

Merzon v Beaux-Merzon, Inc.

2007 NY Slip Op 30357(U)

March 19, 2007

Supreme Court, New York County

Docket Number: 0603461

Judge: Louis B. York

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

PRESENT: _____

PART 2

Justice

Merson

INDEX NO. 603461/06

- v -

Beaux Merson, Inc.

MOTION DATE _____

MOTION SEQ. NO. ~~603461~~ 01

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

MAR 27 2007

NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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Dated: 3/19/07

Ley
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE (1)

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

----- X

RICHARD MERZON,

Plaintiff,

INDEX NO.
603461/06

-against-

BEAUX-MERZON, INC.,

Defendant.

----- X

FILED

MAR 27 2007

**NEW YORK
COUNTY CLERK'S OFFICE**

LOUIS YORK, J.:

Defendant moves pursuant to CPLR 3211(a)1 and 7 for an order dismissing the complaint.

According to the complaint (defendant's exhibit A) plaintiff and his son Adam each owned 50% of defendant's stock. On December 30, 2004 plaintiff sold his stock to Adam pursuant to the terms of a letter agreement (the Agreement) which, *inter alia*, provided for plaintiff to receive 50% of defendant's profits for 2004. The Agreement (defendant's exhibit B) also granted plaintiff the right to examine defendant's books and records upon reasonable written notice within six months from December 30, 2004 to determine defendant's profit for its 2004 fiscal year. Plaintiff's February 9, 2005 written request to inspect defendant's books and records, followed by similar requests, was rebuffed by defendant. The relief requested is specific performance, i.e., an order compelling defendant to permit plaintiff's representative to examine defendant's books and records.

On February 24, 2005, prior to commencing this action, plaintiff commenced an

arbitration proceeding against defendant seeking access to defendant's physical inventory. Defendant moved to stay arbitration. In his answer to defendant's petition plaintiff asserted a counterclaim seeking the results of a physical inventory conducted by defendant (see defendant's exhibit E, ¶ 22). By order dated April 5, 2005 the court (Edmead, J) granted defendant's petition to stay arbitration, granted plaintiff's cross-motion to permit his counterclaim to proceed as an action and scheduled a preliminary conference on the counterclaim for May 24, 2005 (see defendant's exhibit F). Plaintiff failed to attend the preliminary conference and, as a result, the court dismissed his counterclaim pursuant to 22 NYCRR §202.27 (see defendant's exhibit G). This action was commenced in October 2006.

In support of the instant motion to dismiss the complaint defendant argues that plaintiff's failure to exercise his right of inspection by June 30, 2005, as required by the Agreement, coupled with his abandonment of his counterclaim in the converted arbitration proceeding, resulted in the loss of that right.

In opposition, plaintiff contends that defendant prevented him from examining the books and records and that time was not of the essence under the Agreement. Plaintiff adds that the relief sought in the converted arbitration proceeding differed from the relief sought herein.

To succeed on a motion to dismiss pursuant to CPLR 3211(a)1 (defense based on documentary evidence) the proffered documentation must definitively dispose of the claim (see *Demas v. 325 West End Avenue Corp.*, 127 AD2d 476, 477 [1st Dept 1987]). The standards applicable to a motion to dismiss pursuant to CPLR 3211(a)7 (failure to state a cause of action) are summarized immediately below.

A motion to dismiss for failure to state a cause of action assumes the truth

of the material allegations and everything reasonably to be implied therefrom. (see, *Foley v D'Agostino*, 21 AD2d 60, 65.) In determining such a motion, it is not the function of the court to evaluate the merits of the case (*Carbillano v Ross*, 108 AD2d 776, 777) or express an opinion as to plaintiff's ability to ultimately establish the truth of the averments. (*219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509.) Rather, the plaintiff must be "given the benefit of every possible favorable inference" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634) and the motion to dismiss will fail if, "from [the pleading's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275).

(*Khan v. Newsweek, Inc.* 160 AD2d 425, 426 [1st Dept 1990]). As noted by defendant, factual allegations presumed to be true may be negated by documentary evidence and affidavits (see *Wilhelmina Models, Inc. v. Fleisher*, 19 AD3d 267, 269 [1st Dept 2005]).

The court finds that the complaint herein states a facially viable claim which, although unnecessary since the facts alleged are presumed to be true, is amply supported by the papers submitted herein. As alleged in the complaint, by letter dated February 9, 2005 plaintiff requested access to defendant's books and records pursuant to the Agreement (see plaintiff's exhibit 1). Defendant responded by letter dated March 10, 2005 that the examination could not take place until completion of a tax audit followed by a Merrill Lynch financial audit (see plaintiff's exhibit 2). By letter dated April 22, 2005 plaintiff requested copies of the audit reports (see plaintiff's exhibit 3). Defendant failed to respond. By letter dated June 28, two days before the end of the inspection period in the Agreement, plaintiff again requested the opportunity to inspect defendant's books and records (see plaintiff's exhibit 4). Additional letters were written and certain concessions were made, but defendant never did allow plaintiff to conduct the requested inspection (see plaintiff's exhibits 5-11). As a result, defendant cannot now complain that plaintiff failed to conduct a timely inspection (see *Ellenberg Morgan Corporation v. Hard*

Rock Cafe Associates, 116 AD2d 266, 271 [1st Dept 1986] [a party may not insist on performance of a condition when nonperformance has been caused by that party]; *Stardial Communications Corp. v. Turner Construction Company*, 305 AD2d 126 [1st Dept 2003] [one who frustrates another's performance cannot hold that party in breach]). The fact that plaintiff's counterclaims in the converted arbitration proceeding were dismissed because he failed to attend a preliminary conference in court is of little moment. The counterclaims involved defendant's inventory, not its books and records. The dismissal was not on the merits. Perhaps for these reasons defendant has not sought to invoke the doctrines of *res judicata* or collateral estoppel. In any event, the court concludes that the complaint herein states a valid cause of action for specific performance.

Accordingly, defendant's motion is denied.

Defendant has fifteen (15) days from the service of a copy of this decision with Notice of Entry to serve its answer to the complaint.

This constitutes the decision and order of the court.

DATED: March 19, 2007

FILED
MAR 27 2007
NEW YORK
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J.S.C.

LOUIS B. YORK
J.S.C.