

Conway v de Poland
2021 NY Slip Op 32848(U)
December 30, 2021
Supreme Court, New York County
Docket Number: Index No. 151630/2019
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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DANIEL CONWAY,

Plaintiff

Index No. 151630/2019

-against-

DECISION AND ORDER

BETH CHASADIM DE POLAND,
AVROHOM STERN, INDIVIDUALLY,
and STEPHEN SIMINOÛ, ESQ.,

Defendants
-----x

LUCY BILLINGS, J.S.C.:

Plaintiff brought this action alleging breach of a contract with defendants Beth Chasadim de Poland, a religious organization, and Stern, plus related claims. Plaintiff's claims against the sole remaining defendant Siminou are based on plaintiff's delivery of a \$20,000 deposit under the alleged contract to Siminou, who was the other defendants' attorney for the transaction, and Siminou's failure to return the deposit to plaintiff immediately when the alleged contract did not close.

Siminou now moves for summary judgment dismissing the claims against him. C.P.L.R. § 3212(b). Plaintiff cross-moves for summary judgment on his claims against Siminou, which plaintiff limits to the complaint's third and fourth claims. C.P.L.R. § 3212(b) and (e). In opposition to plaintiff' cross-motion, Siminou seeks his attorneys' fees incurred in defending against

the cross-motion, which Siminou maintains is frivolous. 22
N.Y.C.R.R. § 130-1.1(c).

I. UNDISPUTED FACTS

Plaintiff signed a contract in August 2017 to purchase the air rights for the real property at 233 East Broadway, New York, New York, owned by Beth Chasadim. Aff. of Stephen Siminou, NYSCEF Doc. 45, ¶ 2. Siminou represented Beth Chasadim in the sale. Although defendants dispute the validity and enforceability of that contract, plaintiff, pursuant to the contract, wired \$20,000, representing the initial deposit, into Siminou's Interest on Lawyer Account (IOLA account). Id. ¶ 8. The sale did not close. Siminou retained the initial deposit in his IOLA account until, while this action was pending, he received notice from another attorney for Beth Chasadim renouncing any claim to the initial deposit. Id. ¶ 12, Ex. H, NYSCEF Doc. 53. Siminou then sent a check for \$20,000 from his IOLA account to plaintiff's attorney. Id. ¶ 13, Ex. I, NYSCEF Doc. 54. Plaintiff deposited the \$20,000 check "under protest," which he claims preserved his rights to seek relief in addition to the deposit's return. Aff. of Daniel Conway, NYSCEF Doc. 58, ¶ 3.

II. THE MOTION AND CROSS-MOTION

Defendant Siminou moves for summary judgment dismissing the first two claims on the ground that they do not apply to him.

Although the complaint alleges these claims against "Defendants," Siminou Aff. Ex. A, NYSCEF Doc. 46, ¶¶ 17-18, 24, plaintiff now concedes that the first two claims are not against Siminou. The first claim is for breach of a contract, but Siminou was not a party to any contract with plaintiff. The second claim is for Stern's misrepresentations of his authority to bind Beth Chasadim and thus does not apply to Siminou either. Siminou maintains that plaintiff fails to state a basis for the attorneys' fees sought by the third claim and that the fourth claim is moot, since it seeks return of the \$20,000 deposit that Siminou already returned.

Plaintiff cross-moves for summary judgment on his third and fourth claims and asks that Simonou's motion for summary judgment on the first two claims be denied as moot. Plaintiff insists, without citing any authority, that Siminou's defense of this action and prior refusal to return the deposit lacked merit from the outset, caused plaintiff to incur expenses, and constituted a fraud on the court. Regarding the fourth claim, which seeks the deposit's return, plaintiff acknowledges receiving the returned \$20,000, but also seeks pre-judgment interest from January 2, 2018, after the sale failed, to when Siminou returned the deposit August 11, 2021. Plaintiff does not dispute that Siminou did not receive Beth Chasadim's permission to return the deposit before its correspondence dated August 3, 2021, but insists that Siminou

was obligated to seek the congregation's permission or initiate an interpleader. C.P.L.R. § 1006. Siminou maintains that his refusal to disgorge the deposit before receiving his client's permission and his defense against this action seeking that disgorgement were not frivolous and that, instead, plaintiff's cross-motion for summary judgment on those claims against Siminou is so lacking in merit as to be frivolous. Siminou therefore requests attorneys' fees and sanctions against plaintiff for making a cross-motion that "is completely without merit," 22 N.Y.C.R.R. 130-1.1(c)(1), and "asserts material factual statements that are false." 22 N.Y.C.R.R. 130-1.1(c)(3).

III. DISPOSITION OF THE CLAIMS AGAINST SIMINO

Since plaintiff concedes that his first two claims, for breach of the contract and fraud in the inducement of the contract, are not against Siminou, as far as those claims refer to "Defendants," Siminou Aff. Ex. A, NYSCEF Doc. 46, ¶¶ 17-18, 24, plaintiff discontinues those claims against Siminou, rendering them and Siminou's motion for summary judgment dismissing them moot. Therefore the court denies that part of the motion as moot. PNY III, LLC v. Axis Design Group Intl., LLC, 148 A.D.3d 550, 550 (1st Dep't 2017); Astil v. Kumquat Props., 125 A.D.3d 522, 523 (1st Dep't 2015); Santiago v. Berlin, 111 A.D.3d 487, 487 (1st Dep't 2013). See Admiral Ins. Co. v. Joy Contrs., Inc., 190 A.D.3d 630, 631 (1st Dep't 2021).

The fourth claim seeks return of the \$20,000 deposit, plus interest, which plaintiff's cross-motion limits to the period from January 2, 2018, to August 11, 2021. Plaintiff does not dispute that Siminou has returned the deposit to plaintiff, but he still seeks the interest, plus the attorneys' fees sought by the third claim. Since plaintiff also does not dispute that he deposited the \$20,000 pursuant to the contract in Siminou's IOLA account, New York Judiciary Law § 497 applies. That statute gave attorney Siminou, who received the deposit in a fiduciary capacity, the discretion to keep the funds in an unsegregated account, as they were "reasonably expected to be held for too short a time to generate sufficient interest income to justify the expense of administering a segregated account for the benefit of the client or beneficial owner." N.Y. Jud. Law § 497(2). Interest on funds held in an IOLA account would be payable only if plaintiff established that Simonou retained the funds in escrow in bad faith, which would abrogate Judiciary Law § 497(5)'s protection against an attorney's liability "because of a deposit of moneys to an IOLA account." See Zahavi v. JS Barkats PLLC, 138 A.D.3d 618, 619 (1st Dep't 2016).

Plaintiff cites no evidence of bad faith to support his demand for interest on the deposit. He claims only that Siminou failed to take advantage of C.P.L.R. § 1006, which would have allowed him to discharge his liability to any parties with claims

to the funds, deposit the funds in a designated account, and allow the court to determine ownership. Nothing in C.P.L.R. § 1006, however, requires a party exposed to multiple potential claims for the same funds to take advantage of the interpleader procedure. Siminou did not need to discharge his liability pursuant to C.P.L.R. § 1006(f), since Judiciary Law § 497(5) already protected him against liability as long as he acted in good faith.

To that end, Siminou presents undisputed evidence that he transmitted to plaintiff a check for the amount of the deposit approximately one week after Beth Chasidim notified Siminou that it disclaimed any interest in the deposit. Siminou Ex. H, NYSCEF Doc. 53; Ex. I, NYSCEF Doc. 54. Siminou thus establishes a prima facie defense of his good faith, entitling him to Judiciary Law § 497(5)'s protection.

Plaintiff relies solely on the hearsay correspondence dated January 2, 2018, from David Jaroslawicz, another attorney for "Beth Hachsidim" (as spelled in the correspondence), to the Office of the New York Attorney General's Charities Bureau, claiming that the congregation did not authorize the contract at issue. Siminou Aff. Ex. E, NYSCEF Doc. 50. Although plaintiff may rely on this inadmissible evidence since Siminou presents it, e.g., Cortez v. Bray, 192 A.D.3d 451, 451 (1st Dep't 2021); Macdelinne F. v. Jimenez, 126 A.D.3d 549, 550 (1st Dep't 2015);

Pantojas v. Lajara Auto Corp., 117 A.D.3d 577, 577-78 (1st Dep't 2014); Mitchell v. Calle, 90 A.D.3d 584, 585 (1st Dep't 2011), neither it nor unauthenticated correspondence from Stern to Jaroslawicz, admitting Stern lacked authority to execute the contract, Siminou Aff. Ex. G, NYSCEF Doc. 52, raises a factual issue that competing claims to the deposit were absent or that Siminou held it in bad faith until those claims were resolved. This correspondence did not constitute an instruction to Siminou that the contract was unauthorized, let alone an instruction to return the deposit. At least two undisputed facts actually dictated to the contrary: first, plaintiff's claim "that the contract of sale was a valid and binding agreement," Siminou Aff. Ex. A, NYSCEF Doc. 46, ¶ 3, and, second, Jaroslawicz's correspondence to Simonou dated February 28, 2018, proposing not to return the deposit to plaintiff, but to hold it in Jaroslawicz's IOLA or other escrow account. Id. Ex. F, NYSCEF Doc. 51. Plaintiff's grievance regarding the delay in Siminou's receipt of permission to return the deposit is against Beth Chasidim and Stern.

The evidence supporting Simonou's motion for summary judgment thus establishes his defense so as to warrant judgment in his favor dismissing plaintiff's fourth claim as a matter of law. C.P.L.R. § 3212[b]. Therefore the court grants summary judgment to Siminou dismissing the fourth claim seeking interest

on the deposit. Id.

Siminou also moves for summary judgment dismissing the third claim, seeking plaintiff's attorneys' fees because Siminou's defense of this action was frivolous. The analysis above demonstrates that his defense was not frivolous, as Siminou returned the deposited funds as soon as entitlement to those funds was resolved. Therefore the court also grants summary judgment to Siminou dismissing the third claim. Id.

The court denies plaintiff's cross-motion for summary judgment on the third and fourth claims for the reasons explained in granting Siminou's motion. On the other hand, regarding Siminou's request for attorneys' fees in response to plaintiff's cross-motion, the cross-motion was not so "completely without merit in law" as to warrant sanctions. 22 N.Y.C.R.R. 130-1.1(c)(3). See Bradley v. Bradley, 167 A.D.3d 489, 489-90 (1st Dep't 2019); Korangy v. Malone, 161 A.D.3d 645, 646 (1st Dep't 2018); Curtis v. Tabak Is Tribeca, LLC, 144 A.D.3d 509, 509-10 (1st Dep't 2016); Gordon Group Invs., LLC v. Kugler, 127 A.D.3d 592, 594-95 (1st Dep't 2015). While defendant contends that plaintiff made false factual statements, those statements, regarding repudiation of the contract, or mischaracterizing Siminou's answer or other documents in the record that speak for themselves, were immaterial to a determination of the motion and

cross-motion. 22 N.Y.C.R.R. 130-1.1(c)(3). Therefore the court denies Siminou's request for attorneys' fees.

IV. CONCLUSION

In sum, for the reasons explained above, the court grants defendant Siminou's motion for summary judgment dismissing the third and fourth claims against Siminou and denies his motion dismissing the first and second claims, since plaintiff has discontinued these claims against Siminou, rendering this part of the motion moot. C.P.L.R. § 3212(b) and (e). The court denies plaintiff's cross-motion for summary judgment and denies Siminou's further request for attorneys' fees. C.P.L.R. § 3212(b); 22 N.Y.C.R.R. 130-1.1(c). This decision resolves all remaining claims in this action.

DATED: December 30, 2021

Lucy Billings

LUCY BILLINGS, J.S.C.

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J.S.C.