Oseff v Scotti
2010 NY Slip Op 33997(U)
February 19, 2010
Supreme Court, New York County
Docket Number: 005821/2008
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

LANCE OSEFF, JENNIFER OSEFF, BALCO SECURITY SERVICES, INC. and SECURITY CENTRAL ALARM SERVICES, INC.,

Plaintiffs,

-against-

FRANK SCOTTI, BALCO ALARM SERVICES CORP., RALPH AIELLO and ELECTRONIC SECURITY SYSTEMS OF NEW YORK,

Defendants.

INDEX No. ~~00582/08~~ 005821/2008

MOTION DATE: Nov. 30, 2009
Motion Sequence # 002
AND #003

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affirmation in Opposition..... X
Reply Affirmation XX

This motion, plaintiffs, for an order disqualifying Mildred J. Michalczyk, attorney at law, (hereinafter "MJM"), as legal counsel for defendant Ralph Aiello, (hereinafter "Aiello"), due to a conflict of interest respecting such representation, and granting such and further relief as to the Court seems just and proper; and a motion (incorrectly termed a "cross-motion"), for an order as follows:

a. Dismissal by reason of lack of jurisdiction pursuant to CPLR Section 3211 (a) (8);

b. Dismissal pursuant to CPLR 3211 (a) (7) and summary judgment pursuant to CPLR 3212 in favor of defendant Ralph Aiello on plaintiffs' second, third, fourth and seventh cause of action; and

c. Such other and further relief as to this Court seems just and proper including attorney's fees, costs and disbursements,

are **both** determined as hereinafter set forth.

Factually, the basis of the instant action is as follows:

On or about January 2, 2007, defendant Balco Alarm Services Corp. (BAS) entered into an Agreement of Sale (the Agreement) to sell certain assets to plaintiff Balco Security Services, Inc. (BSS) a company formed by plaintiff Lance Oseff (Oseff) and his wife Jennifer Oseff. Plaintiff Security Central Alarm Services, Inc. (SCAS) is another corporation organized by Oseff. The plaintiff BSS is required to cease the use of the "Balco" name on the third anniversary of the date of the Agreement. Defendant Frank Scotti (Scotti) is the sole shareholder of defendant BAS. Oseff alleges that defendant Electronic Security Systems of New York (ESS) is a sole proprietorship set up by Scotti for the purpose of interfering with the contractual relationship of the parties to the Agreement. Throughout his affidavit in opposition Scotti contends neither he nor BAS has any connection to ESS. Defendant BAS was and continues to be in the business of installing, servicing and monitoring electronic security systems. Oseff worked for BAS for 17 years.

The plaintiff alleges eight separate causes of action against the defendant, first for fraud and misrepresentation; second for interference with contractual relations; third for wrongful inducement of breach of contract; fourth for prima facie tort; fifth for breach of contract; sixth for defamation; seventh cause of action, for a permanent injunction; and the eighth cause of action, for attorneys fees.

Procedurally, this Court granted a preliminary injunction.

The plaintiffs' attorney avers that the disclosure process led to information that the defendant ESS was aided and abetted by the defendant Aiello. The complaint was amended accordingly and the defendant Aiello was added as a defendant. The plaintiffs' attorney asserts that the attorney for the defendant Aiello, MJM, represents the defendant Scotti in his matrimonial action. He argues that because MJM, in her representation of Scotti in the divorce action, has a professional duty to ". . .distance Scotti from any financial interest in the defendant ESS [and allegedly converted accounts]" which would conflict with her representation of defendant Aiello because she would become aware of the relationship between the various defendants. This would conflict, in turn, with the defendant Scotti's averments to date that he has no involvement with ESS, shifting liability to all defendants. He avers that documentary evidence shows that the defendant Aiello is actually doing business in New York via a private mail box in Rochester; that invoices, advertising and customer decals all contain telephone numbers and addresses for Aiello, all leading to the inescapable conclusion that there is a connection between the two individual defendants, which connection has accomplished the theft of at least fifty customers from the plaintiffs. He points to several instances of inconsistencies between the documentary evidence and the defendant Scotti's prior sworn affidavits; and contends that the testimony of the two individual defendants will be to place any blame on the other and be in direct conflict, thus rendering MJM in conflict because of her representation of the defendant Scotti in his divorce, while representing Aiello in the instant action because of her obligation to Scotti to aver that he does not have any interest in the defendant ESS, while at the same time arguing that her client herein, Aiello, is not liable for the plaintiffs' damages, but some unnamed third-party or person. He further contends that MJM's representation of both Scotti and Aiello in the different litigations will likely lead to a violation of the advocate witness rule of the Code with relation to the potential that the defendant ESS, because of the intertwining nature of the two individual defendants' interests therein, that ESS could be a marital asset of Scotti, while advocating that ESS is owned by Aiello herein and has no relationship to Scotti or against the plaintiffs. He asserts that proper representation of Aiello herein must lead to a cross-examination of her client Scotti (in the divorce action) relative to confidential financial information.

In the motion by the defendant Aiello, he avers that both he and Scotti have signed waivers to permit MJM to continue representation of himself and Scotti in their different litigations; that he and his entities are not parties to the contract between the plaintiffs and the Scotti entities; that the first cause of action is inapplicable to him; that the second cause of action is duplicative of the third cause of action and he denies any knowledge of the contract that he is alleged to have interfered with. He also denies any conduct

inducing a breach of contract and there is no proof of any breaches of contract. Counsel repeats that both individual defendants have signed appropriate waivers so that MJM may continue as the attorney for the defendant Aiello and the defendant Scotti in his divorce action. She further avers that, because Scotti has denied any ownership or financial interest in certain entities, and because there is no opportunity that she would have to depose Scotti, she would not be placed in a position of acting against his interests in a cross-examination. She contends that Mr. Scotti's position herein is consistent with his position in the divorce action, and Aiello's position of non-liability is consistent with Scotti's position. She further contends that plaintiffs' amended verified complaint ". . .is not very clear", as it does not state which causes of action are alleged against the Scotti entities and which are focused on the Aiello entities. She argues that the cause of action, sounding in tortious interference with contract, states no cause of action, and the cause of action lacks clarity as against the defendant Aiello because it does not state which contracts have been breached and he was not a party to a contract with the plaintiffs or with Scotti. With respect to the cause of action for tortious interference with business relationship, because the defendant Aiello denies same, and there is no allegation of malice, that cause of action should be dismissed. With respect to jurisdiction over the defendant Aiello, the plaintiff has not demonstrated long arm jurisdiction over him.

In reply, plaintiffs' counsel argues that, due to MJM's questionable status in this action, the motion to dismiss and for summary judgment should not be considered and be deferred. He notes that the defendant Scotti's affidavit does not contain a denial of an interest in ESS. He asserts that MJM has assumed the legal position that, due to her dual representations, her respective clients have placed ". . .all responsibility for truthful filings on her shoulders", an improper ethical position. He notes that neither defendant has denied the facts alleged in the complaint. He further asserts that Aiello is a defendant herein by virtue of his actions in concert with Scotti, not for the direct acts for which Scotti is sued; and Aiello's purported ignorance of contracts is irrelevant to MJM's conflict and disqualification.

In reply to the opposition to Aiello's motion, his counsel attempts to supplement with assertions regarding the disqualification motion by the plaintiff. Such will not be considered herein inasmuch as that would amount to a "sur-reply". Counsel asserts that the plaintiffs have not opposed the Aiello application and it should be granted. She repeats the arguments previously made in her moving papers.

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DECISION

Initially,

> "Although the **disqualification** of an **attorney** is a matter which rests within the sound discretion of the trial court (see ***Boyd v Trent***, 287 AD2d 475, 731 NYS2d 209), a party's entitlement to be represented in ongoing litigation by counsel of its choosing is a valued right which should not be abridged absent a clear showing that **disqualification** is warranted (see ***S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.***, 69 NY2d 437, 443, 515 NYS2d 735, 508 NE2d 647)".

(**Zutler v Drivershield Corp.**, 15 AD3d 397, 790 NYS2d 485, 2nd Dept., 2005).

There is no showing herein that Aiello's counsel's testimony is necessary.

As to the plaintiffs' assertion that MJM's representation of the defendant Aiello is simultaneous with her representation of the defendant Scotti is such that requires her disqualification herein, it must be demonstrated that the representation of both persons, in different actions, are both adverse and substantially related (see, **Solow v Grace & Co.**, 83 NY2d 303). After a close examination of this record, while plaintiffs' counsel has fervently set forth his rationale for disqualification of MJM, he has failed, in this Court's view and discretion, to articulate a firm basis for that relief. (see, **Jamaica Public Service Co., Ltd. v AIU Insurance Co.**, 92 NY2d 631, 684 NYS2d 459, 1998).

With respect to that part of Aiello's motion that seeks summary judgment in his favor, the rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

> "It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank of Albany v McAuliffe**, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; **Zuckerman v City of New York**, **supra**, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)".

An examination of the record herein yields a conclusion that the defendant has failed to satisfy his burden of proof. Without that, it is unnecessary to evaluate the plaintiffs' submission in opposition.

With respect to the remainder of that application, i.e., for dismissal of the complaint against Aiello as the second, third and fourth causes of action, counsel asserts that this Court lacks jurisdiction over the defendant Aiello. Demonstrably, this Court disagrees, as the plaintiffs' counsel has submitted sufficient proof to establish a jurisdictional nexus with the defendant Aiello. (see, **Firegreen Limited v Claxton**, 160 AD2d 409, 553 NYS2d 765, 1st Dept., 1990; **Pomerantz v Wolfin**, 236 AD2d 379, 653 NYS2d 37, 2nd Dept., 1997). Notwithstanding the defendant Aiello's self-serving denials, the plaintiffs have shown, by the documentary evidence, the moving defendant's contacts and connections within New York State.

With respect to the defendant Aiello's motion seeking dismissal of the complaint pursuant to CPLR 3211(a) 7, it is well-settled that

> "On a motion to dismiss a cause

> of action pursuant to CPLR 3211(a)(7), the court must accept the factual allegations of the complaint as true and accord the plaintiff all favorable inferences which may be drawn therefrom (see ***Leon v Martinez***, 84 NY2d 83, 87-88; ***Guggenheimer v Ginzburg***, 43 NY2d 268, 275). If the plaintiff can succeed upon any reasonable view of the allegations, the cause of action may not be dismissed (see ***Board of Educ. of City School Dist. of City of New Rochelle v County of Westchester***, 282 AD2d 561, 562)".

(**Hayes v Wilson**, 25 AD3d 586, 807 NYS2d 567, 2nd Dept., 2006). This Court, in accepting the facts, as alleged in the complaint, as true, and that the plaintiffs are afforded the benefit of every possible favorable inference, the complaint asserts cognizable causes of action against this defendant.

Accordingly, both motions are **denied**, without prejudice to renewal upon new or additional facts.

Dated FEB 19 2010

Stephen A. Bucaria
J.S.C.

ENTERED
FEB 23 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE