Full Time Fitness Corp. v J & B Fitness, Inc.

2010 NY Slip Op 30200(U)

January 20, 2010

Supreme Court, Nassau County

Docket Number: 013514/2009

Judge: Ira B. Warshawsky

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCAN

E

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

FULL TIME FITNESS CORP.,

Plaintiff,

INDEX NO.: 013514/2009
MOTION DATE: 11/16/2009
MOTION SEQUENCE: 001

-against-

J & B FITNESS, INC., and
BRIAN BRATKOWSKY,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed 1
Affidavit in Opposition of Brian Bratkowsky & Exhibits Annexed 2
Reply Affidavit in Further Support of Glen Morale 3

PRELIMINARY STATEMENT

Plaintiff moves for partial summary judgment to the effect that the Defendants are obligated to pay 20% of the gross income which they received in their capacity of independent contractors performing physical training for customers of the Plaintiff, pursuant to a contract between the parties dated November 2, 2000. Defendants oppose the motion on the ground that Brian Bratkowsky, a 10% shareholder in Plaintiff, was required to incur expenses for the maintenance of the premises in which they were working as independent contractors. They contend that the majority shareholders of Plaintiff, operating under the name "Gold's Gym", failed to maintain the premises in a condition which would result in the retention and increase of members who were available to retain services of Defendants.

This motion relates to premises 2060 Broadway, Bellmore; but there is another action in which Defendant herein is a Plaintiff and Plaintiff herein is a Defendant, and yet a third action in which Juan Mayoral, individually and as a shareholder of Time for Fitness, d/b/a Gold's Gym of Garden City Park is Plaintiff and Anthony Caliendo, Glenn Morale and Gold's Gym are Defendants. The latter two actions were joined for discovery purposes by Order of this Court dated October 27, 2009.

BACKGROUND

The Agreement

This action emanates from an agreement between Full Time fitness Inc., and Time for Fitness, Inc., both doing business under the name of Gold's Gym as Party of the First Part and J & B Fitness, Inc., and Brian Bratkowsky and Juan Mayoral, Parties of the Second Part. [1] The purpose of the agreement was to provide the services of Party of the Second Part as physical trainers at The Gold's Gyms located at 2060 Bellmore Avenue, Bellmore, and 190 Broadway, Garden City, New York. The agreement was terminable by either party at will on 30-days notice by certified mail. Parties of the Second Part were at all times to serve as independent contractors, although Bratkowsy was a 10% minority shareholder of Plaintiff Full Time Fitness Corp.

In lieu of rental, J & B Fitness, Inc. were to pay, on a monthly basis, 20% of the gross revenue derived from working within the premises of Plaintiff. Certain existing clients of J & B, designated on Exh. "A" to the Agreement, were excluded from the provisions of the Agreement. J & B was also required to render a quarterly Statement of Account to Plaintiff. Recognizing the difficulty of calculating damages in the event of a breach by Defendant, liquidated damages of $500 per breach was included in the Agreement.

Party of the Second Part agreed to provide physical fitness services solely at the Gold's Gym premises in Bellmore and Garden City, and only after the customers have registered as Gold's Gym members. They were also required to provide general and personal liability insurance in the amount of $3,000,000, with Plaintiff named as a loss payee. Plaintiff agreed that it would not contract with or hire any other independent contractor other than the parties to the Agreement.

---

[1] Exh. "A" to Order to Show Cause.

Defendants also agreed to a restrictive covenant and non-compete in perpetuity within a 2-mile radius.

Performance Under the Agreement

The parties apparently operated in accordance with the terms of the Agreement between 2000 and 2005. At that time Bratkowsky became a 10% equity owner in Plaintiff corporation. According to Bratkowsky, from that point forward, the majority shareholders began to neglect their obligations to maintain the premises in a suitable condition. As a consequence, Bratkowsky, in an effort to maintain J & B's client base, states that he undertook to perform and pay for services which were the obligations of Plaintiff.

Plaintiff claims that as an independent contractor, J & B were unauthorized to provide services or make payments to others and thereby create a setoff against the obligation to pay 20% of their gross income. Bratkowsky responds that as a 10% shareholder in Plaintiff, he had an interest in the maintenance of the premises and the satisfaction of the members of the gym. In addition, Defendants allege that Plaintiff had a good faith duty, under the terms of the contract, to make available to Defendants the "use, enjoyment and occupation of the subject premises", and their failure to provide adequate heat, air conditioning, and other services constituted a breach which warranted Defendants' action in providing such services.

The Pleadings

The complaint in *Full time Fitness Corp. v. J & B Fitness, Inc., and Brian Bratkowsky* [2] alleges four causes of action: breach of contract; tortious interference with contract; unjust enrichment; and, breach of fiduciary duty. There is no pending cross-motion, but the Court notes that where a contract is in place, and relied upon by Plaintiff, equitable claims alleging quasi contract are generally not permitted to stand.

The Answer [3], in addition to general denials, includes as an affirmative defense that the contract expired and was terminated. There is also a counterclaim to the effect that the failure of Plaintiff to maintain the premises resulted in a diminution of the Defendants' ability to earn

---

[2] Exh. "C" to Motion.

[3] Exh. "D" to Motion.

income. It is clear from a reading of the affidavit in opposition to the motion, that Defendants are also claiming a setoff in the amount of funds expended on behalf of Plaintiff.

DISCUSSION

The Court's initial concern is that the matter almost assuredly is not one which should be assigned to the Commercial Division. In the Reply Affidavit at ¶ 6 the clear implication is that Defendants may owe Plaintiff $25,000, constituting 10 months non-payment of monthly payments typically of approximately $2,500. The claim of Defendants is stated in ¶ 6 to be less than $10,000.

Authority for Setoff by Independent Contractor

Plaintiff cites *Miller v. Lou Halperin's Stations, Inc.*, 284 A.D.2d 439 (2d Dept. 2001) for the premise that an independent contractor is not entitled to a setoff. The Court does not interpret the case in this fashion. *Miller* involved an agreement by which plaintiffs were obligated to provide an environmental cleanup in conjunction with the removal of undergound tanks if contamination was determined. In preparation for the removal of the tanks, Defendant obtained an environmental report which revealed contamination. Plaintiff acknowledged their obligation and intention to clean up the property upon notification that Defendant was going to remove the tanks. When Defendant failed to remove the tanks, Plaintiff undertook to do so, and sought reimbursement from Defendant. Defendant then notified Plaintiff that it was cancelling the license on the grounds that the property was contaminated and Plaintiff had failed to comply with local and state requirements requiring cleanup.

The Court rejected Defendants' claim that they were not liable because the obligation of Plaintiff to perform the cleanup was a condition precedent. Plaintiff's obligation was a condition subsequent to the removal of the tanks, which did not delay Defendants' obligation to remove the tanks. Defendant's contention that they were entitled to suspend performance of its obligation under the agreement pending the completion of the cleanup was without merit.

Plaintiff's intervention to perform the work which was Defendant's obligation, was therefore appropriate, and a setoff should stand. In this case, Plaintiff alleges non-payment of 20% of gross receipts by Defendant. Defendant, in response, itemizes, by a person with personal knowledge, certain services and payments which were the obligation of Plaintiff, but which they

failed to perform. Defendant has therefore raised a triable issue of fact as to Plaintiff's entitlement to payment, in that the setoffs could well exceed the amount claimed. Parenthetically, Plaintiff has not submitted an affidavit by a person of personal knowledge as to the non-payment of monthly sums due under the contract, which could constitute a failure to make a prima facie claim. Plaintiff correctly cites the principal that an attorney's affirmation which simply serves as a vehicle for "evidentiary proof in admissible form", is accurate, (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 563 [1980]); but there is no such documentation with respect to non-payment, and this would have required an affidavit from a person with actual knowledge.

Defendants' affidavit in opposition is by Brian Bratkowsky, the named Defendant, and a person with personal knowledge. His recitation of the agreement and performance by the parties creates a legitimate factual question as to whether or not Plaintiff has met its implicit obligation of "good faith and fair dealing". "[E]ven where one has an apparently unlimited right under a contract, that right may not be exercised solely for personal gain in such a way as to deprive the other party of the fruits of the contract. This limitation on an apparently unfettered contract right may be grounded . . . on the construction of the parties' fiduciary obligations". (*Richbell Info. Servs., Inc. v. Jupiter Partners, L.P.,* 309 A.D.2d 288, 302 (1st Dept. 2003).

It is of particular note that Defendant Bratkowsky is a minority shareholder in Plaintiff, and in addition to his rights under the contract in which he is an independent contractor, he is owed a fiduciary duty by the majority shareholders.

Referral

It is clear that Defendants are obligated to make payments of a percentage of their gross receipts earned at the premises. Defendants make claim for a setoff, based upon an itemization of repairs and payments made by them on behalf of Plaintiff, which were allegedly necessary to maintain the business which they had developed, and for which Plaintiffs were receiving compensation. If so then they will be allowed as a setoff.

The Plaintiff's motion for summary judgment is denied in that there exists material issues of fact as stated herein.

This matter is referred to Special Referee Thomas Dana, Esq. to hear and determine (if the

parties consent) all issues of this case. If the parties do not consent, then Mr. Dana is to "hear and report" his findings to the Court. The parties and counsel are directed to appear before the Special Referee on February 25, 2010, at 10:00 A.M., Room 206, Second Floor, at which time they are to produce witnesses with knowledge of the facts, and documentation reflecting monthly payments from the commencement of the Agreement, as well as statements and receipts for payments allegedly made on behalf of the Plaintiff by the Defendants.

Counsel for Plaintiff shall serve Defendants and file with the Clerk of the Court a Note of Issue and pay all appropriate fees for the filing thereon on or before February 11, 2010.

This constitutes the Decision and Order of the Court.

Dated: January 20, 2010

J.S.C.

ENTERED
JAN 22 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE