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SHORT FORM ORDER

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

CMS ENTERPRISES, LLC and COSTELLO MAIONE SCHUNCH, INC.,

Plaintiffs,

- against -

CHRISTOPHER J. MAIONE,

Defendant.

INDEX NO.: 020379/2010
MOTION DATE: 4/6/11
SEQUENCE NO .: 01

The following documents were read on this motion:

Defendant's Motion to Dismiss Complaint and Summary Judgment on First, Second and Third Counterclaims ..... 1.
Memorandum of Law in Support of Motion ..... 2.
Affirmation in Opposition to Motion for Summary Judgment ..... 3.
Reply Affirmation in Further Support of Motion ..... 4.

PRELIMINARY STATEMENT

Defendant moves for summary judgment dismissing the complaint and granting judgment to defendant on counterclaims First, Second and Third. Plaintiff opposes the motion on the grounds that there are open questions of fact with respect to the adequacy of the Notice to Cure served by plaintiff upon defendant.

BACKGROUND

On or about September 22, 1992 Andrew J. Costello, Michael A. Schuch and Christopher J. Maione formed plaintiff Costello Maione Schuch ("Costello") for the provision of audio visual

and consulting services. On or about October 5, 2000 the three of them formed CMS to take title to 8 Fletcher Place, Melville, where Costello conducted its business. Disputes among them resulted in Maione's commencement of a dissolution action in 2009, which eventually resulted in a Stock Purchase and Redemption Agreement. (Exh. "E" to Motion". It provided for the purchase of Maione's interest in both CMS and Costello for $1,200,000, $1,080,000 of which was payable by a promissory note, payable in 96 monthly payments of $12,550.55. This 2009 Agreement supplanted a 2004 stock buyout agreement which had been in place.

Payments commenced in December 2009; but less than one year later, by letter dated September 24, 2010, plaintiffs, by counsel, mailed a "Request to Cure Multiple Default". (Exh. "F" to Motion). The notice was stated to be in compliance with ¶ 9 of the 2009 Stock Purchase and Redemption Agreement. The stated breaches of the Agreement were as follows:

- Violation of ¶ (4) (i) by conducting business on the internet which is competitive with the business of the Companies;
- Violation of ¶ (4) (i) by maintaining a Facebook presence for business purposes which competes with the business of the Companies;
- Violation of ¶ (4) (i) by not providing the Companies with access to such Facebook profiles and/or websites;
- Violation of ¶ (4) (j) by failing to return Confidential and Proprietary information;
- Violation of ¶ (4) (k) by failing to return the Companies' laptop;
- Violation of ¶ 7.04 by disclosing Confidential and Proprietary information to third parties;
- Violation of ¶ 8.01 by hiring, soliciting or attempting to solicit the services of an employee or contractor of the Companies or an Affiliate;
- Violation of ¶ 8.02 by engaging in a business which is competitive with the Companies.

Defendant points to ¶ 8, entitled "Cure", which provides that "(i)f any party to this Agreement believes the other party is in breach of this Agreement and/or the Exhibits annexed hereto, that party must first advise the other party in writing of any breach and offer the other party five)5) business days to cure such breach". Defendant takes the position that the

aforementioned letter did not give a five-day cure period. Rather, the letter concluded with a request that defendant should "(p)lease contact me immediately in a good faith attempt to resolve these issues. This letter is without waiving our client's rights all of which are expressly reserved". Contemporaneously, plaintiffs ceased making monthly payments to Maione, relying upon § 6 (c)(iii) of the Agreement, which provides that if the Companies believe, in good faith, that Maione is in breach of the Agreement, in addition to any remedies available to them, they may cease payment of all amounts due under the Promissory Note provided that the Companies commence litigation to enforce their rights within thirty (30) days of cessation of payments, and provided that the Companies attempted to resolve any dispute concerning Seller's failure to comply with the Agreement in accordance with Section 8.

Defendant contends that the failure to include a 5-day notice to cure renders the September 24 a nullity, and precludes them from terminating payments under the 2009 Agreement, since they have not attempted to resolve any dispute in accordance with Section 8. He also contends that the notice is impermissibly vague, and does not apprise defendant of the specific conduct which plaintiffs contend violate the Agreement. Plaintiffs respond that irrespective of the failure to include a 5-day notice to cure in the September 24, 2010 correspondence, the parties have engaged in extensive negotiations to resolve the alleged breaches by Maione, which have been unsuccessful.

Maione has counterclaimed for the immediate payment of $978,286.21, the balance of the $1,080,000 Note with interest from the date of cessation of payments; costs of collection and legal fees incurred in collection of the proceeds of the note; and legal fees and expenses in the defense of this action.

DISCUSSION

Defendants seek summary judgment dismissing the complaint because the Notice to Cure, provided for in § 8 of the 2009 Agreement, did not include a 5-day period within which to cure the alleged defaults, and further, that the claimed breaches were impermissibly vague, and, as a consequence the Request to Cure was a nullity, and did not authorize plaintiffs to cease making monthly payments under the terms of the Agreement. It is therefore claimed that their termination of payments constituted a breach of the Agreement, entitling defendant to payment

in full of the amount due, together with counsel fees and expenses in connection with the effort to obtain payment, as well as such fees and expenses incurred in the defense of the action.

The Court does not believe that the failure to include a 5-day cure period was fatally defective. By letter dated September 30, 2010, Mr. Maione advised counsel for plaintiffs that they would continue their telephone conversations in a good faith effort to resolve the issues raised in the September 24 letter. As a practical matter, the Companies, by virtue of their communications with Maione, extended a 5-day period within which to resolve the issues complained of on September 24.

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *(Quinn v. Krumland,* 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *(Stillman v. Twentieth Century-Fox Corp.,* 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *(Moskowitz v. Garlock,* 23 A.D.2d 94 [3d Dept. 1965]); *(Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 [3d Dept. 1965]). However, where a party is otherwise entitled to judgment as a matter of law, an opposing party may not simply raise a feigned issue of fact to defeat the claim. To be "material issue of fact" it "must be genuine, bona fide and substantial to require a trial". (*Leumi Financial Corp. v. Richter,* 24 A.D.2d 855 [1st Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield,* 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. *(Tortorello v. Carlin,* 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' ". *(Braddock v. Braddock,* 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v.*

Martinez, 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

In this case there are significant factual questions which preclude the grant of summary judgment dismissing the complaint or on the First, Second and Third Counterclaims. While some of the accusations set forth in the February 24, 2010 correspondence consist of generalities relating to the restrictions imposed upon defendant in the November 5, 2009 Agreement, some others are more specific. Whether or not any of the allegations constituted violations under the terms of the Agreement are factual issues precluding dismissal of the complaint on a summary judgment motion.

Defendant's counterclaims assert that the allegations of violation are untrue and that plaintiff did not have a reasonable basis for believing them to be true. As a result, defendant claims that he is entitled to immediate payment of the balance of the payments due under the Agreement, the award of legal fees and expenses in the defense of the action and in the prosecution of the counterclaims.

Whether or not conduct by defendant violated the Agreement and even if they did not, whether plaintiffs' belief that they did was reasonable, are questions of fact which preclude the grant of summary judgment on the counterclaims.

Defendant's motions to dismiss the complaint and for summary judgment on the First, Second and Third counterclaims are denied.

This constitutes the Decision and Order of the Court.

Dated: June 20, 2011

J.S.C.