

New York Real Estate Inst., Inc. v Edelman

2008 NY Slip Op 30766(U)

March 13, 2008

Supreme Court, New York County

Docket Number: 0602760/2006

Judge: Leland G. DeGrasse

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

PRESENT: DEGRASSE
Justice

PART 25

602760/06

NY REAL ESTATE INSTITUTE

INDEX NO. 602760/06

- v - INC

MOTION DATE _____

CHARLES EDELMAN

MOTION SEQ. NO. 10

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read 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

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

NOTICE IS GIVEN IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
MAR 18 2008
NEW YORK
COUNTY CLERK'S OFFICE

MAR 13 2008

Dated: _____

Handwritten initials

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

-----X
NEW YORK REAL ESTATE INSTITUTE, INC.,

Plaintiff,

-against-

Index No. 602760/06

CHARLES EDELMAN,

Defendant.

-----X

FILED
MAR 18 2008
NEW YORK
COUNTY CLERK'S OFFICE

DeGrasse, J.:

Motion sequences nine and ten are consolidated. Defendant, Charles Edelman, moves for leave to renew plaintiff's motion for summary judgment. Plaintiff, New York Real Estate Institute, Inc. (NYREI), moves for an order compelling disclosure. This action stems from Edelman's sale of a real estate school to NYREI's principals. By the parties' December 16, 2003 agreement not to compete, Edelman covenants that he "will not establish, open, be engaged in, nor in any manner whatsoever become interested directly or indirectly, either as employee, owner, partner, agent, shareholder, director, officer or otherwise, in any business, trade or occupation similar to" NYREI's business in Long Island, among other places, during periods specified by the agreement.

The non-compete agreement recites the fact that Edelman is the coordinator of his son's entity, American Real Estate School (ARES), which is located in Hauppauge, New York. The agreement requires Edelman to resign his position with ARES as soon as possible but in no event more than six months after the closing. NYREI alleges under the first cause of action that

Edelman breached the agreement by acting on behalf of ARES, an entity similar to NYREI, and maintaining ownership therein. Under the second cause of action, it is alleged that Edelman's preexisting ownership of an interest in ARES constitutes a breach of a separate December 16, 2003 purchase agreement by which Edelman covenanted that he "had no knowledge of any existing facts or developments of any kind which currently or within a reasonable period of time after the Closing, which would affect the Business Property of the Seller's business." The complaint calls for damages and an injunction.

By decision dated August 8, 2007, this court granted NYREI's motion for summary judgment based upon Edelman's deposition testimony that he owns 50% of ARES.¹ Edelman now asserts that the parties mistakenly believed that some unspecified State regulation required him to own at least five percent of NYREI's shares in order to act as its coordinator. Edelman bases the instant motion for leave to renew upon an undated document purportedly signed by the parties and described as a side letter to the non-compete agreement. The side letter provides for the issuance of five percent of NYREI's shares to Edelman in the event of his being asked to act as NYREI's coordinator. On its face, the side letter has nothing to do with ARES. Edelman, however, now proffers it as proof that his "nominal" ownership of shares in ARES was never intended by the parties to constitute a breach of the non-compete or purchase agreement. The apparent reasoning is that NYREI must have understood that Edelman, as ARES's coordinator, would own ARES's shares if it, albeit mistakenly, believed that he was required to own NYREI's shares while acting as its coordinator.

¹The court also found that Edelman breached the non-compete agreement by performing accounting and financing work on behalf of ARES. That additional ground, however, is not tenable because the agreement permits him to do such work.

A motion for leave to renew based upon new facts “shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e][3]). Such justification is not set forth in Edelman’s affidavit or that of the attorney who represented him at the time of the prior motion. It is not stated that the side letter was overlooked, misfiled or otherwise unavailable when the motion was heard. The absence of such an explanation warrants a denial of a motion for leave to renew (*see Wal-Mart Stores v United States Fid. and Guar. Co.*, 11 AD3d 300, 301 [2004]). NYREI also points out that Edelman failed to produce a copy of the side agreement although required to by the parties’ December 14, 2006 so-ordered stipulation. Item 1 (d) of the stipulation requires the production of agreements with Charles Edelman.

The aforementioned stipulation provides for discovery on the issue of damages within 45 days after a verdict or other final determination that Edelman is liable to NYREI for his alleged breaches of the agreements. NYREI seeks to compel such discovery upon the ground that liability was determined by this court’s order granting summary judgment. The order, however, addresses only the first and second causes of action. There has been no liability determination with respect to the third cause of action which is also based on contract. Accordingly, both motions are denied. Absent a stay, a pretrial conference shall be conducted on May 12, 2008 at 2:00 p. m.

Dated: March 13, 2008



J. S. C.

HON. LELAND DeGRASSE

FILED
MAR 18 2008
NEW YORK
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