

Golden v Lininger

2010 NY Slip Op 32187(U)

August 16, 2010

Supreme Court, New York County

Docket Number: 105643/09

Judge: Jane S. Solomon

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

PRESENT: **JANE S. SOLOMON**
Index Number : 105643/2009

PART 55

GOLDEN, DAN

vs

LININGER, FORD

Sequence Number : 003

DISMISS ACTION

INDEX NO. _____

MOTION DATE 5/10/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1-4	
5-6	
7-8	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the emeral memorandum decision and order, together with motion 04.

FILED
AUG 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/16/10

JANE S. SOLOMON S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 55

-----X
DAN GOLDEN and DAN GOLDEN LLP,

DECISION and ORDER

Plaintiffs,

-against-

Index No. 105643/09

FORD LININGER aka JONATHAN LININGER;
FORD LININGER LLC; LOPES LININGER, a
PARTNERSHIP; ANA LOPES; and JOHN DOUGLAS 1-2,
Defendants.

FILED
AUG 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
JANE SOLOMON, J.S.C.:

Motion sequence nos. 003 and 004 are consolidated for disposition. In motion sequence no. 003, defendant Ana Lopes (Lopes) moves, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint as to her, and for monetary sanctions in her favor. In motion sequence no. 004, plaintiffs Dan Golden (Golden) and Dan Golden LLP (DG) move, pursuant to CPLR 3212 (e), for partial summary judgment dismissing defendants' counterclaim for breach of contract.

This action arises out of a falling out between Golden and defendant Ford Lininger (Lininger), who are the founding partners of DG, a commercial interior design firm. The thrust of the complaint is that whether or not Lininger was a good designer, he was a poor business partner who incurred a lot of expenses for travel and entertainment, not all of which have any business justification. He also is alleged to have charged his living expenses to DG. In his counterclaim, Lininger alleges that, as part of his partnership agreement with Golden, he would leave his job and work full time on the enterprise, and would receive additional compensation (beyond a share of profits) from

DG to pay for his living expenses, and that Golden would reimburse Lininger 50% of these expenses to the extent that DG could not pay it.

Plaintiffs also allege that Lininger usurped some of DG's business opportunities for his own benefit, or for the benefit of other business entities he was involved with. A DG client, identified in the contract as "Troutbrook", appears to be a hotel for which DG did work. Lopes is alleged to have assisted in some of the work on the Troutbrook project.

The two causes of action that are alleged as against Lopes, to wit, the fifth and the seventh, allege tortious interference with a contract and breach of fiduciary duty. A plaintiff alleging tortious interference with a contract must show, among other things, the actual breach of a contract between plaintiff and a third party. *Lama Holding Co. v Smith Barney*, 88 NY2d 413 (1996); *Murataj v Dream Dragon Prod.*, 72 AD3d 527 (1st Dept 2010). Plaintiffs' (unverified) bills of particulars fail to identify any contract, to which either plaintiff was a party, that was actually breached.¹ See Walters Affirm., Exh. 2, ¶¶ 22-25, 30-35, 38, 42, and Exh. 4, ¶¶ 22-25, 30-35, 38, 42 (of both Golden's and DG's bills of particulars). Similarly, Golden's affidavit in opposition to Lopes's motion fails to state that any such contract was breached; instead, Golden alleges, upon

¹ Plaintiffs contend that Lopes's motion is defective because she fails to attach a copy of her answer. Her attorney alleges that an answer was served, and plaintiffs responded to a demand for bill of particulars, so it is clear that issue was joined and this motion is not premature (CPLR 3212[a]).

information and belief, that Lopes worked in concert with her fellow defendants to cause a breach of a contract between DG and a client, but not that any breach occurred (Golden Aff., paragraph 22). Accordingly, the fifth cause of action, insofar as it is alleged as against Lopes, fails, as a matter of law.

As to the claim of breach of fiduciary duty, plaintiffs' (unverified) bills of particulars fail to identify any factual basis for plaintiffs' allegation that Lopes owed either plaintiff a fiduciary duty, or how she may have violated any such duty. See Walters Affirm., Exh. 2, ¶¶ 20-21, 44-55, and Exh. 4, ¶¶ 20-21, 44-55 (of both Golden's and DG's bills of particulars). Golden's affidavit in opposition to Lopes's motion merely states that he has "a good faith belief that Defendant Lopes acted, at various times, as either a partner to, an agent of, or a joint venturer with [DG]." Inasmuch as Lopes states in her affidavit that she is not, and has never been, an officer, manager, or corporate director of DG, or held an ownership interest therein, Golden's "good faith belief," standing alone, does not suffice to avert summary judgment. Golden, as one of the two founding partners of DG, which appears not to have had any employees, may be expected to know whether a third party became a partner in, acted as the agent of, or was a joint venturer with DG.

While plaintiffs' bills of particulars are, to put it charitably, exercises in gamesmanship which fail to support the complaint, the complaint, as against Lopes, does not appear to have been brought in bad faith, and while the claims against

Lopes are unsubstantiated, it is not clear that they are frivolous. Accordingly, the imposition of sanctions is not warranted.

In plaintiffs' motion for partial summary judgment dismissing Lininger's counterclaims, plaintiffs contend, as an initial matter, that the allegations upon which Lininger's breach of contract counterclaim is based are barred by the statute of frauds, General Obligations Law § 5-701 (a) (2). Lininger alleges that Golden agreed that DG would fund Lininger's living expenses out of its revenue stream, and that, if such revenue stream proved insufficient, Golden would pay 50% of the amounts due to Lininger. Leaving aside the parties' disagreement as to whether New York or New Jersey substantive law applies, plaintiffs have waived their statute of frauds defense by failing to include it in either their answer to the counterclaim, or in a CPLR 3211 (a) motion to dismiss the counterclaim. CPLR 3018 (b); *Bryant v Broadcast Music, Inc.*, 27 AD3d 683 (2d Dept 2006); *23/23 Communications Corp. v General Motors Corp.*, 257 AD2d 367 (1st Dept 1999).

Plaintiffs next argue that Lininger has failed to show any breach of the alleged oral agreement. However, Golden has expressly acknowledged that, on April 17, 2009, he, or his attorney, caused Bank of America to cancel Lininger's DG credit-debit card, and, while Golden contends that he then had the card unblocked, Lininger states that the card remained blocked for a significant time.

Moreover, Lininger's breach of contract counterclaim is

based, in part, on the allegation that Golden misappropriated for his personal benefit certain projects of DG which, otherwise, would have provided funds to Lininger. Lininger has sought discovery of documents that are pertinent to this allegation, but Golden has refused to supply them. See Hurand Affirm., Exh. I, request no. 4, and Exh. J, response no. 4. In addition, no depositions have yet been conducted. Accordingly, plaintiffs' motion is premature. CPLR 3212 (f); see *Gruenfeld v City of New Rochelle*, 72 AD3d 1025 (2d Dept 2010); *International Rescue Comm. v Reliance Ins. Co.*, 230 AD2d 641 (1st Dept 1996). Accordingly, it is hereby


ORDERED that, in motion sequence no. 003, defendant Ana Lopes's motion for summary judgment is granted, with \$100 costs in her favor on the motion, and the complaint as against Lopes is severed and dismissed with costs and disbursements as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, in motion sequence no. 004, plaintiffs' motion for partial summary judgment dismissing Lininger's counterclaims is denied.

Dated: August 16 , 2010

ENTER:



J.S.C.
JANE S. SOLOMON