

Lessin v Piliaskas
2018 NY Slip Op 32911(U)
November 8, 2018
Supreme Court, Kings County
Docket Number: 500026/18
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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DANIEL LESSIN,

Plaintiff,

Decision and order

- against -

Index No. 500026/18

MS # 2 23

ANTHONY PILIASKAS & BEMBE INC.,

Defendant,

November 8, 2018

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PRESENT: HON. LEON RUCHELSMAN

The defendant Anthony Piliaskas has moved pursuant to CPLR §2221 seeking to reargue a portion of the order dated July 5, 2018. The plaintiff Daniel Lessin has likewise cross-moved seeking to renew and reargue a portion of the prior order and also to amend dismiss the complaint. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in prior orders the plaintiff and defendant formed a corporation named Bembe Inc., and was intended to be a bar and dance club in Williamsburg Brooklyn. Following a dispute, this court held a buyout provision had been triggered and that Lessin was therefore entitled to "half of profits of the last completed year as partner" (see, Agreement, ¶13). The court held the profits as indicated in Bembe's 2016 Income Tax Return governed the profits to which the plaintiff was entitled and consequently dismissed the second cause of action seeking additional profits

he argued existed. Moreover, the court denied the defendant's motion seeking to dismiss the first cause of action regarding the plaintiff's initial deposit of \$36,000. Each party is seeking to reargue the adverse ruling.

Conclusions of Law

A motion to reargue which is not based upon new proof or evidence may be granted upon the showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision (Delcrete Corp. v. Kling, 67 AD2d 1099, 415 NYS2d 148 [4th Dept., 1979]). Thus, the party must demonstrate that the judge must have overlooked some point of law or fact and consequently made a decision in error. Its purpose is designed to afford an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied a controlling principle of law. The motion cannot be made after the time for appealing the prior order has expired (Millson v. Arnot Reality Corp., 266 AD2d 918, 697 NYS2d 435 [4th Dept., 1999]).

The main thrust of plaintiff's motion is that the court incorrectly relied upon the tax return as documentary evidence, specifically since the accuracy of the tax return is in dispute. In Ansonia Associates Ltd. Partnership v. Unwin, 130 AD3d 453, 13

NYS3d 67 [1st Dept., 2015] the court held an apartment claimed to be the residence of a tenant could not be such residence since the tenant asserted on her income tax statements that such apartment was not her residence. The court held that the tenant's "position that the apartment is her primary residence is contrary to declarations made under the penalty of perjury on income tax returns" (id). The court concluded the tenant could not make a claim in court that was "logically incompatible" with a position she asserted in her income tax returns. Similarly, in Man Choi Chiu v. Chiu, 38 AD3d 619, 832 NYS2d 89 [2d Dept., 2007] the court held that information contained within a tax return was documentary evidence concerning the percentages of ownership of a corporation. Again, in In re Suri, 10 AD3d 744, 781 NYS2d 540 [3rd Dept., 2004] the court noted that tax returns could be utilized as documentary evidence to rebut allegations of involvement in various businesses. These cases make plain that tax returns are documentary evidence and are sufficient to establish, as a matter of law, the specific matter sought to be proved. This is especially true where an argument being raised contradicts the information contained in the tax return (Unwin, supra). It is one thing to argue the tax return did not state the profits to which plaintiff is entitled because the tax return only disclosed "'ordinary business income' as defined by the Internal Revenue Code and relevant regulations" (see, Plaintiff's

Original Memorandum of Law Opposing Motion to Dismiss, page 7). It is quite another to argue "there is a significant dispute as to its accuracy" (see, Plaintiff's Memorandum of Law In Support of Cross-Motion Seeking Reargument, page 9) when to do so calls into question the legitimacy of the tax return signed and approved by plaintiff. Therefore, the plaintiff's motion seeking reargument is denied.

Equally unavailing is the plaintiff's motion seeking renewal. The plaintiff argues it was surprised the court accepted the validity of the tax returns without any evidence further establishing such validity. However, as noted the tax returns do not require independent verification or account support. They are self verifying and consist of documentary evidence which can be verified as a matter of law. The inconsistency of plaintiff agreeing to the contents of the tax return yet arguing the very contents are inaccurate is "logically incompatible" and cannot be the basis upon which to grant a motion to renew. Therefore, the motion seeking to renew is denied. Likewise, the motion seeking to amend the complaint is denied as well.

Turning to the defendant's motion, the court held there were questions of fact whether the defendant consented to the suspension of the terms of the agreement. Upon reargument the defendant asserts the oral modification is undated and in any

event is not contained in the complaint and is barred by the statute of frauds. However, as conceded by the defendant the precise date of the alleged oral modification, if made at all, is unknown. Therefore, there are questions about this modification that require discovery. The defendant's objections do not establish the cause of action cannot have merit. Therefore, the motion seeking reargument is denied without prejudice and may be raised again at the conclusion of all discovery.

Lastly, the motion seeking to dismiss the complaint as to Bembe Inc., is granted.

So ordered.

ENTER:

DATED: November 8, 2018
Brooklyn NY



Hon. Leon Ruchelsman
JSC

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