Lang v Zlotnick
2020 NY Slip Op 34085(U)
December 9, 2020
Supreme Court, Kings County
Docket Number: 502419/14
Judge: Lawrence S. Knipel

At an IAS Term, Non-Jury Trial Readiness Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of December, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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PIERRE LANG,
Plaintiff,

- against -

GREGORY ZLOTNICK,
Defendant.

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DECISION AND ORDER

Index No. 502419/14

Mot. Seq. No. 8

The following e-filed papers read herein:	NYSCEF #:
Notice of Motion, Affirmation, and Exhibits Annexed	104-117
Affirmation in Opposition and Exhibits Annexed	121-127
Reply Affirmation and Exhibits Annexed	128-130

In this action to recover on a promissory note, plaintiff Pierre Lang (plaintiff) moves, post-note of issue, for: (1) an order, pursuant to CPLR 3126 (3), striking the answer of defendant Gregory Zlotnick (defendant), for failure to adequately respond to the outstanding portions of Plaintiff's First Combined Demand for Discovery and Inspection, dated Aug. 19, 2015 (D&I notice);[1] (2) leave, pursuant to CPLR 3025 (b), to add Lemonti PA, Inc. (Lemonti) as a party defendant; and (3) an award of costs and attorney's fees. Defendant opposes all three branches of plaintiff's motion.

[1] By order, dated Dec. 19, 2019, the Court (Graham, J.) deleted items "f," "g," and "h" from the "documents" section of the D&I notice (NYSCEF #103).

(I)

"Resolution of discovery disputes and the nature and degree of the penalty to be imposed pursuant to CPLR 3126 are matters within the sound discretion of the motion court" (*Morales v Zherka*, 140 AD3d 836, 836-837 [2d Dept 2016]). Pursuant to CPLR 3126 (3), a court may, among other things, issue an order "striking out pleadings or . . . rendering a judgment by default" as a sanction against a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed." Nevertheless, "[a]ctions should be resolved on their merits whenever possible, and the drastic remedy of striking a pleading should not be employed without a clear showing that the failure to comply with court-ordered discovery was willful and contumacious" (*Rector v City of New York*, 174 AD3d 660, 660-661 [2d Dept 2019] [internal quotation marks omitted]).

Here, the record, as developed following defendant's retention of his current counsel, fails to establish a clear showing of a pattern of willfulness or contumacious conduct necessary to justify the striking of his answer pursuant to CPLR 3126 (3) (*see Burrell v Baptista*, 180 AD3d 988 [2d Dept 2020]; *MacKenzie v City of New York*, 125 AD3d 821, 822 [2d Dept 2015]). Defendant has complied, albeit tardily, with plaintiff's D&I notice and demonstrated, by way of his verified "second response," dated Jan. 20, 2020 (NYSCEF #126), that he is not in possession or control of the responsive documents (*see Poveromo v Kelley-Amerit Fleet Servs., Inc.*, 127 AD3d 1048 [2d Dept 2015]). Under the circumstances of this case, including that plaintiff filed his note of issue and certificate of readiness *before*

serving the instant motion, the Court, in the exercise of its discretion, declines to strike defendant's answer (*see J.H. v City of New York*, 170 AD3d 816, 818 [2d Dept 2019]; *see also Rojas v Hazzard*, 171 AD3d 819, 820 [2d Dept 2019]).

(2)

"CPLR 3025 (b) allows a plaintiff to amend his . . . complaint, with leave of court, to add a party defendant" (*Pensabene v City of New York*, 172 AD3d 1396, 1397 [2d Dept 2019]). "As a general rule, leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted in the absence of prejudice or surprise resulting from the delay in seeking leave, unless the proposed amendment is . . . patently devoid of merit" (*Sabatino v 425 Oser Ave., LLC*, 87 AD3d 1127, 1129 [2d Dept 2011]).

Here, the proposed amendment is patently devoid of merit because defendant is the sole obligor on the promissory note (NYSCEF #5).[2] In fact, the promissory note recites (in ¶ 7 thereof) that it is "secured by . . . [defendant's] personal signature" (NYSCEF #5). Accordingly, leave to amend to add Lemonti as a party defendant is denied (*see Tarantino v Queens Ballpark Co., LLC*, 123 AD3d 1105, 1108 [2d Dept 2014], *lv denied* 25 NY3d 904 [2015]).

(3)

Under Illinois law which applies by virtue of the choice-of-law provision in the promissory note, "prevailing parties [are prohibited] from recovering their attorney fees from

[2] Although the document is denominated as "The Contract," it is a note in substance. Plaintiff commenced this action by moving pursuant to CPLR 3213 for summary judgment in lieu of complaint (NYSCEF #1-2).

the losing party, absent express . . . contractual provisions" (*Sandholm v Kuecker*, 356 Ill Dec 733, 750, 962 NE2d 418, 435 [Ill 2012]). Here, the promissory note provides (in ¶ 8 thereof) that "*[i]f* [plaintiff] *prevails* in a lawsuit to collect on this note, [defendant] will pay [plaintiff's] costs and lawyer's fees in an amount the court finds to be reasonable" (emphasis added). "A prevailing party, for purposes of awarding attorney fees, is one that is successful on a significant issue and achieves some benefit in bringing suit" (*City of Harvard v Elvis J. Henson Trust*, 2012 IL App 2d 120091[U], 2012 WL 6969339, *6 [Ill App 2d Dist 2012]). "A party that receives judgment in his favor is usually considered the prevailing party" (*J.B. Esker & Sons, Inc. v Cle-Pa's Partnership*, 325 Ill App 3d 276, 281, 757 NE2d 1271, 1275 [Ill App 5th Dist 2001]). Thus far, plaintiff has not been a prevailing party in this action and, therefore, is not entitled to an award of costs and attorney's fees.[3]

Conclusion

Accordingly, based on the foregoing, it is

ORDERED that plaintiff's motion in Seq. No. 8 is *denied in its entirety*; and it is further

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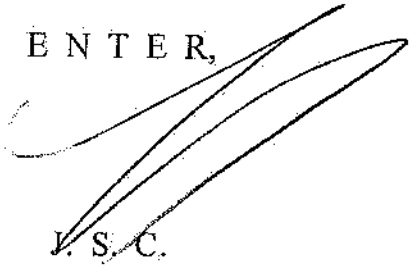
[3] Plaintiff's motion for summary judgment in lieu of complaint was denied twice: initially and on reargument (*see* Orders, dated Dec. 18, 2014 and May 28, 2015 [Rothenberg, J.]) (NYSCEF #18 and 25, respectively). Thereafter, plaintiff's default judgment after inquest, dated Nov. 6, 2017, was vacated by order, dated Sept. 20, 2018 (Rothenberg, J.) (NYSCEF #59 and 80, respectively).

ORDERED that defendant's counsel is directed to electronically serve a copy of this decision and order with notice of entry on plaintiff's counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

E N T E R,



J. S. C.

Justice Lawrence Knipel