

Gall v Colon-Sylvain

2010 NY Slip Op 34054(U)

July 12, 2010

Supreme Court, Nassau County

Docket Number: 6536/07

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ELEMER GALL a/k/a CASABA GALL,

Plaintiff,

-against-

FRANCES COLON-SYLVAIN, WELLS FARGO N.A., JOSEPH GRANT, EMPIRE LAND SERVICES CORP., ANTHONY MICHAEL CAMISA, DAVID M. FISH and JJRG ENTERPRISES INC.,

Defendants.

WELLS FARGO N.A.,

Counterclaim-Plaintiff,

-against-

ELEMER GALL, FRANCES COLON-SYLVAIN, JOSEPH GRANT and JJRG ENTERPRISES INC.,

Counterclaim-Defendants.

The following papers read on this motion:

Order to Show Cause..... X
 Cross-Motion..... X
 Affirmation in Opposition..... X

Motion by Judith Reardon, Esq. for leave to withdraw as counsel for plaintiff is **denied**. Cross-motion by defendant Wells Fargo for a penalty for failure to comply with discovery is **denied** on condition that plaintiff produces the deposition transcripts within 20 days of service of a copy of this order.

This is an action for breach of fiduciary duty. Plaintiff Elemer Gall and defendant Joseph Grant formed a corporation, JJRG Services, Inc, to acquire distressed properties and then renovate the properties for resale. In February 2005, the corporation purchased a property located at 75 Oakdale Boulevard in Farmingdale. Plaintiff alleges that he contributed \$180,000 towards the purchase price and that Grant was responsible for performing the renovation of the property. Plaintiff further alleges that defendant occupied the premises and agreed to remit the mortgage payments and carrying costs.

The property was listed with a real estate broker, defendant A-1 Realty Network of Homes, Inc. Grant entered into a contract to sell the property to defendant Frances Colon-Sylvain, and the closing occurred on December 26, 2006. According to defendant Wells Fargo, N.A., Colon-Sylvain is Grant's former girlfriend. In any event, Colon-Sylvain obtained a purchase money mortgage from Wells Fargo, and the title was insured by defendant Empire Land Services Corp. Plaintiff alleges that subsequent to the closing, Grant continued to occupy the property.

The present action was commenced on April 16, 2007. Plaintiff asserts claims for breach of fiduciary duty, fraud, and conversion against defendant Grant. Additionally, plaintiff asserts fraud claims against defendant Wells Fargo and defendant Empire Land Services. Wells Fargo counterclaims against plaintiff for fraud based upon his participation in a fraudulent loan transaction.

Plaintiff discontinued the action as against A-1 Realty Network on May 28, 2008. By order dated August 13, 2009, plaintiff was granted leave to amend the complaint to name as additional defendants Anthony Michael Camisa, David M. Fish, and JJRG Enterprises, Inc. It appears that JJRG Enterprises was the entity used by defendant Grant to transfer the property to Colon-Sylvain and that Camisa and Fish were attorneys who represented Grant

or Colon-Sylvain at the closing.

Judith Reardon, Esq moves to withdraw as counsel for plaintiff pursuant to CPLR § 321(b). Ms. Reardon alleges a "lack of cooperation" on the part of the plaintiff and that she has received "limited and inadequate compensation." In opposition to Ms. Reardon's motion to withdraw, plaintiff alleges that he has paid his attorney \$8,000 and that she is holding "in escrow a bank check in the amount of \$52,000 from Wells Fargo, which was to be applied to legal fees at the conclusion of this case."

Defendant Wells Fargo cross-moves pursuant to CPLR 3126 to dismiss the complaint for plaintiff's failure to provide discovery. The preliminary conference order dated December 18, 2009 requires, among other things, that all responses to discovery and inspection demands shall be served not later than 30 days after receipt of the demand. By request for production of documents dated January 13, 2010, Wells Fargo requested that plaintiff produce the transcripts and related exhibits for the depositions of Frances Colon-Sylvain, Joseph Grant, and Anthony Camisa. Wells Fargo argues that plaintiff's failure to provide the transcripts is a violation of the preliminary conference order as well as a directive from the court at the status conference held on March 23, 2010. Additionally, Wells Fargo opposes the application to withdraw on the part of plaintiff's counsel.

The court has discretion to permit an attorney to withdraw from representing her client for good and sufficient cause (*Khan v Dolly*, 39 AD3d 649 [2d Dept 2007]). The mere fact that a client fails to pay an attorney for services rendered does not, without more, entitle the attorney to withdraw (*Kaufman v Kaufman*, 63 AD3d 618 [1st Dept 2009]).

The court notes that the present matter has been pending for over three years and is almost ready to be certified for trial. Furthermore, counsel for plaintiff has received some compensation and is holding additional funds in escrow, pending resolution of the various claims. Accordingly, as a matter of discretion, the application of Judith Reardon, Esq to withdraw as counsel for plaintiff is **denied**.

CPLR § 3126 provides that if any party refuses to obey an order for disclosure or fails to disclose information which the court finds ought to have been disclosed, the court may make such orders with regard to the failure or refusal as are just, including dismissal of the action or rendering judgment by default against the disobedient party. In order to obtain the drastic remedy of judgment by default, a party must make a showing of wilfull and contumacious conduct or substantial prejudice (*Isowitz v Suffolk*, 54 AD3d 725 [2d Dept

2008]). The court concludes that Wells Fargo has not shown that plaintiff's conduct was wilful and contumacious or that plaintiff's failure to produce the deposition transcripts in timely fashion caused substantial prejudice to defendant. Accordingly, defendant Wells Fargo's motion for dismissal of the complaint is **denied** on condition that plaintiff produces copies of the requested deposition transcripts with all exhibits within 20 days of service of a copy of this order.

So ordered.

Dated 12 July 2010

Stephen A. Scarcia
J.S.C.

ENTERED

JUL 14 2010

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COUNTY CLERK'S OFFICE