

Automation Graphics, Inc. v SPS Worldwide, LLC

2015 NY Slip Op 30022(U)

January 5, 2015

Supreme Court, New York County

Docket Number: 160722/13

Judge: Peter H. Moulton

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This opinion is uncorrected and not selected for official publication.

Supreme Court: New York County
Part 57

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AUTOMATION GRAPHICS, INC.

Plaintiff,

-against-

Index No. 160722/13

SPS WORLDWIDE, LLC, AMEEN NASSIRI (as
President and Individually), CHUCK JUDGE,
DAVID FINLEY, MELISSA YOBLEN, ROBIN NIEMAYER,
SHAN PENCZAK, JENNIFER FRY, SUSAN HOWE,
and CHRISTINA SPOLJARIC, employees and/or
independent contractors for SPS
Worldwide SPS,

Defendants.

-----X
Peter H. Moulton, Justice

Motion sequence numbers 01 and 02 are consolidated for
disposition.

In this action plaintiff printing company alleges that
defendants conspired with a now-deceased employee of plaintiff to
defraud plaintiff of goods and services. This action mirrors a
long-pending and trial-ready action brought by plaintiff in Civil
Court under Civil Court Index No.: 30693/09 (the "Civil Court
action"). Defendants move to dismiss the complaint on various
grounds and for sanctions. Plaintiff moves to consolidate this
action with the Civil Court action.

BACKGROUND

Plaintiff Automation Graphics Inc. ("AGI") initially sued defendants SPS Worldwide LLC ("SPS"), Chuck Judge, an employee or independent contractor of SPS, and Ira Schwartz, plaintiff's deceased and allegedly disloyal employee, in Civil Court in 2009. The Civil Court complaint alleges that Schwartz provided Judge with products generated by AGI and pocketed payments allegedly made by defendants. Defendants concede that SPS placed orders with Schwartz for printed materials, but maintain they duly paid for those products. Defendants argue that they should not have to pay for the same products twice due to the actions of a rogue employee of plaintiff's.

The complaint in Civil Court sought an accounting and "not less than \$25,000 in damages."

The Civil Court action proceeded, with difficulty, through discovery. Plaintiff moved for discovery sanctions on at least two occasions. In a decision coincidentally issued by me in November 2013 while Supervising Judge in Civil Court, the Civil Court found that no further discovery was outstanding.

After AGI filed a notice of trial in Civil Court it moved in November 2012 to transfer the action to Supreme Court pursuant to CPLR 325(d), asserting that it had discovered that its damages were greater than the \$25,000 jurisdictional limit of Civil Court.

In a decision dated May 3, 2013, Justice Kenney denied the

removal motion, finding that plaintiff had waited too long to transfer the case. Justice Kenney found that plaintiff "knew ... and in fact admitted as early as 2010, that the damages sustained as alleged in the complaint in the Civil Court action exceeded the jurisdictional limit of said Court."

Undeterred by this order, in November 2013 plaintiff commenced the instant action. The complaint herein repeats the same three causes of action contained in the Civil Court complaint, and adds a poorly drafted cause of action for fraudulent conveyance. The final cause of action in the Supreme Court complaint is purportedly based on CPLR 3126, a provision of the CPLR that concerns discovery sanctions. As there has been no discovery in this action, this claim can only be based on defendants' alleged discovery violations in the Civil Court action.

Defendants brought a pre-answer motion to dismiss, and plaintiff made its motion to consolidate. These motions were put on hold as the court attempted without success to settle both this action and the Civil Court action. The court now decides the two motions.

DISCUSSION

The motion to dismiss is granted as there is another action pending in Civil Court. The parties have litigated that action since 2009. Plaintiff chose to litigate in that forum and put the

case on the trial calendar in 2012. Defendants in the Civil Court action are entitled to see that 2009 action come to a conclusion. In this Supreme Court action, plaintiff has added several new individual defendants who are identified as either employees or independent contractors of SPS. These individuals have yet to answer the complaint and may well require additional discovery concerning their alleged roles in the alleged scheme to defraud plaintiff. Plaintiff blithely assures the court that the instant Supreme Court action is ready to be tried, as all the necessary discovery has been obtained in Civil Court. The individual defendants might certainly disagree. Their entitlement to disclosure, and to bring dispositive motions, could delay trial of this action for another two or three years.

If it wanted to bring this action in Supreme Court, and add additional parties, plaintiff should have done so long ago. Justice Kenney found that plaintiff was aware in 2010 that its damages might exceed \$25,000. That finding collaterally estops any relitigation of plaintiff's claim that it only discovered in December 2012 that its damages exceeded \$25,000. (Mchwai v State University of New York, Empire State College, 248 AD2d 111, lv denied 92 NY2d 804.) Having been rebuffed in its attempt to transfer the action to Supreme Court, the plaintiff may not now seek another pathway to this court.

The two additional causes of action present in the instant

action also do not suffice to distinguish this action from the Civil Court action. The third cause of action, sounding in fraudulent conveyance, does not state a claim. The claim has not even the most rudimentary detail necessary to plead a fraud claim. (CPLR 3016; see Greenberg v Blake, 117 AD3d 683; Apt v Block 6222 Const. Corp., 10 Misc3d 1073[A].) Indeed, with the exception of some conclusory statements about defendant Nassiri, the complaint is bereft of any factual allegations tying the individual defendants to any of the alleged causes of action. (Eg Epstein, Levinsohn, Bodine, Hurwitz & Weinstein v Shakedown Records, Ltd., 8 AD3d 34; DeRaffele v 210-22-230 Owners Corp., 33 AD3d 752, lv denied 8 NY3d 814.)

Plaintiff's fourth cause of action, the one founded on CPLR 3126, is utterly without merit. Plaintiff makes no attempt in its motion papers to cite authority that could establish the viability of a cause of action brought under this provision. Moreover, as discovery has not been conducted in this action, the claim can only refer to disclosure violations in the Civil Court action, an action where the court has already ruled that no discovery remains outstanding. As this issue concerns proceedings in a different court, and has already been decided in the November 2013 order of the Civil Court, the fourth cause of action is frivolous under 22 NYCRR § 130-1(c)(1), as it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law." The court awards

defendant SPS \$1000 towards its costs in defending against this claim. The lack of viability of this claim should have been evident to plaintiff's counsel, and he shall bear the full cost of this sanction.

CONCLUSION

For the reasons stated, defendants' motion to dismiss this action is granted. The branch of defendants' motion seeking sanctions against plaintiff is granted to the extent that plaintiff's counsel shall pay defendant SPS \$1000 for bringing a frivolous claim. The motion by plaintiff to consolidate this action with the Civil Court action is denied. This constitutes the decision and order of the court.

Dated: January 5, 2015



J.S.C.
HON. PETER H. MOULTON