Loeb Enters. II, LLC v Florence
2020 NY Slip Op 31532(U)
April 7, 2020
Supreme Court, New York County
Docket Number: Index No. 653521/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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LOEB ENTERPRISES II, LLC,

Plaintiff,

- v -

DAVID FLORENCE, STEVEN MARCUS

Defendant.

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INDEX NO. 653521/2018

MOTION DATE N/A

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 75, 76, 77, 79, 80, 81, 82, 83

were read on this motion to/for DISCONTINUE.

Upon the foregoing documents, Loeb Enterprises II, LLC (the **Plaintiff**)'s motion to discontinue this action without prejudice pursuant to CPLR § 3217(b) is granted only to the extent that this action is discontinued with prejudice.

The Relevant Facts and Circumstances

Reference is made to a promissory note (the **Note**), dated June 26, 2014, by and between David Florence and Steven Marcus (collectively, the **Defendants**), as borrowers, in favor of Loeb Enterprises II, LLC, as lender (NYSCEF Doc. No. 5). The Plaintiff commenced this action by summary judgment in lieu of complaint, which the court denied in a decision and order, dated December 13, 2018, because there existed an issue of fact concerning whether a loan of $5,000 or $100,000 was issued under the Note (NYSCEF Doc. No. 20).

On December 3, 2018, the Plaintiff filed a complaint alleging two causes of action against the Defendants: (1) breach of the Note, and (2) unjust enrichment (NYSCEF Doc. No. 22). On February 15, 2019, the Defendants filed their answer with affirmative defenses (NYSCEF Doc. No. 24). The Plaintiff then moved to dismiss the Defendants' third and fifth affirmative defenses and the Defendants moved to compel the production of certain documents (*see* Mtn. Seqs. 002, 004).

In a decision and order (NYSCEF Doc. No. 70, the **August Order**), dated August 14, 2019, the court dismissed the Defendants' third and fifth affirmative defenses without prejudice and granted the Defendants' motion to compel certain documents, including unredacted copies of the Plaintiff's responsive documents concerning the Note, any purported allonge to the Note, the Plaintiff's alleged advancement of $100,000 pursuant to the Note, and any alleged benefit received by the Defendants (*id.* at 4-5; NYSCEF Doc. No. 58, at 11-13; NYSCEF Doc. No. 49, at 9-11). On August 22, 2019, the Defendants filed a first amended answer and affirmative defenses (NYSCEF Doc. No. 71).

Although the Plaintiff did not produce any documents or an appropriate privilege log in accordance with the August Order, this was allegedly because the Plaintiff intended, and advised Defendants' counsel of its intent, to discontinue this action *prior* to the expiration of the 30 day period when its discovery responses were due (NYSCEF Doc. No. 79, ¶¶ 3-4; NYSCEF Doc. No. 83 at 2). On September 18, 2019, the Plaintiff sought to unilaterally file a Notice of Discontinuance (NYSCEF Doc. No. 73), which did not discontinue this action as it did not comport with the CPLR 3217(a)(2), which provides that after a responsive pleading is served, as

here, a party may discontinue its claim without a court order only by filing a "stipulation in writing signed by the attorneys of record for all parties" (CPLR 3217[a][2]). By letter, dated September 18, 2019, counsel for defendants objected to the Plaintiff's "attempt to unilaterally discontinue this case without obtaining defendants' consent" (NYSCEF Doc. No. 74). The Plaintiff subsequently filed this motion to discontinue on September 23, 2019 (NYSCEF Doc. No. 75).

Discussion

CPLR § 3127 (b) authorizes a court to grant a motion for voluntary discontinuance "upon terms and conditions, as the court deems proper" (*Bank of Am., Natl Assn. v Douglas*, 110 AD3d 452 [1st Dept 2013]). Whether an action should be discontinued pursuant to CPLR § 3127 (b) is generally within the court's sound discretion and, ordinarily, a party cannot be compelled to litigate absent special circumstances such as prejudice to the defendant or other improper consequences (*Tucker v Tucker*, 55 NY2d 378, 383-384 [1982])

A court may discontinue an action with prejudice where a plaintiff's request for a discontinuance without prejudice is made to evade the court's direction and circumvent its authority (*Turner v Ritter*, 293 AD2d 404, 404 [1st Dept 2002], citing *NBN Broadcasting, Inc. v Sheridan Broadcasting Networks, Inc.*, 240 AD2d 319, 319 [1st Dept 1997]).

Here, the Plaintiff argues that the action should be discontinued without prejudice because there are no special circumstances that warrant a dismissal with prejudice. In opposition, the Defendants argue that the discontinuance should be with prejudice and conditioned on payment

of its costs, expenses, and reasonable counsel fees that were incurred since the Plaintiff rejected the Defendants' proposed judgment offer of $10,917.50, together with the costs then accrued, dated April 9, 2019 (NYSCEF Doc. No. 33). In total, the Defendants claim that they have incurred $60,881.55 in defending this action from the time that they offered the Plaintiff a proposed judgment in April of 2019 (NYSCEF Doc. No. 79, ¶ 6).

Relying on *Bank of America, Nat. Assn v Douglas*, 110 AD3d 452 [1st Dept 2013], the Plaintiff argues that dismissal without prejudice is warranted here. In *Bank of America*, the plaintiff sought to voluntarily discontinue its action without prejudice and cancel a *lis pendens*. The trial court denied the motion and granted the defendant's cross-motion to compel certain disclosure. The First Department reversed, finding that the trial court erred in declining to permit the plaintiff to voluntarily discontinue the action because there were no special circumstances warranting such denial as the case was still in ***the early stages of litigation*** (*id.*). The Court also held that the motion to discontinue should have been granted because there was no "showing that plaintiff sought the discontinuance only to avoid an adverse determination in this action" (*id.*, citing *Gonzalez v Kaye*, 58 AD3d 578 [1st Dept 2009]).

Bank of America is not analogous to the instant motion as that case was indisputably in "the early stages of litigation." To wit, the case was not more than a year old by the time the appeal was decided by the First Department. In contrast, the instant matter has had nearly two years of active litigation and no less than five motions at this point (see *Reid v Brown*, 165 AD3d 949 [2d Dept 2018] [dismissing matter with prejudice because it was pending for two and a half years]).

Turner v Ritter may be more analogous (293 AD2d 404 [1st Dept 2002]). In *Turner*, the First Department held that the trial court did not abuse its discretion in discontinuing an action with prejudice where the plaintiff moved for a discontinuance without prejudice during a traverse hearing after the trial court had already ordered the plaintiff to provide a definite method of establishing the monies owed by defendant (293 AD2d at 404). Under these circumstances, the First Department determined that a with prejudice dismissal was warranted as the Court found the plaintiff's attempt to discontinue the action was nothing more than "an apparent attempt on plaintiff's part to evade the court's direction and circumvent its authority" (*id.*, citing *NBN Broadcasting v Sheridan Broadcasting Networks*, 240 AD2d 319 [1st Dept 1997]).

Turner is similar to the instant matter because the Plaintiff in this action, like the plaintiff in *Turner*, was already subject to the court's August Order when it purported to discontinue this action. In accordance with the August Order, the Plaintiff was to produce responsive documents or a privilege log by September 14, 2019, including unredacted documents concerning any purported allonge to the Note. The fact that the Plaintiff alleges that it advised the Defendants of its intention to discontinue before the discovery deadline set in the August Order does not necessarily mean that Plaintiff is entitled to discontinue ***without prejudice***. And, perhaps most significantly, the Plaintiff's purported intention to file this motion to discontinue was made ***after*** the court issued its August Order, which was adverse to the Plaintiff's interest (*Hirschfeld v Stahl*, 242 AD2d 214, 215 [1st Dept 1997] [finding trial court "should have granted the discontinuance with prejudice, since plaintiff would otherwise be able to circumvent a prior order" of the court and deprive defendants of certain rights relating to that prior order]).

Put another way, the Plaintiff's purported intention to discontinue does not excuse or absolve the Plaintiff of compliance with the court's order, as, most importantly, such intention arose ***after*** the court's August Order was issued and the discovery sought, as discussed above, was directly relevant to the Plaintiff's claim regarding an amendment to the Note (i.e., an allonge) or other evidence that might support a claim beyond the face amount of the commercial paper. Tellingly, too, the Plaintiff did not file its motion to discontinue until September 23, 2019, nine days after its discovery was due. The Plaintiff's unilateral filing of an ineffective Notice of Discontinuance on September 18, 2019, also made after its discovery obligations were already due, is further evidence of the Plaintiff's attempt to evade compliance with the August Order. Accordingly, this action may be dismissed but with prejudice.

To the extent that the Defendant seeks to recover costs, expenses, and attorney's fees since offering a proposed judgment in April 9, 2019, this is denied because CPLR § 3220 only permits a party to recover attorney's fees after a trial has been commenced, and this case remains at the discovery stage.

Accordingly, it is

ORDERED that the Plaintiff's motion to discontinue this action is granted to the extent that this action is discontinued with prejudice; and it is further

ORDERED that the Clerk is respectfully directed to enter judgment accordingly.

Dated: April 7, 2020

Hon. Andrew Borrok
J.S.C.

Hon. Andrew Borrok