

<b>Seidler v Metropolitan Arts &amp; Antiques Pavilion Ltd.</b>
2005 NY Slip Op 30158(U)
November 23, 2005
Supreme Court, New York County
Docket Number: 0601474/2005
Judge: Shirley W. Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH PART 54

Index Number : 601474/2005

SEIDER, FRED

vs

METROPOLITAN ARTS &

Sequence Number : 001

STRIKE

INDEX NO.

601474/05

MOTION DATE

8/18/05

MOTION SEQ. NO.

\_\_\_\_\_

MOTION CAL. NO.

\_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion for strike

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1

2,3

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
NOV 30 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/23/05

SHIRLEY WERNER KORNREICH  
J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
FRED SEIDLER,

Plaintiff,

Index No.: 602459/03

-against-

**DECISION  
and  
ORDER**

METROPOLITAN ARTS & ANTIQUES PAVILION LTD.  
a/k/a METROPOLITAN PAVILION,

Defendant.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

**FILED**  
NOV 30 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

This is an action to recover, *inter alia*, allegedly unpaid commissions. Plaintiff Fred Seidler commenced this action against his former employer, Metropolitan Arts & Antiques Pavilion Ltd. a/k/a Metropolitan Pavilion ("MP" or "Employer"), claiming that he is owed certain monies under an employment agreement.

Defendant now moves to dismiss plaintiff's affirmative defenses to its counterclaims, pursuant to CPLR 3211(b). In support of its motion, defendant MP submits the affirmation of counsel and copies of: the summons and complaint; defendant's answer with counterclaims; and plaintiff's reply to counterclaims. Plaintiff has opposed,<sup>1</sup> submitting the affirmation of counsel and copies of the pleadings. Defendant has replied.

**I. Background**

The complaint alleges the following. Plaintiff began working for defendant, an event

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<sup>1</sup> Although plaintiff, in his opposition, seemingly seeks dismissal of defendant's counterclaims, he has failed to cross-move for such relief and, thus, the Court will not consider that portion of plaintiff's opposition. Further, the issues relating to discovery, also raised in the opposition, have been resolved by the issuance of a Preliminary Conference Order.

space service company, pursuant to an agreement dated December 22, 1997, which was amended by an addendum dated January 1, 2000. Compl., paras. 3-5. Thereafter, on April 7, 2004, the parties executed a confidentiality/non-disclosure agreement. *Id.*, para. 6.

On January 8, 2005, defendant terminated plaintiff's employment. *Id.*, para. 8. As of that date, plaintiff alleges he "had negotiated numerous events resulting in commissions due and owing from defendant to plaintiff." *Id.* Plaintiff claims that, pursuant to the employment agreement and its addendum, he is owed commissions for these events, as well as an accounting. *Id.*, para. 9.

On or about May 16, 2005, defendant served its answer upon plaintiff. The answer asserted six affirmative defenses as well as counterclaims sounding in breach of fiduciary duty and breach of loyalty. *See, e.g.*, Answer. Specifically, MP claims that Mr. Seidler "violated his position of trust with defendant for his own personal gain . . . falsely reserv[ing] dates in defendant's calendar to reflect events that had been booked on those dates when in fact no event had been booked on those dates[.]" Answer, p. 3. Thereafter, plaintiff interposed his Reply to Counterclaims, containing general denials and setting forth three affirmative defenses as follows: (1) failure to state a claim; (2) relief requested is unavailable under causes of action asserted; and (3) counterclaim is frivolous under 22 NYCRR 130-1.1. *See, e.g.*, Reply to Counterclaims.

## II. *Conclusions of Law*

A party may move for dismissal of "one or more defenses, on the ground that a defense is not stated or has no merit." CPLR 3211(b). When addressing a motion to dismiss affirmative defenses pursuant to CPLR 3211(b), the Court must view the non-moving party's allegations in the light most favorable to the non-movant. *182 Fifth Ave. v. Design Dev. Concepts, Inc.*, 300

A.D.2d 198, 199 (1st Dept. 2002). See also *In re Liquidation of Ideal Mut. Ins. Co.*, 140 A.D.2d 62, 67 (1st Dept. 1988) (standard of review on motion to dismiss affirmative defense is “whether there is any legal or factual basis for the assertion of the defense . . . [; t]he truth of the allegations must be assumed, and if under any view of the facts a defense is stated, the motion must be denied”). However, allegations that consist only of bare legal conclusions are not entitled to such consideration. *Klebert v. McKoan*, 228 A.D.2d 232 (1st Dept. 1996) (citations omitted). The CPLR 3211 viability of plaintiff’s affirmative defenses to defendant’s counterclaims is assessed below.

The dismissal of an affirmative defense is proper where unsubstantiated allegations fail to establish that defense. *American Mortgage Banking v. Canestro*, 201 A.D.2d 407, 408 (1st Dept. 1994). Where “the moving party properly challenges the factual basis of the defenses it is incumbent on the party asserting the defense to come forward with such evidence as will raise an issue as to the facts pleaded[.]” *Leonard v. Leonard*, 31 A.D.2d 620 (1st Dept. 1968) (internal citations omitted) (“the defenses, when considered in the light of the allegations of the counterclaim, fail to constitute any defense, and in the absence of any evidence which would affect this prima facie showing should have been dismissed”). A defense sounding in “failure to state a cause of action . . . may be dismissed only if all the other affirmative defenses are found to be legally insufficient.” *Raine v. Allied Artists Productions, Inc.*, 63 A.D.2d 914, 915 (1st Dept. 1978).

Here, plaintiff’s Reply to the Counterclaims merely sets forth affirmative defenses, which are entirely conclusory and unsupported by even a single factual allegation. Indeed, each of the three affirmative defenses consists of a single sentence, no more than twenty words. In his

opposition, plaintiff does not elaborate on any of these defenses. Thus, plaintiff's has not properly stated any affirmative defenses and they must be dismissed as insufficient. *See Robbins v. Gowney*, 229 A.D.2d 356, 358 (1st Dept. 1996) (bare legal conclusions are insufficient to raise affirmative defense).

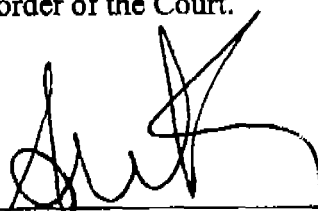
Although plaintiff claims that it is improper to dismiss his first affirmative defense sounding in failure to state a cause of action, this argument is unavailing. Since plaintiff has provided absolutely no facts to support his other affirmative defenses, and those defenses are dismissed pursuant to this order, the first affirmative defense may also be dismissed. *See Raine* at 915. Accordingly, it is

ORDERED that the motion to dismiss plaintiff's affirmative defenses to the counterclaims is granted to the extent that plaintiff's first, second and third affirmative defenses are severed and dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

Date: November 23, 2005  
New York, New York

  
SHIRLEY WERNER KORNREICH

**FILED**  
NOV 30 2005  
NEW YORK  
COUNTY CLERK'S OFFICE