Sherman v Mulerman
2011 NY Slip Op 34164(U)
December 14, 2011
Supreme Court, Kings County
Docket Number: 22685/10
Judge: Carolyn E. Demarest

At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of June, 2011

PRESENT:
HON. CAROLYN E. DEMAREST, JSC.

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SAM SHERMAN,

Plaintiff,

-against-

ALEX MULERMAN, BRANISLAVA SILVER and RANDALL ROGG,

Defendants.

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DECISION AND ORDER

Index No. 22685/10

The following papers numbered 1 to 7 read on this motion:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1,3,5
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	6,7
Other Papers Memoranda of Law	2,4

Defendants Alex Mulerman ("Mulerman") and Branislava Silver ("Silver") move to dismiss the complaint pursuant to CPLR 3211(a)(1), (5), and (7), CPLR 3016, and for sanctions pursuant to NYCRR 130-1.1. Defendant Randall Rogg ("Rogg") cross-moves to dismiss the complaint pursuant to CPLR 3211(a)(1), (5), and (7) and CPLR 3016. Plaintiff cross-moves for default judgment pursuant to CPLR 3215(a) as to Rogg and opposes both motions to dismiss.

BACKGROUND

This action arises out of a dispute over the ownership and management of limousine businesses. On January 9, 2009, plaintiff commenced the action *A-Express Limo Inc. v Mulmerman*, Index No. 476/09, both individually and derivatively on behalf of the various

limousine companies at issue in this action, seeking to enjoin and restrain Mulerman and Silver from interfering with the operation of the businesses. *A-Express Limo* was discontinued by stipulation signed on April 9, 2009. On July 22, 2009, Mulerman and Silver commenced *Mulerman v Sherman*, Index No. 18429/09. According to the complaint in *Mulerman*, Mulerman and Silver entered a purchase agreement on April 8, 2009 to purchase Sherman's 50% shareholder interest in A-Express Limo, Inc., Apex Car & Limousine Service, Inc., Apex Limousines, Inc., Apex PFR, Inc., Apex International Limousine, Inc., and SAS International Group, LTD and 33.33% interest in Apex Coach, LLC (these entities are collectively referred to as "Apex"). The *Mulerman* complaint alleged that Sherman was unwilling to close on the April 8, 2009 purchase agreement.

On December 7, 2009, after the parties brought various orders to show cause seeking injunctions, this court referred the parties to retired Judge Herman Cahn to supervise the closing of the April 8, 2009 purchase agreement. After numerous meetings with Judge Cahn, the parties entered a new "Share Purchase Agreement" dated February 22, 2010 ("Agreement"). The Agreement lists the purchase price for the shares as $582,500.00 "which sum includes [plaintiff's] net receivables of $79,924.31 arrived at by the company accountant by audit of the books and records of [Apex] . . .." The Agreement also provides that the plaintiff has audit rights, for up to one year following the closing, "to independently verify the net receivables calculation through March 11, 2009 contained in the audit report of the company accountant, Randall Rogg, dated October 4, 2009." The Agreement required that, in such an audit, plaintiff's accountant "shall be assisted by Randall Rogg or other Apex employee qualified to assist with the data retrieval" and Mulerman and Silver "shall direct the company accountant [Rogg] to

provide supporting documents requested by [plaintiff's] designated CPA and direct [Rogg's] cooperation with [plaintiff's] designated CPA." Rogg was not a party to the Agreement. On March 9, 2010, a stipulation to discontinue the *Mulerman* action was signed by the respective attorneys and releases were executed by Sherman, Mulerman and Silver with respect to "all unresolved issues, claims and counterclaims relating to [*Mulerman v Sherman*], Index No. 18429/09." On March 17, 2010, this court, upon consent of the parties, ordered the release of funds previously held in escrow pending the resolution of the *Mulerman* action and marked the action as settled and discontinued.

Upon the present motion, defendants argue that documentary evidence establishes that plaintiff did not timely avail himself of the right to audit Apex's financial data and records pursuant to the Agreement and that the complaint therefore fails to state a cause of action. The undisputed evidence reveals that Raphael Grossman ("Grossman"), plaintiff's CPA, sent a written request to "The Apex Companies" pursuant to paragraph 10 of the Agreement, dated July 27, 2010, to conduct an Audit of Apex beginning on August 9, 2010. Silver and Mulerman had sent a written authorization to Rogg dated August 3, 2010, on notice to Grossman, plaintiff, and plaintiff's prior counsel, to proceed with the audit pursuant to the Agreement and included paragraph 10 of the Agreement for Rogg's reference. Grossman alleges that although he did not receive a response, he appeared at Apex on August 9, 2010, and was turned away by Mulerman. Grossman then sent a written request to Rogg, dated August 12, 2010, to schedule the audit on August 18, 2010. Rogg sent a written response, dated August 16, 2010, indicating that he was "occupied with two separate audits for Apex Car & Limousine Service, Inc." that "[affected] the period prior to closing." Rogg indicated that he would contact Grossman at the end of August as

to his available dates and requested a retainer in advance of the audit. Rogg subsequently sent a letter to Grossman, dated September 14, 2010, indicating that he was available for the audit on September 23, 24 and October 1 and 2, 2010. Rogg noted that "[i]f for any reason you are not available on these dates, contact us as soon as possible to let us know what dates are fit for your schedule." Grossman alleges that these dates were either Jewish holidays or a Saturday and he did not work on those dates. Grossman alleges that "it became obvious that continued attempts to fulfill the spirit of [paragraph 10] of the Agreement were futile." According to Rogg, plaintiff has not provided Rogg with a retainer, responded to Rogg's retainer request, or attempted to schedule any further dates for the audit.

On September 14, 2010, plaintiff commenced the present action by filing a summons with notice.[1] The amended verified complaint ("Complaint") alleges that Mulerman and Silver failed to comply with the terms of the Agreement, Rogg refused to provide the documents and assistance to Grossman who was attempting to conduct an audit pursuant to the terms of the Agreement, the net receivables calculation by Rogg in the audit report[2] ("Report") was

[1] Although there is a dispute as to whether the original complaint was properly served on all parties after demands for a complaint were served upon plaintiff by all defendants, and a review of the Kings County Clerk database indicates that the original complaint was never filed with the county clerk, the amended verified complaint, dated November 29, 2010, was filed on January 3, 2011.

[2] Rogg prepared a report ("Report") addressed to the "shareholders and board of directors" of Apex Car & Limousine Service, Inc., Apex PFR, Inc., Apex Limousines, Inc., A-Express Limo Inc., SAS International Group, LTD and the 'partners' of Apex Coach, LLC at the request of both plaintiff and Mulerman. The Report indicates that it was completed "as per the contract between the shareholders & partners of [Apex]" which appears to refer to the April 8, 2009 purchase agreement that states, "the parties agree to retain and evenly share the cost of hiring Randall Rogg, CPA to marshal debts, available cash and accounts receivables of Apex prior and immediately up to closing." The Agreement references "the net receivables calculation through March 11, 2009 contained in the audit report of the company accountant, Randall Rogg, dated October 4, 2009." The amount due to plaintiff as listed in the Report is $79,934.31 and the

understated by over $700,000, and the tax forms filed on behalf of Apex in 2008 and 2009 were improperly filed by Rogg resulting in a higher tax rate for the plaintiff.

Mulerman and Silver move to dismiss the Complaint pursuant to CPLR 3211(a)(1), (5), and (7), CPLR 3016, and for sanctions pursuant to NYCRR 130-1.1. Mulerman and Silver argue that the Complaint fails to state a cognizable cause of action, the allegations are contradicted by documentary evidence, and the allegations are barred by res judicata, settlement payment and release based on the Agreement that settled the prior litigation. Mulerman and Silver also argue that plaintiff commenced this action to harass the defendants, it is frivolous, and they are entitled to sanctions.

Rogg cross-moves to dismiss the Complaint pursuant to CPLR 3211(a)(1), (5), and (7) and CPLR 3016. Rogg claims that he was not a party to the earlier litigation or the Agreement and Rogg filed tax returns for Apex, not for the plaintiff. Accordingly, Rogg argues that he is not in privity with the plaintiff and any claim against him arising out of the Agreement, is without merit. Rogg also argues that there is documentary evidence establishing that he did not interfere with the plaintiff's audit and the Complaint merely raises conclusory allegations that the computation of Apex's net receivables are false and these allegations are insufficient to support a cause of action.

Plaintiff cross-moves for default judgment pursuant to CPLR 3215(a) as to Rogg and opposes both motions to dismiss. Plaintiff argues that Rogg's time to answer or move to dismiss

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net receivables amount listed as due to plaintiff in the Agreement is $79,924.31. Accordingly, assuming a typographical error as to the ten dollar variation in the amounts listed, although undated, the Report is presumably the "audit report . . . dated October 4, 2009" that is referenced in the Agreement.

expired and was not extended and that this action arises solely out of the performance of the Agreement and is therefore not barred by res judicata. Plaintiff further argues that the Report was inaccurate and created to deceive plaintiff.

ANALYSIS

Defendants' argument that this entire action must be dismissed pursuant to CPLR 3211(a)(5) as the causes of action cannot be maintained due to res judicata and the settlement of the prior actions, is denied. The allegations in the Complaint, although inarticulately pled, stem largely from the defendants' purported breach of the Agreement and the defendants' alleged fraud and negligence in producing inaccurate financial documents when entering the Agreement. As this action is substantially for the enforcement of the terms of the Agreement, the causes of action are not barred by res judicata.

Defendants also move to dismiss the Complaint pursuant to CPLR 3211 (a)(1) and (7). When evaluating a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must construe the pleading liberally, "accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference" (*Jacobs v Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999]; *Leon v Martinez*, 84 NY2d 83 [1994]). The court will deny the motion "if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal quotation marks omitted]). "The test on a motion to dismiss for insufficiency of the pleadings is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained" (*Pepler v Coyne*, 33 AD3d 434, 435 [1st

Dept 2006], citing *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 [1st Dept 1990]; *see also Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 [1st Dept 1978]). However, "[w]here documentary evidence definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim, dismissal pursuant to CPLR 3211(a)(1) is warranted" (*Berardino v Ochlan*, 2 AD3d 556, 557 [2d Dept 2003]).

Defendants' motion to dismiss the first cause of action pursuant to CPLR 3211(a)(1) is granted as the defendants have produced documentary evidence that conclusively disposes of plaintiff's first cause of action alleging that Mulerman and Silver failed to pay the plaintiff pursuant to the terms of the Agreement. Paragraph 8 of the Complaint alleges that Mulerman and Silver "failed, neglected and omitted to fulfill their obligations as stated in paragraph "7." above." Paragraph 7 alleges that pursuant to the Agreement, Mulerman and Silver were obligated to "pay to Sherman the Net Receivables due to Apex, *as defined and described in the Agreement*" (emphasis added). Paragraph 1 of the Agreement states that "[t]he purchase price for the Shares shall be Five Hundred Eighty-Two Thousand, Five Hundred ($582,500) Dollars, which sum includes the Seller's net receivables of $79,924.31 arrived at by the company accountant by audit of the books and records of [Apex] through March 11, 2009 . . .."

Defendants provided proof of checks and cashiers checks issued to the plaintiff that, along with this court's March 17, 2010 stipulated order directing the release of escrow funds to plaintiff and plaintiff's signed acknowledgment of receipt of the checks and signed consent order for the escrow release, demonstrate that Mulerman and Silver complied with the terms of the Agreement as of the date of filing this motion. Plaintiff contends, in opposition to the motion, that the first cause of action is for the "underpayment of the 'Net Receivables' described in

paragraph '10.' of the Agreement . . . as well as attorneys and accountants fees as provided for pursuant to paragraph '11b.' of the Agreement . . .." However, this is contradicted by the allegations in the Complaint. To the extent that the plaintiff intended to raise these claims in the first cause of action, they have failed to state a cause of action pursuant to CPLR 3211(a)(7) as these issues cannot be reasonably implied from the allegations in the first cause of action.

Rogg's motion to dismiss the second cause of action pursuant to CPLR 3211(a)(1) is also granted as Rogg has supplied documentary evidence demonstrating that he did not intentionally procure the breach of the Agreement between the plaintiff and Mulerman and Silver. "A claim of tortious interference requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages" (*Foster v Churchill*, 87 NY2d 744, 749-750 [1996]); *see Crown Assocs. v Zot*, LLC, _AD3d_, 2011 NY Slip Op 3020 [2d Dept 2011]).

In response to Grossman's demand to audit Apex's financial documents pursuant to paragraph 10 of the Agreement, to which Rogg was not a party, Rogg responded through correspondence notifying Grossman of a retainer requirement to be provided by the plaintiff prior to the audit, offering Grossman the opportunity to submit a list of questions he may have in advance of the audit, and indicating that Rogg would contact Grossman with potential audit dates in September. In further communication with Grossman, Rogg provided four potential dates in September and October 2010 for the audit and requested that Grossman contact Rogg if those dates were insufficient. Plaintiff has not provided any evidence that either plaintiff or Grossman requested alternative dates for the audit after receiving Rogg's correspondence of September 21, 2010, acknowledged Rogg's request for a retainer, or provided any response to Rogg's

correspondence. Rather, plaintiff preemptively commenced this action effectively waiving the opportunity to audit Apex's books. Grossman's contention that "it became obvious that continued attempts to fulfill the spirit of [paragraph 10] of the Agreement were futile" is unavailing as the documentary evidence demonstrates that Rogg did respond to Grossman's requests, as contemplated in paragraph 10 of the Agreement, and sought feedback for alternative dates. Further, plaintiff's right to audit the records did not expire for more than five months after Rogg's letter of September 21, 2010 and thus there was ample opportunity for plaintiff to schedule and complete an audit. Accordingly, as the plaintiff's claims of tortious interference with the Agreement are contradicted by documentary evidence of Rogg's efforts to facilitate performance of the terms of the Agreement, defendant's motion to dismiss the second cause of action is granted pursuant to CPLR 3211(a)(1).[3]

The third cause of action alleges that "Rogg, at the request of Mulerman and Silver, prepared IRS form 1120S and New York State form CT-3-S . . . for the years 2008 and 2009 for Apex", "[t]he classification of the payments to [plaintiff] as ordinary income . . . was false and known by Mulerman, Silver and Rogg to be false", plaintiff was damaged as a result and "is entitled to recover damages of Mulerman, Silver and Rogg." The Complaint alleges that the funds included in these filings were paid to the plaintiff "pursuant to the Agreement" and thus the plaintiff was taxed "at a rate greater than the rate on the profit on the sale by Sherman of his Apex shares to Silver as provided for in the Agreement." Defendants argue that plaintiff's

[3] Although this cause of action is dismissed, it is noted that at oral arguments upon the current motions, counsel agreed to toll the one year limitation in the terms of the settlement pending the current litigation. The parties are encouraged to forthwith schedule the plaintiff's audit of the books and records pursuant to the terms of the Agreement at a time mutually convenient to all parties.

conclusory allegations are insufficient to plead a cause of action for fraud, and the Complaint does not allege that the plaintiff has actually filed his personal income tax returns for 2008 or 2009 or been assessed penalties by the Internal Revenue Service. Rogg also noted that, "[i]f [plaintiff] disagrees with the treatment of payments made to him in the corporate tax returns his accountant simply has to file the appropriate forms with the IRS stating what he believes to be the proper treatment of the payments together with his personal tax returns." Rogg further argues that he was not in privity with the plaintiff as Rogg was hired by Apex to file Apex's documentation with the taxing authorities and thus cannot be held liable to plaintiff.

Defendants also argue that documentary evidence contradicts the plaintiff's assertion that the identification of "Nonemployee compensation" on the 2008 and 2009 1099 forms was improper as the Agreement was not entered until 2010 and therefore the payments in 2008 and 2009 could not have been in satisfaction of the terms of the Agreement. Although the third cause of action appears to allege fraud as against Mulerman, Silver and Rogg (*see Rosenbach v Diversified Group, Inc.*, 12 Misc. 3d 1152A [Sup Ct, New York 2006], noting that "[a] significant distinction between negligence-based claims and those based on theories of fraud is the element of scienter", which is alleged in the third cause of action in the present action), in opposition to the motion to dismiss, plaintiff claims that the third cause of action is for "negligence"; he only "seek[s] damages from Rogg", and "the payments were made as an ingredient in the purchase of [his] ownership interest."

Rogg's motion to dismiss the third cause of action, pursuant to CPLR 3211(a)(1), is granted, as the documentary evidence establishes that the payments listed in the 2008 and 2009 1099 forms were not in satisfaction of the Agreement entered in 2010 as alleged, and, pursuant to

CPLR 3211(a)(7), as the Complaint fails to state a cause of action for either negligence or fraud. Mulerman and Silver have provided documentary evidence, including proof of payments to the plaintiff pursuant to the terms of the Agreement. The Agreement does not indicate that any payments to plaintiff in 2008 or 2009 were consideration for the shares sold thereunder. Accordingly, plaintiff's allegation that payments made to plaintiff in 2008 and 2009 by Apex were in consideration for the sale of shares of Apex, which were sold in a transaction that did not close until 2010, is definitively contradicted by documentary evidence (*see* CPLR 3211(a)(1)). Moreover, in opposition to Rogg's motion to dismiss, plaintiff does not contest Rogg's assertion that if the plaintiff disagreed with the treatment of payments made to him in Apex's corporate tax returns, plaintiff's own accountant could have filed the appropriate forms with the IRS to contest the treatment of the payments along with his personal tax returns. Thus, it does not appear that plaintiff could have sustained damages as a consequence of Rogg's characterization of his income. To the extent that the plaintiff may have intended to bring a cause of action for fraud, defendant's motion to dismiss pursuant to CPLR 3016(b) is granted for failure to state the circumstances of the fraud in detail (*See Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005]).

The fourth cause of action alleges that "Rogg, Mulerman and Silver prepared and furnished [plaintiff] with a computation of the Net Receivables", the computation "was false and inaccurate in that the Net Receivables were materially understated by in excess of $700,000.00", and that they "knew that the Net Receivable computation was false and [they] deliberately falsified the computation." Defendants argue that plaintiff has failed to allege a cause of action for fraud pursuant to CPLR 3016 which requires that a cause of action for fraud must be pled with

particularity and conclusory allegations of fraud are insufficient to maintain such a cause of action. Defendants also argue that the plaintiff failed to allege that he relied upon the computation and, that as a result of such reliance, sustained damages. In opposition to the motion, plaintiff essentially repeats the claims alleged in the Complaint and refers to the fourth cause of action as the "falsifying of books and records." Grossman provides computations claiming that the net receivables of Apex were "far in excess" of the amount listed in the Report.

"To plead a prima facie case of fraud, the plaintiff must allege 'a material misstatement, known by the perpetrator to be false, made with an intent to deceive, upon which the plaintiff reasonably relies and as a result of which he sustains damages', and each element must be pleaded with particularity. Specifically, '[a] complaint alleging fraud by an accountant is expected to identify the particular manner in which an item included in the financial statement relied upon has been intentionally or recklessly misrepresented'" (*Rotterdam Ventures v Ernst & Young, LLP*, 300 AD2d 963, 964 [3d Dept 2002] (internal citations omitted)). The fourth cause of action sounding in fraud must be dismissed as it fails to allege that the plaintiff reasonably relied upon the Report which is a necessary element for an allegation of fraud (*see Rotterdam Ventures*, 300 AD2d at 964; *Rosenbach v Diversified Group, Inc.*, 12 Misc 3d 1152A [Sup Ct, New York County 2006]).[4]

[4] Paragraphs 10 and 11 of the Agreement demonstrate that the parties foresaw the potential for the present disagreement over Rogg's findings as to Apex's financial status in the Report as the Agreement permitted the plaintiff to review Apex's financial documents *after* the Agreement was entered. However, it is not clear how plaintiff could argue that the financial calculations in the Report by Rogg were fraudulent and damaged him when he maintained extensive Apex financial documents that, he argues, conclusively contradict the purported fraudulent findings in the Report. While parties may plead alternative theories of liability, affidavits and affirmations by the plaintiff and Grossman appear to indicate that the financial records in the plaintiff's control were sufficient to establish plaintiff's claim of a different net

Defendant's motion to dismiss the fifth cause of action for negligence as to Rogg is denied as plaintiff has sufficiently alleged a cause of action for negligence. "To establish a prima facie case for negligence, a plaintiff must prove (1) that defendant owed a duty to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Friedman*, 23 AD3d at 164-165, citations omitted). "In carefully circumscribed instances, accountants may be liable in negligence to third parties who rely on their work, even in the absence of contractual privity, provided the accountants were aware that the financial reports were to be used for a particular purpose or purposes, in the furtherance of which a known party or parties was intended to rely, and there was some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance" (*Barrett v Freifeld*, 77 AD3d 600, 601 [2d Dept 2010]; *see Security Pacific Business Credit, Inc. v Peat Marwick Main & Co.*, 79 NY2d 695, 702-703 [1992]).

The fifth cause of action alleges that Rogg owed a duty of care to the plaintiff, "[t]he conduct of Rogg constituted a breach of the duty of due care owed to [plaintiff] to furnish accurate and reliable information and data to [plaintiff]", and that plaintiff was damaged as a result of the breach (*see Friedman*, 23 AD3d at 164-165). Although Rogg claims that there was no privity between plaintiff and Rogg, the Report clearly states, "I have compiled and verified the cash balances, account receivable, accounts payable accrued expenses and bank loans payable of [Apex] as of March 11, 2009, as requested by both [plaintiff] and [Mulerman]." The Report also states, "I have completed this work as per the contract between the shareholders & partners of [Apex] . . .." This indicates that Rogg was aware that the Report was to be used for settlement

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receivable calculation thereby contradicting any argument that plaintiff relied upon the Report to his detriment when entering the Agreement.

purposes and that the plaintiff would rely on its findings. Accordingly, Rogg's argument that the lack of privity between plaintiff and Rogg precluded a negligence cause of action is unavailing (*see Barrett*, 77 AD3d at 601; *Security Pacific*, 79 NY2d at 702-703).

Plaintiff's motion for default judgment as to Rogg pursuant to 3215(a) is denied for failure to submit proof of service of the Complaint. Plaintiff claims that Rogg's time to answer or move to dismiss has expired and was not extended. Pursuant to CPLR 3215(f), "[o]n any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice . . .." Plaintiff has not provided any proof of service of the summons with notice, complaint, or the amended verified complaint upon Rogg or even allege the date upon which Rogg was served with any of the pleadings or the date upon which Rogg's time to answer expired. Further, Rogg's counsel has submitted proof of his communication with plaintiff's counsel seeking an extension of time to answer and has raised significant defenses in Rogg's cross-motion to dismiss. Rogg's time to answer was also extended pursuant to CPLR 3211(f) upon Rogg's filing of the current cross-motion to dismiss. Accordingly, this court has no basis to grant a default judgment and the motion for default judgment as to Rogg is denied pursuant to 3215(f).

Defendants' motion for sanctions is granted pursuant to 22 NYCRR §130-1.1(a). The plaintiff commenced this action, including the frivolous claim for tortious interference with a contract, well before the plaintiff's right to audit the books and records of Apex expired and before making a good faith attempt to schedule an audit on a date mutually acceptable to the respective parties. Plaintiff's premature commencement of the instant litigation without availing himself of alternative remedies available under the Agreement indicates his bad faith and purpose to harass the defendants. Plaintiff's cross-motion seeking a default judgment against Rogg was

completely unsupported with basic affidavits of service or even allegations that could support the motion. This cross-motion was frivolous and was also primarily undertaken to harass the defendant.

CONCLUSION

Defendants' motion to dismiss the complaint is granted with prejudice as to the first, second, and third causes of action and without prejudice as to the fourth cause of action.

Defendant's motion to dismiss the fifth cause of action is denied.

Plaintiff is granted leave to replead the fourth cause of action in accordance with this decision following his promptly obtaining the audit to which he is entitled under the terms of the Agreement, within 30 days of the service of notice of entry of this decision.

Defendants' motion for sanctions is granted pursuant to 22 NYCRR §130-1.1(a). Plaintiff is directed, pursuant to Section 130-1.3 of the Rules, to deposit $500 with the Lawyer's Fund for Client Protection on or before July 29, 2011. Upon failure to do so, the Fund is directed to enter judgment against Sam Sherman. The Lawyers' Fund for Client Protection, will be notified of this sanction.

Plaintiff's motion for default judgment against Rogg is denied.

This constitutes the decision, order and judgement of the court.

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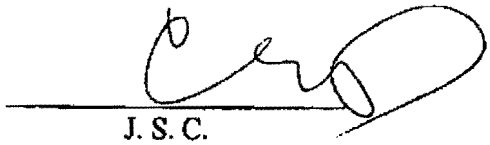

J. S. C.

HON. CAROLYN E. DEMAREST