SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x

YELLOW BOOK OF NEW YORK, INC.,

Plaintiff,

-against-

JOHN MARRA, CHRISTIAN DEMARINIS, and ALLIED/ALL-CITY PLUMBING AND ENVIRONMENTAL SERVICES, INC.,

Defendants

----------x

TRIAL PART: 48

INDEX NO.: 13898/05

MOTION DATE:7-10-08
SUBMIT DATE: 9-11-08
SEQ. NUMBER - 003

The following papers have been read on this motion:

Notice of Motion, dated 7-25-08.....1
Affirmation in Opposition, dated 7-17-08.....2
Affirmation in Opposition, dated 8-25-08.....3
Reply Affirmation, dated 9-10-08.....4

This is a motion by the defendants (other than DeMarinis) to amend their answer to add a counterclaim and affirmative defenses, to add cross claims against DeMarinis and to hold non-party Shelly Williams in contempt.

That portion of the motion which seeks contempt has been withdrawn, however, that aspect of the motion would have been denied as not in compliance with the requisites of the Judiciary Law.

That portion of the motion which seeks to assert cross claims against Christian DeMarinis is denied as the action against DeMarinis was discontinued more than one year prior to the making of this motion, he is no longer a party and has not participated in this action since July 5, 2007, when he gave a deposition as a non-party.

That portion of the motion which seeks to amend the Answer of the defendants is denied for the reasons set forth herein.

This is an action to collect payment on a contract to advertise in a telephone directory.

In February 2004, DeMarinis, then an employee of the corporate defendant signed a contract in his representative capacity and as an agent of his employer to advertise in a telephone directory. Defendant Marra is designated as a contact in the contract (as is DeMarinis) but his name does not otherwise appear in the contract. The complaint alleges claims for advertising which predate the contract signed by DeMarinis but the only contract submitted on this motion is the DeMarinis contract of 2004.

The simple issue in this action is whether DeMarinis was authorized impliedly or expressly to sign the 2004 contract on behalf of any of the defendants. The issue of whether defendant Marra is personally responsible for all or any part of the money due to the plaintiff is not presented on this motion.

The person who took the order on the 2004 contract, one Shelly Williams, has not been deposed although defendants have made unsuccessful efforts to conduct her deposition and the reply submitted by the defendants suggests that her deposition was scheduled on or about the date when this motion was submitted.

As the papers on this motion disclose, defendants have had several attorneys during this litigation and for a time Marra represented himself.

At a conference in this Court, held on March 19, 2007, defendants were given until June 1, 2007 to move to amend their answer. This motion was made more than one year after that deadline with no excuse or reasons offered for the delay. Since that date, DeMarinis was released from the action, conferences with the Court have been held and depositions of DeMarinis and defendant Marra have been conducted.

A litigant cannot ignore Court orders with impunity. *Kihl v. Pfeffer*, 94 NY2d 118 (1999), Sloppy practice threatens the integrity of the judicial system and time frames should be observed whether they are Court ordered or statutory, *Brill v. City of New York*, 2 NY3d 648 (2004). Finally, it is the prerogative of a court to control its calendar and expeditiously dispose of the volume of cases before it. Public policy favoring resolution of cases on their merits is not promoted by permitting a party to impose an undue burden on judicial resources. *Arts 4 All, Ltd., v. Hancock*, 54 AD3d 286 (1st Dept. 2008). Orders of a court including so ordered stipulations such as is present here, "are not options, they are requirements to be taken seriously by the parties." *Ford en rel Kerinsant v. City of New York*, 54 AD3d 263 (1st Dept. 2008).

The Court has given consideration to the circumstance that there have been changes in the representation of defendants but even allowing for such changes, the elapsed time is far too great to permit the amendment.

Moreover, plaintiff and DeMarinis have shown prejudice and the potential for undue further delay and expense. To allow the proposed amendment would necessitate a new round

of discovery, expense and delay of the ultimate resolution of what is essentially a simple factual dispute regarding the authority of DeMarinis to bind his employer and Marra.

Motions for leave to amend a pleading should be freely granted in the absence of prejudice or surprise to the opposing party unless the proposed amendment is palpably insufficient or patently devoid of merit. The legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free of doubt, *Lucido v. Mancuso*, 49 AD3d 220 (2d Dept. 2008). The propounded amended pleading fails to attain the liberal threshold for amendment as recently enunciated.

As to DeMarinis, since he is out of the case, the amendment is clearly improper as the Court lacks jurisdiction over him.

As to plaintiff, in addition to the reasons based on prejudice, delay and failure to adhere to Court ordered time limits, the proposed amendment is, on its face, within the parameters described above.

This is a dispute over the authority of DeMarinis to bind his employer and the individual Marra to a contract. Although there is an abundance of conjecture and speculation contained in the proposed amended answer, there are insufficient facts set forth to support the counterclaim or defenses based on fraud.

To make out a case of fraud in the inducement a party must set forth facts that must demonstrate (1) a misrepresentation or an omission of a material fact which was false and known to be false (2) the misrepresentation was made for the purpose of inducing a party to rely thereon (3) justifiable reliance and (4) injury. *New York University v. Continental Ins., Co.*, 87 NY2d 308, 318 (1995). The proposed new answer fails to plead facts that would

support these elements, See CPLR §3016(b) and *Megaris Furs Inc., v. Gimbel Brothers, Inc.*, 172 AD2d 209 (1st Dept. 1991).

The Court has considered whether the proposed new Answer pleads a claim for civil conspiracy, however, such a cause of action is not pleaded because New York does not recognize civil conspiracy to commit a tort as an independent cause of action and the fraud claim which is also dismissed is a tort. *See Pappas v. Passias*, 271 AD2d 420 (2d Dept. 2000). There is no substantive tort of conspiracy in this state, *See Yerushalmi v. Monroe*, 185 AD2d 841 (2d Dept. 1992) and mere conspiracy to commit a fraud is not of itself a cause of action. *Agostini v. Sobol*, 304 AD2d 395 (1st Dept. 2003).

In their first answer, the defendants denied all of the claims of the complaint. The proposed new affirmative defenses do no more than set forth arguments against previously denied allegations and hence are redundant. One proposed affirmative defense alleges "unclean hands", however, since the sole basis for the complaint is breach of contract and there is no request for any equitable relief, such a defense is not available in an action exclusively for damages. *Manshion Joho Center Co., Ltd. v. Manshion Joho Center, Inc.*, 24 AD3d 189 (1st Dept. 2005). The same rule applies to any other proposed equitable defenses.

Based on the foregoing, the motion is denied.

All parties shall appear at a conference before the undersigned at the Supreme Courthouse, 100 Supreme Court Drive, Mineola, N.Y., on September 22, 2008, at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or Order of

this Court. All parties are forewarned that failure to attend the conference may result in Judgment by Default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: September 18, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: **Concetta G. Spirio, Esq.**
Attorney for Plaintiff
10 East Main Street, PMB #130
East Islip, NY 11730

Elias N. Sakalis, Esq.
Attorney for John Marra and Allied/All City Plumbing and Environmental Services, Inc.,
260 Garth Road, Ste. 2H5
Scarsdale, NY 10583

Simonetti & Associates
Attorneys for Defendant DeMarinis
400 Jericho Turnpike Ste. 103
Jericho, NY 11753

Shelly Williams
Non party
262-44 60th Road
Little Neck, New York 11362