

Gall v Colon-Sylvan

2008 NY Slip Op 33756(U)

September 2, 2008

Supreme Court, Nassau County

Docket Number: 6536/07

Judge: Stephen A. Bucaria

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

ELEMER GALL a/k/a CSABA GALL,

Plaintiff,

INDEX No. 6536/07

MOTION DATE: June 26, 2008
Motion Sequence # 003

-against-

FRANCES COLON-SYLVAN, WELLS FARGO,
N.A., JOSEPH GRANT, EMPIRE LAND
SERVICES CORP., A-1 REALTY NETWORK
OF HOMES, INC.,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Reply Affirmation X

This motion, by defendant Joseph Grant, for an order permitting the Proposed Amended Answer to be filed and served on behalf of defendant Joseph Grant, is determined as hereinafter set forth.

FACTS

Elemer Gall, plaintiff, and Joseph Grant, defendant, are both 50% shareholders in

the corporation JJRG Services, Inc. (hereinafter "JJRG Inc."). JJRG Inc. was established for the purpose of the acquisition, rehabilitation, and re-sale of real property purchased in distress and/or foreclosure sales.

On February 24, 2005, the corporation purchased the premises located at 75 Oakdale Boulevard, Farmingdale, New York ("premises") for a total sum of \$493,600.00. The funds for this purchase were derived from a mortgage loan of \$313,600, and a capital contribution of \$180,000 made by Mr. Gall into the corporate checking account.

After the purchase of said property, an additional capitalization was provided by Mr. Gall to be used towards the renovation of the property.

On June 14, 2005, an agreement (hereinafter "Repayment Agreement") was entered into between Mr. Gall and Mr. Grant that obligated Mr. Grant to pay the sum of \$155,000 with a 12% interest rate per diem, and a maturity date of June 14, 2008. This debt obligation was incurred by Mr. Grant as the result of financial irregularities in connection with JJRG Inc. The Repayment Agreement contained a provision stating that the signatures of both Mr. Gall and Mr. Grant were necessary in order to transfer any corporate asset including the aforementioned premises.

Afterwards, as alleged by plaintiff in his complaint, Mr. Grant moved himself and his family into the premises and agreed to remit all mortgage payments and pay all carrying costs. Then Mr. Grant listed the property for sale with defendant A-1 Realty Network of Homes, Inc. (hereinafter "A-1 Realty"), without the consent of Mr. Gall. A-1 Realty was advised of Mr. Gall's interest in the property and the existence of the Repayment Agreement. Throughout this time period, Mr. Grant continued to make representations to Mr. Gall that renovations were being made when, in fact, they were not.

On November 1, 2006, a contract of sale was entered into between Mr. Grant, as seller, and defendant Frances Colon-Sylvain (hereinafter "Sylvain"), as purchaser, to transfer the said premises for the total sum of \$468,000 with no down payment and a seller's concession of \$25,500.00. On December 26, 2006, the closing occurred transferring the premises. Sylvain obtained a purchase-money mortgage from Wells Fargo, N.A., defendant, which was used to pay the purchase price of the premises. Empire Land Services Corp., defendant, is the title company which insured title on the premises.

After the closing, as alleged in the complaint, Mr. Grant continued to reside on the premises which was then re-listed as a rental property with A-1 Realty.

On April 16, 2007, plaintiff commenced this action by serving the complaint which stated six causes of action; that Mr. Grant breached his fiduciary duty by diverting corporate assets for personal use; that there was conversion of corporate assets and fraud including use and occupancy of corporate premises; and both causes of action seek monetary damages in the sum of \$375,000.

The third cause of action, is for fraudulent transfer of corporate real property, and seeks a constructive trust on the premises. The fourth cause of action seeks an accounting as to all defendants as a result of misappropriation of corporate assets. The fifth cause of action alleges fraud by Wells Fargo, N.A. and Empire Land Services Corp., and seeks an order voiding the deed transfer from JJRG Inc. to the defendant Sylvain . The sixth cause of action alleges on conspiracy to commit fraud as against all defendants, and seeks punitive damages.

On August 2, 2007, Mr. Grant's first attorney served the original answer. Mr. Grant subsequently released that attorney and attempted to proceed pro se. Thereafter, Mr. Grant retained his current attorney.

The proposed amendment includes two alterations: first, a cross-claim is asserted against defendants Colon-Sylvain and Empire Land Services for contribution and/or indemnification; and a counter-claim is asserted against plaintiff seeking to vitiate the repayment agreement entered into between defendant, Grant, and plaintiff, Gall, on the grounds of duress and/or fraud.

CONTENTIONS

Mr. Grant asserts that his proposed amendment would result in minimal or non-existent prejudice to the plaintiff. Counsel argues that defendant Grant has never acted in a manner consistent with the terms of the Repayment Agreement ever since the time it was allegedly executed; and that the plaintiff was mindful that certain efforts would be made to vitiate such agreement.

In opposition, the plaintiff asserts that an amendment would cause an undue delay in the lawsuit because all document discovery has already been completed; so that should the answer be amended, all the parties would be required to serve supplemental discovery demands. Numerous delays have already occurred on behalf of the movant, including those following the discharge of his original attorney, his attempt to proceed pro se, and the extensive search process committed prior to hiring his present attorney. The plaintiff asserts that this counter-claim fails to state a cause of action, that this claim to vitiate the agreement on the grounds of fraud and/or duress simply amounts to a defense. The plaintiff argues that the claim of fraud is not pled with sufficient factual allegations necessary to satisfy the elements of fraud, and the motion to amend should be denied.

In reply, defendant argues that these amendments will not cause an undue delay because, contrary to plaintiff's assertions, its impact on the discovery process will be minimal. Although paper discovery has been completed, the original discovery demands were so extensive that any new issues raised in the proposed Amended Answer will have already have been covered. Furthermore, depositions have not yet commenced, with the exclusion of one, non-party, deposition. Thus, additional discovery is highly unlikely. Defendant argues that his counter-claim does, in fact, state a cause of action. The "vitiating of an agreement" is not simply a defense, but rather a cause of action as well. As a separate action, Mr. Grant seeks the relief of making the agreement unenforceable. This includes any future attempts to enforce the agreement, and not simply unenforceable as related to claims in the present complaint.

DECISION

CPLR 3025(b) provides: "a party may amend his pleadings, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances".

Unless a proposed amendment to complaint will result in undue prejudice to other party, has been unduly delayed, has not been offered in good faith, or moving party has had repeated opportunities to cure defects by amendments previously allowed, leave to amend should be liberally granted. (Neeld v. National Hockey League, D.C.N.Y. 1977, 439 F.Supp. 446.) Leave to amend pleadings shall be freely given where the proposed amendment is not palpably insufficient or patently devoid of merit and will not prejudice

GALL v COLON-SYLVAIN, et al

Index no. 6536/07

or surprise the opposing party. (Bolanowski v. Trustees of Columbia Univ. in City of N.Y., 21 A.D.3d 340, 341, 800 N.Y.S.2d 560, 2nd Dept., 2005; Crespo v. Pucciarelli, 21 A.D.3d 1048, 1049, 803 N.Y.S.2d 586, 2nd Dept., 2005).

An amendment to this answer would not result in an unjustified surprise, prejudice, or unduly delay to the plaintiff's lawsuit. The existence of the Repayment Agreement is central to many aspects of the plaintiff's arguments, and the amendment includes allegations relating to the conduct of plaintiff and his attorney. Although the paper portion of discovery may have been completed, depositions have not yet commenced, so it is highly unlikely that any new issues raised by the amendment will result in additional paper discovery. Should new or additional disclosure be required, it does not appear to be such that would overly delay or prejudice any party.

The movant seeks a declaratory judgment that nullifies, or vitiates, the repayment agreement on the grounds of duress. As it has been developed on this record, this counter-claim does not appear to be palpably insufficient or patently devoid of merit.

The Court notes the total lack of opposition to the proposed cross-claim.

For the foregoing reasons, the motion to amend the pleadings is **granted**, and service of same shall be accomplished by service of a copy of this order upon counsel for all parties.

A Status conference is scheduled for October 7, 2008 at 9:30 a.m. in Chambers of the undersigned.

Dated SEP 02 2008

Stephano Bucaria
ENTERED J.S.C.
 SEP 04 2008
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE