At an I.A.S. Trial Term, Par the Supreme of Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the //) day of O Cal. No. KOSIL Index No. 5 0 4/36/15 Plaintiff(s) - against -Schnitzler Defendant(s) The following papers numbered 1 to read on this motion Papers Numbered Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed Answering Affidavit (Affirmation) Reply Affidavit (Affirmation) Affidavit (Affirmation) Pleadings - Exhibits Stipulations - Minutes Filed Papers Mtn for clarification granted to the extent that the decision is clarified to said order Indicates that I was a one third owner of all membership By its terms, + For Clerks use only EJV-rev 11-04 WRENCE KNIPEL 0017 SUPREME COURT JUSTICE

NYSCEF DOC. NO. 364

INDEX NO. 504136/2015

RECEIVED NYSCEF: 10/26/2018

1 SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS: CIVIL TERM: PART 76-LK 3 LEONID ROSIN, INDIVIDUALLY, AS A MEMBER OF ZIGGY SNACK FOODS, 4 LLC AND AS A SHAREHOLDER OF CUSTOM CUT SNACK FOODS, INC, 5 Index No. 6 Plaintiffs , 504136/15 7 - against -CALENDAR 8 SIGMOND SCHNITZLER A/K/A ZIGGY SCHHNITZLER, ZIGGY SNACKS 9 FOODS, LLC, CUSTOM CUT SNACK FOODS, INC., AND JOEL BRAVER, 10 Defendants . 11 360 Adams Street 12 Brooklyn, New York September 27, 2018 13 B E F O R E: HONORABLE LAWRENCE KNIPEL, 14 Chief Administrative Justice 15 APPEARANCES: Attorneys for the Plaintiffs 16 HOGUET NEWMAN REGAL & KENNY, LLP 10 East 40th Street 17 New York, New York 10016 By: ANDREW N. BOURNE, ESQ. 18 Attorneys for the Defendant-Schnitzler, et al 19 LEVINE & ASSOCIATES 15 Barclay Road 20 Scarsdale, New York 10583 By: MICHAEL LEVINE, ESQ. 21 Attorneys for the Defendant-Joel Braver 22 GOLDBERG, WEG & MARCUS, PLLC 122 West 27th Street 23 New York, New York 10006 By: ISRAEL GOLDBERG, ESQ. 24 25 Margaret Breitfeller, RPR Senior Court Reporter - MB -

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THE CLERK: Leonid Rosin-v-Sigmond Schnitzler, et al, under Index number 50436/15. Counsel, appearances for the record.

MR. BOURNE: Andrew Bourne, attorney for the plaintiffs.

MR. GOLDBERG: Israel Goldberg, attorney for the defendant Branever.

MR. LEVINE: Michael Levine for the defendant Schnitzler.

THE COURT: By the way, was this the one someone called my office 5 to 5:00 yesterday?

MR. BOURNE: That is right.

THE COURT: One of the parties said they didn't want to participate in the phone call unless it was on the record.

MR. BOURNE: Yes.

THE COURT: But in any event whose Order to Show Cause?

MR. BOURNE: It is ours, Your Honor, plaintiff.

THE COURT: What do you want to tell me?

MR. BOURNE: Thank you, Your Honor. Andrew
Bourne. This is what we submit, a relatively simple Order
to Show Cause. We noticed a deposition to take the
testimony of a third-party witness who is going to be out
of the country. There is a trial scheduled. I understand

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he is going to leave tomorrow. We wanted to present his testimony at trial.

Last night at four o'clock we received a motion for a protective order. We believe there are some defects in that motion. We asked our capable adversary if we could proceed on the deposition with a full reservation of rights. Your Honor could rule on that. That request was refused.

We attempted to contact chambers. We couldn't get any guidance because defense counsel demanded it be on the record.

All we are seeking for is a short deposition so there can't be any objections to any property order irregularities because the defense attorney wasn't there, so we could present the testimony at trial next week.

THE COURT: Opposition?

MR. LEVINE: We received notice of deposition post Note of Issue on September 7th. I fully expected to get a motion. I assume it was September 7, I thought, and we didn't get 20 days notice. I assume we were going to get a notice from the Court to take this witness. There was no motion forthcoming. I didn't hear anything. I assumed it wasn't going forward on Tuesday.

I get an email from counsel telling me that we were going to go forward at a different time and different

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location today at eleven o'clock.

At that point of time I basically brought a motion for a protective order, which is now before you. It is on for the 4th, which is the time we are supposed to go to trial.

I will talk about that in a minute. We have no request for an Order to Show Cause. We have a request for interlocutory relief. It is exactly the same relief. The Order to Show Cause is allowed to go forward.

THE COURT: The individual is leaving the country tomorrow?

MR. BOURNE: We understand it to be tomorrow.

MR. LEVINE: There is no affidavit from this person.

Here's what we don't know. He says there is a witness going to be called at trial. He doesn't say what the witness will testify to, what the subject matter of the testimony is. It sounds duplicative.

Does it deal with the main issues?

The gravamen of this case, according to the plaintiff, is they wanted a declaration that they are one-third owner of two entities. They made a motion for Summary Judgment. That motion was granted by the Court, although it will be reversed on appeal.

All we have left is a monetary damage claim. It is now scheduled for a non-jury trial. We don't know what

now beneduled for

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this guy is going to testify to. There is no affidavit from this person saying when he is going to leave.

Additionally, counsel learned in early September that the witness would be out of the country during quote "the relevant time period".

Why couldn't a motion be made to adjourn the trial until this guy come back?

I would have consented to it.

Is he gone for a day, a week, a year? None of that is in the papers. It is not factually true. No copy of plane tickets, no nothing, which you normally do.

THE COURT: Okay. You make a couple of good points. So counsel is asking: (A) what relevance is this witness' testimony going to have to the evidence in the case and (B) what's his schedule as far as leaving and coming back.

MR. BOURNE: As far as we understand, he's going to be out of the country to Israel for at least the month of October. He is -- he was a product manager and floor plan manager at the company.

As counsel pointed out, there are claims for monies damages still pending. There are also equitable claims still pending, including a claim for equitable dissolution.

We'll attempt to reargue the jury issue now. He thinks this witness has firsthand knowledge. I spoke to

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counsel yesterday of the breach of the fiduciary duty and the theft we allege his client did.

He knows about the increased production issues based on fraudulent purchase orders submitted by his client. He knows about the stealing of goods and potentially the misappropriation of money.

These are the things he knows about that go directly to, at least under counsel's estimation, directly to the heart of the trial.

He is not duplicative. He is a fact witness. He is no longer employed by the company. He's, you know, what we are left with.

What we attempted to do when we learned this, we noticed the deposition so we could preserve the record.

THE COURT: Is this an old case? Is it beyond standards and goals?

MR. BOURNE: Yes. We had the trial scheduled a couple of months ago.

THE COURT: When was the Note of Issue filed?

MR. LEVINE: Back in July.

MR. BOURNE: It was filed a long time ago.

THE COURT: Why wasn't he deposed a long time ago?

MR. BOURNE: It was before my time. There was only three depositions of the three principals. There was no third-party discovery for whatever reason.

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1 THE COURT: You represent the plaintiff?

MR. BOURNE: The plaintiff.

THE COURT: So you filed the Note of Issue?

MR. BOURNE: We did not.

MR. LEVINE: We did with a jury demand.

THE COURT: You want to strike the jury demand?

MR. LEVINE: We struck it for now.

MR. GOLDBERG: I am sorry, we have the Appellate Court standing here.

MR. LEVINE: It will be the same as the last couple of matters.

THE COURT: You could have objected to the Note of Issue being filed.

So why are you having the deposition so late?

MR. LEVINE: Or made a motion.

There are a number of things they should have done under the statute. They can't just serve a notice of deposition. They need the Court's permission to do that.

THE COURT: Who do you represent?

MR. GOLDBERG: I represent Mr. Joel Braver, one of the defendants.

THE COURT: What is your position?

MR. GOLDBERG: We are an owner. He is a defendant. We want a dissolution. We need to be named as a party.

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His client actually stole money from the companies involved here. We would like this deposition.

If Your Honor would recall, I had asked for certain depositions before the Note of Issue was filed and after the Note of Issue was filed.

The Court was very restrictive. I got 20 hours of depositions.

If it is someone out of the country, we would have testimony on the issue of damages. That would be important in having this witness here. There is no harm in taking the deposition.

MR. LEVINE: There is.

MR. GOLDBERG: If Your Honor rules for some reason that the deposition is not admissible, let's do that while the person is still here. Let's not squander that opportunity and Your Honor will make a ruling.

MR. LEVINE: May I be heard before you sign the Order to Show Cause?

THE COURT: Yes, yes.

MR. GOLDBERG: Most likely, you will have in limine motions before apparently two motions have been filed by my codefendant, Mr. Schnitzler. He asked for an adjournment of the trial. We are looking to go forward. I actually rearranged my whole schedule right before the holiday, which is a date we scheduled months ago.

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There is no harm to taking the deposition subject to Your Honor's further determination on the motion.

MR. BOURNE: That is all we are seeking here. The ability to take this deposition.

Counsel for the defendant Schnitzler is reserving all rights to object to the deposition and the admissibility of this deposition, but this witness we understand is leaving the country. We'd like the opportunity to talk to him.

If Your Honor so denies the motion, we will have the ability to take his testimony, which would be very helpful.

MR. LEVINE: He never answered your question.

THE COURT: He said a month later.

MR. LEVINE: I don't want to put anything on the record.

THE COURT: Don't talk at the same time how is the court reporter gonna get it?

MR. LEVINE: They could have made a motion to compel us. That was their obligation.

They can't serve a post Note of Issue notice and expecting me now to say I have a deposition at noon when I have a two o'clock in Queens. It is just not fair.

They are asking for the same relief, an interlocutory decision, that they are asking in the underlying motion.

I don't care if you sign the Order to Show Cause. There is no way you can lift the stay without reading my

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papers. It is completely violative of what happened here. You can't just serve a notice of deposition after the Note of Issue was filed without Court approval. That is what they did.

It is a non-jury trial. We can start the trial. They can present the witnesses. It is before you. You put a block of days together, I think. I think you said last time, I assume there are several days open, if we tried the case and they wanted to put another witness on at some other point in time, what is the rush here?

I just don't understand it. I am being deprived the right to hear this witness in person.

THE COURT: He made a good point. I could always start the trial and we can put it on when he is back, if he is back in November.

MR. BOURNE: With all due respect, we have been working hard to get this case to trial. We faced obstacle after obstacle. We are now there.

MR. LEVINE: We filed the Note of Issue.

MR. BOURNE: Again, we are not going back to debate whether the Note of Issue was properly filed or not.

THE COURT: What is the prejudice to you if he goes to Israel, he comes back and he is leaving now, he comes back in November and he'll testify in November?

MR. LEVINE: Exactly, exactly.

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MR. GOLDBERG: Can I tell you what the prejudice is?

THE COURT: Yes.

MR. GOLDBERG: We have a company where his client has an ownership interest. My client can't operate this company moving forward. Every month costs them money.

MR. LEVINE: What does that have to do with anything? It is not a subject matter for the trial.

MR. GOLDBERG: Can I finish?

Justice delayed is just denied. You pushed really hard. You wouldn't let me take hours of depositions. I got 45 minutes of depositions. You wouldn't let me take depositions.

MR. LEVINE: Inaccurate.

MR. GOLDBERG: Will you stop already.

MR. LEVINE: I can't just stand here.

THE COURT: When you are a lawyer, you got to be a poker player and let the other party talk.

MR. LEVINE: I understand.

MR. GOLDBERG: We need to get the matter done and completed. Everybody set the time aside. The witness is not here. He'll come back or he won't come back.

There is a valid reason to get his deposition testimony, so we can put it before the Court. If Your Honor rules at the time of trial you want to hear from the

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witness directly, not from the deposition testimony, then that is fine, we'll have to deal with it. There is no harm.

First of all, the defendant will have, the defendant will have the benefit of hearing the testimony of this witness before the trial. What is the harm?

MR. LEVINE: I am being deprived of the Court seeing the witness' demeanor and the Court deciding on me asking in court questions.

THE COURT: How long is this trial supposed to take?

MR. LEVINE: Your Honor set aside four days.

MR. GOLDBERG: Given your recent decision, it will probably take two or three days.

It will take less time because you already decided a major issue in the case.

THE COURT: You say you spoke to him and he is coming back in a month?

MR. BOURNE: My understanding is he will be gone for the month of October. I do not know the exact date. I intend to ask him.

THE COURT: You say you want to take his deposition this afternoon?

MR. BOURNE: He is in a conference hall around the corner.

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THE COURT: And, counsel, you are busy?

MR. LEVINE: I have a two o'clock. This is a non-jury trial. We can start the trial and when he comes back in November, except I got to ask for one more day.

MR. GOLDBERG: No.

THE COURT: We're going to start when it is scheduled all things being equal. We can start the trial, go through evidence and if he is going to be back in November, I don't see the prejudice.

Do you want to go speak to him and make sure when he is coming back?

I don't want to lose him.

MR. GOLDBERG: This whole deposition will take no longer than a half an hour to 45 minutes.

MR. LEVINE: I have no idea.

THE COURT: Unless counsel asks a lot of questions.

MR. GOLDBERG: Last time you wouldn't let me ask many questions.

THE COURT: If he is coming back in November, I really don't see any prejudice. If something is exigent. It is one that is close. If he is coming back in November and it is a non-jury trial, we can put it over.

MR. LEVINE: Can I raise one other issue?

MR. GOLDBERG: There is no harm in having a

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INDEX NO. 504136/2015 KINGS COUNTY CLERK 10/26/2018 10:24 AM NYSCEF DOC. NO. 364 RECEIVED NYSCEF: 10/26/2018 14 Proceedings 1 deposition. 2 MR. LEVINE: There is. 3 MR. GOLDBERG: If you decide that you want to hear him after you listen to his motion then because I don't 4 want to lose him, let's wait until the motion is decided. 5 6 Let's take it in the meantime, put the deposition 7 transcript on ice until Your Honor decides. 8 THE COURT: Go speak to your client -- or not your 9 client, the individual and see when he is coming back. He 10 is right in the building you said. MR. LEVINE: Can I raise another issue? 11 12 THE COURT: What other issue? 13 MR. LEVINE: We're scheduled to start Thursday, 14 the 4th. I am making an application to start on Friday, the 5th. The reason is I have been directed by Judge Walsh 15 16 in Rockland County for a heavy hearing in a custody 17 visitation matter. That will take the whole day on Thursday, the 4th, therefore, I am just asking the Court to 18 give me one day, Friday, the 5th or either Monday. I just 19 need to be there for the custody battle. It is ongoing. 20 21 There is a lot of animosity. I just need to be there.

MR. BOURNE: With all due respect, this is the first we heard of this. What's the caption of the case and the index number?

MR. LEVINE: Cohen-versus-Cohen.

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THE COURT: The answer is the promulgation of custody matters takes priority. If you furnish counsel with the particulars, we'll start stay the next day. Be in touch with them to let them know. I am here.

MR. LEVINE: I can give it to him right now.

MR. GOLDBERG: If the custody matter is put over, we are going forward.

MR. LEVINE: Absolutely. It is not going to be put over because of subpoenaed witnesses.

MR. GOLDBERG: How do you know? This was not supposed to be put over either.

THE COURT: Go check with the individual and come back.

(Pause in proceedings.)

MR. GOLDBERG: We are withdrawing the application. We'll taking care of it.

THE COURT: The Order to Show Cause is withdrawn.

MR. GOLDBERG: And also the motion for the protective order is moot. So you got two dispositions in one morning.

THE COURT: Lucky me.

MR. LEVINE: On the record.

The sanctions motion is about to come. Counsel represented the witness will be gone. Counsel represented to this Court the witness would be gone for the month of

INDEX NO. 504136/2015 KINGS COUNTY CLERK 10/26/2018 10:24 AM NYSCEF DOC. NO. 364 RECEIVED NYSCEF: 10/26/2018 16 Proceedings October. 1 On a call with the witness, the witness said he's 2 3 leaving tomorrow and he'll be back Monday. MR. GOLDBERG: Judge, you ever have a witness not 4 5 tell you the truth? MR. LEVINE: Fine. He'll put that in his 6 7 opposition to the sanctions motion. 8 Thank you, Your Honor. 9 THE COURT: Has everyone made their record, I 10 quess? MR. GOLDBERG: We will move for sanctions against 11 12 you and everybody will be happy. MR. LEVINE: You should definitely do that. 13 THE COURT: I will see everybody on the next 14 15 motion or trial date. MR. LEVINE: I need to order the transcript. 16 MR. GOLDBERG: I don't need it because he said he 17 is going to file an affidavit of engagement. 18 19 MR. LEVINE: I will put it on the record. It is 20 Cohen. MR. GOLDBERG: It is not that I don't trust 21 counsel, I just want to make sure it is going forward. 22 MR. LEVINE: Call Judge Walsh. 23 MR. GOLDBERG: I don't have to call Judge Walsh. 24 25 I can check on E-file Court.

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MR. LEVINE: I am officially ordering it.

Your Honor, you have it on for the 5th, not the 4th?

THE COURT: Yeah.

MR. GOLDBERG: What time are we going to break on Friday?

THE COURT: Whatever time you want me to break.

MR. GOLDBERG: Because candle lighting is earlier. It just becomes a little more difficult.

THE COURT: Don't worry we'll break in enough time to observe Sabbath.

MR. BOURNE: Just for the record, the affidavit remains true. We understood him to be out of the country for the relevant time period. It was supposed to be from the 4th to the 5th. I did mistakenly say that to mean he was out of the country in October, but the facts remain true.

MR. LEVINE: Counsel can explain all that in his opposition to the sanctions motion.

THE COURT: All right.

REPORTER'S CERTIFICATION

I hereby certify that the foregoing is a true and accurate transcript of the proceedings.

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SENIOR COURT REPORTER