

Tal v Leber

2007 NY Slip Op 34426(U)

July 18, 2007

Supreme Court, New York County

Docket Number: 107328-06

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED PART 60
Justice

HERTZEL TAL,

Plaintiff,

- v -

BERNICE K. LEBER, ARENT FOX, PLLC,
JOHN DOE NO. 1 d/b/a "AREN FOX"
AND JOHN DOE NOS. 2-10,

Defendants.

FBEM

INDEX NO. 107328-06

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 _____

FILED

PAPERS NUMBERED

JUL 18 2007

NEW YORK
COUNTY CLERKS OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE
ATTACHED MEMORANDUM DECISION.

FBEM

Dated: 7/18/07

Bernard J. Fried
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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[Signature]

J.S.C.

BERNARD J. FRIED

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

2. With respect to the allegations in paragraph 6 of the Complaint, defendants demand plaintiff to identify the exact date plaintiff engaged defendants to act as his attorneys in the Malakan Action and the method by which such engagement was made. In the Bill, plaintiff gives a general account of the time and method of the engagement and directs defendants to their records to retrieve the exact information requested.

Motion to compel is granted. Plaintiff should explain why the records are not available to him in preparing a response. Additionally, plaintiff must answer the demand even if he believes defendants have the requested information.

3. With respect to the allegation in paragraph 7 of the Complaint, defendants demand plaintiff to specify the “advice and representation” provided by defendants that resulted in the Malakan Action. Plaintiff’s response broadly states that plaintiff consulted with defendant Leber, explained his grievance against Albert Malekan and others, and was subsequently advised to commence the Malakan action. Plaintiff also refers defendant to the complaint in the Malekan Action.

Motion to compel is granted. Plaintiff’s response lacks the requisite specificity. The specific material requested is discoverable and the proper subject of a bill of particulars as that material is a critical part of plaintiff’s legal malpractice cause of action. See Brannigan v. City of NY, 224 A.D.2d 340, 341 (1st Dep’t 1996). Furthermore, “each item of a demand should be answered separately and categorically under its own number without reference either to the complaint or to other portions of the bill of particulars.” Whirl Knits, Inc., v. Adler Bus. Machs. Inc., 54 A.D.2d 760, 760 (2d Dep’t 1976).

4. With respect to the allegations in paragraph 8 of the Complaint, defendants demand plaintiff to specify the names of "Plaintiff's now former partners." Plaintiff's response lists three individuals by name.

Motion to compel is denied. Plaintiff has provided the requested information.

5. With respect to the allegations of paragraph 9 of the Complaint, defendants demand plaintiff to set forth the bases for the allegation that there was an "existing arrangement" between plaintiff and Malakan and specify the terms of such an arrangement.

Motion to compel is granted. Plaintiff's response fails to specify the bases for this allegation or the terms of the alleged arrangement.

6. With respect to allegations in paragraph 15 of the Complaint, defendants demand plaintiff to state the exact date that defendants' representation of plaintiff concluded. Plaintiff responds that the representation was "until at least July 3, 2003."

Motion to compel is granted. Plaintiff fails to explicitly answer the demand or explain why the information is unavailable to him.

7. With respect to the allegations in paragraph 18 of the Complaint, defendants demand plaintiff to identify every instance in which defendants were negligent and careless in their representation of plaintiff in Malakan Action, the dates of such instances, and the specific person(s) acting on behalf of the defendants at that instance. Plaintiff reiterates the broad allegations stated in the complaint.

Motion to compel is granted. In a negligence action where the party is required to provide a bill of particulars, that party must comply with the demand to supply the facts surrounding the alleged negligence on all elements as to which that party bears the

burden of proof. 159 W. 80th St. Corp. v. Interstate Ins. Group, 21 A.D.3d 834, 834 (1st Dep't 2005).

8. With respect to allegations in paragraph 19 of the Complaint, defendants demand that plaintiff identify the “documents and agreements” that defendants allegedly failed to include in opposition to the motion to dismiss in the Malakan Action.

Motion to compel is granted. Plaintiff must identify such documents with reasonable specificity. Plaintiff’s response, which states “documents relating to the failed rabbinical arbitration,” does not meet this standard.

9. With respect to allegations in paragraph 20 of the Complaint, defendants demand plaintiff to set forth the bases of his allegation that had the documents mentioned in paragraph 19 been included in opposition to the motion to dismiss, the motion would have been denied. Plaintiff’s response does nothing more than refer to the above items of the Bill and the Complaint.

Motion to compel is granted. The purpose of a bill of particulars is not to restate allegations but to “amplify the pleadings, limit the proof and prevent surprise at trial.” Harris v. Ariel Transp. Corp., 37 A.D.3d 308, 308 (1st Dep’t 2007). And, as earlier mentioned, “each item of a demand should be answered separately and categorically . . . without reference either to the complaint or to other portions of the bill.” Whirl Knits, Inc., 54 A.D.2d at 760.

10 – 11. Not contested.

12. With respect to allegations in paragraph 22 of the Complaint, defendants demand plaintiff to set forth the bases of the allegations that a theory of an overall partnership in the

Malakan Action was not well-supported by the facts or documentary evidence. Plaintiff refers defendant to the trial court and appellate division decisions.

Motion to compel is granted. Plaintiff must answer with reasonable specificity.

13. With respect to allegations in paragraph 24 of the Complaint, defendants demand plaintiff to set forth the bases of the allegation that at the oral argument on the motion to dismiss in the Malakan Action, defendant Leber answered in the negative when asked by the Court if she had any written evidence of plaintiff's alleged agreement with the Malakan defendants concerning the 7th Avenue Property

Motion to compel is denied. This negative reply is set forth in paragraph 25 of the Complaint, not paragraph 24.

14. With respect to the allegations in paragraph 25 of the Complaint, defendants demand plaintiff to specify the written proof of plaintiff's alleged agreement with the Malakan defendants concerning the 7th Avenue Property.

Motion to compel is granted. Plaintiff must answer with reasonable specificity.

Merely referring defendant to documents attached to a motion in the Malakan Action is inadequate.

15. Not contested.

16. With respect to allegations in paragraph 28 of the Complaint, defendants demand plaintiff to set forth the specific respects in which defendants "otherwise negligently and carelessly handled the Malakan Action." Plaintiff states that there are no other grounds other than those set forth previously in the Bill.

Motion to compel is denied. The response is sufficient.

17. Defendants demand plaintiff to identify all damages suffered as a result of defendants alleged negligence and carelessness and to set forth the manner by which the negligence and carelessness proximately caused specific items of damage.

Motion to compel is denied. Plaintiff's response, at this point in the action, is sufficient.

18. With respect to allegations in paragraph 29 of the Complaint, defendants demand plaintiff to set forth the bases of the allegation that as a result of defendants' actions, plaintiff lost his interest in the opportunity to purchase the 7th Avenue Property. Plaintiff admits that this allegation is not entirely accurate. Plaintiff maintains, however, that he lost the reasonable monetary value in the property when the Malakan Action was dismissed.

Motion to compel is denied.

19. Not contested.

20. With respect to allegations in paragraph 30 of the Complaint, defendants demand plaintiff to set forth the specific respects in which he incurred legal fees and expenses to the defendants that were not justly payable and to provide a detailed calculation and explanation describing how an amount of approximately \$85,000.00 was reached.

Motion to compel is denied. This information can be sought during further discovery.

21. With respect to the allegations in paragraph 35 of the Complaint, defendants demand plaintiff to specify each respect in which defendants allegedly breached their fiduciary duty. Plaintiff's response merely refers to other items of the Bill.

Motion to compel is granted. The purpose of a bill of particulars is not to restate allegations but to "amplify the pleadings, limit the proof and prevent surprise at trial."

Harris v. Ariel Transp. Corp., 37 A.D.3d at 308. And, "each item of a demand should be answered separately and categorically . . . without reference either to the complaint or to other portions of the bill." Whirl Knits, Inc., 54 A.D.2d at 760.

22. Not contested.

DATED: *12/1/14*

[Handwritten Signature]

J.S.C.

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