

Sansum v Fioratti

2006 NY Slip Op 30394(U)

November 22, 2006

Supreme Court, New York County

Docket Number:

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**

PART 12

0604989/2001

SANSUM, JAMES MONTROSE
VS
FIORATTI, HELEN CONSTANTINO

INDEX NO. 604989/01

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

SEQ 5

AMEND

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*and cross-motion are decided
in accordance with the
accompanying memorandum decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11/22/06

BARBARA R. KAPNICK
J.S.C.
J.B.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
JAMES MONTROSE SANSUM,

Plaintiff,

-against-

HELEN COSTANTINO FIORATTI and
ARIANNA FIORATTI LORETO,

Defendants.

- and -

L'ANTIQUAIRE and THE CONNOISSEUR, INC.,

Nominal and Additional
Counterclaim-Defendants.

-----X
BARBARA R. KAPNICK, J.:

In this action, plaintiff James Montrose Sansum seeks damages against defendant Helen Costantino Fioratti for breach of fiduciary duty (first cause of action) and the dissolution of L'Antiquaire and the Connoisseur, Inc. ("L'Antiquaire", the "Company" or the "Corporation") (second cause of action).

The original Complaint demands judgment as follows:

- (1) on the first cause of action, an order compelling Fioratti to account to plaintiff for all monies she holds derived from her wrongful diversions of Company assets and revenues and all items of the Company's inventory Fioratti has removed to her houses;
- (ii) imposing a constructive trust on such monies and items; and
- (iii) awarding plaintiff judgment in the amount of any portion of such monies and items found to be due to plaintiff by reason of his shareholding in the Company; and

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(2) on the second cause of action, a final order dissolving the Company and appointing a receiver of its property and effects.

The defendants have asserted counterclaims against the plaintiff, inter alia, for an accounting, to impose a constructive trust on certain assets and property in the plaintiff's possession, custody or control, and for damages arising out of fraud and breach of contract.

Plaintiff now moves for an order: (i) granting it leave to serve a Verified Amended Complaint, and (ii) disqualifying the firm of Morelli & Gold, L.L.P. from continued representation of the defendants herein.¹

Defendants oppose the motion and cross-move for an order awarding sanctions against plaintiff and his counsel, Thomas D. Shanahan and Shanahan & Associates, for making a frivolous motion and directing the plaintiff and his counsel to reimburse the defendants for the costs and expenses, including attorneys' fees, incurred by the defendants in connection with this matter.

¹ This motion was brought soon after plaintiff retained his third attorney in the course of this protracted litigation.

Plaintiff's proposed Amended Complaint seeks to cure certain defects in the original Complaint, which failed to name or serve L'Antiquaire as a defendant, even though it sought its dissolution.² The proposed Amended Complaint also pleads plaintiff's claims for breach of fiduciary duty and an accounting which were alleged in the original complaint as a single cause of action, as separate causes of action.

In addition, the proposed Amended Complaint seeks to assert additional causes of action against the defendants and to name Morelli & Gold, L.L.P. as an additional party defendant based upon the firm's purported multiple representation of the plaintiff and the defendants in the execution of L'Antiquaire's Stockholders' Agreements ("the Agreements").³

Specifically, plaintiff's proposed Amended Complaint contains claims against defendants L'Antiquaire, Fioratti and Loreto for breach of contract (first cause of action), breach of fiduciary duty (second cause of action), an accounting (third cause of action),

² L'Antiquaire has already appeared herein as a "nominal and additional counterclaim defendant".

³ Plaintiff contends that he believed that Carl Morelli, a partner of the firm, "was acting not only on behalf of the corporation, but also on behalf of Helen and Arianna Fioratti, and therefore on my behalf as a corporate stockholder and officer."

* 5]
breach of duty of good faith and fair dealing (fourth cause of action), unjust enrichment (fifth cause of action) and for a declaratory judgment that the items of artwork, books and other possessions currently in his possession but which defendants claim are owned by L'Antiquaire are the sole legal property of plaintiff. (sixth cause of action).

The proposed Amended Complaint also seeks to assert claims against all the defendants, as well as the law firm, for fraud and intentional misrepresentation (seventh cause of action) and a declaratory judgment declaring certain provisions of the Agreements to be invalid, unconscionable and unenforceable as a matter of law on the grounds that: (i) Morelli & Gold, L.L.P. intentionally and wrongfully induced plaintiff to waive his right to counsel; (ii) plaintiff did not understand the substantive contents of the Agreements; (iii) plaintiff was not provided with competent and unbiased legal advice by Morelli & Gold, L.L.P. prior to executing the Agreements; and (iv) the conduct of the firm and the collective defendants was part of an intentional pattern and scheme intended to minimize the value of plaintiff's minority interest in the Corporation and unduly and oppressively limit his transfer of that interest and professional growth (eighth cause of action).

Finally, the proposed Amended Complaint seeks to assert a claim against defendants L'Antiquaire, Fioratti and Loreto for a

declaratory judgment declaring that an inventory of specific items (annexed as Exhibit "C" to the Amended Complaint) are the property and assets of L'Antiquaire (and not the personal property of defendants Fioratti and Loreto) for purposes of valuation, an accounting and determining the financial worth of plaintiff's minority interest in the Corporation (ninth cause of action) and an order dissolving the Corporation and appointing a receiver of its property and effects (tenth cause of action).

"Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) 'as a matter of discretion in the absence of prejudice or surprise' (citations omitted), although to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated (citation omitted)." Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d 352, 354-355 (1st Dep't 2005).

Leave to amend a complaint, including leave to name an additional party defendant, "should be denied where the claim is palpably insufficient". Manhattan Real Estate Equities Group LLC v. Pine Equity NY, Inc., 27 A.D.3d 323 (1st Dep't 2006).

The second, third, fourth, sixth, ninth and tenth causes of action of the proposed Amended Complaint at least set forth viable causes of action. Accordingly, plaintiff is granted leave to assert these proposed causes of action.

Defendants, however, argue that plaintiff should not be granted leave to interpose the first cause of action which alleges that defendants breached the Agreements by refusing to compensate plaintiff for his six-percent ownership interest in the Company because the Agreements do not require them to buy out his interest in the Company when, as occurred here, the plaintiff voluntarily terminated his employment.

Plaintiff has not refuted this argument and/or submitted any evidentiary proof in support of this claim. Therefore, that portion of the motion seeking to interpose the proposed first cause of action is denied.

Defendants next argue that plaintiff should not be granted leave to interpose the proposed fifth cause of action for unjust enrichment which alleges that plaintiff has incurred substantial liability for back tax obligations, including interest and penalties, as a result of defendants' alleged conduct, on the ground that plaintiff has not set forth any factual or legal basis for this claim.

The proposed Amended Complaint, however, does allege that defendants "specifically minimized estate tax and other tax

consequences to evade payment to State and local governments rendering the minority interest of Sansum void of minority value.⁴

Thus, this Court finds that the fifth cause of action is not patently insufficient on its face and plaintiff may assert that claim herein.

Defendants strenuously oppose those portions of the motion seeking to assert claims against the law firm on the grounds that said claims, which arise out of the execution of the Agreements not later than June 1998, are barred by the applicable three-year Statute of Limitations (see, CPLR § 214[6]), and do not 'relate back' to the claims asserted against defendants in the original Complaint, which makes no reference to the Agreements.

Defendants further argue that plaintiff had no basis to believe that Mr. Morelli or his firm was personally representing him since there was never any retainer agreement between plaintiff and the firm, or even any communications between them, and further since

⁴ In fact, it appears that during the pendency of this action, defendants Fioratti and L'Antiquaire pleaded guilty to both felony and misdemeanor charges of tax evasion and preparing and filing false instruments, including tax returns, with the State of New York.

In addition, plaintiff himself pleaded guilty to not properly reporting income on his tax returns, falsifying business records and petty larceny for two pieces of artwork which plaintiff contends are not at issue in this lawsuit.

Section 8 of each of the Agreements specifically provides as follows:

SECTION 8
Attorney's Representation

The parties all acknowledge that L'ANTIQUAIRE's counsel, MORELLI & GOLD, LLP, prepared this Agreement on behalf of and in the course of his representation of L'ANTIQUAIRE, and that:

- (1) THE PARTIES HAVE BEEN ADVISED BY MORELLI & GOLD, LLP THAT A CONFLICT EXISTS AMONG THEIR INDIVIDUAL INTERESTS; AND
- (2) THE PARTIES HAVE BEEN ADVISED BY MORELLI & GOLD, LLP TO SEEK THE ADVICE OF INDEPENDENT COUNSEL; AND
- (3) THE PARTIES HAVE HAD THE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT COUNSEL; AND
- (4) THE PARTIES HAVE RECEIVED NO REPRESENTATIONS FROM MORELLI & GOLD, LLP ABOUT THE TAX CONSEQUENCES OF THIS AGREEMENT; AND
- (5) THE PARTIES HAVE BEEN ADVISED BY MORELLI & GOLD, LLP THAT THIS AGREEMENT MAY HAVE TAX CONSEQUENCES; AND
- (6) THE PARTIES HAVE BEEN ADVISED BY MORELLI & GOLD, LLP TO SEEK THE ADVICE OF INDEPENDENT TAX COUNSEL; AND
- (7) THE PARTIES HAVE HAD THE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT TAX COUNSEL.

Plaintiff now claims that he did not read the Agreements prior to signing them, and that he did not fully understand the Agreements when he ultimately read them.

However, it is well settled that "[a] party who executes a contract is presumed to know its contents and to assent to them (citation omitted)." Holcomb v. TWR Express, Inc., 11 A.D.3d 513, 514 (2nd Dep't 2004).

Moreover, in the instant case, there can be no dispute that plaintiff, a Harvard graduate, with a Masters degree in art history

from the Cooper-Hewitt Museum/Parsons School of Design, was literate in the English language and understood these terms.

Thus, plaintiff must certainly be bound by the Agreements, including the above-quoted provision which was typed in capital letters, notwithstanding his claim that he did not read the Agreements and was unaware of their terms. See, Gillman v. Chase Manhattan Bank, N.A., 73 N.Y.2d 1 (1988).

Therefore, plaintiff's proposed seventh and eighth causes of action against the defendants and Morelli & Gold, L.L.P. clearly lack merit and may not be asserted herein.

Finally, plaintiff moves to disqualify Morelli & Gold, L.L.P. from representing the defendants in this action.

It is well settled that a party's entitlement to be represented in ongoing litigation by counsel of its choosing "is a valued right and any restrictions must be carefully scrutinized". S & S Hotel Ventures Limited Partnership v. 777 S.H. Corp., 69 N.Y.2d 437, 443 (1987).

The Court of Appeals has observed that

[d]isqualification may be required only when it is likely that the testimony to be given by the witness is necessary (citation omitted). Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the

significance of the matters, weight of the testimony, and availability of other evidence (citations omitted).

S & S Hotel Ventures Limited Partnership v. 777 S.H. Corp., supra at 446. See also, Talvy v. American Red Cross in Greater New York, 205 A.D.2d 143, 152 (1st Dep't 1994); aff'd 87 N.Y.2d 826 (1995).

Plaintiff contends that Morelli & Gold, L.L.P. must be disqualified in this case because the firm was involved in the drafting of the Agreements and has an interest in seeing that they are upheld. Plaintiff further asserts that he intends to call Mr. Morelli as a witness for numerous purposes, including how the Shareholder Agreements came to be drafted with the provisions they include which plaintiff claims are unfavorable to him, and to subpoena communications between Mr. Morelli and the defendants pertaining to the Agreements and previous tax advice provided to the defendants.

However, Mr. Morelli's partner, Richard L. Gold, Esq., the attorney at the firm who is handling this litigation, denies that the firm provided any tax advice to defendants concerning L'Antiquaire's sales, income or other tax obligations.

In addition, plaintiff has not made a showing that any testimony to be offered by Mr. Morelli is "necessary" and/or would be prejudicial to defendants (see, Plotkin v. Interco Development

Corp., 137 A.D.2d 671 [2nd Dep't 1988]), or that any knowledge he possesses cannot be revealed through other evidence.

Accordingly, that portion of the motion seeking an order of disqualification is denied.

Defendants' cross-motion for sanctions is also denied in the discretion of this Court. However, the law firm of Morelli & Gold, L.L.P. is awarded \$500.00 for costs it incurred in opposing that portion of the motion seeking to name it as a defendant to this action, which shall be paid one half by plaintiff and one half by plaintiff's counsel within 20 days of entry of this order.

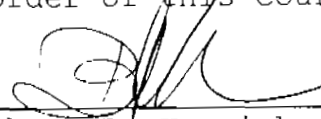
Plaintiff may serve and file an Amended Complaint in accordance with this Decision/Order within 30 days of entry of this order.

Defendants shall serve an Answer to the Amended Complaint within 20 days of said service.

A status conference shall be held in IA Part 12, 60 Centre Street, Room 341 on February 7, 2007 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: November 22, 2006



Barbara R. Kapnick
J.S.C.

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BARBARA R. KAPNICK
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