

Liberty Community Assoc., LP v DeClemente

2015 NY Slip Op 31549(U)

April 7, 2015

Supreme Court, New York County

Docket Number: 156532/14

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

LIBERTY COMMUNITY ASSOCIATES, LP,
Plaintiff,
- v -
JOSEPH DeCLEMENTE,
Defendant.

Index No.: 156532/14
Motion Date: 04/07/15
Motion Seq. No.: 01

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

Table with 2 columns: Document Name and No(s). Rows include Notice of Motion/Order to Show Cause -Affidavits -Exhibits (1), Answering Affidavits - Exhibits (2), and Replying Affidavits - Exhibits (3).

Cross-Motion: [X] Yes [] No

Upon the foregoing papers, it is ordered that the motion of plaintiff to strike the answer shall be granted and the cross motion to dismiss the complaint shall be denied.

Defendant Clemente does not address plaintiff Liberty Community Associates LP's motion to strike his answer for his failure to disclose, but instead cross moves to dismiss the complaint. The only aspect of defendant's cross motion seeking affirmative relief that relates to the question of whether he must offer any response to his alleged failure to disclose is the question of this court's subject matter jurisdiction over the controversy. Verney v Verney, 53 AD2d 608, 609 (2nd Dept 1976).

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

- 1. CHECK ONE: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [X] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER [] SUBMIT ORDER
[] DO NOT POST [] FIDUCIARY APPOINTMENT [X] REFERENCE

It is without peradventure that this court has subject matter jurisdiction over this action that seeks, inter alia, a declaration of rights of the parties under a certain agreement between defendant and plaintiff, a New Jersey limited partnership. See Steinberg v Goodman, 27 NY2d 304 (1970); Nuckel v Danza, 274 AD2d 562 (2d Dept 2000). The other grounds that defendant cites for dismissal are wholly unresponsive to the question of whether he has met his disclosure obligations.

Plaintiff is correct that having filed an answer without asserting them as affirmative defenses, defendant waived his right to move to dismiss based upon "lack of capacity to sue" and "prior action pending". Security Pac Natl Bank v Evans, 31 AD3d 278 (1st Dept 2006). To the extent that defendant cross moves for dismissal based upon forum non conveniens, he likewise does not contest plaintiff's argument that he has failed to meet the discovery requirements. Defendant's utter failure to offer any explanation or position as to his discovery obligations demonstrates deliberate and contumacious conduct on his part. Sony Corp of Am v Savemart, Inc, 59 AD2d 676 (1st Dept 1977).

Accordingly, it is hereby

ORDERED that plaintiff's motion for an order to strike the answer of defendant is granted; and it is further

ORDERED that defendant's motion to dismiss the complaint is denied; and it is further

ORDERED that the first cause of action of the complaint, which seeks a declaratory judgment with respect to the December 9, 2009 Agreement is granted, with costs and disbursements to plaintiff as taxed by the Clerk; and it is further

ADJUDGED and DECLARED that defendant is in default under the December 9, 2009 Agreement, with respect to the promissory note in the amount of fifty-five thousand dollars (\$55,000), plus default interest at the rate of 12% per annum from the original due date of December 17, 2009, and the plaintiff owes no money to defendant, and the defendant is authorized to take action to foreclose upon and sell defendant's limited partnership interest under the promissory note and the Partnership Agreement; and it is further

ORDERED that defendant, and all persons acting on his behalf or in concert with him, are enjoined and restrained from carrying out any wrongful conduct and extortionate threats, such as by communicating with any party to a contract or potential contract with the Partnership, or otherwise interfering with the business of the Partnership, or using for his own benefit or divulging any confidential information concerning the business

and affairs of the Partnership; and it is further

ORDERED that the issue of reasonable attorneys' fees to be assessed against defendant is referred to a Special Referee for a reference to determine pursuant to CPLR 4317 (b) and that within 60 days from the date of this Order the plaintiff shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or soref@courts.state.ny.us) to arrange a date for a reference to determine pursuant to CPLR 4317 (b); and it is further

ORDERED and ADJUDGED that the Clerk is directed to enter judgment against defendant in the sum of \$55,000, with interest at the rate of 12% per annum from December 9, 2009, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, in the amount of \$_____ together with costs and disbursements as taxed by the Clerk, plus reasonable attorneys fees in accordance with the report of the aforementioned Special Referee without any further application.

This is the decision and order of the court.

Dated: April 7, 2015

ENTER:

~~For a L... A~~
DEBRA A. JAMES J.S.C.