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Alice D. Bonner, *BH Hasid LLC, Order on Pending Motions and Setting Hearing*, Georgia Business Court Opinions 453 (2018)

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**IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA**

BH HASID LLC,

Plaintiff/Counterclaim-Defendant,

v.

ARYEH KIEFFER, ADDISON CAPITAL
LLC, and ADDISON ADVISORS LLC,

Defendants/Counterclaim-Plaintiffs,

v.

HASID HOLDINGS, LLC and
RONI AVRAHAM

Counterclaim-Defendants.

CIVIL ACTION NO.:
2017CV298598

Bus. Case Div. 1

ORDER ON PENDING MOTIONS AND SETTING HEARING

The above styled matter is before the Court on various pending motions, to wit: (1) BH Hasid, LLC's, Hasid Holdings, LLC's, and Roni Avraham's Motion for Partial Summary Judgment; (2) BH Hasid, LLC's Amended Motion for Accounting; (3) Defendants' Motion to Quash Plaintiffs' Proposed Order; (4) BH Hasid, LLC's Motion to Dismiss Appeal; (5) Defendants and Counterclaim Plaintiffs' Notice of Service of Verified Application for Admission Pro Hac Vice, and Motion for Admission Pro Hac Vice; (6) Defendants'/Counterclaim-Plaintiffs' Motion to Stay Ruling on Plaintiff/Counterclaim Defendants' Motion for Partial Summary Judgment; (7) Defendants' Motion to Stay Proceedings Pending the Resolution of the Parties' Associated Florida Action; (8) BH Hasid, LLC's Motion to Strike Untimely Filings. Having considered the record, the Court finds as follows:

A. Motions related to Defendants/Counterclaim Plaintiffs' Responses to Plaintiff/Counterclaim Defendants' Motion for Partial Summary Judgment

On Aug. 28, 2018, the parties filed a Joint Motion for Extension of Time of all Deadlines. Therein the parties noted that Defendants/Counterclaim Plaintiffs had recently retained new counsel and requested "an order to extend all deadlines by thirty days." On Sept. 4, 2018, the Court entered an order granting the Joint Motion and setting forth specific, amended case management deadlines. On Sept. 5, 2018, Defendants/Counterclaim Plaintiffs filed a Motion for Extension of Time for Expert Witness Disclosure Deadlines, again citing the recent retention of new Defense counsel and indicating that they were awaiting delivery of the case file from former Defense counsel. According to their motion, Defendants/Counterclaim Plaintiffs requested "a thirty (30) day extension of time for the disclosure of expert witnesses intended to be used at trial" and elsewhere in their motion requested "a 30-day extension of time for all deadlines including deadlines pursuant to the Case Management Order."¹ On Oct. 17, 2018, the Court entered an order granting Defendants/Counterclaim Plaintiffs' motion and, again, included specific, amended case management deadlines.

During this same period, on Aug. 31, 2018, Plaintiff/Counterclaim Defendants filed a Motion for Partial Summary Judgment. Plaintiff also filed a Motion for Accounting on Sept. 4, 2018 which was amended on Oct. 10, 2018. On Oct. 31, 2018, Defendants/Counterclaim Plaintiffs filed a response in opposition to the Motion for Partial Summary Judgment and between Friday, Nov. 2, 2018, and on Monday, Nov. 5, 2018 they submitted various related filings and an amended brief opposing the Motion for Partial Summary Judgment.

¹ Motion for Extension of Time for Expert Witness Disclosure Deadlines, p. 3.

Plaintiff/Counterclaim Defendants contend Defendants/Counterclaim Plaintiffs' summary judgment related filings are untimely and should be stricken, and they have submitted to the Court a proposed order granting their Motion for Partial Summary Judgment. Defendants/Counterclaim Plaintiffs argue the Court's order granting their requested thirty (30) day extension of "all deadlines" extended all deadlines, including their time to respond to the Motion for Partial Summary Judgment. Defendants/Counterclaim Plaintiffs have moved to quash the proposed order and request an additional thirty (30) days for their experts to review the records and an additional 15 days to respond to the Motion for Partial Summary Judgment.²

Having considered the record, insofar as the Court granted the motions seeking an extension of "all deadlines" and to avoid any prejudice that may result to Defendants/Counterclaim Plaintiffs from any ambiguity in the Court's orders extending the case management deadlines, and whereas the Court discerns no prejudice that would result to Plaintiff/Counterclaim Defendants from accepting the subject filings, the Court will deem Defendants/Counterclaim Plaintiffs' responsive filings timely submitted. BH Hasid, LLC's Motion to Strike Untimely Filings is hereby DENIED.

However, with respect to the Motion to Quash Plaintiff's Proposed Orders, to the extent Defendants/Counterclaim Plaintiffs seek to "quash" the proposed order submitted by Plaintiff/Counterclaim Defendants, the motion is DENIED. The Court will review the proposed

² Defendants/Counterclaim Plaintiffs also take the position that this Court orally ruled to stay this case entirely pending the resolution of a separate Florida case seeking judicial dissolution of the limited liability companies holding title to the Georgia properties at issue in this action. However, such is plainly belied by the record of this case including, *inter alia*, the Court's: Order on Pending Motions, entered May 22, 2018; Case Management Order, entered May 22, 2018; Order Regarding Motion to Withdraw, entered Jul. 11, 2018; Order Granting Motion to Withdraw and Ordering Defendants to Retain Legal Counsel, entered Jul. 20, 2018; Order Granting Joint Motion for Extension of All Deadlines and Amending Case Management Deadlines, entered Sept. 4, 2018; Order sealing Plaintiff's original Motion for Accounting, entered Sept. 17, 2018; and Order Granting Defendants' Motion for Extension of Time and Amending Case Management Deadlines, entered on Sept. 17, 2018.

order once the subject motions are argued at the scheduled pending motions hearing (*see* Part D, *infra*) and will amend or disregard the proposed order as it deems appropriate. To the extent, Defendants/Counterclaim-Plaintiffs request additional time to further respond to the Motion for Partial Summary Judgment, the motion is DENIED. *See also* Part B, *infra*.

B. Defendants/Counterclaim-Plaintiffs' Motion to Stay Ruling on Plaintiff/Counterclaim Defendants' Motion for Partial Summary Judgment

Defendants/Counterclaim Plaintiffs have also filed a Motion to Stay Ruling on Plaintiff/Counterclaim-Defendants' Motion for Partial Summary Judgment, asking the Court to stay a ruling on the Motion for Partial Summary Judgment until 45 days after the expiration of the discovery deadline of Dec. 10, 2018.

Georgia law expressly contemplates that summary judgment proceedings can proceed even when discovery has not been completed and sets forth a specific procedure when a non-movant cannot present by affidavit facts essential to justify his opposition to the motion. Specifically, O.C.G.A. §9-11-56 provides in part:

(a) For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, **at any time after the expiration of 30 days from the commencement of the action** or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, **at any time**, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof...

(f) When affidavits are unavailable. **Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavits facts essential to justify his opposition**, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to

be had, or may make such other order as is just.

(Emphasis added). As noted by the Court of Appeals of Georgia in 915 Indian Trail, LLC v.

State Bank & Tr. Co., 328 Ga. App. 524, 759 S.E.2d 654 (2014):

Under O.C.G.A. § 9-11-56(a), a plaintiff may move for summary judgment “at any time.” “Thus, it is not unusual for discovery to be ongoing at the time summary judgment motions are filed and/or ruled upon.” Corry v. Robinson, 207 Ga. App. 167, 170(3), 427 S.E.2d 507 (1993). But when a party is “faced with a motion for summary judgment and the unavailability of evidence to rebut such motion,” a party must seek relief under O.C.G.A. § 9-11-56(f).

Id. at 533.

Here, Defendants/Counterclaim Plaintiffs did not submit any affidavit in support of their Motion to Stay Ruling on Plaintiff/Counterclaim Defendants’ Motion for Partial Summary Judgment. However, with their Motion to Quash Proposed Orders they submitted the Affidavit of Aryeh Kieffer, dated Oct. 11, 2018, wherein Mr. Kieffer avers that: “[u]ntil recently, [he] was unable to find and retain sufficiently qualified expert witnesses willing to testify on [his] behalf in the narrow fields of real estate syndication and real estate portfolio management”; his prior counsel had retained the case file making review of the case by his experts and current counsel difficult; and “[f]ive days ago, [he] was able to retain the services of two qualified and knowledgeable experts to testify on [his] behalf and assist [him] in making [his] case.”³

Insofar as Mr. Kieffer acknowledges he was able to retain “qualified and knowledgeable experts to testify on [his] behalf” in early October and Defendants/Counterclaim Plaintiffs have submitted the Affidavit of Expert Joseph Drabkin in opposing the Motion for Partial Summary Judgment, and whereas Defendants/Counterclaim Plaintiffs have not presented any other affidavit stating reasons why they cannot present by affidavit facts essential to their opposition,

³ Affidavit of Aryeh Kieffer, ¶¶ 3-5.

the Motion to Stay Ruling on Plaintiff/Counterclaim-Defendants' Motion for Partial Summary Judgment is hereby DENIED. *See* 915 Indian Trail, LLC, 328 Ga. App. at 534 (affirming denial of request for continuance where party failed to demonstrate by affidavit “that a continuance would lead to the discovery of relevant evidence’ as required by [O.C.G.A. §9-11-56(f)]”) (citing JarAllah v. Schoen, 243 Ga.App. 402, 406(4), 531 S.E.2d 778 (2000)); Smyrna Dev. Co. v. Whitener Ltd. P'ship, 280 Ga. App. 788, 791, 635 S.E.2d 173, 175 (2006).

C. Notice of Service of Verified Application for Admission *Pro Hac Vice*, and Motion for Admission *Pro Hac Vice*

On Jul. 20, 2018, the Court entered an Order Granting Motion to Withdraw and Ordering Defendants to Retain Legal Counsel. Therein the Court, *inter alia*, ordered Defendants to retain new legal counsel and to have an attorney file an entry of appearance with the Court within thirty (30) days of the entry of the Order noting that, under Georgia law, Addison Capital, LLC and Addison Advisors, LLC may only proceed in this action represented by a licensed attorney. *See* Winzer v. EHCA Dunwoody, LLC, 277 Ga. App. 710, 713–14, 627 S.E.2d 426, 430 (2006); Eckles v. Atlanta Tech. Grp., Inc., 267 Ga. 801, 805, 485 S.E.2d 22, 26 (1997).

On Aug. 28, 2018, Ms. Candace L. Sneed filed an Entry of Appearance on behalf of Defendants Aryeh Kieffer, Addison Capital LLC and Addison Advisors LLC. Subsequently, on Oct. 31, 2018, Defendants/Counterclaim Plaintiffs filed a Notice of Service of Verified Application for Admission *Pro Hac Vice*, and Motion for Admission *Pro Hac Vice* (“Notice and Motion for Admission PHV”), wherein they seek the admission *pro hac vice* of Ms. Debbie Campbell, Esq., sponsored by Ms. Sneed.

Georgia Uniform Superior Court Rule 4.4 governs such applications and provides that “[a]n application shall state the information listed in Appendix A to th[e] rule.” Ga. Unif. Super.

Ct. R. 4.4(E)(1). Appendix A to Rule 4.4 states that an application “shall include:...2. the name, address and phone number of each client sought to be represented.” Id.

Here, although the Notice and Motion for Admission PHV was brought by “Defendants and Counterclaim Plaintiffs, Aryeh Kieffer, et al...by and through undersigned counsel”, the Notice portion of the filing indicates “Defendant Aryeh Kieffer” retained Ms. Campbell for representation in this action subject to her admission *pro hac vice*. Further, Ms. Campbell’s Verified Application for *Pro Hac Vice* Admission expressly states:

3. I have been retained to represent the following
Client(s): Aryeh Kieffer
7050 W Palmetto Park Road
#15-827
Boca Raton, FL 33433
No additional Clients

(Emphasis added).

Thus, it is unclear from the face of the Notice and Motion for Admission PHV whether Ms. Campbell seeks admission to represent only Aryeh Kieffer *pro hac vice* or seeks to so represent all of the named Defendants. Thus, Defense counsel is directed to advise the Court **within five days of the entry of this order** if the Notice and Motion for Admission PHV is only with respect to the representation of Aryeh Kieffer or, if it is with respect to the representation of all the named Defendants, the Court directs Ms. Campbell to amend her verified application accordingly and to serve the amended verified application in accordance with Rule 4.4 **within five days of the entry of this order.**

D. Pending Motions Hearing

In light of the Court's rulings herein, the following motions remain pending: Plaintiffs/Counterclaim-Defendants' Motion for Partial Summary Judgment; BH Hasid, LLC's Amended Motion for Accounting; BH Hasid, LLC's Motion to Dismiss Appeal; and Defendants' Motion to Stay Proceedings Pending the Resolution of the Parties' Associated Florida Action. The Court will hold a hearing on the foregoing motions on **December 14, 2018 at 10:00 AM**. Counsel is ordered to appear. The hearing will be held in Courtroom 9J of the Fulton County Courthouse, 136 Pryor Street, 9th Floor, Atlanta, Georgia 30303. A court reporter will not be provided. If the parties wish for the hearing or any other court proceeding to be taken down, counsel must confer and make appropriate arrangements to have a court reporter present.

SO ORDERED this 30 day of November, 2018.

Alice D. Bonner

JUDGE ALICE D. BONNER
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

Served upon registered service contacts through eFileGA

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