLC

655787/2019, 2023 WL 4554708 (N.Y. Sup. Ct. 2023)

Justin Song

Staff Member

Plaintiff Belnord Partners LLC ("Belnord") brought this action against Defendants Green Star Energy Solutions, LLC ("Green Star") and Joseph A. Novella ("Novella") (collectively "Defendants"), who is the CEO of Green Star. *Belnord Partners LLC v. Green Star Energy Solutions, LLC*, 655787/2019, 2023 WL 4554708, at *1 (N.Y. Sup. Ct. 2023). This was originally an action for breach of contract against Green Star for "fraud, accounting, [and] contractual indemnity." *Id.* On March 27, 2020, default judgment was entered against Green Star for failure to appear and answer the complaint. *Id.* (citing NYSCEF No. 29). Subsequently on August 13, 2020, Belnord served Defendants with notice of entry and the accompanying order. *Id.* Defendants had one-year to move to vacate the order but failed. *Id.* On June 8, 2022, Belnord was awarded $130,896.30 in attorney's fees. *Id.* Belnord moved to confirm Special Referee Diego Santiago's Revised Referee's Report and Recommendations, dated July 22, 2022, and seeks $648,900 in damages. *Id.* Here, the Court is evaluating Defendant's opposition to the application of the Report and Defendant's cross-motion to vacate the default judgment granted in favor of the Plaintiff. *Id.*

The Court began its analysis with Belnord's application to confirm the referee's report awarding attorney's fees. *Id.* at *1-2. The Court notes "[g]enerally, New York courts will look with favor upon a Referee's report" and that "[t]he report of a referee should be confirmed whenever the findings are substantially supported by the record, *id.* at *1 (quoting *Namer v. 152-54-56 W. 15th St. Realty Corp.*, 108 A.D.2d 705, 706 (N.Y. 1st Dept. 1985)), and that the referee has clearly defined the issues and resolved matters of credibility." *Id.* (quoting *Courtview Owners Corp. v. Courtview Holding, B.V.*, 193 A.D.3d 1032, 1033 (N.Y. 2d. Dept. 2021)). After reviewing the documents, the Court found the referee's findings were supported and thus adopted and confirmed the report. *Id.*

Next, the Court turned to Novella's cross-motion to vacate the default judgment. *Id.* The Court observed, "a party seeking to vacate a default judgment must demonstrate both a 'reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action.'" *Id.* (quoting *Eugene Di*

Lorenzo, Inc. v. A.C. Dutton Lbr. Co., Inc., 67 N.Y.2d 138, 141 (1986)). "These two prerequisites for relief must be established through facts contained in affidavits submitted in support of the application." *Id.* (quoting *Tandy Computer Leasing v. Video X Home Lib.*, 124 A.D.2d 530, 531 (1st Dept. 1986).

First, Novella argued that he lacked capacity because he was heavily medicated from deep mental distress. *Id.* at 2. He further disputed that he was personally served with notice of default. *Id.* The Court explained that "courts have routinely failed to find a reasonable excuse where the moving party fails to provide sufficient evidence of a medical condition rendering appearance in court impossible." *Id.* (citing *In re Male Jones*, 128 A.D.2d 403, 404 (N.Y. 1st Dept. 1987). When parties claim depression or other mental health conditions for as their basis for nonappearance, a lack of substantiation through medical documentation is reason to deny the motion. *Id.*

Second, the Court found Mr. Novella failed to present a meritorious defense. *Id.* The Court explained "'[i]n order to demonstrate a meritorious defense, a party must submit an affidavit from an individual with knowledge of the facts [and] [t]he affidavit submitted from such individual must make sufficient factual allegations; it must do more than merely make conclusory allegations or vague assertion[s].'" *Id.* (quoting *Peacock v. Kalikow*, 239 A.D.2d 188, 190 (N.Y. 1st Dept. 1997). Novella argued he was not liable as a corporate officer of Green Star and denied being a personal signatory to the construction contract. *Id.* He further asserted an affirmative defense, and claimed Belnord "submitted frequent change orders, incurring additional costs for Green Star and refused to compensate them for those orders." *Id.* Additionally, Novella argued that Belnord failed to state a claim against him because he was not a party to the contract. *Id.* The Court rejected these assertions because Novella made largely conclusory allegations and failed to rebut the allegations of fraud. *Id.*

Based on these findings, the Court granted Belnord's request to confirm the Referee's report and confirmed the award of $130,896.30 in attorney's fees. *Id.* at *3. The Court also denied Novella's cross motion to vacate the default judgment. *Id.* at *3.

Vertiv, Inc. v. Naithani

652689/2022, 2023 WL 3857551 (N.Y. Sup. Ct. 2023)

Ava Stearns

Staff Member

The Supreme Court of New York County decided the case *Vertiv, Inc. v. Naithani*, No. 652689/2022, 2023 WL 3857551, at *1 (N.Y. Sup. Ct. 2023) on June 6, 2023. There, defendants Mahesh Naithani, Pharmaspectra LLC, Medical Intelligence Solutions LLC, and Medmeme LLC (collectively, "defendants") motioned for leave to amend their answer to assert counterclaims pursuant to CPLR 3025(b). *Id.* at *1. Medmeme, a company that helps pharmaceutical companies analyze medical science, sought to bring a system (hereinafter "Safety Project") to the market that would evaluate publicly-available pharmaceutical data about Food and Drug Administration-approved medications. *Id.* In order to execute this system, Medmeme entered into a contract on February 12, 2018, with Vertiv, Inc. ("plaintiff") to build and launch the product. *Id.* Defendants now moved to amend their answer to plaintiff's complaint to assert counterclaims of breach of contract and conversion. *Id.* at *2.

The contract that the parties entered into stated that the plaintiff's services "would be more fully described in one or more Statements of Work." *Id. at* *1. Defendants alleged that plaintiff began working on the system on or about January 15, 2018. *Id.* Shortly after, defendants alleged that it became apparent that plaintiff did not have the necessary expertise, equipment, and physical space to work. *Id.* at *2. Plaintiff allegedly did not have qualified workers and did not remove these individuals from the Safety Project after defendants informed them. *Id.* Plaintiff claimed that the breach of contract counterclaim fails to identify the provision of the contract that was allegedly breached, properly plead defendants' performance, and claimed actual damages. *Id.* Defendants argued that their counterclaim sufficiently alleged the existence of a valid contract and plaintiff's breach of that contract, in addition to a claim for damages of $500,000. *Id.*

The court acknowledged that a motion for leave to amend only requires the movant to show "that the proffered amendment is not palpably insufficient or clearly devoid of merit." *Id.* (quoting *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dept. 2010)). Defendants sufficiently alleged that plaintiff breached its obligation to use "only full-time 'personnel of

required skill, experience, and qualifications'" for the Safety Project, as required under the contract. *Vertiv, Inc.*, 2023 WL 3857551 at *3. Additionally, defendants asserted that Medmeme fully performed the contract and alleged plaintiff's breaches have caused over $500,000 in damages. *Id.* Thus, the court found that "defendants have demonstrated that their proposed counterclaim for breach of contract is neither palpably insufficient nor clearly devoid of merit." *Id.*

Plaintiff argued that the conversion counterclaim is barred by the statute of limitations. *Id.* at *2. Defendants conceded that this counterclaim is time-barred and removed it from their amended answer. *Id.* Thus, the court denied the section of defendants' motion seeking to add a conversion counterclaim. *Id.* at *3.

Therefore, defendants' motion for leave to amend the answer to assert a counterclaim for breach of contract was granted and this amended answer must be served to plaintiff. *Id.*

Oldcastle Precast, Inc. v Steiner Bldg. NYC, LLC

651491/2019, 2023 WL 3769382 (N.Y. Sup. Ct. 2023)

Lena Vella

Staff Member

On June 15, 2016, Oldcastle Precast, Inc., (hereinafter "Plaintiff"), entered into a trade agreement (hereinafter "the contract") for "the construction of a film and television soundstage complex" at the Brooklyn Navy Yard with Kent Steiner and Steiner Buildings NYC, LLC, (hereinafter "Defendants"). *Oldcastle Precast, Inc. v. Steiner Bldg. N.Y.C., Ltd.*, No. 651491/2019, 2023 WL 3769382, at *1 (N.Y. Sup. Ct. 2023) (citing NYSECF No. 1). Defendants agreed to pay Plaintiff $9,415,000.00 to "manufacture, furnish, and install pre-cast concrete structures." *Id.* On March 12, 2019, after Defendants alleged nonpayment, Plaintiff sued Defendants for breach of contract to recover the outstanding $1,370,922.22. *Id.* at *1–2 (citing NYSECF No. 1; NYSECF No. 90). Defendants counterclaimed for breach of contract and negligence, amongst other things. *Id.* at *2 (citing NYSECF No. 6; NYSECF No. 94; NYSECF No. 98). On August 11, 2021, the Court assigned Honorable Rosalyn H. Richter "to serve as a special referee to hear and determine any discovery issues." *Id.* (citing NYSCEF No. 221). On September 11, 2022, Honorable Richter "issued an order stating that '[t]he discovery reference . . . [had] concluded and [that] the parties shall [] advise the Court.'" *Id.* (citing NYSCEF No. 335). Accordingly, on October 18, 2022, Plaintiff's counsel advised the Court, and requested a conference to discuss the note of issue filing and setting a briefing scheduling for motions for summary judgment. *Id.* (citing NYSCEF No. 296). The Court scheduled a conference for December 6, 2022, and about a month before, Plaintiff "filed a note of issue and certificate of readiness." *Id.* (citing NYSCEF No. 297). On November 28, 2022, Defendants moved to vacate the note of issue pursuant to N.Y. Comp. Codes R. & Regs. 22, § 202.21(e). *Id.* Plaintiff cross-moved, pursuant to 22 N.Y.C.R.R. § 130–1.1, for sanctions against Defendants for frivolous conduct. *Id.* On May 31, 2023, the Court denied both parties motions and ordered for both parties counsel to appear for a virtual pre-trial conference on October 12, 2023. *Id.* at *4.

The Court first addressed the Defendants' motion to vacate the note of issue pursuant to 22 N.Y.C.R.R. § 202.21(e). *Id.* at *2. The Court recognized that Defendants had timely moved to vacate the note in accordance with the statute, but that Defendants

had failed to properly comply with other statutory requirements. *Id.* Thus, the Court declined to vacate the note of issue. *Id.* at *3. Although Defendants conceded to not seeking additional discovery, they argued that the note of issue incorrectly stated that discovery was complete. *Id.* at *2. Defendants argued that Honorable Richter failed to answer two "significant" discovery issues: "(1) whether [P]laintiff should be sanctioned for spoliation of evidence and (2) the propriety of certain rebuttal expert reports submitted by [P]laintiff and sur-rebuttal expert reports submitted by [D]efendants." *Id.* Despite these issues "significance," Defendants admitted that resolution of these issues by the Court was not necessary because the issues were proffered simply to demonstrate that the case was not ready for trial. *Id.* at *2–3.

Regarding the Defendants first issue, the Court declined to vacate the note of issue on the basis of whether to impose spoliation sanctions on Plaintiff because Honorable Richter did not err in refusing to address the issue. *Id.* at *3. That specific issue was raised in two of the Defendants' motions, which Honorable Richter purposely declined to decide, and instead directed to the Court to handle. *Id.* (citing NYSCEF No. 339; NYSCEF No. 449). Accordingly, the issue of imposing spoliation sanctions on Plaintiff was to be decided in the context of the specific motions, and thereby was not a showing, pursuant to 22 N.Y.C.R.R. § 202.21(e), that "a material fact in the certificate of readiness [was] incorrect" or "that the certificate of readiness fail[ed] to comply with the requirements of [] section [202.21] in some material respect," which would have warranted vacating the note. *Id.*

Regarding the Defendants second issue, the Court declined to vacate the note of issue on the basis of whether Plaintiff's rebuttal expert reports were improper because Honorable Richter did not err in refusing to strike the proffered reports. *Id.* at *3. Defendants argued that Honorable Richter's refusal to strike the reports violated the case's prior ruling from the Honorable O. Peter Sherwood, J. (Ret.), dated July 22, 2020, which stated: "Rebuttal reports shall be strictly limited to addressing matters in the report it purports to rebut. Violation of this restriction may result in the entire report being stricken and any related testimony being barred." *Id.* (citing NYSCEF No. 312). However, Honorable Richter refused to strike the reports and instead directed the matter to be handled by the Court since it was not a discovery issue. *Id.* (citing NYSCEF No. 343). Consequently, since Defendants failed to show that either the certificate of readiness had an incorrect material fact or failed to comply with 22 N.Y.C.R.R. § 202.21 in a material respect, the issue did not warrant vacating the note. *Id.*

Moreover, the Court declined to vacate the note of issue on the basis of whether Defendants sur-rebuttal expert reports were

properly precluded by Honorable Richter because the issue did not demonstrate that the case was unfit for trial. *Id.* at *3–4. Defendants challenged a letter order, dated March 25, 2022, wherein Honorable Richter stated that as the discovery referee with the discretion to control the timing of discovery production, considering "the timing of [Defendants] recent production" at "this late stage" and the fact that the "parties already had an opportunity to argue this issue" prior to a ruling being made, since Defendants reports were "far more than rebuttal to plaintiff's rebuttal, but rather [] supplement[ed] the original expert reports," that it would be unfair given the lengthy discovery delays that already occurred. *Id.* at *3 (citing NYSCEF No. 274). Upon precluding Defendants' reports, Honorable Richter distinguished this from the prior decision to not strike the Plaintiff's rebuttal expert reports, because the prior raised issues other than timing. *Id.* Nevertheless, Defendants argued that Honorable Richter's decision created an issue that demonstrated that the case was not ready for trial, because so long as Plaintiff's reports remained, Defendants would seek to have their reports accepted as timely. *Id.* As per 31 N.Y. C.P.L.R. § 3104(d), "[a]ny party . . . may apply for review of an order made . . . by a referee. The application shall be by motion made in the court in which the action is pending within five days after the order is made." *Id.* The Court had found that Honorable Richter allowed Defendants to preserve their objections by submitting two-page letters, but because Defendants only submitted a letter on March 28, 2022, to Honorable Richter and never sought the Court's review of the March 25, 2022 order, the motion would be untimely, considering the statutory five day period. *Id.*

After the Court addressed and denied the Defendants' motion, the Court proceeded to address the Plaintiff's cross-motion for sanctions. *Id.* The Court denied the Plaintiff's motion and held that the arguments raised by Defendants in support of their motion did not reach the level of frivolousness required to impose sanctions under 22 N.Y.C.R.R. § 130–1.1. *Id.* at *4.

Since both Plaintiff and Defendants motions had been denied, the Court concluded that counsel for both parties was to appear "for a virtual pre-trial conference on October 12, 2023, at 10:30 AM." *Id.*