

Day v Zwirn

2005 NY Slip Op 30278(U)

June 20, 2005

Supreme Court, New York County

Docket Number: 0124493/2001

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich
Justice

PART 14

FRANKLIN DAY

- v -

GERARD ZWIRD

INDEX NO. 12493/01
MOTION DATE 4/7/05
MOTION SEQ. NO. 012
MOTION CAL. NO. _____

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

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

PAPERS NUMBERED
<u>1</u>

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
JUL 12 2005
COUNTY CLERKS OFFICE
NEW YORK

Dated: 6/29/05

SHIRLEY WERNER KORNREICH
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
FRANKLIN DAY

Plaintiff,

Index No.: 122493/01

**DECISION and
ORDER**

-against-

GERARD ZWIRN, ESQ.
and JOSEPH PASSARELLI,,

Defendants,

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

This is an action to recover for an alleged fraudulent transfer. In a prior action for legal malpractice, plaintiff obtained a judgment against defendant Gerard Zwirn in the amount of \$131,021.74.¹ In the present action, plaintiff alleges that Zwirn avoided payment of the judgment by fraudulently transferring approximately \$925,000 of his assets in connection with the purported purchase by Zwirn of an interest in two entities in which defendant Joseph Passarelli also held an interest: Danjo Automotive Corp. d/b/a Koeppel Mazda Hyundai ("Danjo"), and Bronx Volkswagen Corp. aka City Line Auto Mall ("Bronx Volkswagen"). According to the complaint, Mr. Passarelli subsequently issued false (and undocumented) capital calls to MR. Zwirn on behalf of said entities, resulting in the purported loss of Zwirn's interests in the entities. All of this, alleges plaintiff, was done by Zwirn and Passarelli as part of a scheme to avoid payment of the judgment.

¹*Good Old Days Tavern v. Zwirn*, Sup. Ct. New York County, Index No. 11465/93.

Motions

There are two motion sequences now before the Court. In Motion Sequence No. 10, plaintiff moves to amend the complaint to add as additional defendants Danjo and Bronx Volkswagen (together, the “Proposed Additional Defendants”), and to make further factual allegations of wrongdoing based on information obtained in discovery. Plaintiff submits the affirmation of his attorney, a copy of his proposed Amended Supplemental Complaint, copies of Stock Surrender Agreements, a letter addressed to Passarelli terminating the dealer agreement between Danjo and Mazda North American Operations, and a copy of the initial complaint. In opposition, Passarelli submits the affirmation of his attorney. Zwirn makes no submission.²

In Motion Sequence No. 12, plaintiff moves for an order striking defendant Passarelli’s answer on the ground that he has failed to comply with the Court’s discovery order dated December 16, 2004. Plaintiff submits: a copy of the order, with notice of entry and proof of service upon Mr. Passarelli’s attorney; a copy of an IRS authorization prepared by Passarelli; the Affidavit of Rhoda Dobencker, and correspondence with the IRS. Neither defendant opposes the motion.

Conclusions of Law

A. Motion to Amend

Leave to amend pleadings “shall be freely given” absent prejudice or surprise resulting from the delay. See Leibowitz v. Mt. Sinai Hosp., 296 A.D.2d 340 (1st Dept. 2002). Leave to amend to add new parties may be granted if the proponent alleges “legally sufficient facts to

²Mr. Zwirn’s attorney addressed a letter to the Court indicating that Mr. Zwirn filed a bankruptcy petition on November 2, 2004, in the United States Bankruptcy Court in the Southern District of Florida, Case No. 04-40306-BKC-AJC.

establish a prima facie cause of action or defense in the proposed amended pleading.” Peretich v. City of New York, 263 A.D.2d 410 (1st Dept. 1999) quoting Daniels v. Empire-Orr, Inc., 151 A.D.2d 370, 371 (1st Dept. 1989).

Plaintiff’s proposed amended complaint alleges, *inter alia*, as follows. Mr. Zwirn has been Mr. Passarelli’s attorney, and personal friend, for over twenty years. Zwirn’s transfer of \$600,000 to Danjo and/or Bronx Volkswagen was far in excess of the value of the shares he supposedly acquired. Zwirn owned a majority interest in the proposed additional defendants at the time of the transfer of funds, but concealed this fact, in order to hide his assets. Passarelli, who has an extensive criminal record, cooperated by issuing a capital call to Zwirn, for which no documentation has been produced. Zwirn did not answer the call, purportedly resulting in the loss of his investment in Danjo and/or Bronx Volkswagen. Passarelli then caused Danjo and Bronx Volkswagen to issue promissory notes to Zwirn transferring his funds back to him. Nevertheless, Danjo and/or Bronx Volkswagen retain the \$600,000 contributed by Zwirn.

Moreover, the amended complaint alleges that discovery in this action revealed two stock surrender agreements whereby Zwirn sold his stock in Danjo and Bronx Volkswagen back to the respective entities for \$720,000. During the course of discovery, Zwirn allegedly fabricated two new undated promissory notes to change the terms of the discovered documents, which Passarelli executed, and produced to the special referee supervising discovery. The amended complaint further alleges that Zwirn also fabricated two new addenda to the stock surrender agreements, which extinguished Danjo’s obligation to repay Zwirn his \$600,000. Passarelli allegedly executed the addenda.

Plaintiff argues that the amended complaint is necessary to add facts obtained through

discovery: *inter alia*, that Danjo, Bronx Volkswagen and Auto Mall were controlled by Zwirn at the time of the fraudulent transfers; and that Zwirn and Passarelli have continued a course of improper conduct through the pendency of this action, as revealed in discovery proceedings. Passarelli's attorney's one-page opposing affirmation simply argues that all proceedings in this action are stayed pursuant to Mr. Zwirn's federal bankruptcy action commenced in Florida. However, "[t]he automatic stay provisions of the Federal bankruptcy laws apply only to the parties in the adversary proceeding in Bankruptcy Court and do not extend to nonbankrupt codefendants." Maynard v. George A. Fuller Co., 236 A.D.2d 300 (1st Dept. 1997); *accord Torre v. Fay's Inc.*, 259 A.D.2d 896, 897 (3d Dept. 1999). Thus, plaintiff may proceed against Passarelli.

The Court concludes that the proposed amendments to the complaint will not prejudice defendants because the factual allegations are connected with the same transactions alleged in the initial complaint. *See Valdes v. Marbrose Realty Inc.*, 289 A.D.2d 28, 29 (1st Dept. 2001) ("Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position"). Moreover, the addition of new parties is justified because plaintiff has alleged an "overall fraudulent scheme" involving Zwirn, Passarelli and the Proposed Additional Defendants. *See Marine Midland Bank v. Zurich Ins. Co.*, 263 A.D.2d 382, 383 (1st Dept. 1999) (citations omitted); *see also Cilco Cement Corp. v. White*, 55 A.D.2d 668 (2nd Dept. 1976) (corporate defendant may be held liable for fraudulent transfer of corporate assets). Thus, plaintiff's motion

to amend the complaint is granted.³

B. Motion to Strike

By order dated December 16, 2004, this Court ordered Mr. Passarelli to turn over authorizations for all tax returns filed for the Proposed Additional Defendants. According to plaintiff, Passarelli produced the authorizations on March 1, 2005, and plaintiff then sent them to the IRS. On or about March 28, 2005, an employee of plaintiff's attorney received a phone call from an IRS representative stating that the authorizations were unacceptable because "the signatures on the forms were unreadable." Affidavit of R. Dobencker, para. 3. Plaintiff's attorney affirms that he contacted Mr. Passarelli's attorney, Richard Aronstein, who refused to provide further authorizations. Affirmation of R. Curtis, para. 6.

The trial court is vested with discretion to strike pleadings where "a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR..." See *Kihl v. Pfeffer*, 94 N.Y.2d 118, 122 (1999) (affirming dismissal of complaint for plaintiff's failure to respond to interrogatories within court-ordered time frames). "[C]ompliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully." *Id.* at 123. Here, Passarelli's response to the Court's order was neither timely nor reflective of good faith. The order was issued on December 16, 2004, and Passarelli did not turn over the authorizations—two simple one-page forms—until March 1, 2005. Moreover, Passarelli's refusal to amend the authorizations to include a legible signature, in accordance with

³The Court notes that the First Department has commented on the "highly questionable circumstances" of the underlying case (the facts of which are also pertinent to this action), and sanctioned Mr. Zwirn for "frivolous conduct" in litigation. See *Good Old Days Tavern, Inc. v. Zwirn*, 259 A.D.2d 300 1st Dept. 1999); *Good Old Days Tavern, Inc. v. Zwirn*, 261 A.D.2d 288, 289 (1st Dept. 1999).

the request of the IRS, evinces anything but good faith. As the Court of Appeals noted, “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.” *Id.* Thus, Mr. Passarelli’s answer shall be stricken, unless he provides the requested authorization, with a legible signature. Accordingly, it is

ORDERED that plaintiff’s motion to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendants shall serve an answer to the amended complaint within 20 days from the date of said service; and it is further

ORDERED that plaintiff is directed to serve a copy of this order on the Trial Support Office and the County Clerk within 20 days, so that their records may be altered to reflect the changes; and it is further

ORDERED that defendant Joseph Passarelli shall provide plaintiff with IRS authorizations for all tax records of Danjo Automotive Corp. d/b/a Koeppel Mazda Hyundai, and Bronx Volkswagen Corp. aka City Line Auto Mall, within 20 days, or his answer shall be stricken.

Date: June 20, 2005
New York, New York


SHIRLEY WERNER KORNREICH

FILED
JUL 12 2005
COUNTY CLERK'S OFFICE
NEW YORK