Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

---x

SAVERIO PUGLIESE,

Plaintiff(s),

-against-

BEN MONDELLO A/K/A BEN MONDELLO, JR.,

Defendant(s).

---x

Index No. 19172/06

Motion Submitted: 1/11/08
Motion Sequence: 002, 004, 005

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XXX
Answering Papers.....XX
Reply.....XXX
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

There are three motions before the Court. The Plaintiff moves for a protective order pursuant to Civil Practice Law and Rules §§ 3103 and 3122 with respect to discovery of the Plaintiff's personal tax returns. The Plaintiff further moves pursuant to Civil Practice Law and Rules § 3211(a)(7) for an Order dismissing the Defendant's counterclaim on the ground that it fails to state a cause of action; pursuant to Civil Practice Law and Rules § 3211(b) to strike all affirmative defenses; and, pursuant to Civil Practice Law and Rules § 3212 striking the Defendant's answer and granting summary judgment to the Plaintiff on the three remaining causes of action. The third motion, also by the Plaintiff, seeks an Order pursuant to Judiciary Law § 753 holding the Defendant and his attorneys in contempt of the Order of this Court dated November 16, 2007, for payment of Plaintiff's counsel fees, and direction to immediately produce documents that were directed to be produced under such Order. Defendant opposes the requested relief.

The Verified Complaint and Counterclaim in this action deal with alleged partnership agreements for the purchase, training and sale of race horses. The Plaintiff contends that in April 2006 he and the Defendant entered into a partnership agreement whereby each party would make a capital contribution of $50,000. The money was to be deposited at Delaware Park and was to be used to purchase horses in claiming races at that track. In furtherance of this agreement, on or about April 7, 2006, the Plaintiff issued a check in the amount of $50,000 payable to the Defendant. Rather than deposit the check in an account at Delaware Park, the Defendant placed it in his personal account, and used the money for his own purposes, as opposed to those of the partnership.

The Complaint set forth Five Causes of Action, the Third and Fourth of which were dismissed by this Court by Order dated March 30, 2007. The remaining Causes of Action are for breach of contract, conversion, and breach of a fiduciary duty.

The Verified Answer denies the existence of a partnership agreement as alleged in the Complaint, but admits depositing a check in the amount of $50,000 received from the Plaintiff. It includes three Affirmative Defenses: that a partnership was never formed, that one or more Causes of Action are barred by the Statute of Frauds, and that the $50,000 received from the Plaintiff was for a 2004 unrelated transaction.

The Defendant also asserts a counterclaim, which relates to the aforementioned 2004 transaction. The essence of the counterclaim is that the Plaintiff, Defendant and a third party purchased a horse in September 2004 for $120,000. The Plaintiff held 50% ownership while the Defendant and the third party each held 25%. The Plaintiff caused the horse to be sold for $50,000 in a claiming race, despite the fact that the value of the horse, as evidenced by three offers subsequent to the sale, was $250,000. The Defendant therefore claims damages of $62,500, 25% of the $250,000 value.

Motion for Protective Order

The Defendant, by supplementary discovery demand dated October 22, 2007, Exh. "G" to moving papers in Motion Sequence #2, requests "(p)laintiff's relevant tax returns from 2004 and 2005." The Court notes that the Defendant supplied copies of his tax returns to the Plaintiff, as directed, by November 20, 2007. The request for copies of the Plaintiff's tax returns has not been dealt with prior to this motion.

Disclosure of income tax returns is generally not favored, since those documents

contain confidential and private information. (***Walter Karl, Inc. v. Wood***, 161 A.D.2d 704, 555 N.Y.S.2d 840 [2d Dept. 1990]). The party seeking to compel production of tax returns must make a strong showing of necessity and desirability for such disclosure. (***Id.***)

The Plaintiff wrote a check to the Defendant for $50,000. Whether this was to be deposited in a partnership account for claiming horses, as the Plaintiff claims, or as reimbursement for a loss incurred in connection with a 2004 transaction, it would most likely appear as an expense entry on Schedule C, Profit or Loss from Business. It is already clear that the Plaintiff considers the $50,000 to be a capital investment in a Delaware partnership, which the Defendant disavows.

In view of the fact that the Defendant has provided copies of income tax returns as ordered, and in keeping with this Court's preference for full and open disclosure, the request for a protective order is denied. Plaintiff is directed to provide copies of income tax returns by April 30, 2008.

Motion to Dismiss Counterclaim for Failure to State a Cause of Action

Civil Practice Law and Rules § 3013 provides as follows:

> Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

Civil Practice Law and Rules § 3019 provides in pertinent part:

> (a) A counterclaim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable.
>
> * * * * * * * * * * * * * * *
>
> (d) A cause of action contained in a counterclaim or a cross-claim shall be treated, as far as practicable, as if it were contained in a complaint, * * * .

The motion to dismiss the counterclaim is pursuant to Civil Practice Law and Rules § 3211(a)(7), which provides that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleadings fail to state a cause of action.

"In considering a motion to dismiss pursuant to CPLR § 3211(a)(7), the court should

'accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'". (***Amalgamated Transit Union Local 1181, AFL-CIO, et al. v. City of New York***, 45 A.D.3d 788, 846 N.Y.S.2d 336, 338 (2d Dept., 2007), citing ***Leon v. Martinez***, 84 N.Y.2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]).

In viewing the counterclaim in a light most favorable to the counter-claimant, the Court finds that it is sufficient to apprise the Plaintiff of the basis for the claim of $62,500. It can be best summarized as an allegation that the Defendant, Plaintiff, and a third party purchased a horse for $120,000. The Defendant and the third party each had a 25% ownership share and the Plaintiff had a 50% share. It further alleges that despite the Defendant's protestations, the horse was entered in a claiming race and sold for $50,000, far less that the alleged value of $250,000.

While not explicitly saying so, the Defendant appears to be claiming that there was an agreement among the parties to acquire, train and sell horses for profit, and that the sale of the horse for a loss was a breach of that contract. Parenthetically, if the Defendant's enunciated position that the $50,000 that he received from the Plaintiff was for reimbursement of the loss sustained in the ill-fated 2004 transaction is accurate, the Plaintiff would seem to be entitled to a set-off in the amount of $50,000.

For the foregoing reasons, the motion to dismiss the counterclaim is denied.

Motion to Strike Affirmative Defenses.

The Defendant raises three affirmative defenses in his verified answer:

1. There was no 2006 partnership agreement as claimed by the Plaintiff;

2. One or more causes of action are barred by the statute of frauds;

3. One of the causes of action is barred by accord and satisfaction in that the Plaintiff compensated the Defendant $50,000 for a loss in a 2004 transaction.

The Court must determine whether any or all of the foregoing constitute valid affirmative defenses as defined in Civil Practice Law and Rules § 3018(b). With respect to item "1", it is simply a replication of the denial contained in the answer. It is not a matter "which if not pleaded would be likely to take the adverse party by surprise, or would raise issues of fact not appearing on the face of a prior pleading * * *." The First Affirmative Defense is stricken.

Statute of Frauds is an affirmative defense, which is specifically mentioned as a matter that must be pleaded, and the failure to do so may waive it. While not determinative of the issue, the interjection of the statute as an affirmative defense is appropriate, and the motion to strike the Second Affirmative Defense is denied.

To the extent that the Third Affirmative Defense could be construed to allege "payment" or "release", as they appear in § 3018(b), it would constitute a valid affirmative defense. But the Defendant is not claiming that he paid the Plaintiff all or part of the sum that the Plaintiff claims; rather, he is reiterating the position that the $50,000 that the Plaintiff paid him was not in conjunction with a new partnership agreement, but rather repayment of a loss incurred by the Defendant from a 2004 transaction. This does not constitute "payment" or "release" within the meaning of the statute. The motion to strike the Third Affirmative Defense is granted.

Motion for Summary Judgment Striking the Answer and Granting Judgment to the Plaintiff on all three Causes of Action.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 837 N.Y.S.2d 594, 41 A.D.3d 755 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the Defendant. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

This action and counterclaim present a fundamental question of fact that precludes the grant of summary judgment. The positions of the parties could not be more contradictory. The Plaintiff alleges that the sum of $50,000 was given to the Defendant as a capital contribution in an oral contract to acquire and re-sell race horses in Delaware. The Defendant denies the existence of any such agreement, and, while acknowledging the receipt of $50,000, claims that it constituted reimbursement for a business loss sustained by the parties in connection with a 2004 transaction. Issues of credibility should not be decided on a motion for summary judgment. (***Skiadas v. Terovolas***, 219 A.D.2d 635, 631 N.Y.S.2d 729 (2d Dept., 1995); ***Singh v. Rosenberg,*** 21 A.D.3d 840, 821 N.Y.S.2d 121 [2d Dept., 2006]). The motion for summary judgment is therefore denied.

Motion for Contempt pursuant to Judiciary Law § 753

Motion Sequence # 5 requests an Order holding the Defendant and his counsel in contempt for violation of the Order of this Court dated November 16, 2007. As appears from

¶ 1 of the Affirmation in Support of the Motion, moving counsel is referring to a conference and application for disclosure before the Court, the transcript of which is annexed to the papers as Exh. "A". Despite the representation by counsel, the transcript does not direct the payment of the Plaintiff's attorney's fees, or for the Answer to be striken in the event of failure to produce documents as ordered. What it does say is that the Defendant was required to turn over all discovery items, including tax returns, by November 20, 2007 "or the Court will grant an application for sanctions and for preclusion." Exh. "A" to moving papers in Motion Sequence # 5, p. 13. The request for in camera review of tax returns was denied.

In response to the motion for contempt, counsel for the Defendant submits as Exh. "3" to the affirmation in opposition, a letter dated November 19, 2007, under cover of which they submitted Form 1040 Schedule C, Form 4797 Sales of Business Property and Form 4562 Depreciation and Amortization for years 2004 and 2005. Also submitted is the personal affidavit of the Defendant, Benedict Mondello, that he has provided to his attorneys all financial records relating to his receipt of $50,000 from the Plaintiff.

The Defendant has complied with the directives of this Court issued on November 16, 2007. In light of the stated position of the Defendant that he was not engaged in a partnership with the Plaintiff in 2006, it is understandable that he would not maintain ledgers and other financial documents relative to an entity, the existence of which he denies. The motion to hold Defendant and their counsel in contempt is denied.

The foregoing constitutes the Order of this Court.

Dated: March 31, 2008
Mineola, N.Y.

Karen V. Murphy
J. S. C.