

Beach v Touradji Capital Mgt., LP
2023 NY Slip Op 30309(U)
January 27, 2023
Supreme Court, New York County
Docket Number: Index No. 603611/2008
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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GENTRY T. BEACH and ROBERT A. VOLLERO,

Plaintiffs,

INDEX NO. 603611/2008

MOTION DATE N/A, N/A, N/A,
N/A, N/A, N/A

- v -

TOURADJI CAPITAL MANAGEMENT, LP, PAUL
TOURADJI, VOLLERO BEACH CAPITAL PARTNERS,
VOLLERO BEACH CAPITAL FUND, VOLLERO BEACH
ASSOCIATES LLC, VOLLERO BEACH CAPITAL
OFFSHORE, LTD., GARY BEACH, and DEEPROCK
VENTURE PARTNERS, LP,

MOTION SEQ. NO. 050 051 052
053 054 055

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 050) 1105, 1106, 1107, 1108, 1125, 1129, 1140

were read on this motion to/for PRECLUDE

The following e-filed documents, listed by NYSCEF document number (Motion 051) 1119, 1120, 1121, 1122, 1123, 1124, 1126, 1130, 1141, 1142, 1143

were read on this motion to/for PRECLUDE

The following e-filed documents, listed by NYSCEF document number (Motion 052) 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139

were read on this motion to/for PRECLUDE

The following e-filed documents, listed by NYSCEF document number (Motion 053) 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1176, 1177, 1215, 1216, 1217, 1218, 1219

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 054) 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1180, 1181, 1182, 1183, 1184, 1185, 1214, 1220

were read on this motion to/for MISCELLANEOUS

The following e-filed documents, listed by NYSCEF document number (Motion 055) 1161, 1162, 1163, 1164, 1178, 1179, 1221

were read on this motion to/for PRECLUDE

In **motion sequence number 050**, defendant and counterclaim plaintiff Touradji Capital Management, LP (TCM) and counterclaim plaintiff Paul Touradji move by order to show cause (OSC) to “preclud[e] Plaintiffs from offering evidence and testimony regarding distributions made between 2012 and 2018 that are the subject of a separate lawsuit by Plaintiffs captioned *Beach, et al. v. Paul Touradji, et al.*, Index No. 654426/2019.” (NYSCEF Doc. No. [NYSCEF] 1105, Proposed OSC.) Specifically, plaintiffs wish to use defendant’s 2012 to 2018 transfers of funds to prove defendant’s consciousness of guilt for allegedly breaching the compensation agreement. The motion is granted, and plaintiffs are precluded from offering evidence concerning defendant’s transfer of funds from 2012 to 2018.

Plaintiffs’ sole claim is for breach of contract. The connection between defendant’s 2012 to 2018 transfer of the funds and plaintiffs’ anticipated judgment for a 2007 breach of contract is too attenuated to be probative here. (*See cf. Miller ex rel. Miller v Lewis*, 40 Misc 3d 499, 502 [Sup Ct, Kings County 2013] [failure to remain at the scene, provide information and render assistance, all contrary to law, “was highly relevant to show a ‘consciousness of responsibility’” for the accident] [citation and quotation omitted].) This is particularly true since the parties agree, and the court has ordered, that the reversed 2019 trial is not to be mentioned during this new trial; plaintiffs cannot connect defendant’s alleged consciousness of guilt to the timing of the prior trial without disclosing that prior trial.¹ In order to consider plaintiffs’ fraudulent conveyance theory a full and fair hearing, there must be a trial where both parties have

¹ Indeed, plaintiffs have suggested a curative instruction using the term “evidentiary proceeding” should anyone mistakenly mention the prior trial. (See Jan. 25, 2023 transcript.)

an opportunity to present their cases. Plaintiffs' evidence is simple: 2012 to 2018 transfers connected to the timeline of this action. However, defendants offer numerous explanations for the transfers some of which involve complex tax code. There may be such a trial in plaintiffs' 2019 fraudulent transfer action, but now is not the time for that complex trial. This trial is already set to take three to four weeks and this time period cannot be expanded. For that reason, among others, plaintiffs' motion to consolidate this trial with the fraudulent transfer case was denied. Introduction of 2012 to 2018 transactions would impermissibly create a trial within a trial. (See *Cheney v Wells*, 2008 NY Misc LEXIS 6660 [Sur Ct, NY County Oct. 21, 2008] [alleged 2007 solicitation of brother's murder not admissible as proof of sister's consciousness of guilt in probate proceeding regarding mother's life insurance proceeds because "too equivocal as to consciousness of guilt, and too likely to create a 'mini-trial'"]; *Cheney v Wells*, 22 Misc 3d 502 [Sur Ct, NY County, Sept. 23, 2008].) The evidence admitted by courts that have allowed consciousness of responsibility evidence, was not an entire trial in and of itself as it would be here. (See *Miller ex rel. Miller v Lewis*, 40 Misc 3d at 503 ["Lewis continued to drive further down the block, failed to call 911 and placed and received numerous phone calls to and from Duane Reade employees, is all admissible as evidence of Lewis' consciousness of liability" for the car accident at issue]; see also *Johnson v Ingalls*, 95 AD3d 1398 [3d Dept 2012].) Finally, plaintiffs cannot remedy their tardy motion to consolidate by injecting the fraudulent transfer case into this trial.

In **motion sequence number 051**, TCM, Touradji, and counterclaim plaintiff Deeprock Venture Partners, LP (DeepRock) move by OSC for an order "precluding

certain expert testimony offered by Plaintiffs.” (NYSCEF 1126, OSC.) The motion is denied and Matthew Solomon, Esq., the former SEC Litigation Counsel for Enforcement may testify generally about the purpose and prophylactic nature of Rule 105 of Regulation M and the mechanics of the SEC’s settlement negotiation as process. Defendant settled with the SEC on December 9, 2011, and the SEC issued an order sanctioning defendant with a fine of more than \$1 million. (NYSCEF 1123, SEC Order.) In defendant’s counterclaim, defendant seeks to hold plaintiffs responsible under its breach of fiduciary duty claim for triggering the SEC investigation by “[v]iolating SEC regulations and laws governing trading public securities.” (NYSCEF 1193, Marked Pleadings, Answer ¶¶198.) Mr. Solomon was not involved in the negotiation of defendant’s order, and thus, will not testify about the order in this case. However, the court finds that Mr. Solomon’s testimony explaining complex securities regulations and esoteric enforcement procedures would be helpful to the jury. The jury charge issued will be addressed in a charge conference when the parties review the court’s jury charges regarding whether plaintiffs triggered the SEC’s investigation resulting in the Reg. M violation order, and if so, whether such activity constitutes a breach of fiduciary duty.

Defendant’s objection to Frank Carr’s testimony was addressed on the record on January 25, 2023.

In **motion sequence number 052**, plaintiffs move, by notice of motion, for an order “excluding the testimony of John Clingerman and limiting the testimony of Richard Bergin and David DeRosa.” (NYSCEF 1109, Notice of Motion.)

For the reasons stated on the record on January 25, 2023, Mr. Clingerman may testify within the parameters set forth on the record.

Richard Bergin's testimony will be addressed in a subsequent decision.

The court reserved decision as to David DeRosa's testimony and the use of the chart, which will be addressed in a subsequent decision.

In **motion sequence number 053**, plaintiffs move by OSC, for an order "bar[ring] Defendants from reviving claims they previously dismissed and neither re-filed nor moved to reinstate" and "bar[ring] Defendants from re-introducing inflammatory and irrelevant evidence previously barred by court order." (NYSCEF 1176, OSC.)

Plaintiffs' motion to exclude emails with a person with whom Beach allegedly had an affair and emails regarding Beach's alleged affair is granted based on Justice Lowe's decision finding the relationship not relevant and barring discovery. (NYSCEF 303.)

Plaintiffs' motion is denied with regard to Beach's work emails. Justice Borrok's seal decision (NYSCEF 869 on motions 041 and 42 [not 52 as plaintiffs state, NYSCEF 1172, ¶15]) sealed, but did not preclude use of the emails at trial. In the stipulation attached thereto, the parties simply agreed to a redaction of those emails.

Defendant may use those emails to support its faithless servant affirmative defense and counterclaims for breach of fiduciary duty claim as a faithless fiduciary and declaratory judgment that plaintiffs are not entitled to compensation or bonuses because of their faithless conduct. Both of these counterclaims list specific acts that breached plaintiffs' fiduciary duties to defendant. (NYSCEF 31, Nov. 4, 2009 Answer; NYSCEF 921, Sept. 27, 2013 Amended Answer.) Defendant has stated this affirmative defense since November 4, 2009. (NYSCEF 31, Answer.) While the list of facts

supporting the breach of fiduciary duty for faithless fiduciary and the declaratory judgment would have been sufficient to survive a motion to dismiss under 3211(a)(7) and CPLR 3016(b), there was no inquiry as to whether there were any other acts to limit defendant's counterclaims to those acts. Although there is no time limit on making a motion pursuant to CPLR 3211(a)(7) to dismiss the affirmative defense of faithless servant for failure to state a claim due to noncompliance with CPR 3016(b), to plead with particularity, plaintiffs have yet to do so. The lack of notice about which plaintiffs now object, is their own doing. Indeed, their reliance on *Advanced Alternative Media, Inc. v Hindlin*, 2022 WL 4279503 (Sup Ct, NY County 2022) is curious since that is precisely what the parties did in *Hindlin*. However, here, plaintiffs never moved to dismiss the affirmative defense. Plaintiffs deprived themselves of meaningful discovery by failing to serve interrogatories as to the basis of the affirmative defense. Plaintiffs assumed that the list was the same as that for the breach of fiduciary duty and declaratory judgment. (NYSCEF 1127, Jan. 26, 2023 Letter.) However, plaintiffs never made a motion to test that assumption. While plaintiffs did no discovery on the factual predicate for the affirmative defense, defendants deposed recipients of the emails. (NYSCEF __, ² Jan. 26, 2023, 12:05 pm email from Marissa Alter-Nelson, Esq.) The emails were on defendants' exhibit list for the 2019 trial. There was no order precluding them. Therefore, plaintiffs' motion is denied. Plaintiffs may submit a limiting instruction if they are so advised.

² Defendant is directed to file the email in NYSCEF. Redactions may be made consistent with Justice Borrok's seal decision.

For the reasons stated on the record on January 25, 2023, plaintiffs' motion is also denied with regard to the counterclaims not pursued at the first trial. The jury verdict was reversed. (NYSCEF 1005, Jan. 14, 2020, Appellate Division, First Department Decision.) The First Department put no restrictions on this trial. (*Id.*)

Defendants may proceed with the counterclaim against Vollero that he failed to notify others that Beach was mismanaging and misrepresenting information related to the Play and Madagascar investments. The court rejects plaintiffs' argument that defendants did not proceed with this claim at the first trial as not conclusive. This is a trial de novo.

Vollero Beach Capital Partners LLC was not dismissed from Count 2 of the counterclaims for unfair competition. (NYSCEF 686, Nov. 22, 2016 Appellate Division, First Department, Decision and Order at 11-12.) Likewise, Vollero Beach Capital Partners LLC is not mentioned in Justice Borrok's March 4, 2019 Order. (NYSCEF 798, Order.)

In **motion sequence number 054**, TCM, Touradji, and DeepRock move by OSC for "an adverse inference charge with respect to the spoliation of Robert Vollero's notes . . ." (NYSCEF 1214, OSC.) For the reasons stated on the record on January 25, 2023, the court denied motion 054 as to PJI 1:77:2. The court reserves decision on PJI 1:77.

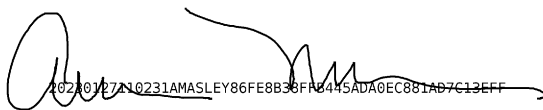
In **motion sequence number 055**, TCM, Touradji, and Deeprock move by OSC to "preclude three categories of evidence and testimony that Plaintiffs introduced at the previous trial and have indicated that they intend to introduce at the upcoming trial." (NYSCEF 1162, Memorandum of Law at 2; NYSCEF 1221, OSC.) For the reasons stated on the record on January 25, 2023, the motion is granted to the extent that there

shall be no testimony elicited regarding plaintiffs' feelings about the length of this action. Consistent with the direction that the parties not refer to the prior trial, the parties shall not raise the issue of the age of the case, all of which is irrelevant. The other two issues – Gentry Beach's testimony about Gary Beach's state of mind and eliciting hearsay testimony -- were resolved on the record on January 25, 2023.

Accordingly, it is

ORDERED that parties shall file in NYSCEF all letters and communications regarding these motions; and it is further

ORDERED that motion seq nos. 050, 053, and 055 are granted in part. Motion seq. no. 054 was denied in part with reservation on one issue, 052 is denied in part with reservations. Motion seq no. 051 is denied.



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1/27/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

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

APPLICATION:

CHECK IF APPROPRIATE: