AMERESTATE HOLDINGS, LLC., BROADWAY WEST, LLC, and 811 ASSOC.

Plaintiffs,

v.

CBRE, INC., GRID REAL ESTATE, LLC., et. al.,

Defendants,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY

DOCKET NO. HUD-L-3012-15

Judge Anthony V. D'Elia

Civil Action

OPINION

Pending before this Court is Plaintiff's motion to compel discovery from the various Defendants relevant to Plaintiff's claims for punitive damages. Also pending is Defendant's cross motion for sanctions: Defendants argue that sanctions are warranted because two different trial judges previously "unequivocally" denied Plaintiff's request for punitive damage discovery.

It is noted that the specific discovery requested by the Plaintiff is excessive and unwarranted. Initially, Plaintiff requested tax returns from 2011 through 2016, but Plaintiff's supplemental requests of August 2017 required much more.

For example, Plaintiff's supplemental requests demanded that CBRE produce any and all documents relating to sales/commissions earned by Berger and Klapper from 2014 to the present and any and all documents evidencing all sales and profits of CBRE, Saddlebrook and the New York City office. Plaintiff's supplemental requests also demanded from Dresdner Robin Environmental Management Inc. all bank, brokerage and financial institutions/statements with ownership interest for

2014, 15 and 2017: copies of all W-2 Statements, K-1 statements for income from assets/real estate and all financial statements and documents provided to accounts for tax years of 2014, 2015 and 2016.

The above are just some examples of the overly broad, unduly burdensome and unjustified discovery requests from the Plaintiff as they relate to the punitive damage claims.

The parties appeared before the Court in August of 2022 for oral argument on the motion and cross motions for sanctions. After argument, the Court directed the parties to further supplement past submissions, to specifically address whether the motion record supports the 17 specific facts alleged by the Plaintiff as they relate to punitive damages. This the parties did: The Defendants however, also attempted to reargue various reasons as to why punitive damage discovery is inappropriate. Defendants also made a number of arguments (again) which were more appropriately arguments for summary judgment.

For example, the Dresdner/Kolling Defendants argue that the Kolling letters contained opinions, not facts, and that those Defendants had no duty to disclose anything to the Plaintiff. Moreover, those Defendants (again) argued that the Plaintiff could not have reasonably relied upon the Kolling letters because of the disclaimers in those letters and the opinions of Plaintiff's own professionals. Moreover, the Dresdner Defendant argued in its submission that the Dresdner Defendants "did not intend" to defraud anyone.

The Court is not considering any of those arguments with relation to the issues now before the Court.

And to further clarify the record: the Court (as previously explained) finds that neither Judge Costello nor Judge Jablonski substantively addressed the Plaintiff's request for punitive damage discovery.

In 2017, Judge Jablonski merely ruled that the Plaintiff's request, at that time, for punitive damage discovery was premature and therefore he did not address the substance of Plaintiff's

argument. Moreover, while the Plaintiff moved before Judge Costello for punitive damage discovery and the parties briefed that issue, neither Judge Costello's rulings, nor the oral arguments before her, addressed Plaintiff's request for punitive damage discovery.

Therefore, despite Defendants protestations, neither Judge addressed the issues presently before this Court.

Moreover, as the Court has emphasized, Plaintiff need not establish "extraordinary circumstances" under the Court Rules to reopen discovery as it applies to the punitive damage claims.

First, it is acknowledged that cases assigned to the Complex Business Litigation Program (CBLP) are to be governed by Part IV, Chapter XI of the Court Rules, and that absent any express contradictory Rule contained in the chapters governing CBLP, then the rules in part IV of the Court Rules should apply to any case in the CBLP.

It is also acknowledged that N.J. Court Rule 4:24-1 (c) governs extensions of time to complete discovery and that that Rule states that the motion to extend discovery must be filed before the end of the discovery end date and that no extension of discovery may be permitted after an arbitration or trial date is fixed unless exceptional circumstances are shown.

There is no arbitration or trial date set in this matter and none will be set in the foreseeable future; for reasons previously provided to the parties.

Nevertheless, as the Court cannot anticipate a trial date being set in this CBLP matter in the foreseeable future, the Court believes it could be in the best interest of the parties and judicial efficiency and economy to consider this motion at this time. This is particularly so as any discovery which could be ordered by the Court as to punitive damages would not be relevant to, or admissible in, the liability trial (whenever it eventually is scheduled).

As the Court previously explained, should there be a punitive damage trial in this matter after the liability trial, the Court and all parties would best be served if it occurred fairly shortly after the

liability trial has concluded. The same jury should hear the facts relating to punitive damages in that instance; particularly in light of the fairly complicated factual matrix presented in this case. There will therefore be an abbreviated period of time between any liability and punitive damage trial under those circumstances. This should be a factor in considering whether some "pre-liability trial" discovery should proceed. As a general statement, therefore, (and if Plaintiff has met its prima facie burden of proof herein) some financial discovery might be appropriate and in the best interests of all concerned.

The Court notes that unsupported assertions by Plaintiff alone are insufficient to establish a prima facie case justifying pretrial discovery on the punitive damage issues. See Williams v. Casino Reinvestment Dev. Auth., #A-5368-18 at *9 (App. Div. July 13, 2021), cert. denied 248 N.J. 597 (2021). Admissible competent evidence must be presented to the Court by the Plaintiff to support its factual claims.

Moreover, the Court again emphasizes that the fact that Defendant's previous motions for summary judgment were denied does not prove that Plaintiff has established a prima facie right to obtain punitive damage discovery. In connection with the Defendants previous motions for summary judgment, the Court was compelled to construe all testimony and evidence in a light most favorable to the Plaintiff who opposed those motions. The Court also was only confronted with, and concluded that, there were genuine issues of material fact as to whether the Plaintiff would be able to prove fraud by a preponderance of the evidence.

In connection with Plaintiff's pending motions, the Plaintiffs now have the heavier burden of proving that there is a prima facie case that Plaintiff could prove by clear and convincing evidence that the harm alleged was the result of "actual malice or was accompanied by a wanton and willful disregard" of foreseeable harm to the Plaintiff. See N.J.S.A. 2A:15-5.12 (a). Because the burden of proof is substantially different, Defendants' failure to obtain summary judgment in this matter are irrelevant.

The parties agree, and the Court finds, that Plaintiff's burden with regard to punitive damages is to establish that the Defendant's conduct in this matter was especially egregious.

Our Courts have held that "every fraud is reprehensible, but not every fraud or fraudulent transfer warrants punitive damages" Jugan v. Friedman, 275 N.J. Super 556, 572 (App. Div. 1995). Punitive or exemplary damages should be awarded only when it has been proven by clear and convincing evidence that the wrongdoers conduct is especially egregious. Leingruber v. Claridge Assocs., 73 N.J. 450, 454, (1977). Fraud, standing alone, without some additional aggravated element, will not sustain a claim for punitive damages. LoBosco v. Kure Eng'g Ltd., 891 F.Supp. 1020, 1034 (D.N.J. 1995). Plaintiff therefore now has the burden to prove fraud and actual malice by clear and convincing evidence against one or more of the Defendants. [1]

In essence, what the dispute now boils down to is this: what does the term "prima facie" mean? Stated another way, the question is what is the evidentiary burden that Plaintiff must satisfy to justify pretrial discovery on the punitive damages claims in this case?

In this regard, the Court should clarify that any previous comments as to the Plaintiff's burden being "modest" were merely meant to describe what the Court believes the term "prima facie" means under the law. It was not meant to minimize the requirement that Plaintiff establish a prima facie case that the Plaintiff could prove fraud by clear and convincing evidence.

Herman v. Sunshine Chem. Corp., 133 N.J. 329 (1993), held that the procedures for pretrial discovery, (as they relate to punitive damages), applies to any and all punitive damage cases brought in New Jersey. It specifically held that:

> Although the present case arises in the context of a claim for punitive damages and a products liability action, the requirements for bifurcation of compensatory and punitive damages, for allocation to a Plaintiff of the burden of proving the Defendants' financial condition, for proof of a prima facie case as a condition precedent to discovery of a Defendant's financial condition,

[1] Contrary to the arguments raised or implied by the Dresdner Defendant in one of their previous briefs, Plaintiff does not have to meet this burden at trial first in order to than obtain punitive damage discovery.

> and for limitations on such discovery is applied equally to all such claims. Consequently, we expect those requirements to govern all claims for punitive damages, even those that arise outside the Act.
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> Ibid., at pg. 343-46.

The parties also agree that the financial conditions of the various Defendants is a relevant factor to be considered at a trial on punitive damages.

N.J.S.A. 2A:15-5.12 provides that:

> If the trier of fact determines that punitive damages should be awarded, the trier of fact shall then determine the amount of those damages. In making that determination, the trier of fact shall consider all relevant evidence, including, but not limited to, the following:
>
> ....
>
> (4) the financial condition of the Defendant.
>
> N.J.S.A. 2A:15-5.12 (c).

The Court also finds that the CBRE/Berger/Klapper Defendants have failed to produce any case law or statute which somehow would alter how or why one would apply the "prima facie" standard to this motion any differently than as it was applied by the Supreme Court in Zive v. Stanley Roberts Inc., 182 N.J. 436, 441 (2005).

Though Defendants went to great lengths in their supplemental briefing to argue that the type of "prima facie" showing in this matter is somehow significantly different than the analysis before the Court in Zive because Zive involved the burden shifting required in an employment discrimination case, the Defendants have not provided any support for that argument.

The prima facie standard was analyzed and applied in that L.A.D. case. The same standard and understanding of the term "prima facie" should apply to this motion as well.

The Court is also mindful that the parties consented to a Confidentiality Order on January 22, 2016 which would apply to any punitive damage discovery which this Court might order. Moreover, the parties agreed on the record, and the Court would order that, any punitive damage discovery would

be produced under seal so that it does not become part of the public record and Plaintiff's counsel would be prohibited from discussing or disclosing the contents of any punitive damage discovery with their clients. The information could only be provided to an expert of the Plaintiff's choosing for consultation purposes.

In determining whether Plaintiff is entitled to any punitive damage discovery, the Court is mindful of the fact that a sensitive balancing is needed. Herman v. Sunshine Chem., supra at pg. 344. The Court also notes that with regards to publicly held corporate parties, the annual shareholder reports, or reports filed with regulatory bodies, may well be enough. Ibid. With regard to privately held corporations, a certified financial statement may also be enough. Ibid. With regard to income tax returns, interrogatories may be appropriate but only when good cause is shown. See Lepis v. Lepis, 83 N.J. 139, 158 (cited for support in Herman, supra at pg. 344).

Plaintiffs argue that they are entitled to discovery as to whether CBRE engaged in a "scheme" to defraud the state of New Jersey out of tax revenue and, therefore seeks to depose CBRE's E.E.O. who certified the reports to the SCC. Plaintiffs argue that the Defendants may not have listed this litigation as being material to its financial condition, thus justifying a deep discovery dive into those issues.

The Court disagrees with the Plaintiff. There will be no discovery into the veracity/credibility of any of the filings that were made with the SCC relating to CBRE. There will be no deposition of CBRE's E.E.O. Those issues are far from the type of discovery that should be permitted in connection with Plaintiff's punitive damage claims.

Moreover, whether the Defendant did or did not list this litigation as "being material to its financial condition" in its SCC filings is irrelevant as to what its actual financial condition is – and that is the real issue to be addressed in punitive damage discovery: what is the financial condition of the various Defendants?

With the above in mind, the Court has reviewed this motion record to determine whether the Plaintiff has established a "prima facie" case that the Plaintiff will be able to prove by clear and convincing evidence that the Defendant (or Defendants) committed a fraud justifying punitive damages. The Court shall evaluate this motion record "solely on the basis of the evidence presented by the Plaintiff, regardless of the Defendant's efforts to dispute that evidence" Zive, supra., at 441.

The Court must review the facts in the light most favorable to that party bearing the burden of establishing a prima facie claim. State v. Presciose, 129 N.J. 451, 462, 463 (1992). A party seeking to establish a prima facie case should be given the benefit of all reasonable inferences that can be drawn from the evidence presented. See Kant v. Seton Hall Univ., 210 N.J. Super, unpub. LEXIS 2469, *7 (App. Div. 2010); Teilhaber v. Greene, 320 N.J. Super 453, 464 (App. Div. 1999).

With the above in mind, the Court reached the following conclusions. [2]

(1). It does not appear that there is any factual dispute that the broker Defendants marketed the development at the end of March 2014.

(2). Plaintiff's submission cites to the testimony of Plaintiff Salomon and to "Exhibit C". However, it is unclear to the Court, but exhibit C appears to relate to unrelated deposition testimony.

(3). Plaintiff provides Defendant Antonicello's email in support of this factual allegation.

(4). This fact is supported by the deposition of Antonicello and is corroborated by the deposition of Wegner.

(5). The Court does not see support (via admissible evidence), that the City Planner Wegner told the broker Defendants that the property "would yield 486 as of right units".

(6). Plaintiff has established in its submissions that the Offering Memorandum stated that the property would yield "+/- 580" as of right units.

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[2] [Any references to be numbered request shall be to the 17 numbered requests in the Court's Order of August 19, 2022].

(7). Defendants admit that the number "486" was never disclosed but point out that it wasn't revealed because the City Planner's preliminary estimate was based upon a faulty analysis of which properties/ sites would be developed.

(8). Defendant Berger's email of July 1, 2014 confirms that Berger represented that "approximately" 565 units could be built.

(9). The Court does not read the email to "implicitly confirm" that the City Planner, Wegner had agreed with that number.

(10). See number 5 above.

(11). There is nothing confirming that Solomon was told he could "take that to the bank" regarding the number of units that could be built. That language was not in the July 1, 2014, email of Berger. There is no other admissible evidence in this record to support that testimony of the Plaintiff Salomon. Plaintiff also cites to Exhibit H, attached to the Solomon certification of December 30, 2019, in support of this fact. However, that Exhibit does not support this alleged fact.

(12). Plaintiff cites to the Salomon certification attaching the Berger deposition, at page 425. That deposition testimony is not at that citation.

(13). Plaintiff alleges that the Defendant prepared two different planning reports. No evidence has been provided in this motion record to support that the Defendants prepared different planning reports.

(14). Plaintiff makes much of the first report of August 29, 2014 (Exhibit M) and the second report that was provided (Exhibit N). It is not clear that the first report specifically said that only 486 units could be built. This letter (not really a report) addressed to Antonicello clearly states that the number of units that could be built would be affected by which parcels of land were available for development. It further states that if the various lots were developed separately, then that also would affect the number of units which could be built at the site.

(15). The second report, (Exhibit N) omits the planners' previous determinations and again reaffirms that the calculations are all subject to a number of conditions: ie., which lots could be considered for development and whether they would be developed separately or jointly etc. Thus, the Court finds that the first report does not establish that "... Wegner told brokers that only 486 as of right units could be built", as alleged by Plaintiff.

(16). It is not clear to the Court that the letter or report, (Exhibit M) made clear that Defendants were using a tax map "created by CBRE".

(17). As noted above, the second letter/report, (Exhibit N) does not reference whether there had been a previous determination that 486 as of right units could be built. As noted, however, the first report does not clearly state that only 486 as of right units could be built (which might explain why the second letter/report of Exhibit N did not contain the number "486").

(18). It seems undisputed that the Defendant Berger forwarded the second report to the Plaintiff and that this is confirmed by the Berger email.

In light of the court's findings regarding 1-17 above, Plaintiff has not made the requisite prima facie showing that it can prove one or more of the Defendants acted with "actual malice or with a wanton and willful disregard of foreseeable harm to the Plaintiff", as required by N.J.S.A. 2A:15-5.12 (a).

While (after giving Plaintiff the benefit of all reasonable inferences) Plaintiff may be able to establish fraud by a preponderance of the evidence, the admissible evidence on this motion (without relying upon mere assertions by the Plaintiff) falls short of meeting the clear and convincing standard.

For example, it is not as clear, based upon the admissible evidence, that the City Planner clearly stated that only 486 units can be built or that the Defendants maliciously, egregiously, and with willful disregard of foreseeable harm to the Plaintiffs, concealed the City Planner's opinion as to the number of "as of right" units which could be built at the properties/sites. There are enough factual questions

and uncertainties and conditions built-in to the City Planner's letters (Exhibits M and N) and the various emails to preclude a finding that the Plaintiff has established prima facie right to punitive damage discovery.

The Plaintiff represented that the Defendants clearly stated that Plaintiff could "take it to the bank" regarding the number of units that could be built. Except for the bald assertion by the Plaintiff, there is no other admissible evidence to support that factual allegation. Defendants marketing materials were phrased as approximations or (+/- 500 units).

While the Plaintiff asserts that the Defendant prepared two different planning reports with the specific intent to defraud the Plaintiff, there is no admissible evidence to establish that Defendants prepared different planning reports. The explanation proffered by the Defendant as to why Exhibit N (the second letter from the Planner) omitted the number 486 further precludes a finding that the Plaintiff has established a prima facie case that it could establish by clear and convincing evidence that the Defendant acted with malice or a willful disregard of foreseeable harm to the Plaintiff.

Plaintiff has argued that the Defendant CBRE created a tax map so as to intentionally defraud the Plaintiff. The admissible evidence on this motion record does not support that allegation.

The Court will not disturb the prior findings by other Judges that there are genuine issues of material fact as to whether the Plaintiff can prove fraud by a preponderance of the evidence. Moreover, it may be that the Plaintiff can prove the Defendants acted with sufficient intent to justify punitive damages. A fuller evidentiary record, with live testimony and witnesses subject to cross examination, may shed more light on the issue. This Court, however, finds that based on this motion record alone, Plaintiff has not established that it is entitled to punitive damage discovery.

Finally, Defendants cross-motion for sanctions are denied as neither Judge Jablonski nor Judge Costello addressed the substance of Plaintiff's request for punitive damage discovery.

So ordered,

Hon. Anthony V. D'Elia, J.S.C.

(Decided on January 17, 2023)