

Cox v Lehman Brothers, Inc.
2002 NY Slip Op 30090(U)
April 4, 2002
Supreme Court, New York County
Docket Number: 111006/00
Judge: Paula J. Omansky
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: OMANSKY,
Justice

PART 47

RODNEY T. COX
- v -
LEHMAN BROTHERS, INC.

INDEX NO. 111006/00
MOTION DATE 2/22/02
MOTION SEQ. NO. 3
MOTION CAL. NO. 26

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

SCANNED
APR 18 2002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____

Dated: 4/12/02

[Signature]
J. S. C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

-----X
RODNEY T. COX

Index No. 111006/00

Plaintiff,

DECISION AND ORDER

-against-

LEHMAN BROTHERS, INC.
Defendant.

-----X
PAULA J. OMANSKY, J.:

Defendant Lehman moves for a separate non-jury trial of its counterclaims sounding in equity in accordance with CPLR 606, 4101 and 4011. In addition, defendants moves to stay the jury trial of plaintiff's complaint and the remaining counterclaims until its equitable counterclaims are heard.

Plaintiff Rodney T. COX cross-moves to dismiss the counterclaims and affirmative defenses.

FACTS

Plaintiff has an account with defendant broker. In 1989, defendant alleges that plaintiff maintained 120,000 shares of Borealis Exploration Stock ("Borealis") in his account. Defendant stated that a margin call was made on the account in December 1989 and that plaintiff failed to meet the margin call.

In March 1990, defendant maintains that it demanded payment of the sum owed and that plaintiff agreed to liquidate shares. Defendant claims that between 1989 to February 1990, 7,600 shares of Borealis were liquidated leaving a balance of 112,400 shares. According to defendant, an additional 30,700 shares were liquidated

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between August 1990 through July 1993 which allegedly reduced plaintiff's position in Borealis from 112,400 to 81,700.

Defendant stated that it called plaintiff regarding the debit balance of the amount owing from the margin call and informed plaintiff that defendant would refrain from commencing an arbitration proceeding as long as plaintiff continued to make regular payments towards reducing the debit balance. In May 1996, plaintiff allegedly paid down the principal amount of the debt so that the principal amount owing totaled \$28,406.29

Defendant stated that in October or November 1996, plaintiff tendered several checks to defendant but refused to pay the interest on the debit balance.

In March 1998, defendant initiated an action by filing a Statement of Claim with the AMEX arbitration division. In April 1998, plaintiff filed an answer.

On March 16, 1999, before the arbitration hearing commenced, the parties entered into a stipulation of settlement. According to defendant, the intent of the parties was that plaintiff would pay defendant \$60,000 and defendant would return to plaintiff all the shares of Borealis that defendant was holding in plaintiff's account. Defendant states that plaintiff only had 81,700 shares of Borealis.

Defendant maintains that the settlement mistakenly listed the original number of shares owned by plaintiff in Borealis and does

not state the actual number of shares in plaintiff's account in March 1999. Instead, the agreement provided that plaintiff pay defendant \$60,000 in three installments and that

“ [u]pon collection of the full amount of the settlement amount set forth in paragraph 1 hereof, to wit, the sum of Sixty Thousand and 00/100 (\$60,000) Dollars, Claimant [Lehman] shall remit to Respondent [Cox] 112,400 shares of stock in Borealis Exploration Limited.

When defendant attempted to return to plaintiff his correct number of shares, plaintiff demanded that defendant return to him 112,400 shares as stated in the March 1999 settlement.

Defendant then offered plaintiff two options, he could accept the return of the 81,700 shares or defendant would return the \$60,000 and arbitrate the dispute on the merits.

Plaintiff rejected defendant's offer and commenced the present action to enforce the terms of the stipulation. Defendant interposed equitable counterclaims for reformation and rescission of the agreement based on mutual mistake and unilateral mistake on the part of defendant.

Plaintiff alleges that defendant wrote the agreement and should be required to perform accordingly. Plaintiff also states that defendant has not produced any evidence that a mistake was made and that defendant's vice president litigation approved and assented to the settlement terms.

DISCUSSION

Reformation of a contract in this state is not granted for the

purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties (Georae Baker Mgt. Corp. v Acme Quilting Co., Inc.; 46 NY2d 211, 219 [1978]). Generally, there is a presumption that a deliberately prepared and executed written agreement manifests the true intention of the parties and a correspondently high order of evidence is required to overcome that presumption (Chimart Assocs. v Paul, 66 NY2d 570, 574 [1986]).

However, the facts as alleged by defendant, if proven, support a claim that some of the shares of Borealis in plaintiff's account were sold to pay his margin call (Food Service Mkt., Inc. v National Foods, Inc., 225 AD2d 477 [1st Dept 1996]). If defendant's version of the facts is true, then plaintiff would not be entitled to more shares than he owned and he shall not be permitted to commit a fraud and the court shall not enforce a clearly mistaken writing (ibid.).

Although plaintiff claims that defendant should be bound by its settlement, plaintiff does not present any evidence to show that he indeed had more than 81,700 shares of Borealis in his account when the stipulation was signed or that his shares of Borealis were improperly liquidated by plaintiff.

The court grants defendant's motion for a separate non-jury trial on defendant's reformation and rescission counterclaims (CPLR

603). A jury trial on plaintiff's contract claims and the defendant's remaining counterclaims is stayed.

Plaintiff's cross motion to dismiss defendant's counterclaims and the affirmative defenses is denied. The court's has considered the plaintiff's remaining objections to defendant's application and finds them to be without merit.

Accordingly, it is

ORDERED that defendant's motion for a separate non-jury trial its on reformation and rescission counterclaims is granted and these claims are severed for trial; and it is further

ORDERED that the jury trial on the claims raised by plaintiff in the complaint and the remaining counterclaims raised by defendant are stayed pending the outcome of defendant's equitable counterclaims; and it is further

ORDERED that plaintiff's cross motion is denied in its entirety; and it is further

ORDERED that the parties shall appear for a pre-trial conference to set a hearing date for the equitable claims on May 17, 2002 at 11: a.m. at 71 Thomas St. Rm, 205, N.Y., N.Y.

DATED: April 4, 2002

ENTER:



PAULA J. OMANSKY
J.S.C.