SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61

Arts4All Ltd and Richard Humphry,

Plaintiffs,

– against –

Judith L. Hancock,

Defendant.

Index No. 101123/03

Seq. Nos. 20, 21 & 22

DECISION/ORDER

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

Judith L. Hancock,

Third-Party Plaintiff

– against –

Daniel Y. C. Ng, Robert McBain,
Joel Meyerson, and Peter Osgood,

Additional Defendants
On the Counterclaims.

The following documents were considered in reviewing defendant's motion to, inter alia, dismiss the remaining cause of action and strike plaintiffs' answers to defendant's counterclaims for failure to comply with discovery orders (Seq. No. 20); plaintiffs' motion to dismiss the counterclaims because of the unauthorized practice of law and defendant's abusive discovery demands, CPLR 3120, 3133 & 3123 and defendant's cross-motion seeking the Court's signature on minutes (Seq. 21); and, defendant's motion for summary judgment dismissing the remaining cause of action (Seq. 22):

Papers	Numbered
Order to Show Cause (Seq. 20), Affidavits & Memorandum of Law	1-4 (Exhibits Schedules A-J)
Affirmation in Opposition (and corrected pages) & Memorandum of Law	5-6 (Exhibits 1-16)
Reply Affidavits & Memorandum of Law	7-9
Hancock's Supplemental Affidavit	10
Order to Show Cause (Seq. 21), Affirmation & Affidavits	1 (Exhibits 1-11, A-D, A)
Notice of Cross-Motion, Affidavits & Memorandum of Law	2-4 (Exhibits A-R; Annex 1: Response Documents & Exhibits A-G; Annex 2; Annex 3: Exhibits A-BB; Annex 4: Exhibits A-R)
Affirmations in Opposition and in Reply & Memorandum of Law	5-7 (Exhibits 1-11)
Notice of Motion (Seq. 22); Affidavit & Memorandum of Law	1-3 (Exhibits 1-11; Exhibits Incorporated by Reference)
Affidavits in Opposition & Memorandum of Law	4-5 (Exhibits 1-10; 1- 4; 1-4)
Defendant's Reply Memorandum of Law	6

This case started with plaintiffs asserting twelve causes of action against defendant, Arts4All's former counsel. The complaint was dismissed by a Justice of this Court on September 25, 2003. The Appellate Division, First Department modified the order dismissing the complaint by reinstating four causes of action. Arts4All v. Hancock, 5 A.D.3d 106 (1st Dept. 2004). The matter was then transferred to this Part in early 2004. On September 14, 2004, this Court dismissed plaintiffs' remaining causes of action except for the portion of the first cause of action for breach of the no-disparagement clause in the parties' severance agreement. That decision was affirmed by the Appellate Division, First Department. Arts4All v. Hancock, 25 A.D.3d 453 (1st Dept. 2006). Defendant's counterclaims consists, inter alia, of claims for breach of contract and breach of fiduciary duties.

Given how very little is left to this case, the amount of motion practice (seventeen motions after this Court dismissed three out of the remaining four causes of action) and the incredibly lengthy submissions by the parties cannot be explained other than as an attempt to harass each other for personal issues totally unrelated to the relatively simple legal issues in this case.[1] This Court, however, will not allow the parties to continue

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1. By order dated January 19, 2006, the Appellate Division, First Department, affirmed all six orders appealed by the parties. Arts4All v. Hancock, 25 A.D.3d 453 (1st Dept. 2006). These included, in addition to the order dismissing three out of the four remaining causes of action, the following five orders:

> [1] entered December 22, 2004, to the extent that it directed plaintiffs to answer defendant's counterclaims, but not as part of a second amended complaint, which the court had already precluded; [2] entered January 26, 2005, which denied plaintiffs' motion to compel defendant to accept service of an amendment to a new complaint; [3] entered February 8, 2005, which denied defendant's motion to renew so much of the September 30, 2004 order seeking summary dismissal of the first cause of action in the first amended complaint; [4] entered February 15, 2005, which imposed costs on plaintiffs and Osgood for failing to comply with an earlier order directing them to answer defendant's counterclaims; and [5] entered May 5, 2005, which denied defendant's renewal motion for default on the counterclaims, struck plaintiffs' affirmative defenses to the counterclaims, declined to strike Osgood's affirmative defenses, and declined to order plaintiffs and Osgood to post security, unanimously affirmed, without costs.

to waste this Court's resources any longer; the parties need to find a different battleground .

Notwithstanding the Court's imposition of gradual discipline, including repeated verbal and written warnings, and ultimately sanctions, the parties are ignoring anything that gets in the way of their bare knuckles fight.[2] Although the Court can cite to

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2. For instance, on September 25, 2005, after issuing it decision on six different motions (Seq. Nos. 13 to 18), this Court admonished the parties for their refusal to move the case forward:

> I have to tell you folks that I have reached my limit. Never has that happened to me yet in eight years as a judge.
>
> What seems to me is that the parties in this case are less interested in litigating legal issues than they are in a tit-for-tat that has more to do with personal matters than they do with legal disputes.
>
> I am serious when I tell you that you are to stop. You have burdened this Court unnecessarily in a way that I haven't been burdened by any other case, ever, and that is exemplified by the fact that this Court has had to read over 2,000 pages of documents just in the last couple of weeks on a matter where there is only a remaining [cause of action].
>
> You are to stop, okay? I am ordering you to engage in the depositions in the jury room, which will take place with a guard, okay" Whoever does not engage in what I am ordering them to do will suffer the consequences of that failure to comply, okay? I am asking you to please stop. Okay?

September 29, 2005 transcript at pages 4 - 5 (emphasis added). Despite these warnings, approximately one month later, on November 1, 2005, the parties were before the Court again because discovery was still not moving forward:

> It seems, despite my best efforts, a few weeks ago, that you folks are still not closer to the target than you were then.

* * *

numerous instances of extraneous matters finding their way into this litigation, a few examples would suffice. In this Court's decision under Seq. 6, plaintiffs were sanctioned $500.00 for failing to comply with this Court's April 19, 2004 order. Rather than accept the Court's imposition of sanctions on plaintiff, Hancock took it as an opportunity to garnish Arts4All's bank account and impede its ability to conduct business. Plaintiffs cried "uncle" and, ironically, then had to move to compel defendant to accept the $500.

> I am going to sanction the counterclaimant [$500] for failing to appear for the deposition as scheduled by my order in October to appear in Part 61 to the jury room for that deposition. Inasmuch as the Court had previously sanctioned plaintiff in the same amount by a judgment that you folks have still generated several hundred pages and are still not satisfied. The Court deems the prior judgment satisfied.
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> So, basically the Court just deems this $500 sanction satisfied by the $500 that I have previously sanctioned the plaintiffs in the case. I am – the Court sua sponte enters an order dismissing plaintiff's claims unless plaintiff complies with the following discovery schedule and I will give you that schedule in a minute [that schedule provided for all discovery to be completed by the end of November].
>
> I'm also doing the same thing with respect to counterclaimant's. I am hereby ordering all the counter claims dismissed unless Ms. Hancock subjects herself to that same discovery schedule. You have had over now two and a half years to conduct discovery, both documentary and otherwise, and you have failed to do so.
>
> * * *
>
> Any failure by either side to abide by this discovery schedule results automatically in dismissal of that party's action.

November 1, 2005 transcripts at pages 2, 8-9(emphasis added). Although the Court had ordered the parties to complete discovery by the end of November, the parties were back in court on April 6, 2006, on Hancock's motion to dismiss for plaintiffs' failure to comply with discovery. The parties were last in Court on May 11, 2006, for argument on their respective motions to dismiss. After attempting to settle the parties' discovery requests, the Court ultimately gave up. See May 11, 2006 transcripts.

Under Seq. 10, defendant, without raising new facts or a change in the law, CPLR 2221(e)(2), moved for renewal of an earlier motion for a default judgment on her counterclaims. She also sought an order striking "scandalous and prejudicial" matter from Peter Osgoods' (an Arts4All shareholder and board member, and a defendant on the counterclaims) responsive pleadings even though the "scandalous and prejudicial" matter was relevant to the issue that she raised in the first instance. That is, in her amended counterclaims Hancock alleged that she was wrongfully terminated and then forced to sign a release. See ¶¶ 47-49 in Verified Amended Counterclaims. In his answer, Osgood alleged, inter alia, that Hancock was terminated for sexually harassing Humphrey. Significantly, at some point prior to this litigation, Hancock, then counsel to Arts4All, and Humphrey, Arts4All's CEO, were involved in a romantic relationship.

On May 19, 2005, plaintiff was ordered to turn over certain financial records and shareholder meeting minutes within 30 days of the order, which it failed to comply with thus prompting defendant to move to hold plaintiffs in contempt. Although this Court denied that motion (Seq. 16) on September 29, 2005, it ordered Arts4All to comply within 20 days of the order. On that same day, under Seq. 14, the Court ordered the parties to conduct all depositions in its jury room within 30 days of the order and further ordered that the Note of Issue be filed by November 18, 2005. Once again, that order was ignored.

Defendant also moved to dismiss the plaintiffs' remaining cause of action based on her claim that Arts4All had failed to pay franchise taxes. This Court denied that motion because not only did she waive it by failing to raise it in her answer or in a pre-answer motion to dismiss, FBB Asset Managers, Inc. v. Freund, 2 A.D.3d 573 (2nd Dept. 2003), but her claims that she first learned of the issue during oral argument on a different motion was belied by the fact she was Arts4All's counsel prior to the litigation.

In the meantime, defendant had submitted several requests for admissions. The first, marked "First Request for Admissions by Plaintiff," totaled 34 pages, with 222 paragraphs. The second, marked "First Request for Admissions by Counterclaim Defendant Peter Osgood" totaled 31 pages and 202 paragraphs. And the third, marked "Second Request for Admissions By Plaintiff and Counterclaim Defendant Peter Osgood" was 10 pages with 41 paragraphs. On September 29, 2005, this Court granted Arts4All and Osgood's motion to strike the requests for admissions inasmuch as they sought admission of the ultimate facts in the case. Washington v. Alco Auto Sales, 199 A.D.2d 165 (1st Dept. 1993).

At about the same time, defendant moved pursuant to CPLR 3103 and the Court's equitable powers for an order enjoining plaintiff Richard Humphrey from, inter alia, coming within 50 feet of defendant, stalking defendant or causing a third party to do so. That motion was denied on September 29, 2005, with leave to pursue the matter in Criminal Court.

The Note of Issue was eventually filed on January 13, 2006, but like everything else about this case, the simple filing of a Note of Issue turned into a major ordeal. The Clerk accepted the filing of the Note of Issue, but crossed out part of the caption because of the way the parties were demarcated. Of course, this prompted Arts4All to seek permission to move to dismiss the counterclaims even though there had been no prior complaints about the caption. See the Court's Decision and Order dated March 15, 2006 (Seq. 19). The Court also denied defendant's motion for an order striking Arts4All's and Osgood's jury demand and the latter's motion which sought a non-jury trial, but granted the parties leave to move in limine for the relief requested.

Equally as offensive to this Court as the filing of all of these unnecessary motions, was the parties' conduct during oral arguments. Indeed, examining each motion independently, it may be difficult to discern that ulterior motives were at play here. It is only upon listening to and observing the parties during oral argument and their utter lack of respect for each other that this Court came to its conclusion that the parties have no interest in resolving this dispute nor allow the Court or a jury to do so, but instead are intent on using the court as a weapon to harass each other.

The parties' desire to harass each other can also be gleaned by the reams of letters produced within the last few years. A good example of this harassment by letter can be seen in the March 20-21, 2006 exchange. Defendant had moved by order to show cause for certain relief and counsel for Arts4All, through his father, had sought a 7 day adjournment because he was recovering from emergency surgery. Court intervention was requested because defendant would agree to the adjournment only if Arts4All would submit opposition papers by 5:00 p.m. on a Friday rather than on Monday.

Now, two and a half years after this Court inherited this case and tried to compel the parties to engage in discovery, the parties are once again moving to dismiss each other's cases for failure to comply with discovery orders notwithstanding that both sides have violated discovery orders. Indeed, Arts4All failed to comply with, inter alia, this Court's September 29, 2005 order, which required that all discovery be completed by

October 29, 2005, and the November 1, 2005 orders, which directed Arts4All to comply with certain aspects of the September 29th order.

Defendant has likewise failed to comply with this Court's orders. For instance, notwithstanding the Court's September 29th order, defendant waited to October 24, just five days before the end of discovery, to serve deposition notices.[3] She also waited until mid October to serve voluminous notice of discovery and inspection, interrogatories and notices to admit. Moreover, she did not submit to a properly noticed deposition until a much later date.

Notwithstanding numerous decisions in both of their favor clearly outlining the parties positions and the Court's interest in having this matter move forward, they simply will not take "yes" for an answer and proceed to trial. Accordingly, it is hereby

ORDERED that Plaintiffs' sole remaining count (that portion of the first cause of action for breach of the no-disparagement clause in the severance agreement) is dismissed pursuant to CPLR 3126(3); and it is further

ORDERED that defendant's counterclaims are dismissed pursuant to CPLR 3126(3); and it is further

ORDERED that defendant's motion for summary judgment dismissing plaintiffs' sole remaining cause of action is dismissed as moot.

This constitutes the Decision and Order of the Court.

Dated: July 11, 2006

ENTER

SO ORDERED

Rolando T. Acosta, J.S.C.

ROLANDO T. ACOSTA
J.S.C.

3. Although defendant sought a revised discovery schedule on October 17, 2005, it could not have come as a surprise when on October 20, 2005, the Court denied the request.

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