G.K. Alan Assoc., Inc. v Lazzari
2005 NY Slip Op 30102(U)
December 14, 2005
Supreme Court, Nassau County
Docket Number: 3456-03/
Judge: Zelda Jonas
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. ZELDA JONAS
Justice

TRIAL/IAS PART 19

G.K. ALAN ASSOC. INC.,

Plaintiff,

Index No. 13456/03

- against -

Sequence No. 9 & 10
Motion Date: October 17, 2005

DERVAL LAZZARI,

Defendant.

DERVAL LAZZARI and ACME AMERICAN REPAIRS, INC.,

Counterclaim-Plaintiffs,

- against -

G.K. ALAN ASSOC. INC. and HARVEY KATZENBERG,

Counterclaim-Defendants.

The following papers read on this motion:

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Motion by defendant for an order pursuant to CPLR 3212 granting him summary judgment dismissing the plaintiff's complaint is granted.

Motion by plaintiff for an order pursuant to CPLR 3212 granting it summary judgment dismissing the defendant's affirmative defenses and counterclaims is determined as provided herein.

This is an action for breach of contract. The plaintiff's amended complaint alleges that: "On or about March 21, 2001, G. K. Alan and Lazzari entered into a written agreement (the 'Consulting Agreement') whereby Lazzari agreed to engage G.K. Alan as a consultant on behalf of four affiliated companies in which Lazzari was becoming, on that day, a significant shareholder (the 'Companies')." The amended complaint further alleges that: "Pursuant to paragraph 3 of the [Consulting Agreement], Lazzari agreed to pay G. K. Alan consulting fees of $25,000 per month, commencing on August 1, 2001, for a term of fifteen (15) years, plus expenses." In this regard, it is additionally alleged that: "Lazzari has failed to make any payments due under the Consulting Agreement since the July 2003 payment."

The plaintiff's amended complaint goes on to allege that: "On or about March 21, 2001, Lazzari purchased, pursuant to a written stock purchase agreement, his interests in the Companies from Harvey Katzenberg ('Katzenberg'), who, along with his wife, was one of the two [principals] of G. K. Alan (the 'Stock Purchase Agreement')." It is furthermore alleged that: "Pursuant to the Stock Purchase Agreement, Lazzari agreed to pay Katzenberg the amount of $1,900,000 (one million nine hundred thousand dollars) over a period of fifteen years." It is additionally alleged that: "The contemporaneously executed Stock Purchase Agreement and Consulting Agreement represented an integrated transaction whereby Katzenberg sold his interest in the Companies to Lazzari for a down payment, a series of payments under the Consulting Agreement and a series of payments under the Stock Purchase Agreement (the 'Transaction')."

In his answer to the amended complaint, defendant Lazzari alleges that: "By the terms of the Stock Purchase Agreement the two agreements were intended to be separate. Paragraph 2.2 of the Stock Purchase Agreement prescribed the amount Lazzari is to pay for the stock, and paragraph 3 of the Consulting Agreement prescribes how much Lazzari is to pay for G.K. Alan's consulting services." Defendant Lazzari's answer to the amended complaint also asserts five (5) affirmative defenses and two (2) counterclaims.

Taking the defendant's motion first, the Court will consider it as addressed to the plaintiff's amended complaint. In the June 25, 2005 order adjourning this motion, this Court expressed the opinion that "the defendant has made a prima facie showing that he

was justified in terminating the 'Consulting Agreement' between the plaintiff and defendant." The justification being the scheme to defraud insurance companies and overbill the Companies. The Court now so holds. In addition to Defendant's Exhibit F (*i.e.*, the June 4, 2003 letter from Pearl Feuer [Katzenberg], the President of G. K. Alan, to Donna Zerbo, Esq.), the Court relies upon the admissions made by Mr. Katzenberg in his September 26, 2005 affidavit in support of plaintiff's motion, his other affidavits, and his deposition testimony. The Court additionally reaffirms its prior holding that "the conduct of the plaintiff's principals precludes the plaintiff from recovering any further 'consulting fees' under the Consulting Agreement."

The plaintiff opposes the defendant's motion, inter alia, on the grounds that "it is G. K. Alan's position in this case that the entire consideration which Lazzari agreed to pay under the Consulting Agreement is payment for the stock which Katzenberg sold Lazzari in March 2001" (Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, p. 4). The Court has previously rejected this argument. In this regard, the Court reaffirms its prior holding that "the Consulting Agreement as written can only be interpreted as a contract by the defendant to hire the plaintiff to provide consulting services to the Acme Companies [referred to in this decision as the 'Companies']." The Court cannot ignore the plain language of the Consulting Agreement and interpret it as a "tax device" designed to avoid or evade tax laws. If it is a "tax device," the plaintiff's amended complaint would still be dismissed because the Court will not enforce a sham agreement.

It is furthermore argued in the plaintiff's memorandum of law that: "Defendant's Summary Judgment Motion is a Covert Attempt to Replead a Previously Dismissed Affirmative Defense and Counterclaim." This argument is without merit. In another order signed June 21, 2005, this Court held that it "had mistakenly concluded in the January 5, 2005 order that the defendant lacked standing to assert his first and second affirmative defenses" and granted defendant leave to amend his answer by adding three affirmative defenses and two counterclaims. The standing issue has thus been resolved in favor of the defendant. This Court's prior orders dismissing the defendants' counterclaims and affirmative defenses do not bar the assertion of the affirmative defenses and counterclaims in the defendant's answer to the plaintiff's amended complaint.

It is also argued in the plaintiff's memorandum of law that: "Lazzari is Himself Actively Involved in the Alleged Scheme to Defraud Insurance Companies." This argument is without merit as well. The Court of Appeals has held that: "The doctrine of unclean hands is only available when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct" (*Weiss v. Mayflower Doughnut Corp.*, 1 N.Y.2d 310, 316; *see, also*, *Fade v. Pugliani*, 8 A.D.3d 612, 614). There is no showing that the plaintiff has been injured by the defendant's alleged participation in the fraudulent scheme.

Turning to the plaintiff's motion, the Court rules as follows: The defendant's affirmative defenses are sustained to the extent they allege that the defendant was

justified in terminating the Consulting Agreement. With the dismissal of the plaintiff's complaint, that branch of the plaintiff's motion seeking dismissal of the defendant's affirmative defenses is denied as moot. As to the defendant's three counterclaims, all of which in substance seek rescission of the Consulting Agreement, the plaintiff's motion is denied because a triable issue has been raised as to the nature of the Consulting Agreement.

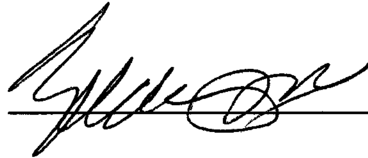
It is the rule that remedy of rescission "lies in equity and is a matter of discretion" (*Symphony Space v. Pergola Props.*, 88 N.Y.2d 466, 485; *Rudman v. Cowles Communications, Inc.*, 30 N.Y.2d 1, 13). If it is determined that the Consulting Agreement is a "tax device," rescission will not be granted. The Court will not grant relief to either party based upon a sham agreement. In the event that it is determined that the Consulting Agreement is a legitimate contract for consulting services, then there will be a further triable issue as to the plaintiff's performance under the Consulting Agreement. In this regard, the Court notes that on November 1, 2004, the Appellate Division, Second Department, affirmed this Court's denial of plaintiff's prior motion for summary judgment, inter alia, holding that a question of fact exists regarding plaintiff's own performance under the Consulting Agreement (Exhibit 1 to Defendant's Reply Memorandum of Law).

Lastly, the plaintiff's motion is granted to the extent that the claims asserted against Mr. Katzenberg in the defendant's counterclaims shall be dismissed for lack of personal jurisdiction. Mr. Katzenberg states in his affidavit in support of the plaintiff's

motion that: "[He] [has] never been served with process in this action, nor has the defendant ever made any attempt to join [him] in this action in any capacity." This statement has not been controverted. Thus, this affirmative defense is sustained.

Accordingly, the plaintiff's complaint is hereby dismissed. Additionally, the claims asserted against Harvey Katzenberg by the defendant's counterclaims are hereby severed and dismissed. The action shall continue with respect to the counterclaims asserted against G. K. Alan Associates, Inc.

Dated: 12/04/05



J.S.C.

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