

Salvan v Rudin

2013 NY Slip Op 31530(U)

July 11, 2013

Sup Ct, New York County

Docket Number: 109432/11

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

SHERWOOD ALLEN SALVAN,
Plaintiff,

-against-

FRANK RUDIN,
Defendant.

FILED

JUL 16 2013

INDEX NO. 109432/11

MOTION SEQ. NO. 003

COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1-4 were considered on this motion to dismiss affirmative defenses/counterclaims and for partial summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is

ORDERED that plaintiff's motion to dismiss defendant's third, eighth, eleventh, thirteenth, fourteenth and fifteenth affirmative defenses, first and second counterclaims, and for partial summary judgment, on the issue of liability, is granted, as detailed below.

BACKGROUND

Plaintiff commenced this action against defendant seeking to enforce the terms of a September 26, 2003 indemnification agreement ("the agreement"), signed by defendant, which required defendant to indemnify plaintiff for attorneys' fees incurred or paid by plaintiff, defending a third-party action initiated by defendant's former law partners. In plaintiff's first and second causes of action, plaintiff seeks, *inter alia*, \$72,000, based upon defendant's alleged breach of such indemnification agreement and defendant's fraudulent inducement of plaintiff, to enter into such agreement.

In his answer, defendant asserted numerous affirmative defenses, however, all but the following affirmative defenses have been withdrawn: (1) failure to state a cause of action; (2) action barred by laches; (3) action barred by the statute of limitations; (4) extinguishment by payment; (5) failure to mitigate damages; and (6) fraudulent inducement and harassment. Defendant also asserts the following two counterclaims: (1) malicious prosecution; and (2) sanctions pursuant to 22 NYCRR Rule 130.

DISCUSSION

Plaintiff has moved to dismiss such affirmative defenses, alleging that defendant has failed to provide the factual particulars and/or legal basis for their continued prosecution. Plaintiff also seeks to dismiss defendant's first and second counterclaims, on the basis that the counterclaims lack merit, as a matter of law. Further, Plaintiff maintains that he is entitled to partial summary judgment on his first and second causes of action, arguing that there are no material questions of fact.

Significantly, in opposition to plaintiff's motion, defendant only submits an affirmation by his attorney, which lacks the requisite personal knowledge of the facts, and, therefore, is of no probative value. See *Israelson v. Rubin*, 20 AD2d 668, *affirmed* 14 NY2d 887 (1964); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). It is noted that, defendant's attorney's affirmation fails to contain any supporting exhibits and consists of a mere, two typed pages (including the caption). Thus, in essence, plaintiff's motion to dismiss the affirmative defenses/counterclaims and for partial summary judgment is unopposed.

Motion to Dismiss Affirmative Defenses/Counterclaims

CPLR 3211(b) states that “[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.” Affirmative defenses that are mere titles of such defenses and are not sufficiently particular to give the court and the parties notice of the grounds for the defenses are required to be dismissed. *See Bel Paese Sales Co. Inc. v. Macri*, 99 AD2d 740 (1st Dept 1984); *Allen v. Murray House Owners Corp.*, 130 AD2d 356 (1st Dept 1987); *Bentivegna v. Meenan Oil Co.*, 126 AD2d 506, 508 (2nd Dept 1987).

Here, plaintiff alleges that defendant’s six (6) remaining affirmative defenses (third, eighth, eleventh, thirteenth, fourteenth and fifteenth) are deficient. This court agrees, as detailed below.

Defendant’s third affirmative defense, failure to state a cause of action, is dismissed, as the pleadings state valid causes of action for indemnification based upon defendant’s breach of the agreement. Moreover, as detailed below, plaintiff has established a *prima facie* entitlement to judgment as to liability on his claim that defendant breached the indemnification agreement; as noted, plaintiff’s allegations are undisputed, since an affidavit in opposition has not been submitted by defendant.

Defendant’s eighth affirmative defense, that this action is barred by laches, is dismissed, as it is not disputed that this case was commenced prior to the expiration of the six (6) year statute of

limitations. Thus, a defense of laches must fail, as a matter of law. *See Columbus Trust Co. v. Campolo*, 110 AD2d 616, *affirmed* 66 NY2d 701 (1985); *Gonzalez v. Chalpin*, 159 AD2d 553 (2nd Dept 1990). Moreover, defendant failed to come forward with factual proof that plaintiff delayed in asserting his claims.

Defendant's eleventh affirmative defense that this action is barred by the six (6) year statute of limitations is dismissed, as plaintiff maintains that this case was commenced within six (6) years of plaintiff's invoice dated December 20, 2005, which defendant fails to refute. Moreover, defendant failed to come forward with any facts to support such defense.

Defendant's thirteenth affirmative defense is the extinguishment of plaintiff's claim, by payment in full, as a result of defendant's initial payment of \$5,000 in 2003. However, such assertion is contrary to the terms of the agreement, and, therefore, is dismissed.

Defendant's fourteenth affirmative defense, failure to mitigate, is dismissed, as there is no obligation to mitigate the right to recover under a claim of indemnification. *See North Star Reinsurance Corp. v. Continental Ins. Co.*, 82 NY2d 281 (1993).

Defendant's fifteenth affirmative defense of fraudulent inducement and harassment is dismissed. To state a claim for fraudulent inducement, the party asserting such a claim must allege that he or she reasonably relied on a material misrepresentation by the other side, and that he or she suffered an injury as a result of that reliance. *See Skillgames, LLC v. Brody*, 1 AD3d 247, 250 (1st Dept 2003). Here, defendant has failed to assert any such allegations to support a defense of

fraudulent inducement against plaintiff. Further, New York does not recognize a civil cause of action for harassment. See *Cohn-Frankel v. United Synagogue of Conservative Judaism*, 246 AD2d 332 (1st Dept 1998); *Jacobs v. 200 E. 36th Owners Corp.*, 281 AD2d 281 (2001); *Broadway Central Property v. 682 Tenant Corp.*, 298 AD2d 253 (1st Dept 2002).

Defendant's first counterclaim for malicious prosecution is dismissed, as there is no evidence in the record before the court, that plaintiff maliciously commenced and continued this, or any other action against defendant. See *Ramos v. City of New York*, 285 AD2d 284, 298 (1st Dept 2001); *Present v. Avon Products, Inc.*, 253 AD2d 183, 189 (1st Dept 1999), *lv dismissed* 93 NY2d 1032 (1999).

Defendant's second counterclaim seeking sanctions pursuant to 22 NYCRR Rule 130 is dismissed, as there is no independent cause of action for sanctions under such rule (*360 West 11th LLC v. ACG Credit Co. II*, 90 AD3d 552 [1st Dept 2011]); nor does defendant cite to any case, in opposition to this motion, to support such a counterclaim.

Partial Summary Judgment

The proponent of a summary judgment motion must "make a prima face showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). If the moving party sustains its burden, then the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of facts". CPLR 3212 (b); *Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067 (1979). However, the Court of Appeals has made it

clear that “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat a motion for summary judgment. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

Here, based upon the submissions before the court, plaintiff is entitled to partial summary judgment on the issue of liability, as it is undisputed that defendant has breached the indemnification agreement, by failing to indemnify plaintiff, for the attorneys’ fees plaintiff incurred, as a result of the litigation in which plaintiff herein was named a third-party defendant. It is again noted that, in opposition to the within motion, defendant failed to come forward to raise an issue of fact, as an affidavit by someone with personal knowledge of the facts has not been supplied; thus, all of plaintiff’s factual assertions are unrefuted. It is further noted that in his deposition testimony, defendant admitted to signing the indemnification agreement. Exh. 10, Notice of Motion, at 39 lines 23-25, at 40, line 2. Moreover, in response to questions regarding the contents of the agreement, defendant repeatedly answered that “the agreement speaks for itself”. *Id.* at 43, lines 7-14.

The court notes that while plaintiff’s complaint includes a claim for punitive damages in the amount of \$750,000, as no basis for such relief has been supplied in the moving papers, such claim is deemed withdrawn, *unless within 20 days of entry of this order*, plaintiff files a subsequent motion, with supporting facts and case law, to support an award for punitive damages. *See Cohen v. Mazoh*, 12 AD3d 296, 297 (1st Dept 2004); *New York University v. Continental Insurance Company*, *supra*, 87 NY2d at 315-316 (punitive damages available only in *limited* circumstances where it is necessary to deter gross, morally reprehensible or wantonly

dishonest conduct or egregious conduct *directed at the public generally*).

Accordingly, it is

ORDERED that plaintiff's motion to dismiss defendant's affirmative defenses/counterclaims and for partial summary judgment as to liability on plaintiff's claim that defendant breached the indemnification agreement is granted; it is further

ORDERED that, in accordance with CPLR §4317(b), the issue of damages is respectfully referred to a Special Referee to hear and determine; and it is further


ORDERED that, *within 30 days of entry of this order*, plaintiff shall serve a copy of this order, with notice of entry, upon defendant and upon the Special Referee Clerk (Room 119M), to arrange a calendar date for the reference to a Special Referee; the failure to comply with the above will result in the dismissal of this case.

FILED

JUL 16 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/15/13


DORIS LING-COHAN, J.S.C.

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Check if Appropriate: DO NOT POST

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