

Amerimax Capital, LLC v Ender
2017 NY Slip Op 30263(U)
February 10, 2017
Supreme Court, New York County
Docket Number: 158057/2015
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

AMERIMAX CAPITAL, LLC
Plaintiff,

-against-

INDEX NO. 158057/2015
MOTION DATE 12/21/2016
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

PAUL ENDER and SIMONE ENDER,
Defendants.

The following papers, numbered 1 to 9 were read on this motion for summary judgment, and cross-motion for leave to reargue, dismiss affirmative defenses, or amend the complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 6</u>
Replying Affidavits _____	<u>7 - 8; 9</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant’s motion for summary judgment dismissing the Complaint, is granted. Plaintiff’s cross-motion for leave to reargue, or to dismiss the affirmative defenses, or to amend the Complaint, is denied.

Plaintiff commenced this breach of contract action on August 4, 2015 seeking to recover for unpaid loan brokerage commissions pursuant to two separate agreements. (Mot. Exh. A). The first cause of action was asserted against Paul Ender (herein “Paul”) regarding a 2011 Agreement, and the second cause of action was asserted, jointly and severally, against Paul Ender and Simone Ender (herein “Simone”) (collectively herein “Defendants”) regarding a 2014 Agreement. (Id.) The Complaint alleges that both agreements provided that Plaintiff was to be the exclusive agent for the Defendants in procuring loans for the refinance of real property, that Defendants were to apply for refinancing only through Plaintiff, that Defendants were to pay Plaintiff 1.5% of the gross loan amount, and that Defendants closed on loans to refinance the properties without notifying or paying Plaintiff. (Id.).

On December 11, 2015, Plaintiff moved for a default judgment on the second cause of action against Simone only, as Paul died prior to commencement of the action. (Mot. Exh. B). Plaintiff filed a Notice of Voluntary Discontinuance against Paul

on January 12, 2016. (Mot. Exh. E).

In an Order dated May 5, 2016, this Court denied Plaintiff's motion for a default judgment, and directed Simone to file an Answer to the Complaint- which she filed on June 4, 2016. (Mot. Exh. G & I). In denying Plaintiff's motion, this Court found that Plaintiff had not shown it had a meritorious claim against Simone as the Agreement submitted as proof of a contract between the parties showed only the signatures of Plaintiff and Paul.

Simone now moves pursuant to CPLR §3212 for summary judgment dismissing the Complaint.

Simone argues that she did not enter into the Agreement with Plaintiff, and that the documentary evidence utterly refutes Plaintiff's claims that she has, or ever had, a contractual relationship with Plaintiff. That as this Court held in its May 5, 2016 Order, the Agreement that Plaintiff submitted as proof of a contract between the parties showed only the signature of Paul (Mot. Exh. G). That Simone cannot be bound by an Agreement that she was not a signatory to, especially since such an agreement for payment of services rendered in negotiating a loan must be in writing pursuant to the Statute of Frauds under GOL §5-701(a)(10).

Plaintiff opposes the motion and cross-moves for: (1) leave to reargue this Court's May 5, 2016 Order pursuant to CPLR 2221(d), and upon reargument granting Plaintiff a default judgment against Simone pursuant to CPLR 3215, or (2) to dismiss the Affirmative Defenses pursuant to CPLR 3211(b), or (3) for leave to amend the Complaint pursuant to CPLR 3025(b).

Plaintiff argues that this Court erred in denying its motion for default as Simone only submitted an attorney's affirmation in opposition to the motion, and because nonsignatories to a contract may still be bound by its terms. That although this motion to reargue was filed outside of the 30 day requirement, the Court nevertheless has discretion to reconsider its prior Order as Simone will not be prejudiced by the delay, and because Plaintiff has not yet perfected its appeal of the May 5, 2016 Order.

Plaintiff also argues that Simone's affirmative defenses set forth in her Answer should be dismissed because they are legally insufficient and unsupported by any factual allegations. Plaintiff also argues that the second affirmative defense for equitable defenses should be dismissed as it is unavailable against a claim for monetary damages, and because the laches defense is unavailable where the action was commenced within the applicable six-year statute of limitations. That the sixth affirmative defense must also be dismissed because the Court has already ruled that it has jurisdiction over Simone because service was proper, and that she has waived this defense by failing to move to dismiss on this ground within 60 days of serving her Answer.

Plaintiff contends that Simone has not established a right to summary judgment. That the fact that Simone was included in the preamble of the agreement raises an issue of fact as to whether or not she was intended to be bound by its terms. That if it is determined that Simone was not a party to the agreement, she is still liable for payment under its terms because she manifested an intent to be bound by it. That because discovery has not taken place, the motion for summary judgment is premature since any facts concerning Simone's intent to be bound by the agreement are within her possession.

Finally, Plaintiff contends that it should be granted leave to amend its Complaint to add causes of action for unjust enrichment, quantum meruit and tortious interference with a contract.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. (Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp., 77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

GOL §5-701 provides in relevant part that, “[e]very agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking...[i]s a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein... ‘[n]egotiating’ includes procuring an introduction to a party to the transaction or assisting in negotiation or consummation of the transaction.” (See GOL 5-701(a)(10)).

Simone makes a prima facie showing of entitlement to judgment as a matter of law as she was not a signatory to the Agreement, and such an agreement requires it to be in writing and signed by the person to be charged with its breach. Plaintiff fails to rebut this showing as it has failed to demonstrate that Simone affixed her “signature” to the agreement. Simone's name merely appearing in the preamble does not establish a signature. “[A] signature for Statute of Frauds purposes may be ‘a name, written or printed, [but] is not to be reckoned as a signature unless inserted or adopted with an intent, actual or apparent, to authenticate a writing.’” (Parma Tile Mosaic & Marble Co. v. Estate of Short, 87 N.Y.2d 524, 663 N.Y.2d 633, 640 N.Y.S.2d 477 [1996]). “[T]he absence of a writing or a subscription cannot be remedied by arguing that obligations were nevertheless incurred.” (See Parma, Supra). On each

page of the agreement, and at the end of the agreement, only Paul's initials and/or signature appears. Further, there is no signature line indicated for Simone's signature at the end of the agreement. Plaintiff fails to raise an issue of fact, and its argument that Paul acted and signed the agreement on behalf of Simone as her agent is unavailing as there is no evidence on the signature lines, or anywhere throughout the document, that Paul was acting and/or signing the agreement on behalf of Simone. Therefore, summary judgment dismissing the second cause of action as against Simone is granted. The grant of summary judgment in Simone's favor renders that portion of Plaintiff's cross-motion to dismiss the affirmative defenses to the Complaint moot.

CPLR § 2221(d) states that a motion for leave to reargue (1) shall be identified specifically as such, (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion, and (3) shall be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry.

The Court has discretion to grant a motion to reargue upon a showing that it, "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (Kent v. 534 East 11th Street, 80 A.D. 3d 106, 912 N.Y.S. 2d 2 [1st Dept., 2010] citing to Foley v. Roche, 68 A.D. 2d 558, 418 N.Y.S. 2d 588 [N.Y.A.D. 1st Dept., 1979]). Reargument is not intended to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted. The movant cannot merely restate previous arguments (Kent v. 534 East 11th Street, 80 A.D. 3d 106, supra and UI Haque v. Daddazio, 84 A.D. 3d 940, 922 N.Y.S. 2d 548 [N.Y.A.D. 2nd Dept., 2011]).

Plaintiff fails to establish how this Court misapprehend the law or facts in denying its motion for a default judgment against Simone. In order to obtain a default judgment, a Plaintiff must establish that it has a meritorious claim, which the Plaintiff failed to do. Therefore, Plaintiff's cross-motion to reargue this Court's May 5, 2016 Order is denied.

Leave to amend pleadings pursuant to CPLR 3025(b) should be freely given "absent prejudice or surprise resulting directly from the delay" (Anoun v. City of New York, 85 A.D.3d 694, 926 N.Y.S.2d 98, 99 [1st Dept., 2011] citing to, Fahey v. County of Ontario, 44 N.Y.2d 934, 935, 408 N.Y.S.2d 314, 380 N.E.2d 146 [1978]), "or if the proposed amendment is palpably improper or insufficient as a matter of law" (McGhee v. Odell, 96 A.D.3d 449, 450, 946 N.Y.S.2d 134, 135, [1st Dept., 2012] citing to, Shepherd v. New York City Tr. Auth., 129 A.D.2d 574, 574, 514 N.Y.S.2d 72 [2nd Dept., 1987]).

That portion of Plaintiff's motion seeking leave to amend the Complaint is also denied. Plaintiff seeks to allege a cause of action for quantum meruit, however, when the "alleged agreement is void by reason of the Statute of Frauds, plaintiff cannot use

the same alleged promise as a basis for a cause of action sounding in quantum meruit.” (Wings Assoc. v. Warnaco, Inc., 269 A.D.2d 183, 703 N.Y.S.2d [1st Dept. 2000]). The same goes for a cause of action for unjust enrichment “...as litigants may not use such a claim to evade New York’s statute of frauds.” (Kocourek v. Booz Allen Hamilton Inc., 71 A.D.3d 511, 900 N.Y.S.2d 1 [1st Dept. 2010]).

Plaintiff has also failed to sufficiently plead the facts regarding its tortious interference with a contract claim. In order to establish a cause of action for tortious interference with a contract, the plaintiff is required to allege: (1) the existence of a valid contract between Plaintiff and Paul; (2) Simone’s knowledge of that contract; (3) Simone’s intentional procuring of the breach of that contract; and (4) damages. “Specifically, a plaintiff must allege that the contract would not have been breached ‘but for’ the defendant’s conduct.” (Burrowes v. Combs, 25 A.D.3d 370, 808 N.Y.S.2d 50 [1st Dept. 2006]). Plaintiff does not allege that Paul would not have breached their agreement, but for Simone’s conduct. Therefore, Plaintiff’s motion seeking leave to amend its Complaint is denied.

Accordingly, it is hereby ORDERED that Defendant Simone Ender’s motion for summary judgment dismissing the Complaint is granted, and it is further

ORDERED, that Plaintiff’s cross-motion for: (1) leave to reargue this Court’s May 5, 2016 Order pursuant to CPLR 2221(d), and upon reargument granting Plaintiff a default judgment against Simone pursuant to CPLR §3215, or (2) to dismiss the Affirmative Defenses pursuant to CPLR 3211(b), or (3) for leave to amend the Complaint pursuant to CPLR 3025(b), is denied, and it is further

ORDERED, that the Complaint is dismissed, and it is further

ORDERED, that the Clerk of Court enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ
J.S.C.

Dated: February 10, 2017

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE