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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ROY G. JACOBS individually and d/b/a CROSS COUNTY REAL ESTATE, PROPERTIES, LLC and CROSS COUNTY REAL ESTATE PROPERTIES, LLC,

Plaintiffs,

TRIAL/IAS PART: 25
NASSAU COUNTY

Index No: 11182-07
Motion Seq. No: 2
Submission Date: 10/9/09

-against-

RE/MAX OF NEW YORK, INC., RE/MAX INTERNATIONAL, INC., RE/MAX BENCHMARK REALTY GROUP, CAROLYN WEBER and HENRY WEBER,

Defendants.

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Papers Read on this Motion:

Notice of Motion, Affidavit in Support, Affirmation in Support and Exhibits...x
Memorandum of Law in Support.....x
Affirmation in Opposition and Exhibit.....x
Reply Affirmation and Exhibits.....x
Reply Memorandum of Law in Further Support.....x

This matter is before the court on the motion filed by Defendants RE/MAX of New York, Inc. ("RMNY"), Carolyn Weber and Henry Weber (collectively "RMNY Defendants") on August 19, 2009 and submitted on October 9, 2009. [1] The Court grants the motion in part and denies it in part. For the reasons set forth below, the Court 1) grants the motion of the RMNY Defendants for leave to amend their Verified Answer to include a Counterclaim alleging Plaintiffs' breach of the Franchise Agreement, with the further directive that Defendants appear

[1] By letter dated October 15, 2009, counsel for Plaintiffs asked the Court to disregard Defendants' reply papers as untimely. Defendants opposed that request by letter dated October 16, 2009. Over Plaintiffs' objection, the Court will consider Defendants' reply papers, in addition to the other papers submitted in connection with this motion.

for a further deposition no later than December 16, 2009, or on an earlier date that is mutually agreeable to all counsel and parties; and 2) denies the motion of the RMNY Defendants for leave to amend their Verified Answer to include a Counterclaim alleging defamation.

BACKGROUND

A. Relief Sought

The RMNY Defendants seek an Order, pursuant to CPLR § 3025, granting them leave to amend their Verified Answer to include Counterclaims against Plaintiff Roy G. Jacobs ("Jacobs") for 1) breach of the Franchise Agreement dated November 19, 2004, and 2) defamation. Plaintiffs oppose the motion.

B. The Parties' History

Defendant Re/Max International established a system for the opening and operation of real estate offices under the trade name RE/MAX. RMNY owns the right to franchise the operation of RE/MAX offices in New York State.

On or about November 19, 2004, RMNY and Jacobs entered into a Franchise Agreement dated November 19, 2004 ("Franchise Agreement"). Pursuant to the Franchise Agreement, RMNY granted Jacobs a Franchise for an office to be located in Ulster County, New York, for a term of five years, commencing on June 1, 2005. In consideration for RMNY granting the Franchise, Jacobs executed and delivered to RMNY a Guaranty and Assumption of Obligations.

Plaintiffs commenced this action on or about November 2, 2006 to recover money damages against the Defendants for breach of the Franchise Agreement, as well as a Recruiting Services Agreement dated November 1, 2005 and an Internet Strategy Agreement dated February 6, 2006. RMNY Defendants interposed a Verified Answer ("Answer") dated December 18, 2006. That Answer, in addition to addressing the allegations in the Verified Complaint ("Complaint"), contained nine (9) affirmative defenses, but did not assert any counterclaims.

When the parties were unable to agree on a discovery schedule, the court (Austin, J.) appointed a Special Referee to supervise discovery. The depositions of all party witnesses have been completed. The RMNY Defendants now seek leave of the Court to interpose two (2) counterclaims alleging: 1) Jacobs' breach of the Franchise Agreement and 2) Jacobs' defamation of the RMNY Defendants.

The RMNY Defendants provide an Affidavit in Support of Henry F. Weber ("Weber"), President of Defendant RE/MAX of New York, Inc. ("RMNY"). With respect to the proposed defamation counterclaim, Weber affirms that, on June 10, 2009, after Defendants had served their Answer, he discovered that Jacobs had published a report on the website www.ripoffreport.com in which he stated, *inter alia*, that "RE/MAX of NY fraudulently and deceitfully induced me to purchase a RE/MAX franchise and enter into other RE/MAX related agreements, and ultimately breached every agreement !" (Ex. 4 to Ds' Motion). Weber submits that this report contains misstatements of fact intended to tarnish the reputation of the RMNY Defendants. The report states that it was "submitted" and "modified" on February 10, 2007.

With respect to the proposed counterclaim alleging breach of the Franchise Agreement, counsel for RMNY Defendants ("Counsel") affirms that, by letter dated November 12, 2007, counsel for Plaintiffs acknowledged that he was holding $8,027.00 from Jacobs in an escrow account ("Escrow Account"), representing franchise fees that Jacobs paid pursuant to the Franchise Agreement. RMNY Defendants provide a copy of that letter (Ex. 7 to Ds' Motion), in which Plaintiffs' counsel writes "In answer to your question concerning an escrow account balance, please note that our law firm is holding $8,027.00 in our escrow account which represents franchise fees paid by [Jacobs]."

Counsel affirms, further, that by letter dated March 5, 2008, Plaintiffs' counsel confirmed that he was holding that $8,027.00 sum in the Escrow Account, and provides a copy of that letter (Ex. 8 to Ds' Motion). In that letter, Plaintiffs' counsel made reference to his November 12, 2007 letter confirming that the funds were in the Escrow Account, in the context of disputing RMNY Defendants' claim that Jacobs owed over $19,000 in franchise fees. Plaintiffs' counsel also advised Counsel that Jacobs would deposit, into the Escrow Account, 1% of all commissions that Jacobs' office received from January 1, 2006 to the outcome of the pending litigation.

Counsel affirms further that, subsequent to serving their Answer, RMNY Defendants learned at the deposition of Jacobs on January 27, 2009 that Plaintiffs' counsel had released to Jacobs the funds being held in the Escrow Account that represented franchise fees that Plaintiffs owed to RMNY. Counsel provides a copy of the relevant deposition testimony (Ex. 9 to Ps' Motion) in which Jacobs testified as follows in response to questions by Defendants' attorney:

Question: You may be aware that there were some communications between my firm and your prior counsel, Tarshis Catania, where Mr. Minard was an attorney, in which you were to deposit monies representing the franchise fees with their firm. Are you aware of that?

Answer: Yes.

Question: As of today, how much money is on account with Tarshis Catania?

Answer: There is no money.

Question: Was that money transferred to Mr. Minard?

Answer: No, it wasn't.

Question: Where is that money presently?

Answer: There was $8,000 that was in Mr. Mahon's escrow account and when this all seemed to get out of hand, I requested the money back because the fees weren't accountable that RE/MAX of New York was sending us.

Question: When was that money withdrawn from the escrow account?

Answer: The exact date I don't know.

Question: Was it prior to the commencement of the litigation in 2006?

Answer: No. It was after.

Question: Was it in January of 2008?

Answer: I don't know the exact date.

Question: Was it in 2008?

Question by Jacob's counsel: Pre or post-termination? Let him ask the question.

Question: Was it in May of 2008?

Answer: You're asking me –

Question: When the money was withdrawn from Mr. Mahon's account.

Answer: I don't know the exact date

Question: Do you know about what month and year?

Answer: No, I do not sir. It was after, I believe, I was terminated that that happened.

Counsel affirms that, by letter dated January 16, 2008, Defendants requested confirmation from Plaintiffs' counsel that Jacobs had paid the sum of $16,163 into the Escrow Account, representing the total franchise fees that Jacobs owed to date. Counsel provides a copy of that letter (Ex. 10 to Ds' Motion). Counsel affirms that Defendants did not receive the requested confirmation.

In his Affirmation in Opposition, Plaintiffs' counsel opposes Defendants' applications, submitting that Defendants' sole motivation in seeking to amend its Answer at this juncture is to delay further the resolution of this litigation. Plaintiffs' counsel affirms that, during a telephone conference with the court to whom this matter was previously assigned, Counsel was advised that "RMNY would be in for an 'uphill battle' if it submitted the motion to amend" (Aff. in Opp. at ¶ 5). Plaintiffs' counsel affirms, further, that this conference took place nearly a month after the deadline that the assigned court referee set for RMNY to file its Rule 24(c) letter seeking leave to amend.

In opposing Defendants' motion, Plaintiffs' counsel submits that 1) the Defendants will be prejudiced by the granting of the motion because the case will be further delayed as a result of Plaintiffs' need to re-depose Defendants; 2) the proposed defamation claim is barred by the statute of limitations and lacks merit; 3) RMNY's "gross delay" in seeking leave to amend warrants denial of its motion; and 4) RMNY could have asserted the non-payment of franchise fees in its original Answer. Plaintiffs' counsel affirms that, at present, all party depositions are completed and only one non-party remains to be deposed.

In his Reply Affirmation, Counsel affirms that, upon learning at the January 27, 2009 deposition of the release of the Escrow funds, RMNY Defendants attempted to resolve the issue informally, as reflected by letters dated February 17 and March 16, 2009 (Exs. D and E to Ds' Reply Affirmation). Counsel affirms that, by letter dated March 27, 2009, Plaintiffs' counsel denied the existence of the Escrow funds. In that letter (Ex. F to Ds' Reply Affirmation), Plaintiffs' counsel states, *inter alia*, that 1) the letters of February 17 and March 16, 2009 do not accurately reflect the parties' or counsel's understanding; 2) the parties never signed a formal escrow agreement, but rather entered into a "conditional deposit agreement; and 3) as a result of RE/MAX's improper conduct in causing Jacobs' loss of his franchise, Jacobs is no longer a

franchisee. In that letter, Plaintiffs' counsel also states that "[a]t no time have the parties signed an escrow agreement[,] but rather they "agreed that conditional deposits would be set aside to preserve Jacobs' franchise rights."

Subsequently, by letter dated May 26, 2009 (Ex. G to Ds' Reply Affirmation), RMNY Defendants advised Plaintiffs' counsel that they believed that Plaintiffs' counsel was ignoring its obligations with respect to the Escrow funds. RMNY Defendants also notified Plaintiffs' counsel of Defendants' intention to assert counterclaims against Jacobs, and to seek compensation from Plaintiffs' counsel regarding the satisfaction of a judgment from the allegedly missing Escrow funds. RMNY Defendants submit that, in light of Plaintiffs' failure to replace the Escrow funds, they were constrained to seek leave from the Court to amend their Answer to add a counterclaim to recover franchise fees allegedly due pursuant to the Franchise Agreement, a portion of which were held in Escrow.

C. The Parties' Positions

RMNY Defendants seek leave to amend their Answer to assert Counterclaims based on 1) libel for an allegedly defamatory posting on a website and 2) for breach of the Franchise Agreement based on Jacobs' alleged failure to pay the franchise fees into the Escrow Account during the pendency of this litigation. Defendants submit that the relevant facts came to light after they served their initial Answer.

Plaintiffs oppose Defendants' motion, contending that the Defendants were aware of the facts constituting the alleged breach of the Escrow Agreement as early as when they served their Answer, and in any case by November 2007 and March 2008, but delayed making the within motion to impede the resolution of this matter and cause the Plaintiffs to incur additional legal fees.

RULING OF THE COURT

CPLR §3025(b) provides that leave to amend the pleadings shall be "freely given" unless the proposed amendment clearly lacks merit or the opposing party demonstrates prejudice or surprise. *Acuri v. Ramos*, 7 A.D.3d 741 (2d Dept. 2004); *Matter of Rouson*, 32 A.D.3d 956 (2d Dept. 2006).

Plaintiffs have failed to demonstrate that the first proposed Counterclaim, alleging a breach of the Franchise Agreement by failing to pay fees into the Escrow Account, lacks merit or that interposing it at this time would prejudice Plaintiffs. To the extent that Plaintiffs wish to

obtain discovery on that Counterclaim, it appears that a deposition of one or more of the Defendants on that Counterclaim would provide Plaintiffs with the necessary information. Accordingly, the Court grants the motion of RMNY Defendants for leave to amend their Verified Answer to add a counterclaim alleging Plaintiffs' breach of the Franchise Agreement, on the condition that the Defendants appear for a further deposition no later than December 16, 2009, or a sooner date mutually agreeable to all counsel and parties.

The second amended counterclaim alleges defamation. The statute of limitations for an action sounding in for defamation is one (1) year, and accrues at the time of the publication of the alleged defamatory matter, not the time of the discovery of the alleged defamatory matter. *See* CPLR 215(3); *Frederick v Fried*, 10 A.D.3d 444 (2d Dept. 2004), *lv. app. den.* 5 N.Y.3d 708 (2005). The report that Defendants RMNY claim forms the basis for their defamation claim was allegedly posted on February 10, 2007. The statute of limitations has expired as Defendants would have been required to interpose their counterclaim for defamation by February 10, 2008. The fact that RMNY's president, Henry Weber, may have discovered the alleged defamatory statement in June 2009 is irrelevant as the cause of action does not accrue on discovery, but rather at the time of publication. Accordingly, the Court denies Defendants' motion to amend their Answer to interpose the second counterclaim sounding in defamation.

The proposed Amended Verified Answer and First Counterclaim, a copy of which is annexed to the moving papers as Exhibit 11, is deemed served on condition that Defendants appear for a further deposition no later than December 16, 2009, or a sooner date mutually agreeable to all counsel and parties, as directed herein.

The Court reminds counsel of their required appearance for a Certification Conference before the Court on December 17, 2009 at 9:30 a.m.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
November 25, 2009

HON. TIMOTHY S. DRISCOLL
J.S.C.