

<b>Lepatner &amp; Assoc., LLP v Jaffe</b>
2020 NY Slip Op 31045(U)
April 22, 2020
Supreme Court, New York County
Docket Number: 650064/2013
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X

LEPATNER & ASSOCIATES, LLP,
Plaintiff,

- v -

JOSEPH JAFFE,
Defendant.

-----X

INDEX NO. 650064/2013
MOTION DATE 09/5/2018
MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130

were read on this motion to/for JUDGMENT - SUMMARY.

In this breach of contract action, the defendant moves for summary judgment dismissing the complaint. This is the defendant's second motion for summary judgment in this action. The defendant's first motion for summary judgment was denied, in part, by decision and order of the Appellate Division, First Department, dated April 5, 2016. See LePatner & Assocs., LLP v Jaffe, 138 AD3d 411 (1st Dept. 2016). The plaintiff opposes the motion. The motion is denied.

The plaintiff is a law firm located in New York, New York. The defendant is an attorney and private investigator. On October 1, 2010, Barry LePatner, the sole equity partner of the plaintiff, executed an agreement with the defendant pertaining to the defendant's employment with the law firm. The defendant was to perform legal work for the plaintiff and form a limited liability company for the purpose of carrying out the defendant's monitoring, investigative consulting, intelligence and risk management business. The agreement detailed the plaintiff's intent to procure new office space with additional space to accommodate the defendant and the limited liability company. The agreement further detailed the defendants' responsibility to pay the pro rata cost of the additional rent for this new space, which was to be rented from Boies Schiller LLP. The relevant portion of the agreement provides:

“LePatner shall be assuming new tenant space and will take additional space to accommodate you and the Business. To the extent that you voluntarily resign your position in the two entities prior to the expiration of said tenancy, you agree to assume the cost of the additional space for the pro rata portion of the remaining three year lease, (approximately \$75,000 a year). At the end of each year a pro rata portion of this obligation shall be abated and at the end of three (3) years, provided you are still employed by the firm, this obligation shall be invalidated. If you withdraw from the firm and the LLC or are asked to resign from the entities by LePatner & Associates during this three-year period the above obligation shall not apply. Except that if you choose to stay on as a sub-subtenant and assume the cost of such additional space, no claim by the firm shall be made therefor.”

On March 1, 2012, the defendant ceased employment with the plaintiff.

The plaintiff commenced this action on January 8, 2013, to recover damages for breach of contract, alleging, *inter alia*, that the defendant failed to pay the pro rata cost of the additional office space after his voluntary resignation from the plaintiff law firm. The defendant counter-claimed for breach of contract alleging that plaintiff underpaid him in violation of the agreement. On September 27, 2013, the plaintiff moved to amend the complaint. On October 9, 2013, the defendant cross-moved for summary judgment dismissing the complaint and for summary judgment on his counterclaim.

In support of his first summary judgment motion, the defendant did not dispute that he left the firm voluntarily. The parties disagreed as to whether the provision in the contract pertaining to “voluntary resignation” or “withdrawal” applied in this case and thus, whether the defendant’s departure from the firm obligated him to pay the plaintiff the pro rata share of the rent that the plaintiff incurred in subleasing the additional space in accordance with their contract. The defendant also submitted an affidavit in the first summary judgment motion averring several times that the agreement was, in fact, an agreement, and that summary judgment should be granted in his favor on the counterclaims because the plaintiff failed to pay him the wages set forth in their agreement. By order dated October 16, 2014, this court granted the defendant’s summary judgment motion in its entirety. This court held that the agreement’s provisions concerning rent were ambiguous because the terms “voluntary resignation” and “withdrawal” are “reasonably susceptible of more than one interpretation” and that the ambiguity should be resolved against the plaintiff-law firm that drafted the agreement. The court also granted summary judgment to the defendant on his counterclaim for unpaid salary.

The Appellate Division, First Department agreed with the portion of this court's order that found the agreement to be ambiguous with respect to whether the defendant was obligated to pay any portion of the additional rent that the plaintiff incurred in entering into the agreement. The First Department held that "the agreement between the parties contained two contradictory statements, rendering it ambiguous. Even when considering extrinsic evidence, there is still an issue of fact as to what the parties intended when they entered into the agreement." LePatner & Assocs, LLP v Jaffe, supra at 412. However, the court reversed and denied the defendant's summary judgment motion on the ground that both parties were attorneys who had a "voice in the selection of the language in the agreement" and as such, "the terms should not be construed against the plaintiff." Id. The Appellate Division also searched the record and granted summary judgment to the plaintiff dismissing the defendant's counterclaim for wages on the ground that the defendant "waived enforcement of the salary provision of the parties' agreement by continuing to work for [the] plaintiff for seven months after the reduction of his salary." Id.

After discovery, the defendant moved for summary judgment for the second time, raising three newly-minted arguments that could have been made at the time of the prior summary judgment motion. First, the defendant argues that the agreement is an unenforceable agreement to agree. Second, the defendant argues that the plaintiff failed to plead and that it performed its own obligations under the agreement. Third, the defendant argues that the agreement is an enforceable lease agreement that does not include material terms that are required to be in a lease such as the area to be leased, the duration of the lease, or the rent to be paid.

On a motion for summary judgment, the moving party must make a prima facie showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra. This is because "[s]ummary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any

doubt about the issue.” Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) quoting Nesbitt v Nimmich, 34 AD2d 958, 959 (2<sup>nd</sup> Dept. 1970). Additionally, “[s]uccessive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification.” Jones v 636 Holding Corp., 73 AD3d 409, 409 (1<sup>st</sup> Dept. 2010); see Landis v 383 Realty Corp., 175 AD3d 1207 (1<sup>st</sup> Dept. 2019).

The defendant failed to show any newly discovered evidence or sufficient justification for the court to entertain this motion. The defendant’s arguments in this motion are grounded in the contract and the complaint, and not anything discovered after he first moved for summary judgment. This alone mandates denial of the motion.

Additionally, even if the court were to consider the merits of the motion, none of the defendant’s three newly-minted arguments establishes, prima facie, the absence of triable issues of fact mandating denial of the motion regardless of the sufficiency of the opposition papers.

The defendant’s first argument that the contract is an unenforceable agreement to agree contradicts the defendant’s position on in his prior motion seeki where he swore in his affidavit that the agreement was an enforceable agreement and attempted to enforce his right to compensation under the contract by his counterclaim. It was only after the Appellate Division, First Department dismissed his counterclaim on the grounds that he had waived his rights and no longer had claims under the agreement that the defendant testified at his deposition that the agreement was an agreement to agree. These inconsistent self-serving sworn statements raise triable issues of fact. See B&H Florida Notes LLC v Ashkenazie, 149 AD3d 401 (1<sup>st</sup> Dept. 2017); see also Stephens v Triboro Bridge & Tunnel Auth., 55 AD3d 410 (1<sup>st</sup> Dept. 2008). Additionally, whether there was a meeting of the minds is generally an issue that must be resolved by a trier of fact and not on a motion for summary judgment. See Kramer v Greene, 142 AD3d 438 (1<sup>st</sup> Dept. 2016).

The defendant’s second argument, that the plaintiff failed to plead that he performed his own obligations under the agreement, is misplaced. The complaint alleges that the plaintiff fulfilled his obligations under the contract by making the defendant a partner in the firm and subleasing office space to further their business arrangement. Whether those allegations are true is a triable issue of fact.

Finally, the defendant has not established as a matter of law that the contract was an unenforceable lease. The agreement does not, *inter alia*, give the defendant any interest in the premises that the plaintiff subleased from its landlord or obligate the defendant to pay rent. See CC Vending, Inc. v Berkeley Educ. Serv's of New York, Inc., 74 AD3d 559 (1<sup>st</sup> Dep't 2010). Rather, upon the defendant's voluntarily resignation, the agreement obligated the defendant to pay costs accrued by the plaintiff under its sublease with its landlord. Thus, this is also a triable issue of fact.

Accordingly, it is hereby,

ORDERED that the defendant Joseph Jaffe's motion for summary judgment dismissing the complaint is denied in its entirety and it is further

ORDERED that the parties shall appear for a settlement conference on August 20, 2020, at 3:00 p.m.

This constitutes the Decision and Order of the court.

  
\_\_\_\_\_  
NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

<u>4/22/2020</u>			
DATE		NANCY M. BANNON, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> SUBMIT ORDER	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		