

Zodkevitch v Feibush
2007 NY Slip Op 31179(U)
May 4, 2007
Supreme Court, New YorkCounty
Docket Number: 0601342/2006
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART _____

Index Number : 601342/2006

ZODKEVITCH, RONY

vs

FEIBUSH, IGAL

Sequence Number : 008

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH A COURT ORDER OR A DECISION

FILED

MAY 14 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/14/07

Y
WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 DO NOT POST REFERENCE

[*2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
RON ZODKEVITCH, M.D. AND RONY Z. LLC

Plaintiffs,

Index No. 601342/06
Mtn Seq. 008,009

-against-

IGAL FEIBUSH, STEVEN SPIEGEL, ESQ.,
DAVID YORK and PHYLLIS YORK

Defendants.

-----x
STEVEN SPEIGAL, ESQ.,

Third-Party Plaintiff

-against-

AMERICAN FAMILY HEALTH SERVICES GROUP, LLC
and TOUGHLOVE AMERICA LLC,

Third-Party Defendants

FILED
MAY 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----x
WALTER B. TOLUB, J.:

Motion sequence 008 and 009 are consolidated for disposition. By motion sequence 008 Plaintiff seeks an order dismissing Defendant Speigal's counterclaims and striking his affirmative defenses. By motion sequence 009, Defendant Spiegel seeks an order striking Plaintiffs' Note of Issue and vacating the certificate of readiness. Plaintiffs' motion is denied with leave to renew and Defendant Speigal's motion is granted.

Facts

This case arises out of business disputes between the Plaintiffs, Roney Zodkevitch (Zodkevitch) and Rony Z, LLC (Rony

* 3]

Z) and Defendants Igal Feibush (Feibush) and Steven Speigal, Esq. (Speigal). Feibush and Zodkaevitch are co-managing members of Third-Party Defendant, American Family Health Services Group, LLC (AFHSG) which is the managing member of Toughlove America, LLC (TLA). Speigal acted as general counsel to the two companies and has a 5% ownership interest in AFHSG. Plaintiffs' claims against Speigal sound in breach of fiduciary duty, conversion, defamation, tortuous interference and legal malpractice. Defendant Speigal's counterclaims and affirmative defenses sound in payment of legal fees, fraudulent inducement and breach of contract to name a few.

On September 11, 2006, a preliminary conference was held whereby Justice Richard B. Lowe, III ordered the matter referred to Alternate Dispute Resolution. (Speigal's Ex. H). At that conference no Preliminary Conference Order regarding discovery was entered into. The Order of Reference to Alternative Dispute Resolution set forth that "[a]ll proceedings shall continue during the ADR process, except that no new discovery shall be served." (Id.).

On October 11, 2006 the deposition of Mr. Zodkaevitch was adjourned. Then, on October 30 and 31, 2006, mediation took place and the result was a Memorandum of Understanding (MOU) executed by all parties on November 3, 2006. In the MOU the parties agreed to request a 90 day stay of the lawsuit to

[* 4]

effectuate a settlement. The parties further entered into stipulations adjourning the time to answer certain discovery demands. Unfortunately, the parties were unable to effectuate the settlement and no further discovery was conducted, however, the Plaintiffs went on to file their Note of Issue as directed.

On March 21, 2007 Plaintiffs filed their motion to dismiss Speigal's counterclaims and his affirmative defenses. That motion is motion sequence 008 now before this court. Defendant Speigal then filed motion sequence 009 to vacate the Note of Issue because discovery has not been completed.

Discussion

Plaintiffs' Note of Issue is vacated. To accept the Note of Issue would run against the spirit of CPLR §3101(a). CPLR 3101(a) states that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action regardless of the burden of proof. The First Department dictates that the certificate of readiness is supposed to reflect that discovery proceedings known to be necessary have been completed and that there are no outstanding requests for same, and that there has been a reasonable opportunity to complete discovery proceedings. (Grant v. Wainer, 179 AD2d 364 [1st Dept 1992]). These requirements have not been met since no depositions have been conducted, no discovery conference orders have been entered into, and Speigal's discovery demands remain outstanding.

[* 5]

It follows that the Note of Issue is vacated and the matter is removed from the trial calendar as there remains outstanding discovery. Discovery will be completed by August 2, 2007 and the parties will appear for a pre-trial conference on August 3, 2007. Furthermore, Plaintiffs' motion must be denied as premature but with leave to renew. Accordingly it is

ORDERED that Plaintiffs' motion (motion sequence 008) is denied with leave to renew; and it is further

ORDERED that Defendant Speigal's motion (motion sequence 009) to vacate the Note of Issue is granted; and it is further

ORDERED that all outstanding discovery is to be completed by August 2, 2007; and it is further

ORDERED that the matter is removed from the trial calendar; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Counsel for the parties are directed to appear for a pre-trial conference on Friday August 3, 2007 at 11:00 a.m. in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/4/07

FILED

MAY 14 2007

HON. WALTER B. TOLUB, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE