

Mikhailov v Katan

2012 NY Slip Op 33588(U)

April 9, 2012

Sup Ct, Westchester County

Docket Number: 17393/10

Judge: Francesca E. Connolly

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

FILED AND ENTERED ON 4-10 2012 WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF WESTCHESTER - COMPLIANCE PART

MICHAEL MIKHAILOV,

Plaintiff,

DECISION & ORDER

-against-

Index No. 17393/10 Motion Date: April 9, 2012 Seq # 3 & 6

ITZHAK KATAN, RICHARD MARANS and MARANS, WEISZ & NEWMAN LLC,

Defendants.

FILED APR 10 2012 TIMOTHY C. IDONI COUNTY CLERK COUNTY OF WESTCHESTER

CONNOLLY, J.

The following papers numbered 1 to 24 were read on these motions by the plaintiff for an order vacating the note of issue to allow for completion of discovery, striking defendant Itzhak Katan's ("Katan") answer, precluding defendant Katan from presenting or offering any evidence at trial relating to the discovery demanded in this action, compelling defendant Katan to produce the documents demanded, or granting sanctions against defendant Katan; and (2) defendant Katan's cross motion for a protective order striking and vacating certain document requests included within plaintiff's third demand for discovery and inspection.

Order to Show Cause - Affirmations - Exhibits	1-12
Notice of Cross Motion	13
Affirmations in Opposition-Exhibits	14-23, 25
Memorandum of Law	24

Upon the foregoing papers and the proceedings held on April 9, 2012, these motions are determined as follows:

In this action, plaintiff alleges that pursuant to a December 19, 2008 contract, he paid defendant Katan one million dollars in exchange for a partial membership interest in a New York limited liability company known as Gowanus Village IV LLC ("Gowanus"). Plaintiff further alleges that unbeknownst to him at the time he entered into such contract, defendant Katan had already pledged the very same membership interests that he was allegedly selling to plaintiff, to an entity known as AI Holdings (USA) Corp ("AI Holdings") pursuant to a May 15, 2008 promissory note. In addition, plaintiff alleges that defendant Katan was represented by defendants Richard Marans and Marans, Weisz & Newman LLC, at the time he executed the

May 15, 2008 promissory note. Thus, plaintiff alleges among other things, breach of contract; breach of the covenant of good faith and fair dealing, and fraudulent inducement.

Following the exchange of paper discovery, on or about November 18, 2011, defendant Katan was deposed in this action. Following defendant Katan's deposition, on or about December 8, 2011, plaintiff served defendant Katan with a third demand for discovery and inspection.

On or about January 18, 2012, a compliance conference was held and a trial readiness order was issued. The trial readiness order was filed and entered on or about January 19, 2012 and stated that all disclosure previously ordered had been completed or waived, and the matter was ready for trial.

On or about January 19, 2012, plaintiff filed a note of issue and certificate of readiness for trial. On the certificate of readiness, plaintiff added that subject to the "agreed katan production of ebt documents" there were no outstanding requests for discovery.

On or about February 3, 2012, defendant Katan served a response and objections to plaintiff's third demand for discovery and inspection. In addition, defendant Katan produced what defendant Katan purports to be hundreds of documents responsive to plaintiff's third demand.

Plaintiff now moves to vacate the note of issue, as well as strike defendant Katan's answer, compel and preclude defendant from testifying based on defendant Katan's inadequate responses to plaintiff's third demand for discovery and inspection. In support of plaintiff's motion, he argues that all objections made to the production of documents were waived at defendant Katan's deposition since at the deposition, counsel for Katan did not refuse to produce the requested documents. In addition, plaintiff avers that defendant Katan waived all objections by failing to timely respond to plaintiff's third demand for discovery and inspection, by responding on February 3, 2011 to demands served on December 8, 2011. Plaintiff also states that defendant Katan's belated objections and responses are driven by an attempt to hinder plaintiff's prosecution of this action, and that defendant Katan's abusive discovery tactics warrant the imposition of sanctions.

In opposition to plaintiff's motion and in support of his motion for a protective order, defendant Katan argues that his February 3, 2012 response and objections to plaintiff's third demand for discovery and inspection were appropriate. Defendant Katan avers that he served numerous documents responsive to certain requests. With respect to other requests, defendant Katan asserts that corporate counsel for Katan produced documents. Furthermore, defendant Katan states that on or about February 16, 2012, he supplemented his responses to plaintiff's third demand for discovery and inspection, and that with respect to requests for banking records and other financial information, defendant Katan is willing to produce such documents subject to a confidentiality order.

In opposition to defendant Katan's motion for a protective order and in further support of his motion to compel, plaintiff argues that defendant Katan has belatedly objected to the inspection demands, despite repeated assurances that the documents would be produced. Plaintiff further asserts that he is prejudiced by defendant Katan's belated objection to producing financial information because he could have moved to compel these documents before filing the note of issue.

Once the note of issue has been filed and discovery presumably completed, the applicable standards for allowing additional discovery and vacating the note of issue are governed by Uniform Rules for Trial Courts [22 NYCRR] § 202.21(d)(e). Pursuant to § 202.21(d), "[w]here unusual or unanticipated circumstances develop subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court ... may grant permission to conduct such necessary proceedings." Section 202.21 (e) provides that if more than 20 days has elapsed since the filing of the note of issue, good cause must be shown to warrant an order vacating the note of issue.

In the present action, even though plaintiff added language to the certificate of readiness to indicate that he was still awaiting documents in connection with defendant Katan's deposition, the additional discovery was not so ordered by the court, and the plaintiff filed the note of issue denoting the completion of discovery. Accordingly, plaintiff has failed to demonstrate good cause to warrant vacating the note of issue. In any event, it appears that defendant Katan has substantially complied with plaintiff's third demand for discovery and inspection. Nevertheless, since defendant Katan has refused to produce certain documents in response to plaintiff's third demand for discovery and inspection, defendant Katan shall be precluded from introducing any documents, or testimony related to such documents, which have not already been produced as of the date of this decision and order.

Accordingly, it is

ORDERED that the branch of plaintiff's motion to vacate the note of issue is denied; and it is further

ORDERED that the branch of plaintiff's motion to strike the answer of defendant Katan is denied; and it is further

ORDERED that the branch of plaintiff's motion to compel defendant Katan to produce documents in respond to plaintiff's third demand for discovery and inspection is denied; and it is further

ORDERED that the branch of plaintiff's motion to preclude defendant Katan from introducing documents requested but not yet produced is granted to the extent that defendant shall be precluded from introducing any documents, or testimony related to such documents, which have not already been produced as of the date of this decision and order; and it is further

ORDERED that the branch of plaintiff's motion for sanctions is denied; and it is further

ORDERED that defendant Katan's cross motion for a protective order is denied as moot.

Dated: White Plains, New York
April 9, 2012


HON. FRANCESCA E. CONNOLLY, J.S.C.

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cc: Compliance Part Clerk