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

PRESENT: JANE S. SOLOMON PART 55

Index Number : 602191/2007

SERETIS, PANO

VS

FASHION VAULT

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
FEB 19 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the decision + order of which a copy is annexed hereto.

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

Dated: 2/17/10

JANE S. SOLOMON J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

PANO SERETIS, a shareholder of FASHION VAULT CORP., d/b/a SERETI LTD., suing in the right of FASHION VAULT CORP., and in his individual capacity,

Plaintiff,

-against-

FASHION VAULT CORP., THE LEATHER WAREHOUSE, INC., and FREDERICK MARGULIES,

Defendants.

INDEX NUMBER 602191/2007
Motion Sequence 001 & 002
DECISION & ORDER

JANE S. SOLOMON, J.:

Plaintiff Pano Seretis (plaintiff) moves to strike defendants' answer for their failure to comply with discovery demands (motion seq. 001). Defendants, in turn, move for summary judgment dismissing the complaint against them (motion seq. 002).

Plaintiff is a 50% shareholder of Fashion Vault Corp. (Fashion Vault), a New Jersey corporation retailing fur and leather clothing, established in 2003. Defendant Frederick Margulies (Margulies) is a 50% shareholder of Fashion Vault and also controls The Leather Warehouse, Inc. (TLW), a New Jersey retailer located at the same address as Fashion Vault. TLW owns the building and Fashion Vault occupied space without a written lease. Plaintiff and Margulies are directors and officers of Fashion Vault whose shareholders' agreement required unanimous consent on all major corporate decisions.

In March 2005, as a result of poor business performance by Fashion Vault, Margulies asked plaintiff to remove himself as an owner, officer and director of Fashion Vault. Plaintiff refused this request and, by plaintiff's account, Margulies locked him out of the premises and removed him from Fashion Vault's management. Margulies, on the contrary, claims that plaintiff "voluntarily stopped actively participating in Fashion Vault's affairs" (Margulies Affidavit, attached to Motion for Summary Judgment, p. 4). Plaintiff asserts that, in the six months that followed, Fashion Vault's assets went from $2.6 million, including $2.3 million inventory and over $80,000 in cash, to a negligible amount, leaving Fashion Vault virtually insolvent, a result that Margulies does not dispute.

On July 2, 2007, plaintiff commenced the instant action on his own behalf and as a derivative action for the benefit of Fashion Vault with causes of action for (1) an accounting against Margulies; (2) conversion of corporate assets against Margulies; (3) breach of fiduciary duty against Margulies; (4) constructive eviction against TLW and Margulies; (5) actual eviction against TLW and Margulies; (6) breach of lease against TLW; (7) tortious interference with leasehold rights against Margulies; (8) conversion of personal property against TLW and Margulies; and (9) breach of the shareholders' agreement against Margulies.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute,

and that it is entitled to judgment as a matter of law" (Dallas-Stephenson v Waisman, 39 AD3d 303, 306 [1st Dept. 2007], citing Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853 [1985]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (People ex rel. Spitzer v Grasso, 50 AD3d 535, 545 [1st Dept. 2008], quoting Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Hous. Corp., 298 AD2d 224 [1st Dept. 2002]).

On February 9, 2009, the Honorable Judith J. Gische, JSC, rendered a decision after trial in the case of Berman Brothers-Bloch Furs, Inc. v Fashion Vault Corp., New York County Index No. 601232/2006 (Berman). Defendants maintain that this decision determined several key facts pertaining to the instant action and warrants summary judgment in favor of defendants pursuant to the doctrine of collateral estoppel. The Berman trial dealt solely with a cause of action for tortious interference with contract. In that case, Margulies stopped payments on Fashion Vault's checks to Berman Brothers in order to preserve funds to repay loans for which he, members of his family

and TLW had made personal guarantees. Plaintiff testified as a witness at the Berman trial on behalf of Berman Brothers.

"Collateral estoppel means simply that, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit" (McGrath v Gold, 36 NY2d 406, 411 [1975]). While plaintiff was a witness in Berman, he was not a party and had no legal relationship or privity to the Berman plaintiff. Therefore, collateral estoppel has no role in the instant motion.

While the complaint alleges plaintiff's involuntary exclusion from Fashion Vault's premises and operations, and loss of personal property, it centers on the fate of Fashion Vault's assets, alleged to be $2.6 million in or about March 2005. Defendants' conduct in that period and its associated business and financial transactions are unclear.

According to the affidavit of Frederick Margulies, at the start of 2005, Fashion Vault maintained $1.2 million in inventory and $1 million in consignment/memo inventory, but owed the bank $358,000 and other creditors $1.5 million. He avers that he returned the consignment goods between January and March 2005, and "liquidated Fashion Vault's remaining merchandise in 2006 at proceeds below cost and the proceeds were paid to [the bank]" (Margulies Affidavit, at pp. 3-4). Despite his alleged diligent efforts, Fashion Vault remained insolvent with total

payables in 2006 of $1,082,000. However, Margulies does not submit information on how much money he recovered for the merchandise that was sold in 2006, rather, he only affirms that inventory he valued at $1.2 million was sold to pay off a $358,000 loan and other unspecified creditors.

In addition, while Margulies claims that plaintiff "voluntarily stopped participating in Fashion Vault's affairs" (Id., at p. 4), Plaintiff's testimony in Berman, submitted as evidence here (Motion, Ex. D), was that Margulies unilaterally changed the password for access to the company's bank records, changed the locks on the warehouse and store, and was disposing of inventory and paying creditors over plaintiff's objections. As a result, triable issues of fact remain regarding the financial operations and management of Fashion Vault. Accordingly, Defendants' motion for summary judgment must be denied on the first, second, third and ninth causes of action, for an accounting, conversion and misappropriation of corporate assets and breach of the shareholder's agreement. Furthermore, there is also no basis to grant summary judgment on plaintiff's eighth cause of action alleging conversion of personal property against TLW and Margulies.

However, defendants' motion seeking dismissal of the fourth through seventh causes of action dealing with Fashion Vault's tenancy is granted. All parties agree that Fashion Vault had no written lease and occupied space in TLW's building on a

month-to-month basis, and continued to occupy the space during the winding up of its affairs. Plaintiff fails to allege what tenancy rights were violated.

Turning to plaintiff's motion to strike defendants' answer, on July 20, 2009, the court ordered plaintiff to serve any additional discovery demands by July 27, 2009 and to file the note of issue by September 15, 2009. On July 22, 2009, plaintiff served defendants a second set of interrogatories dealing with Fashion Vault's inventory, accounts receivable and debt position in the period December 2004 - December 2006, and a second demand for discovery and inspection of Fashion Vault's financial records for 2004, 2005 and 2006 (Notice of Motion, Ex. D). Plaintiff claims that defendants have not responded to the interrogatories nor produced any of the requested financial records. Nevertheless, plaintiff filed a note of issue on September 15, 2009. Generally, filing a note of issue waives plaintiff's right to assert discovery issues (Melcher v City of New York, 38 AD3d 376 [1st Dept. 2007]), but defendants do not raise the issue of waiver in opposing the motion. Therefore, absent a showing of prejudice to defendants, there is no procedural obstacle to plaintiff's motion.

Plaintiff argues that striking defendants' answer is appropriate, pursuant to CPLR 3126, for their willful and contumacious failure to respond to the discovery permitted by the compliance conference order. Defendants contend that they

informed plaintiff's counsel, on August 22, 2009, of their efforts to comply with the discovery requests and, due to the "voluminous documents required," asked for a short extension of time to comply. There is no evidence of this request nor plaintiff's reaction to it. Nevertheless, on November 5, 2009, defendants claim to have sent their response by overnight mail to plaintiff's attorney, but to the wrong address. They further claim to have resent it on November 11, 2009, by regular mail. With exhibits, defendants claim their response ran to over 1,000 pages. Under these circumstances, defendants argue that the motion to strike is moot.

Plaintiff's counsel replies that what he eventually received "was a monstrosity of utterly irrelevant documentation . . . [and] a pitifully inadequate Answer to Plaintiff's Second Set of Interrogatories" (Reply Affirmation in Support of Discovery Enforcement, ¶¶ 4-5), and defendants' counsel has shown "reluctance to return several of my telephone calls".

The quality and quantity of production in response to discovery demands are often impossible to determine at a distance. Defendants's response was certainly late and, according to plaintiff, inadequate. However, plaintiff does not provide sufficient evidence of defendants' purported failures to comply to warrant the harsh punishment of striking their answer.

Accordingly, it is

ORDERED, that plaintiff's motion to strike defendants'

answer is held in abeyance and will be heard in Part 55 on March 8, 2008 at 10:00AM for the parties to argue further about the adequacy of the material supplied late in 2009; and it is further

ORDERED, that defendants' motion for summary judgment dismissing the complaint is granted to the extent of dismissing the fourth, fifth, sixth and seventh causes of action, and is denied in all other respects.

DATED: February 17, 2010

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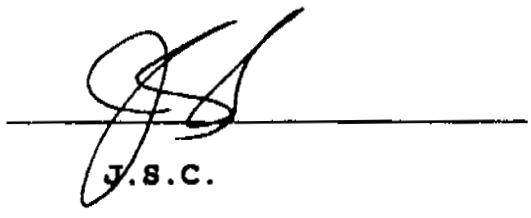

J.S.C.