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Latin Mkts. Brazil, LLC v. McArdle

654374/2020, 2022 WL 4090084 (N.Y. Sup. Ct. 2022)

Ezra Rash

Editor-in-Chief

Plaintiff, Latin Markets Brazil, commenced an action against defendants William McArdle, Thomas Mallon, and Titan Investors LLC (collectively, defendants) in New York County, alleging "misappropriation of trade secrets, breach of contract, unfair competition, tortious interference, breach of fiduciary duty, and conversion." *Latin Mkts. Brazil, LLC v. McArdle*, 654374/2020, 2022 WL 4090084, at *1 (N.Y. Sup. Ct. 2022). In a motion pursuant to CPLR 3124, plaintiff sought "an order compelling defendants to provide discovery responses." *Id.* Plaintiff also moved for attorneys' fees pursuant to New York Court Rule 130-1.1, as well as to dismiss the defendants' hostile work environment counterclaim pursuant to CPLR 3211(7). *Id.* Defendants "cross-move[d] to amend their counterclaims." *Id.* Defendants also moved for sanction and attorneys' fees, pursuant to 22 NYCRR 130-1.1. *Id.*

On plaintiff's motion to compel discovery, the Court found that the motion was filed "in direct contravention of Commercial Division Rules 14 and 24, and Part 43 Rule 6[h]" and that this "alone permit[ed] denial of the motion." *Id*. Rule 14 states that "all disclosure disputes in a pending case will be governed by the part rules to which the case is assigned." *Id.* In addition, according to the Court, Part 43 Rule 6[h] requires that "the parties confer in good faith on all discovery disputes and directs the parties to write to the court if the parties are unable to resolve the dispute." *Id.* Furthermore, before filing a motion, Rule 24 "requires that the court be given the opportunity to resolve disputes by pre-motion conference, and expressly prohibits the filing of motions before the court has had the opportunity to conference the matter." *Id.* Even though the Court found the motion deniable on a procedural point, it still reached the merits of the motion, finding that "a discovery conference held with all parties" addressed the merits, and that the order "is, accordingly, moot." *Id.* at *2.

The Court denied plaintiff's motion for attorneys' fees because plaintiff failed to "comply with this court's directives," that is, Rules 14, 24 and Part 43 Rule 6[h], when filing the discovery motion. *Id.* at *1.

Plaintiff's motion to dismiss defendants' hostile work environment counterclaim was denied. *Id.* at *2. The Court found that defendants' cross-motion to amend the counterclaim was supported by "factual allegations" that are sufficient to support the defendants' application to amend." *Id*. Under CPLR 3025(b), "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." *Id*. The Court explained that "[t]he standard is not a high one." *Id*. "[T]he moving party only needs to show that the amendment 'is not palpably insufficient or devoid of merit.'" *Id.* (quoting *MBIA v. Greystone & Co., Inc.,* 74 A.D. 3d 499, 500 (1st. Dept. 2010)). Not only did the Court find that defendants had met their burden to show merit, but also that plaintiff "did not allege any prejudice or surprise that would result" from the amendment. *Id.*

Finally, the Court denied defendants' motion for sanctions and attorneys' fees because plaintiff's motion, even though made in violation of court rules, was not entirely unmeritorious. *Id*. The Court noted that the standard for frivolous conduct, under New York Court Rule 130-1.1, requires that "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." *Id.*

In summary, the Court denied as moot plaintiff's motion to compel discovery responses, denied plaintiff's motion to dismiss defendants' hostile work environment counterclaim, granted defendants' cross-motion to amend its hostile work environment counterclaim, and denied both plaintiff's and defendants' motion and cross-motion for sanction and attorneys' fees. *Id.* at *13.

People v. National Rifle Assn. of Am., Inc.

451625/2020, 2022 WL 2112889 (N.Y. Sup. Ct. 2022)

Ezra Rash

Editor-in-Chief

New York Attorney General Letitia James, plaintiff, commenced a motion against the National Rifle Association (hereinafter "NRA"), defendant, to dismiss their counterclaims. *People v. National Rifle Assn. of Am., Inc.*, 451625/2020 2022 WL 2112889, at *1001. NRA's counterclaims alleged the Attorney General's investigation of the NRA was unconstitutional. *Id.* The Attorney General investigated NRA based on "reports of fraud, waste, and looting within the NRA." *Id.* at *1005. Along with other claims, she filed dissolution claims against NRA, arising out of her investigation. *Id.* at *1003. NRA sought "declaratory and injunctive relief stemming from the dissolution claims." *Id.* NRA also sought monetary damages "against the Attorney General in her individual capacity." *Id.* The remaining counterclaims—the retaliation counterclaims—arose out of the Attorney General's "public comments denouncing the organization." *Id.* NRA alleged that the Attorney General engaged in "unconstitutional retaliation against the NRA and its members for engaging in political speech." *Id.* at *100304.

The Court granted the Attorney General's motion to dismiss the counterclaims. *Id.* at *1002. Because the dissolution claims were dismissed pursuant to a March 2, 2022, court order, the declaratory and injunctive relief claims were moot. *Id.* at *1003.

I. The Retaliation Counterclaims

The Court dismissed the retaliation counterclaims because NRA failed to state causes of action in its motion. *Id.* *1003. For a First Amendment retaliation claim to survive a motion to dismiss, "a plaintiff must allege (1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." *Id.* at *1004, quoting *Dolan v. Connolly*, 794 F.3d 290, 294 (2d Cir. 2015). The Court elaborated on the third element—the causation element—stating that: "It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—

the motive must cause the injury;" and that "but-for" the retaliatory motive, the adverse action would not have been taken. *Id.* (quoting *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019)). The Court noted there was an additional hurdle for NRA to clear based on the "presumption of regularity accorded to prosecutorial decision-making." *Id.*

Here, the Court found that "[t]he causal element [was] missing." *Id.* "The NRA fail[ed] to allege that investigation was without a lawful basis." *Id.* at *1005. First, the Attorney General has "broad statutory authority to oversee not-for-profit entities, like the NRA, which are organized under New York law." *Id.* Also, the Court stated that "no factual allegations suggest[] that the stated concerns driving the investigation . . . were imaginary or not believed by the Attorney General." *Id.* The Court went on to hold that "the 'nonretaliatory grounds' were more than sufficient to justify the Attorney General's investigation." *Id.*

The Court noted that NRA had "itself recognized many of the same issues about corporate governance underlying the Attorney General's investigation." *Id.* Continuing to state that a federal bankruptcy court in Texas raised "concerns about the NRA's corporate governance." *Id.* at *1006. The Court concluded that "an objectively reasonable investigation…is not rendered unconstitutional solely by the investigator's subjective state of mind." *Id.* at *100607. The Court also rejected the NRA's argument that the Court may not dismiss First Amendment retaliation claims "for failure to adequately allege but-for causation." *Id.* at *1007. The Court stated: "Dispatching fatally flawed retaliation claims against public officials at this early stage is not merely permissible but serves a salutary gatekeeping function." *Id.*

II. The Selective Enforcement Counterclaims

The Court also dismissed the NRA's counterclaims the alleged "the Attorney General's decision to investigate and seek dissolution of the NRA represents selective prosecution, in violation of the NRA's constitutional right to equal protection." *Id.* The Court stated the standard: "A claim of selective prosecution requires a showing 'that the law has been administered 'with an evil eye and an unequal hand." *Id.* (quoting *People by James v. Trump Org., Inc.*, 2022 NY Slip Op 03456 (1st Dept. May 26, 2002)). The claim must also "overcome the presumption that, generally speaking, the State can select whom to prosecute." *Id.* at *1008.

This is a "heavy burden" for the plaintiff to overcome under New York law. *Id.* at *1009. The Court determined that NRA's allegations did not "overcome the presumption that the Attorney General acted lawfully in pursuing the dissolution claims through its investigation." *Id.* The Court noted that in the counterclaims NRA "tacitly acknowledges" that "a 'course correction' was needed, undercutting its assertion that the Attorney General's concerns were wholly fabricated." *Id.*

Further, the Court rejected the argument that the recent dismissal of the Attorney General's dissolution claims did "not undermine the presumed legality of her investigation." *Id.* at *1010. "Where, as here, a claim for dissolution is found to be legally insufficient, the proper remedy is dismissing that claim, not imposing liability on the Attorney General for exercising her statutory right to bring it." *Id.* The Court also found that the counterclaims failed "to allege that the NRA was treated differently from similarly situated charitable organizations due to impermissible consideration." *Id.* NRA argued that the selective enforcement counterclaims "trigger[ed] a strict scrutiny analysis of whether the government action was the least restrictive means available in exercising its authority." *Id.* at *1011. But the Court rejected this argument based on NRA's inability to provide supporting authority. *Id.* The Court also rejected NRA's argument that the insufficiency of the Attorney General's dissolution claims, specifically the failure to allege public harm in those claims, "does not automatically impose liability on the Attorney General." *Id.*

As a final matter, the Court declined to rule "on the scope of the Attorney General's qualified immunity under federal and state law" because the Attorney General is not liable. *Id.*

Spellmans Marine Inc., v. HC Composites L.L.C.

611493/2022, 2022 WL 4690375 (N.Y. Sup. Ct. 2022)

Astrid Roe

Managing Editor

Plaintiff Spellmans Marine Inc. ("Plaintiff") commenced an action for breach of contract against Defendant HC Composites LLC d/b/a World Cat ("Defendant"). *Spellmans Marine Inc., v. HC Composites L.L.C.*, 611493/2022, 2022 WL 4690375 at *1 (N.Y. Sup. Ct. 2022). Plaintiff is a boat dealer in Suffolk County, New York and Defendant is a boat manufacturing company. *Id.* The parties entered into an exclusive agreement whereby Plaintiff agreed to market and sell Defendant's boats. *Id.*

Defendant, to terminate the relationship, sought to exercise the contract's non-renewal clause. *Id.* This led to Plaintiff bringing this action, alleging Defendant breached its implied duty of good faith and fair dealing and its fiduciary duty to Plaintiff. *Id.* In its complaint, Plaintiff requested a permanent injunction, barring Defendant from terminating the agreement, and monetary damages for Defendant's violation of the Vessel Dealer Act, New York General Business Law §§ 810-816. *Id.; see* N.Y. G.B.L. 810-816 (McKinney 2005). Additionally, Plaintiff moved for a preliminary injunction allowing Plaintiff to continue selling Defendant's boats under the terms of the agreement while the case was still pending. *Id.* In response, Defendant cross-moved for an order of dismissal pursuant to CPLR § 3211(a)(1), alleging New York was not the proper forum for this case. *Id.*

The Court began by evaluating Defendant's cross-motion to dismiss. *Id.* CPLR § 3211(a)(1) allows a party to move to dismiss a cause of action against it based on documentary evidence. N.Y. C.P.L.R. 3211(a)(1) (McKinney 2022). As the Court noted, the documentary evidence in a motion of this kind must "utterly refute[ ] the plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Spellmans Marine Inc.*, 2022 WL 4690375 at *2 (quoting *Encore Lake Grove Homeowner's A'ssn, Inc. v. Cashin Assocs., P.C.*, 111 A.D.3d 881, 882 (N.Y. App. Div. 2013)).

Defendant submitted the forum selection clause in Articles 10 and 11 of the agreement as its documentary evidence. *Id.* As it is well-settled that contracts and forum selection clauses within contracts are undeniable documentary evidence, the Court set forth

evaluating whether the language in these provisions allowed New York to hear this cause of action. *Id.* (citing *Lischinskaya v. Carnival Corp.*, 56 A.D.3d 116, 123 (N.Y. App. Div. 2008)).

In beginning its evaluation of the forum selection clause, the Court first had to determine whether the clause was mandatory or permissive. *Id.* Mandatory forum selection clauses declare that the chosen forum is the "exclusive or sole forum in which the matter may be heard." *Id.* (quoting *Walker, Truesdell, Roth & Assocs., Inc. v. Globeop Fin. Servs. LLC*, 993 N.Y.S.2d 647 (N.Y. Sup. Ct. 2013)). Conversely, permissive clauses offer parties the option of suing in any forum with personal jurisdiction over the Defendants. *Id.* The forum selection clause in the agreement stated:

> ARTICLE 10: GOVERNING LAW AND VENUE 10.1. This Agreement is made and entered into in Tarboro, North Carolina. This Agreement shall be construed and governed by the laws of the State of Florida without giving regards to its conflict of laws provisions. Dealer consents to the exclusive jurisdiction and venue of the state court in Edgecombe County, North Carolina for any lawsuit arising from or relating to this Agreement or the Parties' relationship, and Dealer hereby waives any objections Dealer may have to jurisdiction and venue of the lawsuit.

Id. at *3.

The Court focused on the sentence "consents to the exclusive jurisdiction and venue of . . . North Carolina." *Id.* Based on prior case law holding that forum selection clauses are mandatory when there is an agreement among parties "that a specified forum 'shall' hear a matter or that the forum is 'exclusive,'" the Court held that this clause could only be interpreted as mandatory, and therefore North Carolina was the proper forum, not New York. *Id.* (quoting *Walker, Truesdell, Roth & Assocs.*, 993 N.Y.S.2d at 647).

While not denying the forum selection clause was mandatory, Plaintiff asserted that it was unenforceable under the Vessel Dealer Act, a statute protecting boat dealers in contracts with manufacturers. *Id.* Under the Act, a party to a contract is required to provide a ninety-day notice of intention to exercise a contract's non-renewal provision. *Id.* Further, the Act issues

penalties for non-compliance, allows claims to be brought in addition to any other legal or equitable right possessed by the moving party, and prohibits contracts from requiring a dealer to waive any of the provisions or rights they are allowed under the Act. *Id.*

The Court noted that many of the provisions under the Act provided helpful protections to the Plaintiff, but the real issue at hand was whether the Act required that this case be heard in New York. *Id.* To begin its analysis, the Court first quoted the well-known case *Brooke Group Ltd. v. JCH Syndicate 488*, holding that contracted forum selection clauses are valid and enforceable unless the opposing party can show they are unreasonable. *Id.* (citing 87 N.Y.2d 530 (N.Y. 1996)).

In support of their cross-motion, the Defendant cited to *Boss v. American Express Financial Advisors, Inc.* in which it was argued that a forum selection clause was unenforceable due to its involving a New York statute that had a substantive effect on the parties. *Id.* (citing 6 N.Y.3d 242 (N.Y. 2006)). The court in *Boss* held that the statute did not render the clause unenforceable, and that it could not be assumed the chosen forum would neglect to apply New York law, given the obvious interests and policies of New York in the litigation. *Id.* at *34. The Court accepted this reasoning, deeming objections by Plaintiff distinguishing the Vessel Dealer Act from the labor law statute at issue in *Boss* as irrelevant. *Id.* at *4.

The Court noted the precedence of this case, appearing to be the first "interpreting the Vessel Dealer Act in connection with the viability of a forum selection clause between a boat manufacturer and dealer." *Id.* The Court paid special attention to the importance of implementing legislative intent in their interpretation of the Act. *Id.*

To determine the legislative intent behind the Vessel Dealer Act, the Court first focused on the Act's legislative history. *Id.* According to the Court, the Bill Jacket notes did not reveal there was any intent for New York to be the only forum able to enforce the Act. *Id.* Next, the Court turned to the words of the statute. *Id.* Of particular interest to the Court was New York General Business Law § 814, stating "Every arbitration conducted pursuant to this article shall be conducted in this state." *Id.* (quoting N.Y. G.B.L. 814 (McKinney 2005)). The Court determined that the failure of the legislature to include litigation within the exclusive jurisdiction

of the state created an "irrefutable inference" that this omission was intentional. *Id.*

To further their point, the Court compared the § 814 language to the Prompt Payment Act in New York General Business Law § 757, which renders unenforceable in certain contracts " . . . any litigation, arbitration or other dispute resolution proceeding arising from the contract to be conducted in another state." *Id.* (quoting N.Y. G.B.L. 757 (McKinney 2009)). To the Court, this solidified that the omission was intentional, and not overlooked, allowing litigation cases arising under the Vessel Dealers Act to be heard in forums outside New York. *Id.*

The Court held that the forum selection clause in the agreement between Plaintiff and Defendant was enforceable, therefore New York was not the proper forum for this case, and the case must be heard in North Carolina. *Id.* Under the Court's interpretation of the Vessel Dealer Act, Plaintiff would still be able to assert before the North Carolina court that the Act affects the contract's choice of law clause. *Id.* Accordingly, the Court granted Defendant's cross-motion to dismiss, and denied Plaintiff's preliminary injunction as moot. *Id.*

Deutsche Bank Sec. Inc. v. 683 Capital Partners LP

650164/2022, 2022 WL 2922388 (N.Y. Sup. Ct. 2022)

Matthew Pate

Associate Managing Editor

Deutsche Bank Securities, Inc. ("Plaintiff") brought suit against eighty-six defendants, namely Corbin Opportunity Fund, L.P., Fifth Street Station LLC (collectively "the Corbin Defendants"), Greenlight Capital, L.P., Greenlight Capital Offshore Partners, Ltd., Greenlight Capital Investors, L.P., Greenlight Capital Offshore Master, Ltd., Solasglas Investments, L.P. (collectively "the Greenlight Defendants"), BMO Funds, Inc., Alternative Strategies Fund ("BMO"), and Neuberger Berman Investment Funds PLC (hereinafter "Neuberger"), alleging a breach of contract. *Deutsche Bank Sec. Inc. v. 683 Capital Partners LP*, No. 650164/2022 (N.Y. Sup. Ct. 2022). In motion sequence no. 002, the Corbin Defendants moved by order to show cause for an order sealing two exhibits attached to an affidavit supporting a motion to dismiss the complaint and for sanctions. *Id*. at *1. In motion sequence no. 003, the Greenlight Defendants moved by order to show cause for an order sealing the affidavit of Daniel Roitman in support of the Greenlight Defendants' motion to dismiss the complaint and twelve attached exhibits. *Id*. In motion sequence no. 005, Plaintiff moved for an order extending Plaintiff's time to serve the summons and complaint on the Neuberger Defendants by forty-five days. *Id*.

The Court denied motion sequence nos. 002 and 003. *Id*. at *2. In New York, it is presumed that the public is entitled to access to judicial proceedings and court records. *Id*. at *1. However, a court may seal or redact court records upon a showing of good cause. *Id*. at *2. Sealing is generally appropriate to preserve the confidentiality of internal financial information of a party, which typically is of "minimal public interest." *Id.* However, sealing is inappropriate when a party fails to provide sufficient grounds for why the document should be confidential. *Id*. Here, the Court denied both motions for sealing because both motions provided insufficient ground to do so. *See id.* at *3. Motion sequence no. 002 merely stated that publication of the records would be "detrimental" to the moving defendants and "rubber stamp[ed]" the words "HIGHLY CONFIDENTIAL" on the bottom of the document's page. *Id.* In motion sequence no.

003, the moving defendants only claimed that "the 'documents contain information, the disclosure of which would, in the good faith judgment of Greenlight Defendants, be detrimental if the information were to become public . . . .'" *Id*. (citing NYSCEF No. 47).

In motion sequence no. 005, Plaintiff sought an extension of time to serve BMO and Neuberger. *Id.* Plaintiff claimed that service was effectuated on both parties per Business Corporation Law ("BCL") § 307, the statute governing service on unauthorized foreign corporations. *Id*. Although Plaintiff timely served the parties pursuant to BCL § 307, Plaintiff could not file the required affidavit of compliance with the Court within the ten-day deadline. *Id*. CPLR 306-b allows the court to extend the time for service upon a showing of good cause or in the interest of justice. *Id*. A plaintiff "must show 'reasonable diligence' in attempting to effect service" to establish good cause. *Id*.

The Court granted the motion to extend time to serve process on BMO. *Id.* at *4. The Court found that Plaintiff had good cause for a six-day delay of filing an affidavit of compliance and that the six-day delay did not so prejudice BMO in a way that violated the interest of justice. *Id.*

However, the Court denied the same motion regarding Neuberger because no affidavit of compliance was filed. *Id*. at *5. Plaintiff instead had stipulated with other Neuberger affiliates, without stipulating with Neuberger Investment Funds PLC. *Id.* The Court held that this constituted an incurable jurisdictional defect under BCL §307(c)(2). *Id.*

Forest Road Company LLC v Garbo Holdings LLC

651477/2021, 2022 WL 3023376 (Sup Ct, July 29, 2022)

Kelly Donovan

Staff Member

In *Forest Rd. Co. LLC v Garbo Holdings LLC*, the Plaintiff, The Forest Road Company LLC ("Forest Road"), commenced "this action to enforce personal guarantees of a promissory note . . . ." *Forest Road Company LLC v Garbo Holdings LLC*, No. 651477/2021, 2022 WL 3023376, at *1 (Sup Ct, July 29, 2022). Pursuant to CPLR 3215, Forest Road sought entry of a default judgment, against Defendants Garbo Holdings LLC ("Garbo"), Vitality Visual Effects LLC ("Vitality"), and Linda Liddell Strause ("Strause"), the parties who were responsible for the personal guarantees. *Id.* None of the Defendants submitted an opposition to Plaintiff's motion. *Id.*

The issues in this case arose from a term sheet, which set forth the terms and conditions of a loan agreement between Plaintiff and nonparty Skyline 2 Productions Inc. ("Skyline"), a Canadian corporation. *Id.* The term sheet, which was executed on October 25, 2019, revealed that Plaintiff agreed to loan Skyline "up to $1 million in advance of Canadian federal and provincial tax credits Skyline was expected to receive for filming a movie in British Columbia." *Id.*

On November 12, 2019, Forest Road paid the $1 million loan to Skyline, while Skyline issued a promissory note in return, with a principal amount of $1 million and interest rates established in the term sheet. *Id.* There was a one-year maturity date on the loan, meaning that the Defendants had one year to make their final loan payment. *Id.* As represented in their agreement, Skyline agreed to repay Plaintiff an amount equal to "114% of the net loan amount plus default interest, as accrued thereon and any reasonable costs of enforcement or collection incurred by lender." *Id.* The default interest provision set forth in the term sheet provided that, upon the Maturity Date, default interest would begin to accrue on the outstanding balance for each 90-day default interest period. *Id.* at *1–2. The first default interest period set forth a quarterly rate of five percent, with rates subsequently increasing to seven percent for the second period, nine percent for the third period, eleven percent for the fourth period, and fifteen percent for each 90-day period thereafter. *Id.* at *2.

On October 25, 2019, Defendants Garbo, Strause, and Vitality individually executed guarantees "for the benefit of Skyline, as 'debtor,' [and] in favor of Plaintiff, as 'lender.' *Id.* The guarantees each set forth identical terms, which stated Plaintiff did not need to "exhaust its recourse against Skyline before pursuing payment from each of these [three] Defendants." *Id.* Furthermore, the guarantees provided that each Defendant was responsible for paying Plaintiff reasonable expenses that Plaintiff incurred in enforcing the guarantees, including reasonable legal fees. *Id.* Skyline allegedly failed to repay the $1.14 million that was due upon November 12, 2020, the loan's maturity date, which led to the commencement of this action against Defendants Garbo, Strause, and Vitality. *Id.*

Under CPLR 3215, Plaintiff's application for a default judgment required it to "submit 'proof of service of the summons and the complaint[,] . . . proof of the facts constituting the claim, [and] the default.'" *Id.* at *3. Here, Plaintiff successfully showed that the Defendants were each served with a summons and complaint and that Defendants' time to appear or answer had expired. *Id.* Plaintiff submitted affidavits for each of the three Defendants, proving how and when the Defendants were served with process. *Id.* Plaintiff also served each Defendant with additional notice of the summons and complaint by mail, in compliance with CPLR 3215(g)(3)(i) and (4)(i). *Id.* at *3.

On the merits of the case, the Court relied on First Circuit precedent in determining that a Plaintiff enforcing a written guaranty "need only prove 'an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty'". *Id.* at *3–4 (quoting *Gansevoort Realty LLC v Laba*, 130 A.D.3d 521, 521 (N.Y. Sup. Ct. 2015)). Furthermore, "[w]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." *Id.* at *4 (quoting *Citibank, N.A. v. Uri Schwartz & Sons Diamonds Ltd.*, 97 A.D.3d 444, 446447 (N.Y. Sup. Ct. 2012)). Plaintiff showed that it "advanced $1 million to Skyline on November 12, 2019 in exchange for the note[,]" that Skyline never made payments on the note, and that, as of the note's maturity date, Skyline had remained in default. *Id.* at *4. Furthermore, Plaintiff proved that it sent Skyline a notice of default and demand for payment but did not

receive a response from Skyline nor any of the three Defendant guarantors. *Id.*

The Court ultimately decided in favor of Plaintiff and granted a default judgment without opposition. *Id.* Further, the Court entered a judgment in favor of Plaintiff "in the sum of $1,140,000, together with accrued interest of $409,628 from November 13, 2020 to August 10, 2021, with interest at the" rates set forth in the term sheet "from August 11, 2021 through the date of entry of this judgment, and at the statutory rate thereafter, together with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs[.]" *Id.* Plaintiff did not set forth proper documentation to prove reasonable legal fees, but the Court allowed the Plaintiff thirty days to provide proper documentation of reasonable legal fees incurred. *Id.*at *45.

Ketterer v Grayson

653510/2021, 2022 WL 2922386 (Sup Ct, July 25, 2022)

Emily DePaola

Staff Member

A group of minority shareholders of Auerbach Grayson Holdings Inc. ("the Holding Company") (collectively, "Plaintiffs") brought a derivative claim on behalf of the Holding Company against David Grayson and other defendants (collectively, "Defendants") for alleged fraud and breaches of fiduciary duties. *Ketterer v. Grayson*, No. 653510/2021, 2022 WL 2922386, at *1–*3 (Sup Ct, July 25, 2022). Plaintiffs alleged a multi-step scheme in which Defendants divested Plaintiffs of their indirect $24 million investment in Auerbach Grayson & Company LLC ("the Company"). *Id.* at *1. After amending their complaint, Plaintiffs sought the Court's approval to file the Second Amended Complaint ("SAC") to add factual allegations, remove certain causes of actions, and clarify the remaining causes of action as direct, rather than derivative actions. *Id.* at *3.

The Holding Company was the majority shareholder in the Company, and the Holding Company's "sole purpose was to hold both Class A and Class B membership interests in the Company." *Id.* at *1. The Company had six members: the Holding Company; Bellevue (USA) Inc., which was owned by Mr. Daniel Sigg, one of the two Directors of the Company; Strategic Investments I, Inc.; Alamaro Holding Inc., another company owned by Mr. Sigg; Frank & Company LLC, Stephen Frank's company; and David Grayson. *Id.* David Grayson was the majority shareholder, a Director, and the Chief Executive Office of the Holding Company and one of the two directors of the Company. *Id.* Due to his role at both companies, David Grayson "controlled both entities." *Id.*

The SAC alleged that Defendants engaged in a four-step scheme. *Id.* at *1–3. Step one involved hiring Berkshire Global Advisors LP ("Berkshire") to find a buyer "for the value of the plaintiffs' minority interest without paying them." *Id.* at *2. This step included, without Plaintiff's consent, diluting Plaintiff's interest, converting their shares, and depressing net operating income so that their interests could be bought out for $0. *Id.* The Company and Berkshire's relationship ended in a lawsuit which resulted in a Settlement Agreement among Berkshire, the Company, and Beltone Financial Holdings SAE ("Beltone"). *Id.*

Step two involved an investment agreement ("the Original Investment Agreement) among Beltone, the Company, the Holding Company, and Grayson stipulating that Beltone would purchase 51% of the Company for $25 million. *Id.* Plaintiffs were not consulted, nor did they execute the final Investment Agreement ("Investment Agreement"). *Id.* at *3. Based on the terms of the Investment Agreement, New Frontier Securities LLC ("New Frontier"), a wholly owned subsidiary of Beltone, had an option to purchase up to all of the Class B shares in the Company. *Id*. Plaintiffs allege that they were not aware of this option at all. *Id.*

Step three involved a plot to "squeez[e] the plaintiffs for nothing." *Id.* After the Investment Agreement with Beltone, the Company's Board of Directors was controlled by Beltone, Grayson, and Mr. Sigg. *Id.* The SAC alleged that the controllers of the Board mismanaged the Company, resulting in approximately $6 million of losses per year for the next three years so the Class B shares in the Company could be acquired for $0. *Id.*

Step four came from Beltone's sale of its interest in the Company to HGH Global. *Id.* HGH Global was jointly owned by Grayson. *Id.* From this sale, Grayson recaptured a 25% interest in the Company. *Id.*

The Court considered Plaintiff's conduct and several arguments by Defendants to rule on the motion to amend the complaint. *Id.* at *4–*5. Quickly dismissing the notion that the Plaintiffs' conduct was improper, the Court concluded, as discovery was in its "neonatal state" that nothing suggested that Plaintiffs' conduct was inappropriate "in any manner." *Id.* at *4.

Defendants first argued that the Plaintiffs lacked standing for the derivative claims in the SAC. *Id.* The Court disagreed. *Id.* The Court applied the *Tooley* test which considers: (1) who suffered the alleged harm, and (2) who would receive the benefit of any recovery. *Id.* (citing *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031 [Del 2004]). Applying the *Tooley* test, the Court found valid allegations in the SAC of breaches of both the duty of care and the duty of loyalty by Grayson and Sigg and that Berkshire, Beltone, and New Frontier aided and abetted those breaches. *Id*. Due to Grayson and Sigg's interests, the recovery would not flow to the Company or the Holding Company, but rather to Plaintiffs, as they were the ones who, if the allegations are proven true, suffered the harm. *Id.* The Court thus found that the SAC was not "utterly devoid of merit." *Id.*

The Court also rejected Defendants' argument based on *Serino v. Lipper*. *Id.* In *Serino* the Appellate Division, after applying the *Tooley* test, found that when the harm is caused to the individual, rather than the corporation, direct claims can be brought. *Id.* However, where the individual is harmed, but is connected to harm to the corporation, a direct claim cannot be brought. *Id.* (citing *Serino v. Lipper*, 123 AD3d 34, 41 (1st Dept 2014)). Defendants' reliance on *Lipper* had no relevance to the present action, the Court found, because the claims brought by Plaintiffs were not derivative in nature. *Id*. Additionally, the Court rejected Defendants' argument that the statute of limitations precludes the claims as it was too early to know when Plaintiffs became aware of the Investment Agreement. *Id.* at *5.

Based on Plaintiffs' allegations of prima facie evidence within the SAC and the unavailing nature of Defendants' arguments, the Court granted the motion to file the SAC. *Id.* at *4–*5.

Corrigan v. Suffolk Cnty. Bd. of Elections

611190/2022, 2022 WL 4690448 (N.Y. Sup. Ct. 2022)

Anthony Gambino

Staff Member

Caitlin Corrigan ("Petitioner" or "Corrigan"), the self-represented Petitioner in the matter, sought candidacy for the Republican party in the First Congressional District and filed the requisite forms, including a Certificate of Designation as well as Designating Petitions for the Republican primary. *Corrigan v. Suffolk Cnty. Bd. of Elections*, No. 611190/2022, 2022 WL 4690448, at *1 (N.Y. Sup. Ct. 2022). However, Corrigan was subsequently disqualified by the Suffolk County Board of Elections ("Respondents") on grounds pertaining to the content and timeliness of the forms. *Id.* First, Corrigan's Certificate of Designation "did not state the Party and/or stated a party that does not exist as required by the designating form" rendering the form insufficient. *Id.* at *2. Second, in terms of receiving her Designating Petition, "it is uncontroverted that Ms. Corrigan's petition was postmarked on June 10. It was not received, however, until June 13." *Id.* (June 10th being the deadline to receive candidates' designating petitions, imposed by Justice McAllister in the *Hackenriden v. Hochul* decision). Corrigan then filed a Petition pursuant to CPLR Article 78 and Election Law § 16-102(2), asserting "the Respondents' disqualification was, among other things, arbitrary and capricious and in violation of lawful procedure and in denial of her due process rights under the NYS Constitution." *Id.* at *1. The relief sought was an order directing Corrigan's restoration to the ballot in time for the Republican primary on August 23, 2022. *Id.*

Respondents moved to dismiss the Petition in its entirety, the crux of their argument being timeliness. *Id.* When addressing the survivability of a petition facing a motion to dismiss the court is bound by a petitioner-friendly standard of review, whereby it must "accept the facts alleged in the complaint to be true." *Id.* (citing *Kamchi v. Weissman,* 125 A.D.3d 142, (2d Dep't 2014). Respondents further argued that Corrigan's eighty-six pages of opposition to their motion to dismiss grossly violated the 7,000-word maximum imposed under 22 NYCRR Sec. 202.8-b. *Id* at *2. While the Court had the power to reject the papers based on this defect alone, it chose to disregard the technical defects in the

interest of justice, since Corrigan was self-represented and not an attorney. *Id.* However, while the Court was forgiving in many respects, giving a broad and liberal interpretation to Corrigan's arguments, Corrigan's petition also included personal attacks on Respondents' attorney and a diatribe towards legal writing, deeming it "elitist" and "pompous," which the Court chose to admonish her for. *Id.*

The essence of Corrigan's legal argument was that "she was a properly designated candidate as of May 18, 2022, and her removal from the ballot was an illegal act." *Id* at *3. Her support for the legitimacy of her candidacy stemmed from her own statement that there is "no law that allows the Suffolk County Board of Elections to invalidate [her] candidacy after the New York State Board of Elections already determined [her] petition was valid on May 18, 2022 and placed [her] on the ballot." *Id*. Further, Corrigan opposed the stringent ruling employed by Respondents to disqualify her stating that "her oversight in neglecting to list her party as Republican on the Certificate of Designation was cured by her Amended Certificate of Designation, dated June 14, 2022, and letter to the Board dated June 13, 2022." *Id.* Corrigan also advanced the argument that "the omission should have been considered *de minimus* by the Respondents in light of other documentation she submitted which clearly indicated her [Republican] party affiliation." *Id.* Her last argument was that since she had "been approved by the State Board of Elections prior to Harkenrider's mandate, her filings for the First Congressional District Republican primary should be considered *pro forma*." *Id.* Her arguments ultimately failed on each front*.* *Id*.

The Court then turned to dissecting the sufficiency of the proof submitted by the Respondents regarding their decision in rejecting Corrigan's Certificate of Designation and Designating Petition. *Id.* Administrative decisions that are subject to judicial review must be ". . . sufficiently definite to inform the court and the parties as to the findings made and the basis of the findings." *Id.* Respondents, to satisfy this threshold, provided an exhibit containing the minutes of the proceeding which demonstrated their reasoning in declining to accept the Petitioner's Certificate of Designation. *Id.* A fair reading of the proceeding satisfied the Court as they found the Board of Elections process lent itself to "intelligent review." *Id.* The Court then applied the appropriate standard of review in a proceeding under CPLR Article 78. *Id.*

To overturn an administrative agency's determination, a court must find that the Respondents acted in an “arbitrary and capricious” manner. *Id.* The Respondents' burden of proof to show that their conclusion was not arbitrary is met by demonstrating that their decision is supported by the record. *Id.* The agency's conclusion is also afforded great deference as a court is forbidden from “substitut[ing] its judgment for that of the agency responsible for making the determination . . .” *Id.* (quoting *Cohen v. State*, 2 A.D.3d 522 (N.Y. App. Div. 2003)). The proof Respondents presented was that it was routine procedure when an error is found in forms received to reject them and deem them insufficient. *Id.* at *4. The Court found this prerogative cannot be deemed arbitrary in any respect. *Id.* Corrigan’s argument was further rebuffed when the Court, even assuming for the sake of the argument her Certificate of Designation was valid, ruled it would still be barred by the statute of limitations set forth in Election Law § 16-102 (2). *Id.* As a result, Petitioner's claims arising from the Respondents' rejection of the Certificate of Designation were also deemed invalid. *Id.*

In relation to the validity of Petitioner's Designating Petition being rejected, the Court laid out a similar argument. *Id.* A major product of the *Harkenrider* decision was the June 10, 2022, deadline to obtain ballot access of a new party Designating Petition with the appropriate Board of Elections. *Id.* (citing *Harkenrider v. Hocul*, 197 N.Y.S.3d 157 (N.Y. 2022)). Corrigan's Designating Petition, although postmarked for June 10, 2022, arrived on June 13, 2022. *Id.* The Suffolk Board of Elections met to rule on the propriety of Ms. Corrigan's Designating Petition where it was determined that the submission of the Petition was “untimely on the basis of its failure to comply with the deadline directed in *Harkenrider*.” *Id* at *5. Like their analysis of Respondents' rejection of Corrigan’s Certificate of Designation, the Court found that the Respondents' actions, in the exercise of their administrative responsibilities, “had a rational basis in the record” of rejecting her Designating Petition. *Id.* (quoting *Sternberg v. New York State Off. for People with Developmental Disabilities*, 204 A.D.3d 680, 682 (N.Y. App. Div. 2022)).

Corrigan’s last-ditch effort to overcome the timeliness issues present in her petition was to argue that the time frame for review of the claims asserted herein should be the original petition of June 14, 2022 (served on June 21, 2022) and not the later date of July 5, 2022. *Id.* For this request to be upheld by the Court it

would have to satisfy the elements of the relation-back doctrine. *Id.* The necessary elements for the doctrine to be triggered are:

> (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he or she will not be prejudiced in maintaining his or her defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him or her as well. *Id.*

In Corrigan's case the rejection of the Designating Petition did not occur until after the events complained of in the original Article 78 action rendering the relation back doctrine inapplicable. *Id.*

The Petitioner failed to convince the Court of the existence of any viable cause of action. *Id.* at *6. As a result, the motion of the Respondents was granted and the Petition dismissed. *Id.*

Excelsia Leatherware Co. v. Horowitz

653291/2019, 2022 WL 4090082

Suzanne Hom

Staff Member

Plaintiff Excelsia Leatherware Company ("Excelsia") is a manufacturer of leather goods based in Hong Kong, China. *Excelsia Leatherware Co. v. Horowitz*, No. 653291/2019, 2022 WL 4090082, at *1 (N.Y. Sup. Ct. 2022). Excelsia brought this action against Defendants Bag Studio, LLC ("Bag Studio") and Kenneth Horowitz ("Horowitz") (collectively "Defendants"), who communicated with Excelsia on behalf of Bag Studio. *Id*. Excelsia filed claims against Bag Studio for breach of contract, fraud, conversion, and unjust enrichment; it filed claims against Horowitz for fraud. *Id*. Defendants filed a timely motion to dismiss all claims. *Id.* Defendants' motion was granted in part, with only the cause of action for breach of contract against Bag Studio and the cause of action for fraud against Horowitz proceeding. *Id*. Excelsia served both Defendants with a copy of the decision partially granting the motion to dismiss. *Id.* After Defendants failed to respond to service of the decision, as required by CPLR 3211(f), Excelsia moved for default judgments against both Defendants. *Id.* at *2. Defendants did not submit any opposition to Excelsia's motion, and after evaluating the sufficiency of service on Defendants and the merits of Excelsia's claim, the Court granted Excelsia's motion and entered default judgment in favor of Excelsia. *Id.* at *1–4.

Plaintiff Excelsia entered into a contract for leather goods with Defendant Bag Studio in 2016. *Id.* at *1. Their business arrangement proceeded without issue until Bag Studio failed to pay for shipments beginning in February 2018. *Id.* at *3. Excelsia was in contact with Defendant Horowitz, who allegedly promised payments and "made false statements to induce Excelsia to make and ship merchandise to Bag Studio." *Id.* at *1. Horowitz allegedly fraudulently induced Excelsia to make payments directly to him "as an administrative fee required to continue the business relationship." *Id.* at *3. Excelsia made payments to Horowitz and continued to ship goods and issue invoices to Bag Studio; by the time the complaint was filed, Excelsia had made payments to Horowitz totaling $101,932.39 and had shipped to Bag Studio

$2,761,216.55 worth of goods that had not been paid for. *Id.* at *1, *3.

The Court began its analysis of Excelsia's motion for default judgment by looking at the plain language of CPLR 3215. *Id.* at *2. Under CPLR 3215, a plaintiff seeking a default judgment must establish "proof of service of the summons and the complaint[,] proof of the facts constituting the claim, [and] the default." *Id.* (alterations in original). The Court first examined Excelsia's proof of service. *Id.* The Court noted that Defendants, by counsel, "waived service of the summons and complaint by stipulation . . . [and] accepted service of the complaint." *Id.* The Court also noted that after counsel for both Defendants withdrew, Excelsia "served [D]efendants directly with a copy of the summons and complaint" as well as the Court's decision and order on Defendants' motion to dismiss. *Id.* Defendant Bag Studio was served with process at its last known address and by service on the New York Secretary of State in accordance with CPLR 311(a)(1) and Business Corporation Law § 306(b). *Id*. at *1–2. Defendant Horowitz was served via email and at his last known address. *Id*. at *2. Horowitz acknowledged receipt of the service by email, and service at his last known address was in accordance with CPLR 308(2). *Id.* at *1–2. Accordingly, the Court held that Excelsia had met its burden for proof of service. *Id.* at *2.

Turning to the facts constituting Excelsia's surviving breach of contract claim, the Court observed, "in an action for goods sold and delivered, a plaintiff must submit proof of invoices and other documentary evidence that defendant placed orders for the goods on the dates at issue, the goods were delivered to defendant, defendant accepted delivery, and did not object to the product or invoices." *Id.* at *2 (citing *A&W Egg Co. v. Tufo's Wholesale Dairy, Inc.*, 95 N.Y.S.3d 72, 73 (N.Y. App. Div. 2019)). Following that standard, the Court held that Excelsia had proven the merits of its claim in an affidavit from its owner, Ying Kit Mak ("Mak"). *Id.* at *3. In the affidavit, Mak attested to Excelsia's business relationship with Bag Studio, the missed payments beginning in February 2018, and the communications between Excelsia and Horowitz. *Id.* Mak also attested that the value of the missed payments totaled $2,761,216.55. *Id.* Noting that Mak's statements complied with CPLR 2106(b), the Court held that her statements were "sufficient proof of the goods sold and delivered and of an account stated." *Id.*

Based on its holding that Excelsia had met its burden of proof for both service of process and the merits of the claims, the Court granted Excelsia's motion for default judgment and entered judgment against Bag Studio in the amount of $2,761,216.55 for the goods received and judgment against Horowitz in the amount of $101,932.39 for the fraudulently induced payments. *Id*.

Brawer v. Lepor

652334/2017, 2022 WL 3037226

Hannah Marose

Staff Member

This is an action for mishandling company funds that arose between Plaintiff Michael Brawer, a minority member of Medreviews, a medical communications company, against Defendants, also associated with Medreviews, President Jeffrey Arnold, Vice President Steven Black, and majority member Hebert Lepor. *Brawer v. Lepor*, 652334/2017, 2022 WL 3037226 at *1 (N.Y. Sup. Ct. 2022). Jeff Legault of DLA Piper was retained by the Defendants. *Id.* J. Allen Kosowsky, an accounting expert, was hired by DLA to assist Jeff Legault in the case. *Id.* at *2. Here, the Court is evaluating Plaintiff's motion to compel disclosure of documents in possession of the Defendants. *Id.* at *1. Defendants argued that the documents constitute exceptions of "attorney work product, trial preparation materials, and attorney client privilege." *Id.* The Plaintiff countered by arguing that the fiduciary and crime-fraud exceptions mandate disclosure of the otherwise exempted materials. *Id.* at *2.

The Court began by stating that "CPLR § 3101 requires full disclosure of all matter material and necessary in the prosecution or defense of an action." *Id.* at *1(quoting N.Y. C.P.L.R. § 3101(a) (McKinney 2020)). The Court also noted that this requirement has encouraged broad discovery in New York. *See Lepor,* 2022 WL 3037226 at *1. There are three categories of materials protected from disclosure: "privileged matter, attorney work product, and trial preparation materials." *Id.* However, there are exceptions to these protected materials that will still permit a plaintiff from receiving these otherwise exempted materials. *See id.* at *2. First is the fiduciary exception, which can be invoked only when a trustee obtains legal advice for the administration of the trust rather than for the trustee's own interests in litigation, or when the fiduciary is in an adversarial relationship with the beneficiaries and the materials sought are communications that center around the litigation. *Id.* Second is the crime fraud exception, which can be invoked only if the party claiming the exception "demonstrates that there is probable cause to believe a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime." *Id.*

The Court found that as Legault was hired to represent the Defendants, rather than conduct "a neutral third-party investigation[,]" that his conversations with Medreviews' corporate officers were protected from disclosure. *Id* at *1. The Court also found that communications between Legault and Kosowsky were protected from disclosure because the attorney client privilege extends to communications between attorneys and agents of attorneys. *Id.* at *2.

Regarding the fiduciary exception, the Court stated that since the Defendants sought counsel both in defense of Medreviews and their own individual claims, and that Plaintiff's demands were not solely made as a beneficiary on behalf of Medreviews' fiscal interests, that the fiduciary exception did not apply. *See id.* Regarding the crime-fraud exception, after reviewing the documents in question, the Court found no probable cause of a fraud or crime or that the documents would further a fraud or crime, concluding that the crime-fraud exception did not apply. *Id.*

The Court finally held that communications between the Defendants while consulting with Legault and Kosowsky were also not discoverable as the attorney client privilege extends to communications shared with a third party if the third party has a shared interest in litigation, as would the Co-Defendants in this case. *Id.* at *3.

Ultimately, the Court granted the Plaintiff's motion to compel in part, only providing that the DLA Piper retention letters, engagement letters, and invoices must be disclosed to the Plaintiff. *Id.* The rest of Plaintiff's motion to compel was denied. *Id.*

Dragons 516 Ltd. v GDC 138 E 50 LLC,

651690/2019, 2022 WL 2284694 (Sup Ct, June 22, 2022)

Nicholas Mattone

Staff Member

Plaintiff Dragons 516 Limited ("Dragons") served a judgment debt subpoena on TD Bank to recover financial information on an account in which their loan of $41 million dollars to Defendant GDC 138 E 50 LLC's ("GDC") was allegedly placed. *Dragons 516 Ltd. v GDC 138 E 50 LLC*, No. 651690/2019, 75 Misc. 3d 1216(A), 2022 N.Y. Slip Op. 50522(U), 2022 WL 2284694 at *1 (Sup Ct, June 22, 2022). Defendant Shanghai Municipal Investment (Group) USA LLC (SMI), who was guarantor to the repayment of the loan, moved to quash the subpoena. *Id.* The Court denied the motion in its entirety. *Id.* at *2.

On January 27, 2020, Dragons received a judgment in the amount of $41,138,614.84 against GDC for GDC's default on a loan. *Id.* at *1. SMI had agreed to guarantee the loan's repayment. *Id.* To recover financial information on the bank account that the $41 million dollar loan was allegedly deposited in, Dragons served a judgment debt subpoena on TD Bank. *Id.* After the initial subpoena failed to elicit a response from TD bank, a second subpoena was served on TD Bank seeking the disclosure of SMI's bank account information. *Id.*

SMI moved to quash the subpoena on TD Bank and requested a protective order barring the plaintiff from receiving such information. *Id.* SMI moved to quash the subpoena for "seek[ing] sensitive financial and corporate information that [was] irrelevant to [the] action." *Id.* Dragons argued that the subpoena fit within CPLR §5223, which permits judgment creditors to "compel disclosure of all matter relevant to the satisfaction of [a] judgment." *Id.* at *2. The issue for the Court was whether SMI had established that the requested documents and records were irrelevant. *Id.*

CPLR §3101 requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." *Id.* Applications to quash a subpoena are rejected unless the person seeking to quash the subpoena establishes that the requested documents are "irrelevant to any proper inquiry." *Id.* (quoting

Anheuser-Busch, Inc. v. Abrams, 71 NY2d 327, 331–332 (N.Y. 1988)).

The Court held that SMI had failed to establish that the financial information sought was improper, as CPLR §5223 permits a judgment creditor to induce disclosure of "all matter relevant to the satisfaction of a judgment." *Id.* The Court held that Dragons was entitled to full disclosure from TD Bank, and that the subpoena was both a "proper method mechanism to obtain information" and "sufficiently tailored to assist in enforcement of the plaintiff's judgment." *Id.*

Ultimately, the Court denied the motion in its entirety, denied SMI's motion for costs and sanctions, and ordered TD Bank to respond and comply with the subpoena within 30 days. *Id.*

Linkable Networks, Inc. v. Mastercard Inc.

651964/2019, 2022 WL 3094590

Ekok Soubir

Staff Member

This case concerns the motions of Defendants Mastercard Incorporated and Mastercard International Incorporated (collectively "Defendants" or "Mastercard") seal and redact trial materials made public in a previous case against Plaintiff Linkable Networks, Inc. ("Plaintiff" or "Linkable"). *Linkable Networks Inc. v. Mastercard Inc.*, No. 651964/2019, 2022 WL 3094590, at *1. (N.Y. Sup. Ct. 2022). Specifically, Defendants filed motion sequences no. 003 and 006 while Plaintiffs filed motion sequence no. 005, with all three motion sequences asking for relief pursuant to 22 NYCRR 216.1(a). *Id.*

In motion sequence no. 003, Mastercard, pursuant to 22 NYCRR 216.1(a), moved to: (1) seal Mastercard's memorandum of law supporting its motion for summary judgment, the accompanying exhibits, and the statement of material facts, (2) restrict access to the sealed, unredacted versions of the summary judgment materials solely to the parties, (3) restrict the Chief Deputy Clerk, Chief Clerk of Law and Equity, and the Chief Judgment Clerk from publicly releasing the unredacted materials, and (4) leave the redacted form of the summary judgment materials on the public docket. *Id.* The summary judgment materials were made available to the public on April 21, 2022. *Id.* The summary judgment materials included quotations, excerpts, discussion, and copies of confidential agreements between the parties and nonparties. *Id.* The Court had previously granted a protective order referring to a protective order to seal the MasterCard Rewards System Value Network Services Agreement, since there was a stipulation by both parties that there was good cause to do so. *Id.*

In motion sequence no. 006, Mastercard requested the same relief as motion sequence no. 003, with respect to Mastercard's reply memorandum supporting its motion for summary judgment and Mastercard's response to Linkable's counterstatement of material facts. *Id.* Mastercard's reply materials contained quotations from confidential business agreements between the parties and nonparties to whom a duty of confidentiality might be owed. *Id.* at *3.

In motion sequence no. 005, Linkable, pursuant to 22 NYCRR 216.1(a), moved to seal the unredacted versions of Plaintiff's summary judgment opposition materials which included a memorandum of law in opposition to a motion for summary judgment, accompanying exhibits, responses to Defendants' statement of material facts, and a counterstatement of material facts. *Id.* at *1. Linkable also moved for an order that Defendants publicly file redacted versions of the summary judgment opposition materials with the exception of the accompanying exhibits. *Id*. The summary judgment opposition materials quoted a confidential asset purchase agreement with a nonparty and quoted Mastercard documents with the heading "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY." *Id.* at *2.

The Court granted each motion in its entirety. *Id.* at *1. The Court listed standards for sealing documents, known as the *Mosallem* standards. *Id.* (citing *Mosallem v. Berenson*, 76 A.D. 4d 345, 348350). The *Mosallem* standards note that while there is a presumption in favor of public access to view court records and judicial proceedings, that right is not absolute and a court can seal or redact court documents for "good cause." *Linkable*, WL 3094590, at *1. Additionally, NYCRR 216.1(a) specifically authorizes the sealing of court records upon a written finding of good cause and may balance the interests of the parties and the public in this inquiry. *Id*. Sealing has previously been deemed appropriate to keep confidential materials which involve internal finances of a party that are of little public interest, threaten a business's competitive advantage if published, carry no legitimate public concern, and demonstrate a greater interest in keeping private financial agreements between parties. *Id.*

For motion sequence no. 003, Mastercard claimed that the summary judgment materials should be sealed because there was good cause to do so. *Id.* Specifically, there was information relating to confidential business dealings between the parties and nonparties, and the competitive interests of the parties might be harmed if the material was published due to the citation of "proprietary materials reflecting commercial interests, business strategy, legal and/or financial planning, and other categories of information traditionally shielded from public access." *Id.* Mastercard also alleged that there was no "compelling public interest" in the documents and that it took steps against disclosure of the documents because the documents would allow competitors to know how Mastercard conducted its commercial dealings. *Id.* at

*12. This motion was unopposed and there was no indication of existing public interest in the documents. *Id.* at *2. A party to a proceeding also does not need to publicize its financial information in the absence of a substantial public interest in that information and sealing documents under the guise of protecting a party's internal finances when there is "minimal public interest" in the finances is appropriate. *Id.* The court can determine good cause for issuing an order to seal or redact documents on a case-by-case basis. *Id.* at *2.

The portions of the summary judgment materials at issue on motion sequence no. 003 dealt with information subject to the previous protective order and the parties' confidentiality agreement complying with the *Mosallem* sealing standards. *Id.* The exhibits were protected as well because they were comprised of sensitive financial information about business strategies, licensing agreements, and fees of nonparties. *Id.* Additional documents that contain correspondence between parties' counsel should also have been sealed because they dealt with "proprietary materials that reflect[ed] commercial interests, business strategy, legal planning and other categories of information traditionally shielded from public access." *Id.* These documents should have been sealed because there was "no compelling public interest in the documents" and no opposition from the other party. *Id.*

In motion sequence no. 005, Linkable claimed that there was good cause to seal the summary judgment opposition materials because sealing the materials protected the confidentiality of nonparty business information and protected the interests of the parties as put forth in the protective order. *Id.* This motion was also unopposed. *Id.* at *23. The Court referred to the reasoning used to grant motion sequence no. 003 for this motion sequence. *Id.* at *3. The sealing of these documents met the *Mosallem* standards because the materials involved business strategies. *Id.* The exhibits were also protected because they "contain[ed] extensive sensitive, nonpublic financial information concerning business strategies, licensing agreements and agreements and fees of nonparties as well as legal planning." *Id.*

In motion sequence no. 006, Mastercard's reply materials were also sealed. *Id.* Defendants argued that the reply materials contained confidential business dealings between parties and nonparties, competitive interests would be harmed by disclosure, there was no compelling public interest in these documents, and the Mastercard reply contained quotations from agreements and

transactions that would reveal aspects of how Mastercard conducts its business. *Id.* Linkable did not oppose this motion. *Id*. The Court granted the motion because the materials referenced the same business agreements used as the basis of analysis for motion sequences nos. 003 and 005, the sealing of which would comport with the *Mosallem* standards. *Id.*

Harel Alternative Real Estate L.P. v. All Brooklyn Mgt. LLC

516891/2022, 2022 WL 4589139 (Sup Ct, Sep. 29, 2022)

Jacinda Thermidor

Staff Member

The Supreme Court of Kings County decided the case Harel Alternative Real Estate L.P. v. All Brooklyn Management LLC on September 29, 2022. Plaintiff brought an action against Defendants, Yehuda Cohen ("Cohen") and his company All Brooklyn Management LLC ("All Brooklyn") regarding their joint venture. *Harel Alternative Real Estate L.P. v. All Brooklyn Mgt. LLC*, No. 516891/2022, 76 Misc. 3d 1215(A), 2022 N.Y. Slip Op. 50959(U), 2022 WL 4589139 at *1 (N.Y. Sup. Ct. Sept. 29, 2022). Plaintiff allegedly invested over $46,000,000.00 in fourteen (14) Brooklyn, New York properties as real estate development opportunities. *Id.* Defendants moved to dismiss Plaintiff's complaint against defendant Cohen and to dismiss Plaintiff's seventh cause of action for fraud, alleging Plaintiff failed to state a claim. *Id.* Plaintiff sought "an injunction enjoining defendants from mortgaging, encumbering, or transferring certain real properties at issue herein, among other relief." *Id.*

The parties executed a Cooperation Agreement on October 31, 2018, which outlined each party's roles, responsibilities, and obligations. *Id.* Per the Cooperation Agreement, Plaintiff contributed $46,881,941.00 for purchasing and developing the properties, and each property was owned by a separate, recently formed LLC. *Id.* Separate operating agreements, each dated October 31, 2018, governed each of these LLCs. *Id.* The operating agreement stated that Plaintiff owned 90% of the LLC membership interest and All Brooklyn owned the remaining 10%. *Id.* All Brooklyn was also designated as Manager of each LLC. *Id.* The parties agreed that Plaintiff would transfer its 90% interest in the LLC to All Brooklyn after Plaintiff received a certain amount of money among other occurrences. *Id.*

Plaintiff stated that "Defendants fraudulently misrepresented to the Lenders, Spencer Savings Bank and other banks, and title companies that All Brooklyn was the sole member of certain borrower LLCs when they were obtaining refinancing loans" in Plaintiff's seventh cause of action. *Id.* Additionally, Plaintiff alleged Defendants were "aware that the representation was false" and the Lenders would ultimately rely on the false

representation when making the refinancing loans. *Id.* Last, Plaintiff alleged that this "fraudulent misrepresentation was a material event of default" according to the loan documents, thereby exposing Plaintiff to potential liability to the Lenders. *Id.*

Defendants moved to dismiss for failure to state a cause of action for fraud on the grounds that Plaintiff failed to allege either any misrepresentation made directly to Plaintiff or that Plaintiff relied on any misrepresentation. *Id.* at *2. Defendants asserted that "the Court of Appeals has held that a plaintiff may not establish the reliance element of a fraud claim by showing that a third-party relied on a defendant's false statements." *Id.* On the other hand, Plaintiff claimed that it was a victim of Defendants' misrepresentation because Plaintiff "justifiably relied upon Cohen to act lawfully in the administration of its duties as the managing member of each borrower LLC when applying for loans, and that such reliance was to [P]laintiff's detriment." *Id.* at *1.

Furthermore, Defendants contended that the complaint against Cohen must be dismissed in its entirety because the documents in evidence established "that Cohen only executed the relevant agreements as a member of All Brooklyn, and not in his individual capacity." *Id* at *2. Defendants also stated that the Settlement Agreement signed by Plaintiff and All Brooklyn in June 2021 contained a clause "disclaiming any personal obligation, liability, or guaranty by Cohen in his individual capacity." *Id.*

Plaintiff sought an order granting a preliminary injunction "(1) prohibiting defendants from mortgaging, encumbering, or transferring the remaining 12 properties without the express written consent of plaintiff; (2) prohibiting Cohen from holding himself out as the sole member of the LLC entities; and (3) prohibiting defendants from interfering with, obstructing or impeding plaintiff's unfettered access to the financial books and records of the aforementioned LLCs." *Id.*

In opposition to Plaintiff's motion for a preliminary injunction, Defendants explained that each of the LLC operating agreements "include[d] a mechanism whereby defendants would be the sole owners of the corresponding property at the closing of each refinance and upon certain proceeds being paid to plaintiff." *Id.* Defendants also claimed that when refinancing properties at three (3) locations, Plaintiff expressly approved the transfer of each corresponding LLC to Cohen as the sole owner for refinancing each property. *Id.* This was in an email sent on July 15, 2021, from Plaintiff's prior counsel to defendants' prior counsel. *Id.*

To bring a successful cause of action for fraud, a plaintiff must prove: (1) a material misrepresentation of an existing fact; (2) knowledge of falsity; (3) an intent to induce reliance; and (4) justifiable reliance upon the misrepresentation, and (5) damages. *Id.* at *3 (quoting *Introna v. Huntington Learning Ctrs., Inc.,* 911 N.Y.S.2d 442, 444 (App. Div. 2010)). "Where the alleged fraudulent misrepresentation is directed to a third-party, the plaintiff must allege that the third-party 'acted as a conduit to relay [any] false statement[s] to [the] plaintiff, who then relied on the misrepresentation[s] to [its] detriment.'" *Id.* (citing *Pasternack v. Laboratory Corp. of Am. Holdings*, 27 N.Y.S.3d 817, 829 (Ct. App. 2016)).

The Court granted Defendants' motion to dismiss Plaintiff's complaint for failure to state a cause of action, finding Plaintiff's claim insufficient because it "center[ed] on defendants' alleged misrepresentation to certain lenders on loan documents." *Id.* Plaintiff's claim that it was a victim of fraud because it relied on Defendants to act properly and lawfully was also insufficient. *Id.* The Court denied Defendant's motion to dismiss the action against Cohen in its entirety because Cohen signed the parties' Supplemental Agreement in his individual capacity as well as a member of All Brooklyn. *Id.*

"To be entitled to a preliminary injunction, the movant must establish '(1) the likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor.'" *Id.* (citing (*538 Morgan Ave. Props., LLC v. 538 Morgan Realty, LLC*, 127 N.Y.S.3d 313, 314 (App. Div. 2020)).

The Court denied Plaintiff's motion for a preliminary injunction because Defendants provided "evidence that, under certain circumstances, the representation that they were the sole member of the LLC was proper pursuant to the parties' agreements." *Id.* Plaintiff's harm was also monetary which does not constitute irreparable harm because such harm is compensable by money damages. *See id.*