

Vinar v Litman
2012 NY Slip Op 30392(U)
February 14, 2012
Supreme Court, Queens County
Docket Number: 700017/07
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

 ALEKSANDER VINAR,

Plaintiff,

-against-

JOHN LITMAN, et al.,
 Defendants.

Index No. 700017/07

Motion

Dates November 1, 2011

November 15, 2011

Motion

Cal. Nos. 23, 27, 29, 43,
 44, 45, 46, 47, 48, 49

Motion

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Upon the foregoing papers it is ordered that:

The motion by defendants, Honig, Mongioi, Monahan and Sklavos LLP, Edward H. Honig, Esq., Robert Anthony Monahan, Esq., Mary E. Mongioi, Esq., Alexander E. Sklavos, Esq., Monahan and Sklavos P.C., Alexander E. Sklavos P.C. ("the attorney defendants") for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint as against them;

Cross motion by plaintiff for an order granting summary judgment to plaintiff pursuant to CPLR 3212 against defendants Honig, Mongioi, Monahan and Sklavos LLP, Edward H. Honig, Esq., Robert Anthony Monahan, Esq., Mary E. Mongioi, Esq., Alexander E. Sklavos, Esq., Monahan and Sklavos P.C. and Alexander E. Sklavos P.C.;

Motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment against defendants, John Litman, Ella Gleizer, Terryville Associates Inc., Golden Horizon Terryville Corp., XYZ Partnership, Rainbow Associates Inc. and 2417 Management LLC;

Motion by defendants Boris Imas and Maria Imas ("the Imas defendants") for an order pursuant to CPLR 3212 granting them summary judgment dismissing all claims against them with prejudice;

Motion by plaintiff for an order striking the Answer and/or precluding defendants, John Litman, Alexander E. Sklavos, Esq., Alexander E. Sklavos P.C., Boris Imas and Maria Imas because of their wilful failure to comply with four Court Orders (a Preliminary Conference Order dated August 26, 2009, Compliance Conference Order dated January 11, 2010, Hon. Ritholtz Phone Conference of April 8, 2010, and Hon. Ritholtz So-Ordered Stipulation dated May 14, 2010) and by refusing to honor their own signed stipulation to appear for depositions dated July 2010 and by refusing to respond to plaintiff's discovery demands dated July 13, 2010 and for an order seeking to disqualify the Law Office of Alexander E. Sklavos Esq. from serving as legal counsel to any defendants because he provided prior legal counsel to plaintiff;

Cross motion by plaintiff for an order pursuant to CPLR 3124 and 3126 compelling discovery and striking the pleadings of defendants, which Notice of Cross Motion is dated September 3, 2011;

Cross motion by plaintiff for an order pursuant to CPLR 3124 and 3126 to compel discovery and to strike the Answer of defendants, which Notice of Cross Motion is dated October 21, 2011 and for an order seeking to amend the summons and complaint to read Monahan & Sklavos PC, instead of Monahan and Sklavos P.C.;

Motion by defendants, Honig, Mongioi, Monahan and Sklavos LLP, Edward H. Honig, Esq., Robert Anthony Monahan, Esq., Mary E. Mongioi, Esq., Alexander E. Sklavos, Esq., Monahan and Sklavos P.C. and Alexander E. Sklavos P.C. for a protective order pursuant to CPLR 3103 with respect to discovery demands that plaintiff served on October 3, 2011;

Motion by defendants, Honig, Mongioi, Monahan and Sklavos LLP, Edward H. Honig, Esq., Robert Anthomny Monahan, Esq., Mary E. Mongioi, Esq., Alexander E. Sklavos, Esq., Monahan and Sklavos P.C. and Alexander E. Sklavos P.C. for a protective order pursuant to CPLR 3103 with respect to various discovery demands plaintiff served on August 9, 10, and 11 and for an order pursuant to 22 NYCRR 130-1.1(a) requiring plaintiff and/or plaintiff's counsel to pay costs and/or sanctions based upon their continued practice of engaging in frivolous conduct; and

Motion by defendants, Boris Imas and Maria Imas for a protective order pursuant to CPLR 3103 with respect to various discovery demands of plaintiff dated August 9, 10, and 11 of 2011 and for an order pursuant to 22 NYCRR 130-1.1(a) requiring plaintiff and/or plaintiff's counsel to pay costs and/or sanctions based upon its frivolous conduct; are all hereby consolidated solely for purposes of disposition of the instant motions and cross motions and are decided as follows:

A. Attorney defendants' motion for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint as against them; and plaintiff's cross motion for an order granting summary judgment to plaintiff pursuant to CPLR 3212 against attorney defendants and plaintiff's motion for an order pursuant to CPLR 3212 granting summary judgment against defendants, John Litman, Ella Gleizer, Terryville Associates Inc., Golden Horizon Terryville Corp., XYZ Partnership, Rainbow Associates Inc. and 2417 Management LLC are all denied.

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. Bradlee'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]).

The Court herein finds that the motions by attorney defendants for summary judgment, plaintiff's cross motion for an order granting summary judgment to plaintiff pursuant to CPLR 3212 against attorney defendants and plaintiff's motion for an order pursuant to CPLR 3212 granting summary judgment against defendants, John Litman, Ella Gleizer, Terryville Associates Inc., Golden Horizon Terryville Corp., XYZ Partnership, Rainbow Associates Inc. and 2417 Management LLC are all hereby denied.

It is undisputed that plaintiff previously made a motion for summary judgment against defendants, Honig, Mongioi, Monahan and Sklavos LLP,, Robert Anthony Monahan, Esq., Alexander E. Sklavos, Esq., Monahan and Sklavos P.C. and Alexander E. Sklavos P.C. and one against defendants John Litman, Ella Gleizer, Terryville Associates Inc. and Golden Horizon Terryville Corp. which motions were denied by Hon. Lawrence V. Cullen in a decision/order dated January 6, 2010 as there were a myriad of material issues of fact. The record also reflects that defendants Honig, Mongioi, Monahan and Sklavos LLP,, Robert Anthony Monahan, Esq., Alexander E. Sklavos, Esq., Monahan and Sklavos P.C. and Alexander E. Sklavos P.C. made a cross motion for summary judgment against plaintiff, which cross motion was denied in the decision/order dated

January 6, 2010, wherein the Hon. Lawrence V. Cullen found there were a myriad of material issues of fact.

It is well-established law that multiple summary judgment motions should be discouraged in the absence of a showing of new evidence or sufficient cause (*Welch Foods, Inc. v. Wilson*, 277 AD2d 882 [4th Dept 2000]; *Graney Development Corp. v. Taksen*, 62 Ad2d 1148 [4th Dept 1978]). "Parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment. There can be no reservation of any issue to be used upon any subsequent motion for summary judgment" (*Levitz v. Robbins Music Corporation*, 17 AD2d 801 [1st Dept 1962]). In the instant case, plaintiff and attorney defendants have failed to illustrate to the Court the specific new evidence or sufficient cause that would justify the making of a successive summary judgment motion and merely state that discovery is now complete.

Additionally, the decision of Hon. Lawrence V. Cullen is law of the case with respect to defendants Edward H. Honig, Esq. and defendant Mary E. Mongioi, Esq. as said defendants are united in interest with the defendants who moved for summary judgment before Hon. Lawrence V. Cullen. "[T]he 'law of the case' operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law" (see, *J-Mar Svc. Ctr., Inc., v. Mahoney, Connor, & Hussey*, 45 AD3d 809 [2d Dept 2007][internal citations omitted]).

B. The motion by defendants, Boris Imas and Maria Imas ("the Imas defendants") for an order pursuant to CPLR 3212 granting them summary judgment dismissing all claims against them with prejudice is hereby denied.

It is undisputed that Maria Imas and Boris Imas are shareholders of the corporate defendants, Terryville Associates Inc. and Golden Horizon Terryville Corp.

Plaintiff alleges claims against the Imas defendants for: dissolution and accounting, breach of contract, conversion, fraud, and punitive damages. Specifically, plaintiff alleges in the Complaint claims for (a) dissolution and an accounting, alleging the defendants entered into an agreement to form a partnership with plaintiff for a shopping mall and land, deprived plaintiff of his investment and, therefore the unnamed partnership should be dissolved and an accounting be conducted, and plaintiff receive distributions of unnamed amounts due; (b) breach of contract, alleging defendants Imas entered into an agreement with plaintiff to purchase real property of a shopping mall and agreed to prepare

and execute documents establishing plaintiff's ownership in such entities and depriving plaintiff of an investment of \$440,000, and other benefits thereof; (c) conversion, alleging all defendants intentionally deceived and misled plaintiff to deprive him of money, and to wrongfully convert fund and property belonging to plaintiff, including \$440,000 for their own financial benefit, with willful and malicious intent and reckless disregard entitling plaintiff to punitive damages; (d) fraud, alleging all defendants intentionally made material misrepresentation that they knew were false and fraudulently concealed information from plaintiff, with the intent to deceive, including that defendants falsely represented that plaintiff would have an interest in certain entities and receive profits; and (e) punitive damages, alleging all defendants acted in concert, with the goal of taking plaintiff's property with malicious intent, in a coordinated scheme and malice entitling plaintiff to punitive damages no less than \$2 million.

The Imas defendants establish a prima facie case that there are no triable issues of fact. In support of the motion, defendants Imas submit, inter alia, the affidavit of Maria Imas herself and the affidavit of Boris Imas himself, which establish inter alia, that: defendants Imas had no personal involvement, in any individual capacity whatsoever, regarding the transaction at issue in this litigation and defendants Imas did not communicate with plaintiff in any manner whatsoever regarding the transaction at issue in this litigation; plaintiff's own examination before trial transcript testimony; and the examination before trial transcript testimony of defendant Litman.

In opposition, plaintiff raises triable issues of fact. In opposition, plaintiff submits, inter alia, an affidavit of plaintiff himself, wherein he avers that: the Imas defendants told him that they will give him back his money for his shares in Terryville Associates Inc. and Golden Horizon Terryville Corp., the Imas defendants admitted they had control and possession of his property, the Imas defendants promised to return equivalent property back to him in cash, and the Imas defendants participated in forcing him out of the corporations.

As there are triable issues fact, regarding, inter alia, whether the Imas defendants intentionally deprived plaintiff of his rightful possession of his property, the motion for summary judgment by the Imas defendants is denied.

C. That branch of plaintiff's motion for an order striking the Answer and/or precluding defendants, John Litman, Alexander E.

Sklavos, Esq., Alexander E. Sklavos P.C., Boris Imas and Maria Imas because of their wilful failure to comply with four Court Orders (a Preliminary Conference Order dated August 26, 2009, Compliance Conference Order dated January 11, 2010, Hon. Ritholtz Phone Conference of April 8, 2010, and Hon. Ritholtz So-Ordered Stipulation dated May 14, 2010) and by refusing to honor their own signed stipulation to appear for depositions dated July 2010 and by refusing to respond to plaintiff's discovery demands dated July 13, 2010 and precluding Alexander E. Sklavos Esq. and Law Office of Alexander E. Sklavos P.C. from serving as legal counsel to defendants because of a conflict of interest in providing prior legal representation to plaintiff Aleksander Vinar is hereby denied.

Plaintiff has failed to submit a good faith affirmation that he attempted to communicate with defendants to resolve the discovery dispute (see, 22 NYCRR 202.7; *Barnes v. NYNEX, Inc.*, 274 AD2d 368 [2d Dept 2000]; *Cerreta v. New Jersey Transit Corp.*, 251 AD2d 190 [1st Dept 1998]). Uniform Rules § 202.7, states in relevant part,

"[N]o motion shall be filed with the court unless there have been served and filed with the motion papers (1) a notice of motion and (2) with respect to a motion relating to disclosure..., an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion."

(See also, *Eaton v. Chahal*, 146 Misc 2d 977 [stating, "The 'good faith' requirement is intended to remove from the court's work load all but the most significant and unresolvable disputes over what has been the most prolific generator of pretrial motions: discovery issues. Most seasoned litigators know that, with a modicum of good sense, discovery disputes can and should be resolved by the attorneys without the necessity of judicial intervention"). Pursuant to 22 NYCRR 202.7[c]: "The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held". Plaintiff fails to give any details as to time, place, or nature of any consultation or to give any reason as to why no such conferral was held. Plaintiff therefore "'failed to demonstrate that [he] made a diligent effort to resolve the discovery dispute.'" (*Amherst Synagogue v. Schuele Paint Co., Inc.*, 30 AD3d 1055 [4th Dept 2006]).

Accordingly, this branch of plaintiff's motion is denied.

D. That branch of plaintiff's motion for an order seeking to disqualify the Law Office of Alexander E. Sklavos, Esq. from serving as legal counsel to any defendants because he provided prior legal counsel to plaintiff is hereby denied. Plaintiff has failed to establish a prima facie case that he is entitled to this relief as he has not identified the party Alexander E. Sklavos, Esq. is currently the attorney of record for. As such, this branch of plaintiff's motion is denied.

E. Plaintiff's cross motion for an order pursuant to CPLR 3124 and 3126 compelling discovery and striking the pleadings of defendants, which Notice of Cross Motion is dated September 3, 2011, is hereby denied.

Plaintiff has failed to submit a good faith affirmation that he attempted to communicate with defendants to resolve the discovery dispute (see, 22 NYCRR 202.7; *Barnes v. NYNEX, Inc.*, *supra*; *Cerreta v. New Jersey Transit Corp.*, *supra*).

F. That branch of plaintiff's cross motion for an order pursuant to CPLR 3124 and 3126 to compel discovery and to strike the Answer of defendants, which Notice of Cross Motion is dated October 21, 2011, is hereby denied.

Plaintiff has failed to submit a good faith affirmation that he attempted to communicate with defendants to resolve the discovery dispute (see, 22 NYCRR 202.7; *Barnes v. NYNEX, Inc.*, *supra*; *Cerreta v. New Jersey Transit Corp.*, *supra*).

Accordingly, this branch of plaintiff's cross motion is denied.

G. That branch of plaintiff's cross motion seeking to amend the summons and complaint to read Monahan & Sklavos PC, instead of Monahan and Sklavos P.C. is granted.

It is well-settled law that motions for leave to amend the pleadings are to be freely granted, as long as there is no prejudice or surprise to the adversary (CPLR 3025[b]; *Wirhouski v.*

Armoured Car & Courier Serv., 221 AD2d 523 [2d Dept 1995])). The trial court has discretion to grant the motion to amend pleadings and "[i]n exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom" (*Branch v. Abraham & Strauss Dept. Store*, 220 AD2d 474 [2d Dept 1995])). Under CPLR 2001, the Court can allow a mistake to be corrected "upon such terms as may be just" (see also, CPLR 3025[b], which states that leave to amend pleadings shall be freely granted on such terms that are just).

Additionally, under CPLR 2001, the Court can allow a mistake to be corrected "upon such terms as may be just". Plaintiff demonstrated such an amendment would not be prejudicial to the defendant in the instant case (see, *Kane v. Long Island Jewish Hospital*, 29 AD2d 554 [2d Dept 1967])).

Plaintiff is granted leave to substitute "Monahan & Sklavos P.C." for Monahan and Sklavos P.C. as the correct name of the defendant by the filing and service upon the Clerk of the Court and upon all parties of a Supplemental Summons and Amended Complaint (see, *Connell v. Hayden*, 83 AD2d 30 [2d Dept 1981]) together with a copy of this order and notice of entry within thirty (30) days from the date of entry of this order.

H. The motion by defendants, Honig, Mongioi, Monahan and Sklavos LLP, Edward H. Honig, Esq., Robert Anthony Monahan, Esq., Mary E. Mongioi, Esq., Alexander E. Sklavos, Esq., Monahan and Sklavos P.C. and Alexander E. Sklavos P.C. for a protective order pursuant to CPLR 3103 with respect to discovery demands that plaintiff served on October 3, 2011; and motion by defendants, Honig, Mongioi, Monahan and Sklavos LLP, Edward H. Honig, Esq., Robert Anthony Monahan, Esq., Mary E. Mongioi, Esq., Alexander E. Sklavos, Esq., Monahan and Sklavos P.C. and Alexander E. Sklavos P.C. for a protective order pursuant to CPLR 3103 with respect to various discovery demands plaintiff served on August 9, 10, and 11 and for an order pursuant to 22 NYCRR 130-1.1(a) requiring plaintiff and/or plaintiff's counsel to pay costs and/or sanctions based upon their continued practice of engaging in frivolous conduct; and the motion by defendants, Boris Imas and Maria Imas for a protective order pursuant to CPLR 3103 with respect to various discovery demands of plaintiff dated August 9, 10, and 11 of 2011 and for an order pursuant to 22 NYCRR 130-1.1(a) requiring plaintiff and/or plaintiff's counsel to pay costs and/or sanctions

based upon its frivolous conduct are hereby denied.

CPLR 3103(a): Protective Orders: states the in relevant part:

(a) Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device . . .

The attorney defendants maintain that they were served with discovery demands by plaintiff on August 9, 10, 11 and October 3, 2011, and that such demands are improper because they were served after the filing of the Note of Issue and Certificate of Readiness, which was allegedly filed on May 9, 2011. The Imas defendants maintain that they were served with discovery demands by plaintiff on August 9, 10, 11, 2011. The record reflects that no Note of Issue and Certificate of Readiness was filed on May 9, 2011, but rather there was a vacatur of the Note of Issue and Certificate of Readiness in the Trial Scheduling Part on May 2, 2011. As both the attorney defendants and the Imas defendants failed to establish that a Note of Issue and Certificate of Readiness was filed, they have failed to satisfy their burden for a protective order and the motions for a protective order are denied.

The parties are directed to appear for a status conference in IAS Part 6, courtroom 24, 88-11 Sutphin Blvd., Jamaica, New York on Wednesday, February 29, 2012 at 10:00 A.M.

This constitutes the decision and order of the court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: February 14, 2012

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Howard G. Lane, J.S.C.

