

Arnoff v Grunberg

2018 NY Slip Op 30083(U)

January 18, 2018

Supreme Court, New York County

Docket Number: 152198/2015

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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NORMAN B. ARNOFF,

Index No. 152198/2015

Plaintiff,

-against-

IRVING GRUNBERG, WOLF GRUNBERG CORP.,
And LOMBARD MUTUAL, LLC,

Defendants.

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DEBRA A. JAMES, J.:

In this action, plaintiff Norman B. Arnoff claims that defendants unlawfully sold a diamond pin he provided as collateral for a \$22,000 loan.

Plaintiff moves for an order granting summary judgment (CPLR 3212) as to liability only and dismissing defendants' counterclaims.

Defendants cross move for an order (a) dismissing the complaint for failure to state a cause of action (CPLR 3211[a][7]), (b) granting summary judgment (3212[b]) dismissing the complaint as to defendant Irving Grunberg on the grounds that he is not a proper defendant individually and the claims lack merit; (c) granting summary judgment dismissing the claims for usury, conversion, breach of fiduciary duty, fraud and breach of bailment; (d) granting summary judgment (3212[a]) to defendant Lombard Mutual LLC on its Sixth and Eighth counterclaims

for breach of contract and unjust enrichment in the amount of \$41,360.00 as of December 21, 2016, with interest accruing at 4% per month pursuant thereafter; and (e) imposing sanctions upon plaintiff (22 NYCRR 130-1.1, 130-1.2) for frivolously commencing and continuing to pursue the usury cause of action. In addition, defendants assert that plaintiff's motion must be denied because his motion papers were improperly served and incomplete. Plaintiff, in turn, challenges defendants' cross motion as untimely.

CONCLUSION

For the reasons discussed below, the parties' procedural objections shall be sustained as the court cannot consider or determine the motions on their merits, and the motions shall be denied.

BACKGROUND

Plaintiff commenced this action by filing his summons and complaint on March 5, 2015 through the New York State Courts Electronic Filing (NYSCEF) system.

Plaintiff filed his note of issue with certificate of readiness on June 10, 2016. Thereafter, through NYSCEF, on October 7, 2016 (119 days later), plaintiff filed his motion for summary judgment. However, he did not include nine of the twelve exhibits to his moving affidavit, and on October 7, 2016, his

counsel entered a notation in the case docket that states "Exhibits 1-8 and 11 not accepted fro PDF, being filed by hand". In accordance with Procedure for Electronically Filed Cases Protocol Section D.4(a), plaintiff included the exhibits with "working copies" the motion later provided to the court. However, such "working copies" must be comprised of the motion papers previously filed by NYSCEF.

In a letter faxed to defendants' counsel dated October 7, 2016, plaintiff's counsel repeated the claim that the missing exhibits "were not able to be accepted electronically in PDF format". The letter indicated that those exhibits were enclosed. However, defendants deny receipt. Such denial is corroborated by plaintiff's fax log, which reflects that an attempt was made to send only three documents and that the transmission was cancelled.

Plaintiff also claimed to have experienced a problem with the electronic filing of some pages of the exhibits (nos. 13-15) to his reply papers. Those were faxed and apparently received by defendants and are attached to the hard copy of the reply papers submitted to the court.

Plaintiff did not electronically file the exhibits missing from his original and reply papers until May 11, 2017, over five

months after the last papers on the motions had been submitted.¹

Defendants' cross motion and opposition to plaintiff's motion were electronically filed 174 days after the filing of the note of issue, on December 1, 2016.

DISCUSSION

Plaintiff's Motion

Plaintiff's motion must be disregarded as a nullity because of multiple defects in the filing and service of his papers. First, pursuant to section A(2)(a) of the Protocol on Courthouse Procedures for Electronically Filed Cases (Revised March 9, 2016), e-filing became mandatory in all cases (with certain exceptions not applicable here) filed after February 19, 2013. See also 22 NYCRR 202.5-bb. Once such a case is commenced, all documents must be filed and served by electronic means (NYCRR 202.5-bb[c][1]). As discussed above, plaintiff failed to file and serve timely most of the exhibits supporting his motion.

Plaintiff's efforts to cure this failure did not comply with the governing regulations. NYCRR 202.5-b(d)(1)(ii) sets forth the steps that must be taken in an emergency when electronic filing

¹ Such electronic filing did not conform with the directive of this court made at the date set for oral argument on May 9, 2017, that on or before June 2, 2017, plaintiff's counsel send and e-file a letter confirming that as of October 28, 2016, the original submission/return date of his motion, by NYSCEF, plaintiff had filed the missing exhibits.

Documents that are required to be filed and served electronically in accordance with this section or section 202.5bb(c)(1) of this Part may nevertheless be filed and served in hard copy . . . provided the document is accompanied by the affirmation or affidavit of the filing attorney or party stating that:

(a) a deadline for filing and service fixed by statute, rule or order of the court will expire on the day the document is being filed and served or on the following business day; and

(b) the attorney, party or filing agent therefor is unable to file and serve such document electronically because of technical problems with his or her computer equipment or Internet connection. In the event a filer shall file and serve documents in hard copy pursuant to this paragraph, each such document shall include the notice required by this paragraph, and the filer shall file those documents with the NYSCEF site within three business days thereafter.

Plaintiff did not submit the required affirmation or affidavit describing the nature of the emergency or the technical problem. Nor did plaintiff file and serve hard copies of the documents, or complete electronic filing and service within three days. In fact, plaintiff never supplied defendants with all of the exhibits, and only completed electronic filing and service several months later. Additionally, assuming that plaintiff's faxing of documents to defendants' counsel was an attempt to serve hard copies, it was not successful. Furthermore, under CPLR 2103(a)(5) facsimile service is only permitted where the attorney receiving the documents has signified consent to such service by

designating a fax number in the address block of his motion submissions. Defendants' counsel did not do so here.²

The court does not view plaintiff's failure to include the exhibits as the sort of omission, defect or irregularity that may be excused under CPLR 2001. By its terms, that section only applies if "a substantial right of a party is not prejudiced." Here, the missing exhibits were the transactional and evidentiary documents at the core of plaintiff's claims. Defendants cannot be compelled to rely upon plaintiff's descriptions or discussions of the documents in his affidavits. Although it appears that defendants may have had some of the documents through discovery or other means, in the motion papers made by plaintiff, defendant had a right to all of them in order to formulate a meaningful response. Nor could defendants compare their versions of the documents to those in the possession of plaintiff to ascertain that they were the same.

While the court now has all of the exhibits, defendants have been deprived of making argument based on the complete record. Moreover, the confusion over what documents are properly in the

² The court is also constrained to disregard plaintiff's reply affidavit. The copy electronically filed is unsigned and unsworn and cannot be considered as competent evidence. Eldrainy v Hassain, 56 AD3d 419, 419 (2d Dept 2008). Moreover, there is a discrepancy between the efiled version, which is dated December 3, 2016, and the hard copy proffered to the court, which is dated December 22, 2016 and is signed and notarized.

record could thwart appellate review. See, e.g., Mure v Mure, 92 AD3d 653, 653 ("critical exhibits are missing from the plaintiff's appendix . . . [t]hese omissions inhibit the court's ability to render an informed decision on the merits of the appeal") (internal quotation and citations omitted). This case is also distinguishable from those in which relief was granted under CPLR because an initially omitted pleading was produced in connection with later papers submitted on the motion, see Avalon Gardens Rehab. & Health Care Ctr., LLC v Morsello, 97 AD3d 611, 612 (2d Dept 2012); Crossett v Wing Farm, Inc., 79 AD3d 1334, 1335 (3d Dept 2010).

Defendants' Cross Motion

Defendants' cross motion for summary judgment must be denied as untimely. There is no dispute that such motion was filed more than 120 days after the filing of the note of issue, in violation of CPLR 3212(a). In the absence of a showing of good cause for the delay, the court lacks discretion to determine the motions even if the papers are meritorious and the delay non-prejudicial Brill v City of New York, 2 NY3d 648, 652-53 (2004).

Defendants nevertheless contend that there is an exception permitting consideration of an untimely cross motion that addresses the same or nearly identical issues as the original motion. See Belgium v Mateo Prods., Inc., 138 AD3d 479, 480 (1st

Dept 2016); Maggio v 24 W. 57 APF, LLC, 134 AD3d 621, 628 (1st Dept 2015); Lapin v Atl. Realty Apts. Co., LLC, 48 AD3d 337, 337 (1st Dept 2008). Assuming, arguendo, that the issues on which defendants seek judgment sufficiently overlap with those raised by plaintiff, the court is still precluded from deciding the cross motion. The exception applies only where there is an existing and timely initial motion. As discussed above - and as vigorously urged by defendants - plaintiff's motion was a nullity, with much of the documentation upon which it was based never filed within the CPLR 3212(a) deadline. This case must thus be placed upon the trial calendar, "where a motion to dismiss after plaintiff rests or a request for a directed verdict may dispose of the case during trial." Brill, 2 NY3d 648.

ORDER


Accordingly, it is

ORDERED that the motion of plaintiff and the cross motion of defendant for summary judgment are denied.

This constitutes the decision and order of the court.

Dated: January 18, 2018

ENTER


J.S.C.
DEBRA A. JAMES