

Ikezi v Palumbo

2011 NY Slip Op 33293(U)

November 4, 2011

Supreme Court, Queens County

Docket Number: 23329/10

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

HENRY IKEZI,

Plaintiff,

-against-

JOSEPH PALUMBO, et al.,
Defendants.

Index No. 23329/10

Motion
Date October 3, 2011

Motion
Cal. No. 21 and 22

Motion
Sequence No. 1 and 2

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Upon the foregoing papers it is ordered that plaintiff's motion for leave to file an Amended Complaint pursuant to CPLR 3025(b) and plaintiff's motion for summary judgment pursuant to CPLR 3212 and for sanctions are hereby consolidated solely for the purposes of disposition of the instant motions.

Plaintiff's motion for leave to file an Amended Complaint pursuant to CPLR 3025(b) is hereby denied without prejudice, as such motion is not supported by either an attorney's affirmation or an affidavit of one with personal knowledge of the facts. As such, plaintiff's motion is denied.

That branch of plaintiff's motion seeking an order for summary judgment pursuant to CPLR 3212 in favor of all defendants, and dismissing the plaintiff's claims as against all defendants is hereby decided as follows:

In his Verified Complaint, plaintiff, Henry Ikezi alleges a cause of action against all defendants for breach of contract and a second cause of action against all defendants

for conversion. Plaintiff alleges that on or about October 2009, plaintiff entered into a contract with defendants to provide two (2) luxury cars (Rolls Royce Phantom and Bentley Flying Spur) to be exhibited on defendants' showroom to attract customer, to advertise, and to rent to customers for various purposes, and defendants breached the contract by, inter alia, booking plaintiff's cars without compensating him. Plaintiff further alleges that defendants misappropriated plaintiff's cars for continuous use in promoting defendants' business.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradley's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

Defendants established a prima facie case that the case against individual defendants, Joseph Palumbo and Peter Palumbo should be dismissed. Plaintiff has failed to establish that the corporate veil of Camelot Specialty Limos, Inc. ("Camelot") should be pierced so as to hold individual defendants, Joseph Palumbo and Peter Palumbo personally liable (*Joan Hansen & Company, Inc. v. Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103 [1st Dept 2002]; see also, *American Medical and Life Ins. Co. v. Crosssummit Enterprises, Inc.*, 910 NYS2d 403 [Sup Ct,

Nassau County 2010]) (holding that it is a general rule that when officers and directors are acting in their corporate capacities, they cannot be held personally liable). "To successfully pierce the corporate veil, a [party] must establish that : `(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury'" (*Old Republic National Title Ins. Co. v. Moskowitz*, 297 AD2d 724 [2d Dept 2002][internal citations omitted]). Defendants presented evidence that individual defendants Joseph Palumbo and Peter Palumbo should not be personally liable for plaintiff's damages. In support of this branch of the motion, defendants submit, inter alia, an affidavit of individual defendant, Joseph Palumbo himself, wherein he avers that: he is the Vice-President and his brother, individual defendant, Peter Palumbo is the President of defendant Camelot Specialty Limos, Inc., that neither he, nor his brother have operated a "for-hire" car service in their individual capacities, they have only acted as officers and employees under the corporate entity, Camelot, neither he, nor his brother, Peter Palumbo ever advised, represented, or made any type of writing to the plaintiff indicating that the individual defendants would agree to be held personally liable for the debts incurred by corporate defendant, Camelot. As such, defendants established a prima facie case that the case against individual defendants, Joseph Palumbo and Peter Palumbo should be dismissed.

In opposition to this branch of the motion, plaintiff has failed to present any triable issue of fact. Plaintiff presented absolutely no evidence that individual defendants Joseph Palumbo and Peter Palumbo commingled funds or engaged in any activity sufficient to pierce the corporate veil (*see, Morris v. New York State Dept. of Taxation and Finance*, 82 NY2d 135 [1993]). Plaintiff presented no evidence that: "the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (*Id.*) (*Internal citations omitted*).

As such, the Verified Complaint is dismissed as against individual defendants, Joseph Palumbo and Peter Palumbo.

That branch of defendants' motion seeking an order for summary judgment pursuant to CPLR 3212 in favor of defendant, Camelot is hereby denied.

At the outset, the Court notes that defendants' argument that the plaintiff has no standing to bring the action is

misguided as defendants fails to assert that plaintiff has no ownership interest in the Rolls Royce, only that plaintiff has no ownership interest in the Bentley.

Defendants' argument that the claim is barred by the statute of frauds is not meritorious. Pursuant to New York General Obligations Law § 5-701 an agreement is required to be in writing if, in relevant part: "[by] its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime". In the instant action, it has not been established that the agreement was not to be performed within one year from the making thereof or the performance could not be completed within the end of a lifetime. Such an agreement could indeed be performed within one year.

The papers establish that there are triable issues of fact regarding, inter alia, if and when defendant, Camelot received the registration and insurance for the two cars. As there are triable issues of fact, summary judgment is unwarranted against defendant, Camelot.

That branch of defendants' motion seeking an order for sanctions against plaintiff and plaintiff's attorney under Rule 130 of the New York Rules of Court, 22 NYCRR 130-1 is hereby denied. Pursuant to 22 NYCRR 130-1.1, conduct is deemed frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false". At this stage, the court finds that it has not been established that the conduct of the plaintiff or plaintiff's attorney is "frivolous" as defined by 22 NYCRR 130-1.1. Nor have defendants demonstrated sufficient cause to warrant sanctions (see, *Schaeffer v. Schaeffer*, 294 AD2d 420 [2d Dept 2002]; *Breslaw v. Breslaw*, 209 AD2d 662, 663 [2d Dept 1994]). The conduct of the plaintiff and the plaintiff's attorney has not risen to the level of frivolous. Accordingly, this branch of the motion is denied.

This constitutes the decision and order of the Court.

Dated: November 4, 2011

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Howard G. Lane, J.S.C.

