

Flowers v Seaborn

2009 NY Slip Op 31266(U)

June 9, 2009

Supreme Court, New York County

Docket Number: 104126/08

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB

PART 15

Index Number : 104126/2008

FLOWERS, BEVERLY M.

VS.

SEABORN, RON

SEQUENCE NUMBER : 002

STRIKE ANSWER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

In 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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING RESOLUTION OR DECISION

FILED

JUN 10 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/9/09

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X
BEVERLY FLOWERS,

Plaintiff,

Index No.: 104126/08
DECISION/ORDER

-against-

RON SEABORN,

FILED
JUN 10 2009
COUNTY CLERK'S OFFICE
NEW YORK

Defendant.

-----X
HON. WALTER B. TOLUB, J.S.C.:

In this pro-se action, plaintiff moves for an order to, *inter alia*, reinstate a temporary restraining order, strike defendant's answer and grant summary judgment on the complaint; while defendant cross-moves for an order for certain declaratory and injunctive relief (collectively, motion sequence number 002). For the following reasons, the motion and cross motion are both denied.

BACKGROUND

The court recited the salient facts of this case in its decision dated August 7, 2008, and does not restate them here. The relevant portions of that decision found: (1) that the purported arbitration agreement that the parties apparently executed on December 3, 2006 was unenforceable; (2) that, consequently, plaintiff was unable to establish her entitlement to a preliminary injunction, and that her application for such relief should, therefore, be denied; and (3) that defendant's requests for declaratory relief should also be denied as they were improperly brought before the court on a motion. In the instant motion and cross motion, the parties essentially repeat their previous requests for relief.

DISCUSSION

The first portion of plaintiff's motion seeks the "reinstatement of a temporary restraining order." However, that application for relief was rendered unavailable when the court considered and denied plaintiff's prior application for a preliminary injunction in its August 7, 2008 decision. Thus, at this juncture, it is incumbent upon plaintiff to move for leave to either renew or reargue her earlier motion, pursuant to the grounds set forth in CPLR 2221.

A motion to renew must be based on "material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court." (*See Matter of Beiny*, 132 AD2d 190, 209-210 [1st Dept 1987], citing *Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]). However, "[r]enewal is not available as a 'second chance' for parties who have not exercised due diligence in making their first factual presentation." (*See Chelsea Piers Management v Forest Elec. Corp.*, 281 AD2d 252 [1st Dept 2001], citing *Rubinstein v Goldman*, 225 AD2d 328 [1st Dept 1996]). Similarly, a motion for leave to reargue may be granted only upon a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (*See William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], citing *Schneider v Solowey*, 141 AD2d 813 [2^d Dept 1988]). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." (*Id.* at 27, citing *Pro Brokerage, Inc. v Home Insurance Co.*, 99 AD2d 971 [1st Dept 1984]). Here, plaintiff's motion does not address any of the foregoing grounds, or present any evidence that the court could assess to determine whether or not said grounds exist here. Consequently, the court finds that the first branch of plaintiff's motion is denied.

The next portion of plaintiff's motion seeks an order to strike defendant's answer, pursuant to CPLR 3126, on the ground that defendant "failed to comply with discovery rules." (See Notice of Motion, Flowers Affidavit, at 2 [pages not numbered]). The foregoing statute provides that:

If any party ... refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: ...

3. an order striking out pleadings or parts thereof ...

(CPLR 3126). Here, defendant asserts that "I responded to all of the discovery demands and attached the supporting documentation that is in my possession." (See Notice of Cross Motion, Seaborn Affidavit, ¶ 6). The court notes that defendant, who - like plaintiff - appears pro se in this action, has presented a copy of his handwritten response to plaintiff's demand for a bill of particulars along with such documents annexed as the court might reasonably expect him to possess. (*Id.*; Exhibit 4). Plaintiff's response questions the veracity and completeness of defendant's submission. (See Flowers Reply Affidavit). However, the Appellate Division, First Department, holds that the extreme penalty of "striking an answer is inappropriate absent a clear showing that the failure to comply is willful, contumacious or in bad faith." (See *Palmenta v Columbia University*, 266 AD2d 90, 91 [1st Dept 1999]). Plaintiff has manifestly failed to make such a showing here. Consequently, the court finds that the second branch of plaintiff's motion is also denied.

The final portion of plaintiff's motion seeks an order to grant "full or partial summary judgment" on the complaint. When seeking summary judgment, the moving party bears the

burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. (See e.g. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 [1st Dept 2002]). However, conclusory assertions which are unsupported by evidence are insufficient to sustain a motion for summary judgment. (See e.g. *Mason v Dupont Direct Financial Holdings, Inc.*, 302 AD2d 260 [1st Dept 2003]). Here, plaintiff has identified neither her causes of action against defendant, nor offered any evidence which might support such causes of action. Plaintiff's entire motion consists of "conclusory allegations" of the sort which are patently insufficient to support a request for summary judgment. Accordingly, the court rejects plaintiff's request, and finds that plaintiff's motion is denied in its entirety.

Defendant's cross motion seeks an order to enjoin plaintiff: (1) from denying defendant access to their joint place of business; (2) from slandering and defaming defendant there; and (3) from interfering with defendant's interaction with customers there. Pursuant to CPLR 6301:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

(CPLR 6301). The Court of Appeals holds that "[a] preliminary injunction may be granted under CPLR Article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld;

and (3) a balance of equities tipping in the moving party's favor." (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]). Here, the court notes that defendant's answer sets forth only one counterclaim for a declaration that defendant and plaintiff are each 50% partners in a business venture, and that there is no application contained therein for injunctive relief. (*See* Notice of Cross Motion, Seaborn Affidavit, Exhibit 1). Moreover, in its August 7, 2008 decision, the court held that defendant's application for declaratory relief was "not properly before the court on a motion," and that "if defendant wishes to seek declaratory relief, he must commence a plenary action." Thus far, defendant has still failed to do so. Therefore, without knowing the nature of the claim that defendant may intend to make, the court is unable, at this juncture, to determine that he has a likelihood of ultimate success on the merits of such claim. Accordingly, the court rejects defendant's application for injunctive relief, and the cross-motion is denied in its entirety.

Accordingly, it is

ORDERED that Plaintiff's motion is denied in its entirety; and it is further

ORDERED that Defendant's cross-motion is denied in its entirety.

This constitutes the decision and order of the Court.

The parties, or counsel if obtained, are directed to appear in room 335 at 60 Centre Street at 11:00AM, as scheduled for a conference.

Dated: 6/9/09

FILED
 JUN 10 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

ENTER:

WBT

 Hon. Walter B. Tolub, J.S.C.