

Can Man Carting, LLC v Spiezio
2015 NY Slip Op 32879(U)
February 24, 2015
Supreme Court, Westchester County
Docket Number: 61783/14
Judge: Mary H. Smith
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DECISION AND ORDER

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

-----X
CAN MAN CARTING, LLC and ANDRIS KURINS,

Plaintiffs,

MOTION DATE: 2/13/15
INDEX NO.: 61783/14

-against-

JOSEPH SPIEZIO, CAN MAN SANITATION, INC., and
JLS WASTE SERVICES OF NEVADA CORP.,

Defendants.

-and-

CAN MAN SANITATION, INC.,

Counterclaimant,

-and-

FIOR LOSTUMBO,

Counterclaim Defendant.

-----X
The following papers numbered 1 to 17 were read on this motion by plaintiffs for an Order dismissing defendant Can Man Sanitation, Inc.'s counterclaim, and on this motion by plaintiffs and Counterclaimant Lostumbo for an Order sanctioning defendants pursuant to 22 N.Y.C.R.R. 130-1.1.

Papers Numbered

Notice of Motion - Affirmation (Burstein) - Exh. - Affidavit (Lostumbo) - Memorandum
Of Law 1-5

Answering Affirmation (Mauro) - Exhs. (A-F) - Memorandum of Law 6-8

Notice of Motion - Affirmation (Burstein) - Exhs. (A-G) - Affidavit (Lostumbo) -
Exhs. (A-B) - Memorandum of Law 9-14

Answering Affidavit (Spiezo) - Exhs. (A-G) 15-16

Replying Memorandum of Law 17

Upon the foregoing papers, it Ordered and adjudged that this motion by plaintiff for an Order dismissing defendants' counterclaim alleging fraud is granted.¹

Firstly, this Court dismisses said counterclaim as against Fior Lostumbo since the record of filings demonstrates that Mr. Lostumbo never has been served with a supplemental summons herein naming him a counterclaim defendant, as required by CPLR 305, subdivision (a). See Benn v. Losquadro Ice Co., Inc., 65 A.D.3d 655 (2nd Dept. 2009).

Secondly, the Court grants dismissal of the counterclaim to the extent it purports to allege fraud as against plaintiffs since defendants have failed to allege or establish that they detrimentally had relied upon any allegedly fraudulent statements by plaintiffs to defendant JLS Waste Services of Nevada, Inc. ("JLS"), which reliance is a necessary element of any fraud claim. See Bannister v. Agard, _ A.D.3d _, 2015 WL 669754 (2nd Dept. 2015); Shaffer v. Gilberg, _ A.D.3d _, 2015 WL 445021)2nd Dept. 2015). Indeed, defendants have alleged that all of the identified "misrepresentations" by plaintiffs to JLS with respect to the Purchase Agreement involving the membership interests and business assets of Can Man Carting LLC had been discovered by defendants and thus that the

¹Properly, moving plaintiffs should have included in their motion papers a copy of defendants' Answer with Counterclaim.

Purchase Agreement never closed. Manifestly, defendants were not defrauded by any such misrepresentations and a counterclaim based thereon necessarily is hereby dismissed.

To the extent that defendants otherwise appear to be arguing that a separate cause of action for fraud is stated with respect to the Bill of Sale, the executed date of which is unclear, see *infra*, this Court notes that said Bill of Sale, which of course had been contemplated as part of the Purchase Agreement, specifically states that the assets listed therein were being conveyed for the valuable consideration of “ten dollars.” That being so, this Court will not sustain the pleaded fraud counterclaim based solely upon the Bill of Sale, and said counterclaim is hereby dismissed.

However, to the extent that defendants allege that plaintiffs have been unjustly enriched by defendants having expended monies to repair and/or purchase new vehicles and “rectif[ied] various operational needs borne of Plaintiffs’ and Lostumbo’s mismanagement of the business operations” arising out the failed Purchase Agreement said counterclaim for unjust enrichment is permitted to proceed.

Plaintiffs’ separate motion seeking an Order imposing sanctions upon defendants pursuant to 22 N.Y.C.R.R. based upon defendants’ alleged submission at bar of an affirmation by defense attorney Mauro which has annexed to it an “obviously” forged document is denied. The most that can be said at bar in the presenting circumstances, particularly in the absence of any affidavit from Mr. Lustumbo, is that issues may exist with respect to the genuineness of Mr. Lustumbo’s signature on the submitted Bill of Sale, the date upon which same had been executed and whether the copy of the submitted and allegedly fraudulent Bill of Sale had been furnished to defendant Spiezo by Mr. Lustumbo

himself.

The Court finally notes that it has not "So Ordered" the submitted executed Stipulation for the Production and Exchange of Confidential Information. Under the Differentiated Case Management System now in effect, this Court is not involved with discovery. Any such application for "So Ordering" properly shall be made returnable in the Compliance Conference Part

The parties shall appear in the Compliance Conference Part, room 811, at 9:30 a.m., on March 9, 2015.



Dated: February ²⁴~~23~~, 2015
White Plains, New York


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