Seidler v Metropolitan Arts & Antiques Pavilion Ltd.

2006 NY Slip Op 30294(U)

April 6, 2006

Supreme Court, New York County

Docket Number: 0601474/2005

Judge: Shirley W. Kornreich

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[* 1]
SCANNED ON 4/17/2006

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

PRESENT: SHIRLEY WERNER KORNREICH J.S.C. PART 54

Index Number : 601474/2005

SEIDER, FRED

VS

METROPOLITAN ARTS &

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 6 were read on this motion to/for dismissal

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2-5
Replying Affidavits	6

Cross-Motion: ☒ Yes ☐ No

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

FILED
APR 17 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/13/06

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

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

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

FILED
APR 17 2006
COUNTY CLERK'S OFFICE
NEW YORK

KORNREICH, SHIRLEY WERNER, J.:

This is an action brought to recover unpaid commissions under an employment agreement and pursuant to Article 6 of the Labor Law.

I. ***Motion and Cross-Motion***

Defendant Metropolitan Arts & Antiques Pavilion Ltd. a/k/a Metropolitan Pavilion ("MP" or "Employer") now moves for: (1) summary judgment dismissing plaintiff's second cause of action for wages, attorneys' fees and liquidated damages; (2) leave to amend its answer and assert an affirmative defense and counterclaim (CPLR 3025); and (3) a protective order pursuant to CPLR 3103. In support of its motion, defendant MP submits the affirmation of counsel, the affidavit of its president, Alan Boss, and copies of plaintiff's "Job Description" form; the employment agreement between the parties, dated December 22, 1997 (hereinafter, the "Employment Agreement"); email correspondence from plaintiff; various web site printouts; defendant's proposed amended answer with counterclaims; the Commission Report for plaintiff, dated January 28, 2005; plaintiff's "First Set of Document Requests" (plaintiff's first discovery demand"); and emails between MP employees.

Plaintiff opposes and cross-moves for partial summary judgment for liability on his causes of action and to dismiss the counterclaim. He submits the affirmation of counsel, his affidavit and copies of the complaint; the Employment Agreement; the Addendum to the Employment Agreement, executed between the parties on January 26, 2000 (hereinafter, the "Addendum"); the Confidentiality and Non-Disclosure Agreement executed between the parties, dated April 7, 2004 (hereinafter, the "Confidentiality Agreement"); defendant's answer; plaintiff's reply to counterclaims; the Preliminary Conference ("PC") Order, dated August 15, 2005; emails between plaintiff and MP employees; and plaintiff's own records commissions allegedly due to him. Defendant has replied and opposed plaintiff's cross motion, submitting the affirmation of counsel, the affidavit of Mr. Boss and copies of pleadings; emails between plaintiff and Mr. Boss; a letter from MP to plaintiff terminating his Employment Agreement, dated October 29, 2004 (the "Termination"); a letter from MP to plaintiff setting forth new terms of employment, dated December 1, 2004; and the PC Order.

I. ***Facts***

The complaint alleges the following. Plaintiff began working for defendant, an event space service company, pursuant to a December 22, 1997 Employment Agreement, amended by Addendum on January 1, 2000. Compl., paras. 3-5. The Employment Agreement provides that "[a]t the will of either [MP] or Seidler, either shall have the right to cancel this agreement with one month's written notice." Employment Agreement, para. 2. Thereafter, on April 7, 2004, the parties executed a Confidentiality Agreement. *Id.* at 6.

On January 8, 2005, defendant terminated plaintiff's employment. *Id.* at 8. Plaintiff claims that, pursuant to the Employment Agreement, he was owed commissions for events he had booked prior to termination and for an accounting. *Id.* at 9.

On or about May 16, 2005, defendant served its answer upon plaintiff, asserting six affirmative defenses and counterclaims sounding in breach of fiduciary duty and breach of loyalty. *See, e.g.*, Answer. Specifically, MP claims that plaintiff "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: (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. Defendant then moved to dismiss plaintiff's affirmative defenses, which motion was granted on November 23, 2005.

Defendant now claims that plaintiff was employed in an executive capacity and his second cause of action for wages, attorneys' fees and liquidated damages, therefore, must be dismissed. In support of this claim, Alan Boss, MP's president, avers that "defendant employed Mr. Seidler as the Director of Sales" and, in that capacity, Mr. Seidler reported directly to Mr. Boss, that Mr. Seidler had two employees who reported to him. Aff. of Alan Boss, paras. 3-4, 5. On his own outgoing emails, Mr. Seidler lists his title as "Director of Sales" and various web sites and news sources also list him as holding that title. *See* Aff. of Talis Knets, Exs. D-J. Moreover, the Employment Agreement describes him as "Marketing Director." *See* Employment Ageement.

In addition, defendant states that the instant action sought only commissions from 2000 and onward, but that plaintiff's discovery demands seek "documents and records that date back to the year 1997," as do communications with plaintiff's counsel. *See* Knets Aff., para. 32; Boss

Aff., para. 15. MP contends that plaintiff "now claims to be owed commissions dating back to 1997" and, therefore, defendant seeks to amend its answer, adding the statute of limitations as an affirmative defense. Knets Aff., para. 34.

Defendant further seeks to add a counterclaim sounding in breach of contract, averring that:

> Mr. Seidler repeatedly double booked events and/or kept dates open in the Events Calendar at the Metropolitan Pavilion so that it would appear that an event had been booked for a date when no event had been booked. Mr. Seidler did this so that only he would have the opportunity to sell that date . . . The keeping of dates open in the Events Calendar cost the defendant revenue as [its] event space was left empty on many dates . . . Mr. Seidler double booked events which resulted in a loss of esteem for the defendant.

Boss Aff., paras. 17-19. Such double bookings and fabricated bookings are referred to in emails between MP employees, as well as in email from at least one MP client. *Id.* at Ex. M.

Finally, defendant seeks a protective order for certain of plaintiff's discovery demands. In its opposition, plaintiff has withdrawn certain of those objected-to demands.[1] The following demands remain in dispute: 1, 6, 15, 16, 17 and 18 (the "Remaining Demands").[2]

In opposition, Mr. Seidler avers that he "was hired by Defendant . . . to sell event space" and did so throughout his employment for defendant. Aff. of Fred Seidler, paras. 3, 6. He claims that the majority of his compensation was based on commissions from such sales and that, despite his requests, MP failed to pay him commissions he had earned. *Id.* at 6, 8-9.

Mr. Boss disputes this claim, averring that MP has paid plaintiff all of the commissions that were owed. Second Aff. of Alan Boss, para. 24. Further, MP claims that the Employment

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[1] "Plaintiff hereby withdraws the following demands which are in issue: 7, 8, 9, 10, 11, 12, 13 and 14." Plaintiff's Memorandum of Law, p. 14.

[2] Although plaintiff has not specifically withdrawn his demands numbered 28 and 29, he does not address or oppose defendant's motion seeking a protective order on these demands.

Agreement between the parties no longer was in effect at the time of plaintiff's termination. On or about October 25, 2004, Mr. Boss sent emails to plaintiff in which he cancelled the agreement. MP submits an October 29, 2004 letter, sent to plaintiff from Mr. Boss, which states:

> As previously advised I have already elected to cancel the Agreement between Metropolitan Arts & Antiques Pavilion Ltd. and yourself dated December 22, 1997 and, of course, the Addendum executed by me on January 24, 2000 and by you on January 26, 2000. [MP] exercised its right to cancel the Agreement on one month's written notice.

Id. at Ex. D, "Termination."

II. ***Conclusions of Law***

A. *Summary Judgment*

To prevail on a motion for summary judgment, the movant must establish a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to demonstrate the absence of any material issue of fact. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). Once a prima facie showing is made, the burden then shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues that require a trial. *Zuckerman v. New York*, 49 N.Y.2d 557, 560 (1980). Pursuant to CPLR 3212(f), summary judgment is properly denied as premature where the opposing party has not yet had an adequate opportunity to conduct discovery. *Sloan v. Repsher*, 263 A.D.2d 906, 907 (3rd Dept. 1999). The sufficiency of defendant's motion and plaintiff's cross-motion is addressed below.

1. *Defendant's Motion*

Defendant argues that plaintiff's second cause of action is barred since Mr. Seidler was employed in an executive capacity and, therefore, Sections 190, 191 and 198(1-a) of Article 6 of

the Labor Law do not apply to him. Article 6 defines a "commission salesman" as:

> any employee whose principal activity is the selling of any goods, wares, merchandise, services, real estate, securities, insurance or any article or thing and whose earnings are based in whole or in part on commissions. *The term "commission salesman" does not include an employee whose principal activity is of a supervisory, managerial, executive or administrative nature.*

Labor Law § 190 (emphasis supplied). Plaintiff's second cause of action is contingent on his claim that he is a "commission salesman" pursuant to Article 6 of the Labor Law.

While defendant has submitted evidence that plaintiff functioned as "director," plaintiff disputes this contention, claiming that his principal activity was as a salesman, working on commission. In light of this disputed issue of fact, summary judgment is not appropriate, particularly where discovery remains incomplete.

2. *Plaintiff's Cross-Motion*

Similarly, plaintiff's cross-motion also must be denied at this time. Although plaintiff argues that the Employment Agreement and Addendum were in effect at the time of his termination and, thus, apply to the instant action, defendant has submitted evidence that those agreements had been terminated prior to the termination dated of January 8, 2005, cited in the complaint. With this material issue in dispute, summary judgment is not appropriate at this time.

B. *Leave to Amend*

Generally, a motion for leave to amend a pleading will be granted, "in the absence of prejudice or surprise to the opposing party[.]" *Oil Heat Inst. v. RMTS Assocs., LLC*, 4 A.D.3d 290, 772 N.Y.S.2d 313, 316 (1st Dept. 2004); *see also* CPLR 3025(b) ("[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court . . . . Leave shall be freely given upon such terms as may be just");

St. Paul Fire & Marine Ins. Co. v. Town of Hempstead, 291 A.D.2d 488, 489 (2d Dept. 2002) (prejudice to adverse party is "main barrier" to granting leave to amend pleading). The Court may properly grant plaintiff's motion for leave to amend a complaint where the opposing party "fail[s] to demonstrate that the grant of leave would be prejudicial to [it.]" *Drummond v. Petito*, 271 A.D.2d 208 (1st Dept. 2000). Additionally, "[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with *significant prejudice to the other side*[.]" *Norwood v. City of New York*, 203 A.D.2d 147, 148 (1st Dept. 1994) (internal citations omitted) (emphasis supplied).

Here, plaintiff has failed to demonstrate that he would be prejudiced by an amendment to the answer. Initially, the counterclaim of breach of contract, which defendant seeks to add, arises from the same facts as its prior counterclaim. Thus, plaintiff was on notice from the service of the original answer that defendant was claiming that plaintiff had either double booked or kept dates open with false bookings. Further, the evidence submitted by MP, including Mr. Boss' affidavit and various emails, demonstrates that its proposed counterclaim is meritorious. Similarly, the statute of limitations defense may also be added since plaintiff's discovery requests seek data from 1997–more than six years prior to commencement of the instant action. Plaintiff's arguments to the contrary do not convince the Court otherwise.

Moreover, little discovery has been exchanged and depositions have not yet been held. Thus, no prejudice will result to plaintiff if this motion is granted. Bearing in mind the latitude afforded to parties seeking to amend pleadings, defendant may amend its answer, adding the affirmative defense of the statute of limitations as well as a counterclaim sounding in breach of contract.

C. *Protective Order*

The Court directs the parties to appear for a conference to resolve the remaining discovery issues. Accordingly, it is

ORDERED that the portion of defendant's motion seeking summary judgment is denied; and it is further

ORDERED that the portion of defendant's motion seeking for leave to amend the answer is granted; and it is further

ORDERED that defendant shall serve plaintiff with the amended answer in the proposed form annexed to the moving papers, together with a copy of this order with notice of entry, by mail within ten (10) days of entry of this order; and it is further

ORDERED that plaintiff shall serve any reply to the added counterclaim upon defendant within twenty (20) days from the date of said service; and it is further

ORDERED that plaintiff's cross-motion for partial summary judgment is denied; and it is further

ORDERED that defendant's motion for a protective order shall be resolved at conference and that all parties are to appear before the Court for such conference at 9:30 a.m. on May 11, 2006 at 111 Centre Street, Room 1227, New York, N.Y. 10013.

FILED
APR 17 2006
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

J.S.C.

Date: April 6, 2006