People v Trump
2023 NY Slip Op 30027(U)
January 6, 2023
Supreme Court, New York County
Docket Number: Index No. 452564/2022
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **37**

Justice

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PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Plaintiff,

- v -

DONALD J. TRUMP, DONALD TRUMP JR, ERIC TRUMP, IVANKA TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, 401 NORTH WABASH VENTURE LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC, SEVEN SPRINGS LLC,

Defendants.

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INDEX NO. 452564/2022

MOTION DATE 11/21/2022, 11/21/2022, 11/21/2022, 11/21/2022, 11/21/2022

MOTION SEQ. NO. 007, 008, 009, 010, 011, 012

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 195, 196, 197, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 410, 411, 412, 413, 414, 415

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 198, 199, 200, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 416, 417, 418, 419, 420, 421

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 201, 202, 203, 204, 205, 206, 207, 208, 209, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 422, 423, 424, 425, 426, 427

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 428, 429, 430, 431, 432, 433

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 220, 221, 222, 223, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 434, 435, 436, 437, 438, 439

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 224, 225, 226, 227, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 440

were read on this motion to DISMISS.

Upon the foregoing documents, it is hereby ordered that defendants' motions to dismiss are denied.

Background

This action arises out of a three-year investigation conducted by plaintiff, the Office of the Attorney General of the State of New York ("OAG"), into the business practices of defendants from 2011 through 2021. OAG alleges that the individual and entity defendants engaged in repeated and persistent fraud by preparing and certifying false and misleading valuations made in financial statements presented to lenders and insurers in the conduct of defendants' business operations in New York, violating New York Executive Law § 63(12).

The instant action was preceded by a special proceeding that OAG commenced in 2020, seeking to enforce a series of subpoenas against various named defendants and other persons and entities. This Court presided over the special proceeding, which resulted in several orders compelling compliance with OAG's subpoenas. In a Decision and Order dated February 17, 2022, this Court rejected defendants' arguments that the special proceeding was solely the result of personal and/or political animus and discrimination.

OAG filed the instant verified complaint on September 21, 2022, and service was thereafter effectuated on all defendants. OAG moved for a preliminary injunction and the appointment of an independent monitor to oversee the submission of certain financial information by defendants to financial entities and other businesses, pending the final disposition of this action. On November 3, 2022, this Court granted a preliminary injunction and appointed the Hon. Barbara S. Jones (ret.) as an independent monitor. In so doing, this Court held that OAG had demonstrated defendants' propensity to engage in persistent fraud arising out of the submission of annual Statements of Financial Condition ("SFCs") for defendant Donald J. Trump ("Mr. Trump"). This Court rejected defendants' arguments, *inter alia*, that OAG did not have standing or the legal capacity to sue, and that the purported disclaimers provided by non-party Mazars insulated defendants from liability. This Court also scheduled the trial to commence on October 2, 2023.

In lieu of submitting answers, defendants now move, pursuant to CPLR 3211, to dismiss the verified complaint.

Sanctionable Conduct

Pursuant to 22 NYCRR § 130-1.1, New York Courts may sanction attorneys for frivolous litigation.

Scattered throughout defendants five motions to dismiss are arguments that (1) plaintiff does not have capacity to sue, (2) plaintiff does not have standing to sue, (3) the Mazars disclaimers insulate defendants; and the instant case is a "witch hunt."

The first three arguments were borderline frivolous even the first time defendants made them. Executive Law § 63(12) is tailor-made for Attorney General Enforcement actions such as the instant one, foreclosing any rational arguments against capacity and standing. The Mazars disclaimers were made by a non-party and shifted responsibility directly on to certain defendants. Finally, this Court (and at least 2 others)[1] has soundly rejected the "witch hunt" argument.

The first time defendants interposed the capacity and standing arguments was in opposition to plaintiff's motion for a preliminary injunction. Defendants made these arguments exhaustively; their repetition in the instant briefs adds nothing new. OAG's legal standing and capacity to sue are threshold litigation questions of justiciability; they do not change whether in the context of a motion for a preliminary injunction or to dismiss pursuant. The Court rejected such arguments as a matter of law, and defendants' reiteration of them, scattered across five different motions to dismiss, was frivolous.[2]

In opposition to sanctions, defendants primarily argue (1) the preliminary injunction decision was just that, "preliminary," "not a finding on the merits," and thus has no preclusive effect (claim preclusion and/or issue preclusion); (2) not raising the arguments could constitute waiver, precluding appellate review and (3) something about "acknowledging precedent" and "record preservation," which sounds an awful lot like point (2). Defendants do not claim, nor could they, that their capacity and standing arguments now are any different from their capacity and standing arguments then; indeed, they acknowledge, in a letter to the Court (NYSCEF Doc. No. 449) that the subject arguments were "re-presented" (emphasis added), which on its face strongly suggests frivolity. Reading these arguments was, to quote the baseball sage Lawrence Peter ("Yogi") Berra, "Deja vu all over again."

Merits

Defendants cite to Univ. of Texas v Camenisch, 451 US 390, 395 (1981), for the proposition that "a preliminary injunction merely grants preliminary relief and does not serve to conclusively determine the rights of the parties in a litigation." True, but totally irrelevant. Defendants claim that "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." That makes sense if, and only if, the conclusions of law are based on the aforesaid findings of fact. That is how our system of adjudication works; facts are "found," and the law is applied in a "conclusion of law." However, an abstract principle of law does not depend on particular facts; and a "conclusion of law" that

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[1] Trump v James, No. 21-cv-1352, 2022 WL 178951 (NDNY 2022); People by James v Trump Org, Inc., 205 AD3d 625 (1st Dep't 2022).

[2] Six motions to dismiss were made before this Court. Five of them contained duplicative frivolous arguments that this Court previously rejected. The only defendant whose motion to dismiss did not contain duplicative arguments was Ivanka Trump.

does rely on facts is case-specific, not a "principle of law." A "conclusion of law" is distinct from a "principle of law."

Defendants cite 21 or so cases (as a simple rule of thumb, three is enough for most purposes) for the proposition that a preliminary injunction decision is not an adjudication on the merits. The first case cited is representative of the others: Town of Concord v Duwe, 4 NY3d 870, 875 (2005) ("mere denial of the motion for a preliminary injunction did not constitute the law of the case or an adjudication on the merits"). But the second case undercuts their point. J.A. Preston Corp. v Fabrication Enters., Inc., 68 NY2d 397, 402 (1986) ("The granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been applied for.") Exactly. If issues must be tried, a preliminary injunction is not preclusive. Here, the issues of capacity and standing, are pure issues of law and do not depend on a trial of disputed issues of fact. Simply put, who the instant parties are and what the law says, which determine capacity and standing, are not disputed issues of fact that need to be tried.

Defendants do not claim, nor could they, that they have found a single case in which a determination of capacity and/or standing in a preliminary injunction decision was not given preclusive effect; indeed, every quote from the cases they cite seems to use the words "merits" or "facts," neither of which is relevant to the instant capacity and standing issues.

Waiver

Defendants' "waiver" argument is wholly unconvincing. They are entitled to, and indeed have, appealed the preliminary injunction decision, including its capacity and standing arguments. If the appeal is successful on the grounds of capacity and/or standing, this case is over. Furthermore, if defendants were genuinely worried about waiver they could have, as suggested by plaintiff (NYSCEF Doc. 448), availed themselves of the simple expedient of stating in their motion papers that they were not waiving the standing and waiver arguments that they included (at length) in their opposition to the preliminary injunction motion. Alternatively, defendants could simply have incorporated by reference. See, e.g., People v Finch, 23 NY3d 408, 413 (2014) ("As a general matter, a lawyer is not required, in order to preserve a point, to repeat an argument that the court has definitively rejected."). The one course of action that was not necessary was "re-presenting" the subject arguments at length.

Defendants state that "[t]he record in this action must nonetheless be properly made and preserved." It is, copiously, as if in amber, on the New York State Courts Electronic Filing System, providing an easy means to appeal any decision.

Defendants cite to GMAC Mtge., LLC v Winsome Coombs, 191 AD3d 37 (2d Dep't 2020), for the proposition that any objection or defense based on legal capacity or standing is waived unless raised by motion or responsive pleading. But defendants did raise it in the context of the preliminary injunction "motion." Had they not done so, that might have constituted waiver. Squarely raising an issue is the antithesis of "waiver."

"Witch Hunt"

The "witch hunt" argument is claim-precluded because this Court already rejected it in its February 17, 2002 Decision and Order enforcing certain subpoenas in the special proceeding,

which the Appellate Division, First Department affirmed. People by James v Trump Org, Inc., 205 AD3d 625 (1st Dep't 2022). Indeed, Judge Brenda K. Sannes also recognized this preclusive effect in Trump v James, Civ. No. 21-1352, 2022 WL 1718951 at 16-19 (NDNY May 27, 2022) (holding that res judicata barred the action based on the preclusive effect of this Court's February 17, 2022 order because Mr. Trump and the Trump Organization already had raised or "could have raised the claims and requested the relief they seek in the federal action" in the subpoena enforcement action); accord, Trump v James, Civ. No. 22-81780, 2022 WL 17835158, at 4 (SD Fla 2022) (denying plaintiff a preliminary injunction because of lack of likelihood of success on the merits).

Frivolous Litigation

"In its discretion, a court may award costs and financial sanctions against an attorney or party resulting from frivolous conduct." Kamen v Diaz-Kamen, 40 AD3d 937, 937 (2nd Dep't 2007). See Yan v Klein, 35 AD3d 729, 729–30 (2d Dep't 2006) ("The plaintiff, following two prior actions, has 'continued to press the same patently meritless claims,' most of which are now barred by the doctrines of res judicata and collateral estoppel."). Here, sophisticated defense counsel should have known better.

Discretion

Notwithstanding the above, in its discretion this Court will not impose sanctions, which the Court believes are unnecessary, having made its point.

Discussion

Defendants bring their motions pursuant to CPLR 3211. "On a CPLR 3211 motion to dismiss, the court will 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" Nonnon v City of New York, 9 NY3d 825, 827 (2007).

Executive Law § 63(12) broadly empowers the Attorney General of the State of New York to seek to remedy the deleterious effects, in both the public's perception and in reality, on truth and fairness in commercial marketplaces and the business community, of material fraudulent misstatements issued to obtain financial benefits.

Statute of Limitations

Defendants argue that all the allegations in the verified complaint are time-barred, asserting that a three-year statute of limitations for fraud is applicable. Defendants are mistaken. As the First Department made unambiguously clear in a case involving some of the very same parties that are now before this Court, a "fraud claim under section 63(12) is not subject to the three-year statute of limitations imposed by CPLR 214(2), but rather, is subject to the residual six-year statute of limitations in CPLR 213(1)." Matter of People by Schneiderman v Trump Entrepreneur Initiative LLC, 137 AD3d 409, 418 (1st Dep't 2016).

Moreover, OAG has demonstrated the potential applicability of the "continuing wrong" doctrine, in which a series of wrongs is "deemed to have accrued on the date of the last wrongful act." Palmeri v Willkie Farr & Gallagher LLP, 156 AD3d 564, 568 (1st Dep't 2017). "[T]he continuing wrong doctrine 'is usually employed where there is a series of continuing wrongs and

serves to toll the running of a period of limitations to the date of the commission of the last wrongful act." People by Underwood v Trump, 62 Misc 3d 500 (Sup Ct, NY County 2018).[3] As the verified complaint alleges an ongoing scheme by defendants that extends up until at least 2021, dismissal pursuant to the statute of limitations must be denied.

Sufficiency of Pleadings

Defendants argue, without citing any authority in support thereof, that OAG's claims should be subject to the heightened pleading requirement for common law fraud. This argument is without merit, as Executive Law § 63(12) is "not subject to this heightened pleading standard because the underlying conduct is premised on deceptive acts or practices that do not include intent or reliance as an element of those claims." Consumer Fin. Protection Bur. v RD Legal Funding, LLC, 332 F Supp 3d 729, 769 (SDNY 2018).

Similarly, contrary to defendants' argument, and as stated by this Court in its November 3, 2022 Decision and Order, OAG need not prove scienter or intent to prevail on a claim brought pursuant to Executive Law § 63(12). State by Lefkowitz v Interstate Tractor Trailer Training, Inc., 66 Misc 2d 678, 682 (Sup Ct, NY County 1971) (holding that "fraud" under § 63(12) "has been construed to include acts which tend to deceive or mislead the public, whether or not they are the product of scienter or an intent to defraud"); People by Abrams v Am. Motor Club, Inc., 179 AD2d 277, 283 (1st Dep't 1992) (holding "scienter is not required" under § 63(12)); Matter of State v Ford Motor Co., 136 AD2d 154, 158 (3rd Dep't 1988) ("we note that proof of fraud, scienter or bad faith is not required for an award of restitution [pursuant to § 63(12)]").

Moreover, defendants' assertion that OAG "must come forward with facts supported by a qualified expert" to support a fraud claim under § 63(12) at the pleadings stage is entirely baseless and would overturn many decades of well-settled law (indeed, such a requirement would turn the law on its head). Defendants do not, and cannot, offer any legal authority in support of this, instead presenting the Court with cases that discussed the need for experts at the summary judgment or trial stage.

Intracorporate Conspiracy Doctrine

Defendants argue that they cannot be held liable for conspiracy pursuant to the intracorporate conspiracy doctrine which provides that "officers, agents and employees of a single corporate entity are legally incapable of conspiring together." Chamberlain v City of White Plains, 986 F Supp 2d 363, 388 (SDNY 2013). This argument is irrelevant, as OAG has not pleaded a cause of action for conspiracy (and, in fact, no such cause of action exists under New York state law), and the cases cited by defendants in support of this argument all arise out of federal conspiracy claims.

Disgorgement of Profits

Defendants argue that OAG's claim for disgorgement should be dismissed because OAG "does not explain" how it calculates the $250 million it seeks. This argument fails, as disgorgement of profits is a form of damages, and the law is well-settled that "there is no requirement of law that

[3] There are other tolls that may apply here. On April 27, 2021, OAG and some of the named defendants entered into a tolling agreement. Additionally, a series of Executive Orders that the Governor issued in response to the COVID-19 pandemic tolled the statute of limitations for another 228 days.

the measure of damages alleged to have been sustained shall be stated in the complaint." Winter v Am. Aniline Products, 236 NY 199, 204 (1923).

Allegations Against Ivanka Trump

Ivanka Trump ("Ms. Trump") separately moves to dismiss the verified complaint as against her, asserting that the pleadings fail to articulate sufficiently allegations against Ms. Trump, and, in particular, do not allege that she personally falsified any business record, or that she was aware of the alleged use of improper methodologies to value the assets included in any SFC. Ms. Trump additionally asserts that she left the Trump Organization in 2017, and, thus, the statute of limitations has run.

As detailed *supra*, on a motion to dismiss pursuant to CPLR 3211, plaintiff is afforded the benefit of every possible inference. DaPuzzo v Reznick Fedder & Silverman, 14 AD3d 302, 303 (1st Dep't 2005) ("To require plaintiffs, at this stage of the proceeding, to establish what defendant knew or intended would present an undue burden, considering that these would be matters particularly within defendant's knowledge").

The verified complaint alleges that the formal process for soliciting the Doral loan began in October 2011, when Ms. Trump sent an "Investment Memo" and financial projections for the Doral property to two Deutsche Bank employees. The verified complaint also alleges that, in the Doral acquisition, Ms. Trump served as the primary point of contact for Deutsche Bank, and that she was responsible for negotiating the terms of the loan, including reducing the net worth covenant from $3 billion to $2 billion. Ms. Trump also advocated for a guaranteed transaction over the objections of Trump Organization in-house counsel, who described the net worth guarantee as "problematic." NYSCEF Doc. No. 1, ¶¶ 571-582.

As OAG persuasively argues, the nature of the loan contracts at issue renders the application of the continuing wrong doctrine particularly compelling in this action. The loans, obtained through the use of allegedly inflated SFCs, continued in effect for many years after the loan was issued and required annual performance by defendants. For example, each of the Deutsche Bank loans had terms extending past 2022, and each had continuing obligations to maintain a net worth of at least $2.5 billion and unencumbered liquidity of $50 million. Each of the loans required annual submissions of Mr. Trump's SFC and a certification that the Statements were true and accurate and that there had been no material change in Mr. Trump's net worth or his liquidity. NYSCEF Doc. No. 1, ¶ 735. Ms. Trump's own biography from 2014 indicated that she "spearheaded the acquisition of [Trump National Doral] and was responsible for overseeing the 250 million dollar renovation of the 800 acre property." NYSCEF Doc. No. 276.

Further, there are emails in evidence that indicate Ms. Trump's repeated interaction with employees from Deutsch Bank arising out of the financial requirements imposed on defendants. In an email from Rosemary Vrablic of Deutsch Bank to Ms. Trump, dated December 15, 2011, Ms. Vrablic informs Ms. Trump of the financial covenants required by Deutsche Bank in order to proceed with the loan necessary to acquire Doral, including ensuring that "Borrower shall maintain a Debt Service Coverage ratio (DSC) defined as Net Operating Income divided by Debt Service of no less than 1.15x" and "Guarantor shall maintain a Minimum Net Worth of $3.0 billion excluding any value related to the Guarantor's brand value." NYSCEF Doc. No. 280.

Further, the email attached a document entitled "Donald J. Trump Doral Golf and Spa Resort Due Diligence Items" that included a list of items to be provided to Deutsche Bank which consisted of many of the same items found on Mr. Trump's SFCs for the corresponding years. NYSCEF Doc. No. 280.

Accordingly, as the verified complaint sufficiently alleges Ms. Trump's participation in continuing wrongs, and given the tolling pursuant to the COVID-19 Executive Orders, Ms. Trump is not entitled to dismissal pursuant to the statute of limitations.

The verified complaint also alleges that Ms. Trump participated in the initial bidding for and negotiations over the Old Post Office renovation project in Washington D.C., including presenting to the General Services Administration ("GSA") information about the substance of the SFCs. NYSCEF Doc. No. 1, ¶¶ 625-636. Indeed, Ms. Trump's own biography states that she "led the charge on this incredibly competitive RFP process." NYSCEF Doc. No. 276.

Furthermore, in an email dated December 16, 2011, David Orowitz, Vice President of Acquisitions and Development for the Trump Organization, wrote to Allen Weisselberg that "Ivanka wanted me to change the language in the GAAP section." NYSCEF Doc. No. 288.

Ms. Trump correctly asserts that just being copied on the transmittal of the SFCs is not sufficient to establish fraud. However, such argument is unavailing here, as the record establishes that Ms. Trump participated far more in securing the loans than just passively receiving emails. Regardless, the Court of Appeals has made clear that pleading requirements for an individual defendant's conduct are meant to be interpreted very liberally, stating:

> Although plaintiffs have not alleged specific details of each individual defendant's conduct, we have never required talismanic, unbending allegations. Simply put, sometimes such facts are unavailable prior to discovery. Lest we willfully ignore the obvious—or the strong suspicion of a fraud—we have always acknowledged that, in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud.

Pludeman v N. Leasing Sys., Inc., 10 NY3d 486, 493 (2008).

In her deposition Ms. Trump testified that she does not understand statements of financial condition and that she does not even know if they would include all assets and liabilities. NYSCEF Doc. No. 290. This is despite her communications with Deutsche Bank about SFCs. It is well-settled that triers of fact determine the credibility of witnesses. People ex rel. Schneiderman v One Source Networking, Inc., 125 AD3d 1354, 1357-58 (4th Dep't 2015) (the Court has "superior ability to assess the credibility of witnesses" in action pursuant to Executive Law § 63(12).) However, such a credibility determination is premature on a motion to dismiss pursuant to CPLR 3211.

Additionally, it not necessary for a defendant to personally draft a fraudulent business record for liability to attach; rather, it is sufficient for that individual to "cause" submission of a false entry. People v Murray, 185 AD3d 1507, 1509 (4th Dep't 2020) (upholding insurance fraud liability where defendant met with insurance company representative and submitted forms even though defendant did not draft them).

Furthermore, the record demonstrates that Ms. Trump received over $10 million in profits from the sale of the Old Post Office. If the RFP for the old Post Office was based on fraudulent submissions, the profits of any such sale may be ripe for disgorgement under Executive Law § 63(12).

Thus, OAG has alleged liability on behalf of Ms. Trump sufficiently to survive a motion to dismiss pursuant to CPLR 3211.

The Court has considered defendants' other arguments, including, incredibly, that the revocable trust of Donald J. Trump was denied equal protection under the law, and finds them to be unavailing and/or non-dispositive.

Conclusion

For the reasons stated herein, the defendants' motions to dismiss are denied in their entirety.

1/6/2023
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE