

Silverman v Pitts

2007 NY Slip Op 33515(U)

October 19, 2007

Supreme Court, New York County

Docket Number: 0604183/2005

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT:
Index Number : 604183/2005
SILVERMAN, ALAN
vs
PITTS, ROBERT
Sequence Number : 004
SUMMARY JUDGMENT

PART 10

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
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

FILED

OCT 24 2007

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

*Mot seq # 004 + 005 consolidated for
consideration & determination.*

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

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

OCT 19 2007

Dated: _____

HON. JUDITH J. GISCHE *JJG* 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 10

-----X
ALAN SILVERMAN,

Plaintiff,

-against-

ROBERT PITTS, personally and d/b/a
MICROVISIONS,

Defendants.
-----X

Decision/Order

Index No.: 604183/05

Seq. No. : 004, 005

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pitts' amended n/m §3212 w/SJF affirm, exhs	1
AS opp w/DB affirm, AS affids (2), TK affid, exhs	2
Pitts' reply w/SJF affirm, exh	3
AS n/m §3212 w/DB affid, AS affid (2), exhs	4
RP opp w/SJF affirm, exhs	5
AS reply w/DB affirm, AS affid, exhs	6
AS Appendix of Exhs I (sep back)	7

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff Alan Silverman ("plaintiff") to enforce the repayment of a loan in the sum of \$50,000. Previously, plaintiff moved for summary judgment in lieu of a complaint pursuant to CPLR § 3213. The court denied the motion, and ordered plaintiff to serve a complaint. Order, Gische J., 4/4/06. Plaintiff has since served the complaint, and issue has now been joined. The preliminary conference was held, and discovery was ordered.

Defendant Robert Pitts ("Pitts") now moves for summary judgment dismissing the complaint against him on the basis that the document that plaintiff contends is the note

[* 3]
or operative loan document between was not signed by him (Pitts) in his individual capacity, but on behalf of a corporate entity known as Microvisions Complete Computer Configurations, Inc., that is not a party to this action.

Plaintiff opposes Pitts' motion as being premature because discovery has not been completed. On that basis, he also seeks the imposition of CPLR § 3126 sanctions and sanctions under the court rules [Part 130]. Plaintiff contends that Pitts' refusal to comply with court ordered discovery, and his having brought this motion for summary judgment, was done solely to prolong or delay this action. Plaintiff has also separately moved for summary judgment.

Since the note of issue has not yet been filed in this case, the time restrictions of CPLR § 3212 have not been triggered, consequently these motions can be considered on the merits. Brill v. City of New York, 2 NY3d 648 (2004). The court previously consolidated the motions for consideration and decision in a single decision/order.

The court's decision and order is as follows:

Arguments presented

There is admittedly a document dated April 1, 2005 signed by the plaintiff and Pitts. The dispute is whether Pitts signed the document in his individual capacity, or on behalf of an entity. This document states as follows:

"Alan Silverman (*printed*) 4/1/05
\$50,000 Loaned to
Microvisions to
Be paid Back
25,000 June 15, 2005
25,000 July 15, 2005
Ok, Alan Silverman (signature)
Robert J Pitts (signature)

(*Printed Logo*)
RIBBTRIM INC" (*printed*)

Plaintiff contends that Pitts is personally liable on the note, not only because Pitt did not place any limiting language alongside or below his signature, but also because ultimately Pitts received and used the money himself. Plaintiff contends further that there are several "Microvision" entities which were used by Pitts to shield himself from liability and, in this case, defraud the lender. It is plaintiff's contention that until discovery is completed in this case, he cannot mount a more vigorous opposition to the motion by Pitts for summary judgment, another reason to deny it. Plaintiff contends that there are extant orders of court ordered discovery that Pitts has refused to comply with. These orders include the preliminary conference order of August 10, 2006, this court's decision on a prior motion by plaintiff to strike the answer (Order, Gische J., 2/8/07 w/steno record), and the decision of the First Department on appeal of the February 8th Order (Order, Appellate Division, First Department, M-1345 4/3/07) of that order record). Violations of these orders also form the collective basis for plaintiff's motion to sanction Pitts by striking his answer or any of the other available remedies under CPLR § 3126.

It is undisputed that Pitts has not been deposed, nor has he complied with this court's order of February 8, 2007 (affirmed on appeal), requiring him to produce documents and appear for his deposition. Pitts, however, contends that this is not a reason to impose sanction upon him because he has provided some documents already and a motion for summary judgment stays discovery. In reply, plaintiff contends that Pitts' summary judgment motion is entirely frivolous, brought solely to delay this action, therefore sanctions under Part 130 are warranted.

Applicable Law

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Where it appears that facts essential to justify opposition may exist but cannot then be stated, the court may deny a motion for summary judgment. R.C.S. Farmers Markets Corp. Best Section End v. Great Amer. Ins. Co., 56 N.Y.2d 918, 920-921 (1982).

Discussion

The two motions at bar demonstrate the significant polar opposite facts that have to be tried and decided in this case before the law can be applied. They also highlight the little progress that has been made thus far in readying this case for trial. Most of the arguments presented in connection with these motions are virtually indistinguishable from those that were made in connection with plaintiff's motion for summary judgment in lieu of a complaint. As already decided by the court in connection with that prior motion, the note or loan document in question is ambiguous. Though signed by Pitts, it does not specify in what capacity.

[* 6]

According to Pitts, he signed the note on behalf of "Microvisions." The law permits the incorporation of a business for the very purpose of escaping personal liability. Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp., 296 A.D.2d 103 (1st Dept 2002). The plaintiff, however, urges the court to decide Pitts signed the note in his individual capacity, and not in a representative capacity. In certain situations, a court may pierce the corporate veil where the (a) owner exercised complete dominion over the corporation; (b) such dominion was utilized to cause a wrong against the plaintiff; (c) under capitalization of the corporation; and (d) personal use of corporate funds, shuttling such funds in and out of the corporation. Hyland Meat Co., Inc. v. Tsagarakis, 202 A.D.2d 552 (2nd Dept 1994).

Although Pitts contends that the court cannot pierce the corporate veil, this does not prevent the trier of fact from deciding at the appropriate time whether Pitts is personally responsible for the repayment of the loan. Presently, however, there are factual disputes that have to be decided before the court can apply the law. Lederer v. Merchants Bank of New York, 194 AD2d 647 (2nd Dept. 1993). Since neither party has made out its prima facie case, each motion for summary judgment must be denied as there are disputed issues of fact.

The defendant's motion is denied also on the basis that certain facts essential for plaintiff to mount a vigorous opposition may exist but remain unknown to the plaintiff because discovery has not yet been completed. CPLR § 3212 [f]; R.C.S. Farmers Markets Corp. Best Section End v. Great Amer. Ins. Co., supra.

Plaintiff's further motion, that Pitts' answer be stricken, or certain issues be resolved against Pitts, is denied on condition that Pitts comply with this final discovery

[* 7]
order as to production of documents and that he appear for his deposition. Pitts has admittedly not complied with the court's February 8th order which was affirmed on appeal. Although a motion for summary judgment stays discovery, and Pitts exercised legal remedies available to him under the CPLR, the infancy of this case is due, in large part, to Pitts' not complying with court ordered discovery.

Consequently, Pitts' time to comply with its February 8, 2007 discovery order, as affirmed is extended to so that Pitt must, no later than **FIFTEEN (15) DAYS** after service of a copy of this order with notice of entry, provide the outstanding documents and other responses to plaintiff's discovery demands. In addition, Pitts shall appear for his deposition and be deposed on **NOVEMBER 30, 2007 at 10:00 a.m.**, or such other date as both sides shall mutually agree to in a written stipulation.

Pitts' failure to comply with either of these conditions may be the basis for plaintiff to renew his motion for an order imposing any of the sanctions available under the CPLR.

Plaintiff's motion, for the imposition of Part 130 sanctions is denied. Such sanctions are available where a party or attorney engages in frivolous conduct which is by definition conduct completely without merit in law and cannot be supported by a reasonable argument, or undertaken primarily to delay or prolong the resolution of the litigation, or to harass or injure another, or the assertion of false statements. 22 NYCRR §§130-1.1 [c] 1 through 3. Though Pitts' motion was denied, it was not frivolous within the meaning of the rules.

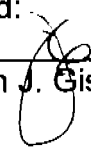
Conclusion

Plaintiff's and Pitts' motion for summary judgment are each denied because there are triable issues of fact. Defendant's motion is also denied on the basis that there is outstanding discovery. Plaintiff's motion for sanctions under CPLR 3126 is granted only to the limited extent set forth, otherwise denied without prejudice to renew. Plaintiff's motion for the imposition of Part 130 sanction is, however, denied in its entirety.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
October 19, 2007

So Ordered:


Hon. Judith J. Gische, JSC

FILED
OCT 29 2007
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