

Patsis v Nicolia

2010 NY Slip Op 32376(U)

August 24, 2010

Supreme Court, Suffolk County

Docket Number: 11185-2010

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 06-24-2010
Motion Submit Date: 06-29-2010
Motion Sequence .: 001 MG

[] FINAL DISP
[X] NON - FINAL DISP

_____ X
STEVEN PATSIS,

Plaintiff,

-against-

ROBERT NICOLIA,
_____ X
Defendant.

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ORDERED, that the motion (motion sequence no. 1) by plaintiff for partial summary judgment on the first and fourth causes of action is granted; and it is further

ORDERED, that a preliminary conference is scheduled for October 5, 2010 at 9:30 a.m. before the undersigned.

This action arises out of a March 14, 2008 agreement between plaintiff and defendant wherein plaintiff agreed to sell defendant his 50% interest in Gatsby Dining LLC (“Gatsby”) for the sum of \$300,000. At the time of the execution of the agreement, captioned, “ASSIGNMENT OF MEMBERSHIP INTEREST IN GATSBY DINING LLC” (the “agreement”), defendant’s wife, Diane Nicolia, was the owner of the other 50% interest in Gatsby. Pursuant to the terms of the agreement, the purchase price was \$300,000.00, payable by defendant by (1) remitting certain sums due and owing to defendant under a promissory note held by a third party, and (2) the balance upon the Gatsby “turning

a profit". The determination of profit was to be made on an annual basis by plaintiff's accountant after a review of the books and records of Gatsby. The agreement provided that the books and records were required to be provided by defendant to plaintiff, and the profits, if any, were to be paid to plaintiff until the entire purchase amount had been paid.

Plaintiff commenced this action against defendant by the filing of a Summons and Complaint on March 25, 2010 and issue was joined by defendant's service of a Verified Answer dated April 16, 2010. The Complaint sets forth causes of action for breach of contract for failure to provide an accounting as required by the parties' agreement and seeks the balance of the purchase price due under the agreement and lost profits. Plaintiff now moves for partial summary judgment on the first and fourth causes of action of the Complaint which seek an accounting of the books and records of Gatsby. Plaintiff alleges that by correspondences dated December 9, 2009 and December 18, 2009, he requested that defendant provide the books and records of Gatsby, but that defendant has failed and refused to do so. Plaintiff argues that there is no question of fact that defendant has failed to comply with the agreement, and thus, seeks an Order granting partial summary judgment on the first and fourth causes of action for an accounting.

Defendant opposes the motion and argues that plaintiff's claim for an accounting is barred by the doctrine of "unclean hands" and further that summary judgment is premature as no discovery has been exchanged in this case. Although defendant admits that he signed the agreement containing the accounting provision, he explains that subsequent to the execution of that agreement, he sold his interest in Gatsby to non-parties, Dorothy Geraci ("Geraci") and Jack Guarneri ("Guarneri") who subsequently defaulted pursuant to the terms of the agreement. Specifically, defendant states that he entered into a management agreement with Geraci on March 20, 2009 for her to manage the Gatsby pending the consummation of the asset purchase. According to the purchase agreement, also executed on March 20, 2009, Geraci and Guarneri agreed to purchase Gatsby's assets, including the business lease, furniture and fixtures, telephone numbers, goodwill, inventory and equipment leases for the sum of \$700,000.00. Defendant states that pursuant to the terms of the management agreement, he turned over all of Gatsby's books and records to Geraci who managed the restaurant from March 18, 2009 to March of 2010 when it ceased operating. Defendant claims that Geraci failed to pay the rent and the landlord commenced a non-payment proceeding in District Court, resulting in a judgment of possession being issued on or about or about April 8, 2010. Defendant further claims that it intends to commence an action against Geraci,

and has annexed a proposed Summons and Complaint to his opposition papers.

Defendant argues that plaintiff's motion for partial summary judgment should be denied because there are questions of fact regarding plaintiff's "unclean hands" in this case. Here, defendant refers to alleged conduct by plaintiff which resulted in a prior lawsuit by defendant against plaintiff seeking injunctive and other relief for damages to the Gatsby. That lawsuit, however, was resolved by a stipulation by and between the parties which was So-Ordered by Justice Emerson on May 5, 2009. Additionally, defendant claims that the motion for partial summary judgment is premature since no discovery has been conducted and no preliminary conference held. Based on the foregoing, defendant seeks denial of plaintiff's motion in its entirety.

In reply, plaintiff notes that defendant does not deny that the parties' agreement required him to provide the necessary accounting. Moreover, plaintiff argues that the doctrine of "unclean hands" does not apply in this case because plaintiff is seeking to enforce a contractual right to an accounting rather than an equitable claim. Additionally, on the merits of the defense, plaintiff argues that the basis of the alleged unclean hands arises out of the facts pertaining to the prior lawsuit which was settled by the parties and should not be considered herein. Finally, plaintiff argues that defendant has failed to demonstrate that summary judgment is premature as defendant has failed to establish any fact or document in the exclusive control of plaintiff that would be necessary to oppose the motion. Thus, plaintiff urges the Court to grant his motion for partial summary judgment on the first and fourth causes of action ordering defendant to account.

It is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Goldberger v. Brick & Ballerstein, Inc.*, 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. *Zayas v. Half Hollow Hills Cent. School Dist.*, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996). However, if the movant fails to meet its prima facie burden, the Court need not consider the sufficiency of the opposition papers. *McMahan v. McMahan*, 66 A.D.3d 970, 886 N.Y.S.2d 825 (2d Dept. 2009). "It is not up to the court to determine

issues of credibility or the probability of success on the merits, but rather to determine whether there exists a genuine issue of fact.” *Triangle Fire Protection Corp. v. Manufacturer’s Hanover Trust Co.*, 172 AD2d 658, 570 NYS2d 960 (2d Dept. 1991). A motion for summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.” *Scott v. Long Island Power Auth.*, 294 AD2d 348, 741 NYS2d 708 (2d Dept. 2002).

The Court of Appeals has recognized that:

In cases of contract interpretation, it is well settled that when parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. This principle is particularly important in the context of real property transactions, where commercial certainty is a paramount concern, and where...the instrument was negotiated between sophisticated, counseled business people negotiating at arm’s length. It is also important to read the document as a whole to ensure that excessive emphasis is not placed upon particular words or phrases.

South Road Assoc., LLC, v. International Business Machines Corp., 4 N.Y.3d 272, 793 N.Y.S.2d 835, 826 N.E.2d 806 (2005)(internal quotations omitted). These principles have been oft repeated by the Second Department where it has held that a written agreement that is “complete, clear, and unambiguous” on its face must be enforced according to the plain meaning of the terms contained therein. *Johnston v. MGM Emerald Enterprises, Inc.*, 69 A.D.3d 674, 893 N.Y.S.2d 176 (2d Dept. 2010). See also, *Lobacz v. Lobacz*, 72 A.D.3d 653, 897 N.Y.S.2d 516 (2d Dept. 2010); *M & R Rockaway, LLC v. SK Rockaway Real Estate Co.*, 74 A.D.3d 759, 902 N.Y.S.2d 621 (2d Dept. 2010).

Although summary judgment may be denied as premature, “to speculate that something might be caught on a fishing expedition provides no basis pursuant to CPLR 3212(f) to postpone decision on a summary judgment motion.” *Orange County-Poughkeepsie Limited Partnership v. Bonte*, 37 A.D.3d 684, 830 N.Y.S.2d 571 (2d Dept. 2007), quoting, *Gateway State Bank v. Shangri-La Private Club*, 113 A.D.2d 791, 493 N.Y.S.2d 679, 490 N.E.2d 546. See also, *Binyan Shel Chessed, Inc., v. Goldberger Insurance*, 18 A.D.3d 590, 795 N.Y.S.2d 619 (2d Dept. 2005)(mere possibility of a factual issue is insufficient to defeat summary judgment and permit additional discovery); *Greenberg v. McLaughlin*, 242 A.D.2d 603, 662 N.Y.S.2d 100 (2d Dept. 1997).

Finally, turning to the defense of unclean hands, the Courts have held that such equitable defense is unavailable where the action is exclusively for damages. *Greco v. Chirstoffersen*, 70 A.D.3d 769, 896 N.Y.S.2d 363 (2d Dept. 2010); *Manshion Joho Center, Ltd., v. Manshion Joho Center, Inc.*, 24 A.D.3d 189, 806 N.Y.S.2d 480 (2d Dept. 2005). Moreover, where the allegations regarding the plaintiff's conduct are unrelated to the action at issue, the defense of unclean hands will not lie. *See, e.g., Unger v. Leviton*, 25 A.D.3d 689, 811 N.Y.S.2d 691 (2d Dept. 2006).

In this case, plaintiff has met its prima facie burden of demonstrating entitlement to summary judgment on its causes of action for an accounting. The parties entered into an agreement, which was clear on its face, that required defendant to pay certain sums to plaintiff based on its profits, determined by a review of the books and records of Gatsby. Plaintiff demanded a review of the books and records, in writing, on at least two separate occasions, and defendant failed to comply. In opposition, defendant has failed to raise a triable issue of fact. The allegations regarding plaintiff's conduct were addressed and resolved by stipulation in the prior action between the parties and thus cannot serve as a basis for a defense of unclean hands. Moreover, the fact that defendant may have claims against a third party, Geraci, are of no moment to plaintiff's claim for an accounting. While defendant has annexed a proposed Summons and Complaint to his opposition papers, there is no indication that this action has been commenced to date. Lastly, defendant has failed to demonstrate that summary judgment is premature in that additional discovery would lead to relevant evidence to defeat plaintiff's claims.

Based on the foregoing, plaintiff's motion for summary judgment on its first and fourth causes of action is granted. The effectuation of the accounting will be addressed at the preliminary conference which will be held on October 5, 2010 at 9:30 a.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: August 24, 2010
Riverhead, New York


EMILY PINES
J. S. C.

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