Dickerson v Olde Vine Golf Club, Inc.
2017 NY Slip Op 31954(U)
August 28, 2017
Supreme Court, Suffolk County
Docket Number: 15421/2010
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Greg Dickerson,

Plaintiff,

-against-

Olde Vine Golf Club, Inc.,
Olde Vine Golf, LLC and NF Development, LLC,

Defendant.

Index No.: 15421/2010

Motion Sequence No.: 002; MG
Motion Date: 5/31/17
Submitted: 6/28/17

Motion Sequence No.: 003; MD
Motion Date: 6/14/17
Submitted: 6/28/17

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Clerk of the Court

Upon the following papers numbered 1 to 33 read upon this motion for summary judgment and cross-motion for sanctions and leave to amend the complaint: Notice of Motion and supporting papers, 1 - 11; Notice of Cross Motion and supporting papers, 12 - 24; Answering Affidavits and supporting papers, 25 - 31; Replying Affidavits and supporting papers, 32 - 33; it is

ORDERED that the motion by NF Development, LLC, and the motion by plaintiff are hereby consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant NF Development, LLC, for summary judgment in its favor dismissing the complaint asserted against it is granted; and it is further

ORDERED that the cross-motion by plaintiff seeking sanctions for spoliation of evidence pursuant to CPLR 3126 (a) and leave to amend his summons and complaint pursuant to CPLR 3025 is denied.

Plaintiff Greg Dickerson commenced this action to recover $120,000.00 for the rental of certain equipment to defendants. Plaintiff alleges that defendants agreed to an annual rental fee of $20,000.00 per year from June 1, 2004 onward, and that $120,000.00 remains due. Issue has been joined, discovery is complete, and plaintiff filed a note of issue on January 31, 2017.

Defendant NF Development, LLC now moves for summary judgment in its favor dismissing the complaint against it, maintaining that it did not enter into a contract or employ plaintiff. In support of the motion NF Development submits, among other things, copies of the pleadings, an affidavit of George Heinlein, its operating agreement, and plaintiff's deposition transcript. Plaintiff opposes the motion and cross-moves for the imposition of sanctions for spoliation of evidence and for leave to amend his summons and complaint. In support of the cross-motion plaintiff submits his own affidavit, copies of the pleadings, Olde Vine Golf Club, Inc.'s certificate of incorporation, a demand letter for payment to Olde Vine Club, an invoice to Olde Vine Golf Club, the deposition transcript of George Heinlein, and his demand for discovery with defendants' responses. In opposition to the cross-motion defendants submit the affidavit of William Nolan, and Olde Vine Club Golf Club, LLC's amended and restated club transfer agreement.

George Heinlein avers that he is a member of NF Development, LLC, and a former officer and shareholder in Olde Vine Club, Inc. NF Development was formed in 2002 to develop residential homes in a development located along Tyler Drive in Riverhead, New York. The members of NF Development were Heinlein, John Blaney and Bruce Barnett. Heinlein avers that NF Development believed that the construction of a golf course would attract potential home buyers and Olde Vine Golf Club, Inc. was formed in 2004 to construct a golf course and sell memberships. Heinlein avers, "NF Development was never in the business of owning or controlling the golf course and many of the residents at the NF Development have nothing to do with the Olde Vine Golf Club." He explains that DF Stone Contracting, Ltd., a company he controls, took control of NF Development and constructed the residential homes. He avers that the golf course was "largely" constructed by Rick Delea. Heinlein avers that Olde Vine Golf Club was controlled day-to-day by Bruce Barnett, who hired Parkland Management, Inc., to supervise construction of the golf course and membership sales. Heinlein avers that at the time of the commencement of this lawsuit he had no idea who plaintiff was, other than that he was an employee of Rick Delea.

Plaintiff testified that he was employed by Olde Vine Golf Club and received his checks from Rick Delea. He testified he was asked by Jeff Seaman and Ed Wankel, owners of Long Island Management, to be the superintendent of and to build the golf club. He testified he was paid through Rick Delea's sod company and understood that once the golf club was established he would be on

Olde Vine Golf Club's payroll. Plaintiff testified he was "strictly being compensated by Mr. Delea." He testified that Bruce Barnett told him that once Olde Vine Golf Club was up and running he would be compensated $20,000.00 for his equipment. In each subsequent year, plaintiff sent Olde Vine Golf Club an invoice for rental of his equipment and he was advised that when the business was profitable he would be paid.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, *citing* ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

Here, NF Development, LLC, has established its *prima facie* entitlement to summary judgment dismissing plaintiff's complaint against it. The common law elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage (*see e.g.* ***J.P. Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*see* ***W.W.W. Assoc., Inc. v Giancontieri***, 77 NY2d 157, 162, 565 NYS2d 440 [1990]; ***Costello v Casale***, 281 AD2d 581, 723 NYS2d 44 [2d Dept 2001], *lv denied* 97 NY2d 604, 737 NYS2d 52 [2001]). The evidence establishes the existence of an agreement between plaintiff and Bruce Barnett of the Olde Vine Golf Club and/or Parkland Management, Inc., but not the existence of an agreement with NF Development, LLC. The evidence reveals that non-party Barnett agreed that plaintiff should be compensated when Olde Vine Club was "up and running." Although plaintiff avers that he never received payment and sent "them" an invoice, that invoice sent was to Olde Vine Golf Club, not NF Development, LLC.

In opposition, plaintiff has failed to raise a triable issue of fact. The affirmation of an attorney who has no personal knowledge of the facts is insufficient to defeat a motion for summary judgment (*see* ***McCovey v Williams,*** 105 AD3d 819, 962 NYS2d 690 [2d Dept 2013]; *see also* ***2 North St. Corp. v Getty Saugerties Corp.***, 68 AD3d 1392, 892 NYS2d 217 [3d Dept 2009]). Moreover, a party may not, through an affidavit submitted on summary judgment, contradict his or her own deposition testimony in order to feign an issue of fact (*see* ***Andrew T.B. v Brewster Cent. School Dist.***, 67 AD3d 837, 889 NYS2d 240 [2d Dept 2009]; ***Knox v United Christian Church of God, Inc.***, 65 AD3d 1017, 884 NYS2d 866 [2d Dept 2009]). Mere conclusions and unsubstantiated

allegations are insufficient to raise any triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore***, *supra*). Plaintiff's affirmation that the "owners of the project were George Heinlein, Bruce Barnett and John Blaney" is directly contradicted by his statement "I did not know the entities that they operated under or the relationship between them." As such, plaintiff has not established that he had an oral agreement with defendant NF Development, LLC. Accordingly, the complaint is dismissed as to NF Development, LLC.

As to plaintiff's motion, a court may strike a pleading or impose other sanctions against a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds should have been disclosed" (CPLR 3126; *see* ***Tos v Jackson Hgts. Care Ctr., LLC***, 91 AD3d 943, 937 NYS2d 629 [2d Dept 2012]; ***Nicolia Ready Mix v Fernandes***, 37 AD3d 568, 829 NYS2d 704 [2d Dept 2007]). The penalties authorized by CPLR 3126 are designed "to prevent a party who has refused to disclose evidence from affirmatively exploiting or benefitting from the unavailability of the proof" during a civil action (***Oak Beach Inn Corp. v Babylon Beacon***, 62 NY2d 158, 166, 476 NYS2d 269 [1984]). The willful and contumacious character of a party's conduct can be inferred from either the repeated failure to respond to demands or comply with discovery orders, without demonstrating a reasonable excuse for these failures, or the failure to comply with court-ordered discovery over an extended period of time (*see* ***Matone v Sycamore Realty Corp.***, 87 AD3d 1113, 1114, 930 NYS2d 460 [2d Dept 2011]; ***Friedman, Harfenist, Langer & Kraut v Rosenthal***, 79 AD3d 798, 800, 914 NYS2d 196 [2d Dept 2010]). However, a party seeking the drastic sanction of preclusion has the initial burden of coming forward with evidence clearly showing that the failure to comply with disclosure orders or discovery demands was willful, contumacious or in bad faith (*see* ***Chong v Chaparro***, 94 AD3d 800, 941 NYS2d 709 [2d Dept 2012]; ***Euro-Central Corp. v Dalsimer, Inc.***, 22 AD3d 793, 803 NYS2d 171 [2d Dept 2005]; ***181 S. Franklin Assocs. v Y & R Assoc.***, 6 AD3d 594, 774 NYS2d 811 [2d Dept 2004]). Here, plaintiff certified on January 3, 2017, that all discovery was complete, and may not now complain that defendants failed to produce or destroyed evidence (***Brown v Veterans Transp. Co.***, 170 AD2d 638,567 NYS2d 65 [2d Dept 1991]).

As to the second branch of plaintiff's motion, generally leave to amend a pleading "shall be freely given" (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient or patently devoid of merit, or where a delay in seeking the amendment would cause prejudice or surprise the opposing party (*see* ***Rogers v New York City Tr. Auth.***, 109 AD3d 535, 970 NYS2d 572 [2d Dept 2013]; ***Trystate Mech., Inc. v Macy's Retail Holdings, Inc.***, 94 AD3d 1095, 943 NYS2d 158 [2d Dept 2012]; ***Daly-Caffrey v Licausi***, 70 AD3d 884, 895 NYS2d 197 [2d Dept 2010]; ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]; ***G.K. Alan Assoc., Inc. v Lazzari***, 44 AD3d 95, 99, 840 NYS2d 378 [2d Dept 2007], *affd* 10 NY3d 941, 862 NYS2d 855 [2008]; ***Surgical Design Corp. v Correa***, 31 AD3d 744, 819 NYS2d 542 [2d Dept 2006]). However, when an amendment is sought after the action has been certified as ready for trial, "judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious" (***Clarkin v Staten Is. Univ. Hosp.***, 242 AD2d 552, 552, 662 NYS2d 91 [2d Dept 1997]; *see* ***Rodgers v New York City Tr. Auth.***, 109 AD2d 535, 970 NYS2d 572; ***Schreiber-Cross v State of New York***, 57 AD3d 881,

870 NYS2d 438 [2d Dept 2008]). When leave to amend is sought on the eve of trial, judicial discretion in allowing such an amendment should be exercised "sparingly" (***Morris v Queens Long Is. Med. Group, P.C.***, 49 AD3d 827, 828, 854 NYS2d 222 [2d Dept 2008]; ***Cohen v Ho***, 38 AD3d 705, 705-706, 833 NYS2d 542 [2d Dept 2007]; ***Glickman v Beth Israel Med. Ctr.- Kings Hwy. Div.***, 309 AD2d 846, 846, 766 NYS2d 67 [2d Dept 2003]; *see* ***American Cleaners, Inc. v American Intl. Specialty Lines Ins. Co.***, 68 AD3d 792, 691 NYS2d 127 [2d Dept 2009]). Further, in exercising its discretion, a court should consider how long the party seeking the amendment was aware of the facts upon which the motion is based, whether a reasonable excuse for the delay was offered, and whether prejudice resulted from such delay (***American Cleaners, Inc. v American Intl. Specialty Lines Ins. Co.***, 68 AD3d 792, 794, 891 NYS2d 127; ***Cohen v Ho***, 38 AD3d 705, 706, 833 NYS2d 542; *see* ***Sunrise Harbor Realty, LLC v 35th Sunrise Corp.***, 86 AD3d 562, 927 NYS2d 145 [2d Dept 2011]; ***Al-Khilewi v Turman***, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]; ***Sampson v Contillo***, 55 AD3d 591, 865 NYS2d 137 [2d Dept 2008]; ***Glickman v Beth Israel Med. Ctr. Kings Hwy. Div.***, 309 AD2d 846, 766 NYS2d 67).

Here, plaintiff has failed to submit the proposed amended complaint and the failure to do so is fatal to the application. CPLR 3025 (b) requires any motion to amend or supplement pleadings be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading. Accordingly, the motion by plaintiff is denied in its entirety.

Dated: August 28, 2017

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**