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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

ELIOT F. BLOOM,

Plaintiff,

- against -

RUSSELL LUGLI and NORTHWESTERN CONSULTANTS, INC.,

Defendants.

INDEX NO.: 013207/2009
MOTION DATE: 4/6/11
SEQUENCE NO.: 07, 08, 09

The following documents were read on this motion:

Sequence 7
Cross-Motion to Deny Defendant's Request to Amend Answer and Sanctions 1..
Sequence 8
Motion for Return of Security Deposit pending Appeal ..... 2.
Affirmation of John E. Lawlor, Esq. in Support of Motion ..... 3.
Affidavit of Eliot Bloom, Esq. in Opposition ..... 4.
Reply Affirmation of John E. Lawlor in Further Support of Motion .... 5.
Sequence 9
Motion by Defendants for Leave to Amend Answer ..... 6.
Affirmation and Memorandum of Law in Support of Motion ..... 7.
Reply Affirmation in Further Support of Motion to Amend Answer .... 8.

PRELIMINARY STATEMENT

There are three motions pending, not necessarily in Sequence Order. Defendants move for leave to amend their answer to include twelve defenses. Because this action was initially commenced by motion for summary judgment in lieu of complaint, the reversal of the judgment converts the motion to the complaint and the answering papers the answer,

and, pursuant to CPLR § 3025, defendant should be permitted to amend their answer because the Appellate Division, in reversing the grant of summary judgment to plaintiff, did not reach certain issues upon which defendant claims entitlement to judgment in their favor. Plaintiff responds by Cross-motion (Sequence 7) to deny the request to amend the Answer, primarily because the majority of the proposed defenses are affirmative causes of action in *Northwestern Consultants, Inc. v. Eliot F. Bloom, et al.,* Index No. CV-10 5087, currently pending in United States District Court, Eastern District of New York (Bianco, J.).

Motion Sequence 8 seeks an Order directing the Return of Deposit made by defendants to stay enforcement of the judgment pending the determination of the appeal. Plaintiff contends that there is no authority of this Court to direct the return, and requests that it remain as security for any judgment ultimately obtained.

BACKGROUND

On August 16, 2006 , plaintiff and Northwestern Consultants ("Consultants") entered into a joint venture agreement for, among other activities, developing residential condominiums in Bay Shore. Consultants was to have a 55% interest and plaintiff 45%. Among plaintiff's obligations was the obtaining of required zoning and development approvals. The parties amended the Agreement on October 5, 2007 to provide for the sale of plaintiff's interest in the joint venture to defendants for $450,000, $100,000 of which was paid at the time of the amendment, with $175,000 to be paid on or before April 1, 2008, and the balance of $175,000 payable on October 1, 2008. The defendants failed to make both subsequent payments.

By Decision dated February 1, 2011, the Appellate Division reversed the determination that the amendment to the agreement was an instrument for the payment of money only. They concluded that the issue of whether or not plaintiff provided the legal representation as he agreed to do in the October 5, 2007 agreement precluded summary judgment.

In order to stay enforcement of the judgment awarded by this Court during the pendency of the appeal, defendant Lugli posted the sum of $386,312.50 with the Nassau County Clerk. By its Decision, the Appellate Division determined that the only viable issue remaining between the parties is the performance, or lack thereof, of the legal services which plaintiff agreed to perform. The Court specifically noted that "(t)he parties' remaining contentions have been rendered academic in light of our determination".

DISCUSSION

Amendment of Pleadings

Defendants seek to amend their answer to include twelve affirmative defenses:

First: The September 28, 2007 Agreement annexed to the motion for summary judgment was a product of misrepresentations and plaintiff's self-dealing in violation of the professional obligations of an attorney owed defendants;

Second: Defendants were fraudulently induced to enter the agreement;

Third: Defendants were induced to enter the agreement based on plaintiff's negligent misrepresentations;

Fourth: Plaintiff breached his obligations under the Joint Venture Agreement of August 15, 2006 as well as the September 28, 2007 Agreement;

Fifth: Plaintiff breached fiduciary obligations under the Joint Venture Agreement, and the September 28, 2007 Agreement is therefore unenforceable;

Sixth: Plaintiff breached his obligations under the September 28, 2007 Agreement, and it is therefore unenforceable;

Seventh: Plaintiff breached fiduciary obligations under the September 28, 2007 Agreement, and it is therefore unenforceable;

Eighth: Plaintiff breached implied covenants of good faith and fair dealing under bothe the September 28, 2007 Agreement and the Joint Venture Agreement of August 15, 2006, rendering

the September 28, 2007 Agreement unenforceable;

Ninth: The Agreement of September 28, 2007 fails for lack of consideration;

Tenth: The Agreement of September 28, 2007 is void as against public policy;

Eleventh: The Agreement of September 28, 2007 is the product of breaches of the then applicable Lawyer's Code of Professional Responsibility, and therefore, unenforceable;

Twelfth: Plaintiff has been unjustly enriched at the expense of the plaintiffs, and the enforcement of the September 28, 2007 would further unjustly enrich him.

The amendment of pleadings is governed by Civil Practice Law and Rules § 3025 of the Civil Practice Law and Rules, which provides, in pertinent part, as follows:

Rule 3025. Amended and supplemental pleadings

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(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

The language of the statute, and cases interpreting it, make it abundantly clear that amendment of pleadings is to be freely granted unless the proposed amendment is "palpably insufficient" to state a cause of action or defense, or it is patently devoid of merit. To the extent that prior decisions led to the conclusion that the movant was under a burden to establish the merit of the amendment, they erroneously stated the standard to be followed. [1]

The law of the case, as enunciated by the Appellate Division, is that the only bar to recovery of the balance of $350,000 , is whether or not plaintiff has complied with his obligation to provide continuing legal services with respect to the acquisition of building permits and zoning applications as provided for in the October 5, 2007 amendment to the agreement.

Defendant was previously confronted with a motion for summary judgment, and was

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[1] *Lucido v. Mancuso*, 49 A.D.3d 220, 230 (2d Dept. 2008).

successful in having the trial court determination reversed. In opposing the motion, the non-moving party has the obligation to present proof in evidentiary form demonstrating a triable issue of fact in order to defeat the motion. [2] The Court in *Victory* was dealing with a motion for summary judgment in lieu of a complaint under CPLR § 3213, and stated "(a) defendant can defeat a CPLR 3213 motion by offering evidentiary proof sufficient to raise a triable issue of fact" and that "(a)verments merely stating conclusions, of fact or of law, are insufficient" to "defeat summary judgment" (internal citations omitted).

Either defendants raised the proposed defenses in opposition to the motion, and the Appellate Division specifically found them to be without merit, or they failed to raise them in opposition to the motion, in which case they were waived. In either event, the decision of the Appellate Division has clearly framed the only issue precluding the issuance of summary judgment, that is, whether or not plaintiff has continued to provide legal services as he agreed to do.

For an additional reason, the defendant must be precluded from raising the defenses which he now seeks to allege. The issues of the validity of the agreements between the parties, and the claims of breaches of contract, and breaches of fiduciary obligations, along with other unrelated issues, are squarely before the United States District Court for the Eastern District of New York. There is, therefore, a prior action pending. [3] That action alleges unlawful sale of securities in the First and Second Causes of Action, but goes on to make allegations against Bloom and others with respect to the transactions involved in this action in the Third through Thirteenth Causes of Action.

The Court has broad discretion to dismiss an action upon the grounds of a prior action pending where there is a substantial identity of the parties and causes of action. [4] Permitting

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[2] *Banco Popular North America v. Victory Taxi Management, Inc.*, 1 N.Y.3d 381 (2004).

[3] Exh. "B" to Cross-motion. *Northwestern Consultants, Inc., et al. v. Eliot F. Bloom, et al.*, CV-10 5087.

[4] CPLR § 3211 (a)(4); *Nakazawa v. Horowitz*, 50 A.D.3d 985, 986 (2d Dept.2008).

defendant to amend their answer to allege defenses which are substantially identical to those which constitute affirmative claims between Lugli and Bloom would simply prompt a motion to strike based upon the prior action. It is not essential that the precise legal theories presented in the prior proceeding also be presented in the second proceeding. It is only necessary that both actions arise out of the same subject matter or series of alleged wrongs.[5] A reading of the complaint in the federal action makes it clear that the transactions involving the Joint Venture Agreement, together with its amendment, and the alleged misconduct of Bloom and others is the crux of the case.

Defendants' motion (Seq #9) to amend their answer is denied. Plaintiffs' Cross-Motion (Seq #7) to deny the request to amend the answer is granted. The request for sanctions is denied.

Defendants' Motion for Refund of Security (Seq #8)

The Defendants posted security to prevent the execution upon the judgment which was the subject of the appeal. Defendant was successful on the appeal, resulting in a vacatur of the judgment against them. There is no further need for the maintenance of security with the County Clerk. The Court finds no basis for plaintiff's contention that this Court is without jurisdiction to direct the return of the posted security and declines to create what would amount to a pre-judgment attachment in the absence of any justification for doing so.

The motion for the return of the deposit of $386,312.50 is granted. Maureen O'Connell, Nassau County Clerk, is directed to refund to defendants Russell Lugli and Northwestern Consultants, Inc., the sum of $386,312.50, receipt of which was acknowledged on February 1, 2010.

This constitutes the Decision and Order of the Court.

Dated: June 28, 2011

J.S.C.

[5] *Simonetti v. Larson*, 44 A.D.3d 1028, 1029 (2d Dept.2007).