

Workman v Douglas Ellman, LLC

2011 NY Slip Op 33927(U)

November 4, 2011

Sup Ct, NY County

Docket Number: 111026/09

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

DAVID WORKMAN,
Plaintiff,

Index No.: 111026/09

Motion Date: 07/26/11

- v -

Motion Seq. No.: 01

DOUGLAS ELLIMAN, LLC d/b/a PRUDENTIAL
DOUGLAS ELLIMAN REAL ESTATE,
Defendant.

Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
_____	1
_____	2
_____	3

FILED

Cross-Motion: Yes No NOV 14 2011

Upon the foregoing papers,

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COUNTY CLERK'S OFFICE

Defendant moves to dismiss the third cause of action in plaintiff's second amended complaint. Plaintiff cross-moves to further amend the complaint mainly with respect to the third cause of action.

The proposed third cause of action sounds in fraud and alleges that defendant misrepresented to plaintiff that a "6% royalty fee" was required by the franchisor and would be paid to the franchisor out of the plaintiff's commissions under the parties' agreement. Plaintiff states that based upon this.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

representation he agreed to the defendant's proposed commission structure although he had attempted to negotiate the commission arrangement. Plaintiff alleges that defendant misstated the royalty fee actually paid to the franchisor, that the real royalty fee paid to the franchisor was only 1.8% although the defendant deducted 6% from plaintiff's royalties, and that defendant retained the difference.

As stated by the Court, "[l]eave to amend pleadings is freely granted (see CPLR 3025 [b]) so long as there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit." Paolucci v Mauro, 74 AD3d 1517, 1519 (3d Dept 2010) (citations and internal quotations omitted). "To establish fraud, a plaintiff must demonstrate that the defendant knowingly misrepresented a material fact for the purpose of inducing reliance upon it, that there was, in fact, justifiable reliance thereon, and that damages resulted." Id. at 1520; see CPLR 3016 (b). "[A] motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment." Non-Linear Trading Co., Inc. v Braddis Associates, Inc., 243 AD2d 107, 116 (1st Dept 1998).

Plaintiff here has presented sufficient allegations in addition to his affidavit and documentary evidence to support the cross-motion to amend. Plaintiff alleges with specificity the

misrepresentations of the defendant with respect to the amount of the royalty fee and how it would be applied. As in Paolucci, plaintiff's complaint merely amplifies the original allegations by setting forth the specific misrepresentations alleged and the nature of the royalty fee as well as the fact that the concealment of the fraud was ongoing. Plaintiff also sets forth justifiable reliance on the misrepresentations with respect to the negotiation of and final terms of the agreement.

Plaintiff's allegation that the defendant concealed the true amount and nature of the royalty fee, supported by plaintiff's affidavit and documents appended thereto in support of the cross-motion, raises an issue of fact as to the commencement of the limitations period pursuant to CPLR 213 (8) sufficient to survive summary dismissal. See Kaufman v Cohen, 307 AD2d 113, 123 (1st Dept 2003) ("clear question of fact exists as to whether plaintiffs could reasonably have inferred . . . that a fraud was perpetrated upon them. Accordingly, defendants' motion to dismiss the fraud . . . claim[] as time-barred should have been denied").

Accordingly, it is

ORDERED that defendant's motion is DENIED; and it is further

ORDERED that the plaintiff's cross-motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served

upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the parties shall appear at a preliminary conference on December 6, 2011, at 9:30 A.M, in IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013.

This is the decision and order of the court.

Dated: November 4, 2011

ENTER:

FILED

~~Richard A. James~~
DEBRA A. JAMES J.S.C.

NOV 14 2011

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COUNTY CLERK'S OFFICE