

Kahn v Burke Supply Co. , Inc.

2008 NY Slip Op 33317(U)

December 2, 2008

Supreme Court, Nassau County

Docket Number: 2105/07

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

JEFFREY KAHN,

Plaintiff,

-against-

BURKE SUPPLY CO., INC.,

Defendant.

TRIAL/IAS, PART 4
NASSAU COUNTY

INDEX No. 2105/07

MOTION DATE: Aug. 26, 2008
Motion Sequence # 002

The following papers read on this motion:

- Notice of Cross-Motion..... X
- Affirmation/Affidavit in Support..... XX
- Reply Affidavit..... X
- Memorandum of Law in Support..... X
- Memorandum of Law in Further Support... X
- Reply Memorandum of Law..... X

The previously-made motion by the plaintiff has been withdrawn, and by agreement of the parties, only the cross-motion has been submitted.

This cross-motion, by defendant, for an order granting defendant's motion to dismiss plaintiff's Complaint and to disqualify plaintiff's counsel, and for such other and further relief as this Court deems just and proper, is determined as hereinafter set forth.

FACTS

Defendant Burke Supply Company, Inc. is a wholesale supplier and distributor of paper, packaging, food service products and janitorial supplies in the metropolitan New York City area. Defendant hired the plaintiff, Jeffrey Kahn, as a salesperson. After the plaintiff was hired he asked the defendant if he could be paid as a corporation. Defendant received a fax from the plaintiff's lawyer containing an assignment agreement between the plaintiff and JTJAM Corp., a New York Corporation. Under the terms of the assignment agreement the plaintiff assigned all of his rights, title and interest in and to all benefits under the employment agreement to JTJAM Corp. The plaintiff's complaint against the defendant alleges causes of action for breaches of contract, unjust enrichment, permanent injunction and constructive trust.

DEFENDANTS' CONTENTIONS

Defendant argues that plaintiff is no longer a party in interest to the employment contract because plaintiff assigned all of his rights to JTJAM Corp. Defendant further argues that JTJAM Corp. is a necessary party to the litigation because otherwise the defendant would be subject the potential risk of being sued twice on the same claims in separate actions by both plaintiff and JTJAM Corp. Therefore, the defendant seeks to have the court dismiss plaintiff's cause of action on grounds that: (a) plaintiff lacks standing, and (b) for failure to join JTJAM Corp. as a necessary and indispensable party to the litigation.

Defendant asserts that it intends to call two attorneys at plaintiff's counsel's law firm, Salon Marrow Dyckman Newman & Broudy LLP, as witnesses to fully explore the validity of the assignment between the plaintiff and JTJAM Corp. Defendant argues that Plaintiff's law firm played a role in: (a) forming and incorporating JTJAM Corp., and (b) preparing an assignment of the employment agreement from the plaintiff to JTJAM Corp. Therefore, the defendant seeks to have the court disqualify Salon Marrow as counsel for the plaintiff under the advocate-witness rule.

PLAINTIFFS' CONTENTIONS

Plaintiff asserts that the defendant waived its defenses of documentary evidence and lack of capacity by not raising them in either a pre-answer motion or answer. Plaintiff argues that the defendant has failed to meet its burden of proof on a motion to

dismiss because the cross motion is predicated upon an unsigned assignment document between the plaintiff and JTJAM Corp.

Plaintiff argues that the defendant has failed to meet its evidentiary burden for an application of compulsory joinder because the cross motion is speculative at best, based solely upon an unsigned assignment document. Plaintiff further argues that it will consent to the joinder of JTJAM Corp. as a plaintiff in the litigation if this court determines that JTJAM Corp. is a necessary party in the current action.

Plaintiff asserts that its counsel is not subject to disqualification under the advocate-witness rule because the matter in which the attorneys in question from plaintiff's counsel's office could testify to are either: (a) an uncontested issue in the current action, or (b) privileged and not subject to discovery. Plaintiff argues that the testimony sought from its counsel is not necessary to the current action. Plaintiff further argues that the information sought from its counsel could be ascertained by circumstantial evidence.

DEFENDANT'S REPLY

Defendant argues that the unsigned assignment agreement between the plaintiff and JTJAM Corp. is legally valid because its unambiguous terms establish that plaintiff intended to transfer all of his rights flowing from the employment agreement to JTJAM Corp. Defendant further argues that the assignment agreement is enforceable in equity because defendant issued checks to plaintiff's assignee, JTJAM Corp., under circumstances that plaintiff himself set in motion. Therefore, the plaintiff has failed to establish that he is the real party in interest and his complaint should be dismissed with prejudice.

Defendant argues that it has not waived its affirmative defenses based upon documentary evidence and lack of capacity because defendant's sixth affirmative defense expressly reserves the right to plead additional separate and affirmative defenses that may be ascertained during the course of this action. Alternatively, the defendant requests leave to amend its answer to assert the defenses based upon documentary evidence and lack of capacity if this court finds that the defendant waived these defenses by not raising them in either a pre-answer motion or its answer.

Defendant contends that plaintiff's counsel should be disqualified because the counsel's testimony is necessary to the determination of plaintiff's standing in the lawsuit. Defendant argues that plaintiff's counsel would be called to testify as to the validity of the assignment agreement between the plaintiff and JTJAM Corp., which is a contested issue in the case. Defendant further argues that the plaintiff has not established the applicability of the attorney-client privilege because plaintiff's communication to his counsel were made with the intent that they be conveyed to the defendant, therefore they lack the requisite intent of confidentiality to establish the privilege.

DECISION

Addressing the plaintiff's procedural objection, i.e., that the movant's interposition of its answer acts as a waiver of its right to make this motion to dismiss, discussion is appropriate. CPLR 3211(e) provides, in pertinent part, as follows:

“At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading”. (Emphasis supplied)

There is no assertion that the answer was untimely served.

This Court has perused the pertinent case law, inter alia, Matter of Abramov v Board of Assessors, Town of Burley, Ulster County (257 AD2d 958, 684 NYS2d 326, 3d Dept., 1999), particularly that part of the opinion which states:

“An objection based on the failure

to timely commence a proceeding may be raised in one of two ways: in the answer as an affirmative defense, or in a motion to dismiss pursuant to CPLR 3211(a)(5). Such a motion must be made prior to the time in which to serve an answer, and the failure to do so will result in a waiver of the defense unless raised in the responsive pleading". (*supra*, p.328). (emphasis supplied).

With respect to that part of the defendant's cross motion to dismiss based upon plaintiff's lack of standing and failure to join an indispensable party, the motion is **denied**.

CPLR 1001(a) provides that

"Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants".

Plaintiff has resolved any doubt about the necessary joinder of JTJAM Corp. by consenting to the joinder of JTJAM Corp. as a plaintiff. This court directs that plaintiff join JTJAM Corp. as a necessary party in the litigation.

With respect to that part of the defendant's cross-motion to disqualify plaintiff's counsel under the advocate-witness rule, the relevant Disciplinary Rule must be considered.

R 5-102. [22 NYCRR§ 1200.21] Lawyers as Witness

"A. A lawyer shall not act, or

accept employment that contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, except that the lawyer may act as an advocate and also testify:

1. If the testimony will relate solely to an uncontested issue.
2. If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
3. If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or the lawyer's firm for the client.
4. As to any matter, if disqualification as an advocate would work as a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case".

Plaintiff has consented to joining JTJAM Corp. as a plaintiff in the litigation. The joinder of JTJAM Corp. will remove the possibility of the defendant being sued twice on the same claims in separate actions by both plaintiff and JTJAM Corp. Therefore, the potential testimony of plaintiff's counsel as to the validity of the assignment agreement will not relate to the issue of standing because JTJAM Corp. will be included as a plaintiff in the litigation. Therefore, that portion of the defendant's application is also denied.

Dated DEC 02 2008

ENTERED

Stephen A. Bucarea
J.S.C.

DEC 05 2008