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Index Number : 115576/2008
ABYSSINIAN DEVELOPMENT et al.
vs.
BISTRICER, DAVID, et al.
SEQUENCE NUMBER : 007
AMEND SUPPLEMENT PLEADINGS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

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ABYSSINIAN DEVELOPMENT CORPORATION and WINDELS MARX LANE & MITTENDORF, LLP,

Plaintiffs,

-against-

DAVID BISTRICER and CLIPPER EQUITY HOLDINGS, LLC,

Defendants.

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Index No. 115576/08

OPINION

RICHARD F. BRAUN, J.:

This is an action for breach of contract, an account stated, and quantum meruit against the corporate defendant Clipper Equity Holdings, LLC (Clipper), and for breach of contract against the individual defendant David Bistricer (Bistricer). By a June 3, 2011 decision and order, this court dismissed defendants' counterclaim, and awarded summary judgment in favor of defendant Bistricer to the extent of dismissing the account stated and quantum meruit causes of action as against him.

Defendants move for leave to amend their answer to add affirmative defenses of unclean hands and illegality, based on alleged illegal lobbying activity, and for a judgment in favor of defendants, pursuant to CPLR 4401, following the close of plaintiffs' case during a continuing non-jury trial, which has had so far twelve days of trial. The court previously denied defendants' oral request during trial for a directed verdict, in part because there is no verdict or directed verdict in a non-jury trial. Defendants are now moving by formal motion.

In 2007, defendant Clipper entered into a contract to purchase Spring Creek Development f/k/a Starrett City (Starrett City). Plaintiff Windels Marx Lane & Mittendorf, LLP (WMLM) was retained as counsel to plaintiff Abyssinian Development Corporation (ADC) in relation to a joint venture to purchase and redevelop Starrett City. Plaintiffs claim that they provided consulting and legal services to defendants, for which plaintiffs now seek payment.

While, pursuant to CPLR 3025, leave to amend a pleading should be liberally afforded (*Edenwald Contr. Co. v City of New York,* 60 NY2d 957, 959 [1983]), such permission should be denied where the proposed amendment lacks merit (*BGC Partners, Inc. v Refco Sec., LLC*, 96 AD3d 601, 603 [1st Dept 2012]). Defendants contend that plaintiffs' case at trial has revealed that the services provided by WMLM can be characterized as illegal lobbying activities on behalf of defendant Clipper.

An equitable maxim is that he or she "who comes into equity must come with clean hands". (*National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12, 15 [1966].) This doctrine may be used as an affirmative defense in relation to a plaintiff who is allegedly "guilty of immoral, unconscionable conduct" (*id.*) The plaintiff's conduct must be "directly related to the subject matter in litigation", and the defendant seeking to invoke the doctrine had to have been injured by the plaintiff's conduct. (*id.* at 15-16.) Although defendants seek to add an elaborated upon unclean hands affirmative defense, unclean hands is already part of defendants' answer as the sixth affirmative defense. Defendants do not allege sufficient facts to establish the need to add a second more specific additional affirmative defense of unclean hands.

Lobbying activities are defined in this State's Legislative Law § 1-c and in 2 USC § 1602.

In particular, 2 USC § 1602 (9) provides that a lobbying firm is "a person or entity that has 1 or more employees who are lobbyists on behalf of a client other than that person or entity." 2 USC § 1602 (10) provides that a lobbyist is "any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period."

Defendants do not allege sufficient facts to establish a prima facie defense of illegal lobbying. The facts alleged by defendants in relation to plaintiff WMLM's activities are incongruous with the legal theory advanced by defendants (*see East Asiatic Co. v Corash,* 34 AD2d 432, 436 [1st Dept 1970]). Plaintiffs have provided an analysis of the work that WMLM performed and demonstrated that it does not fall within the definition of lobbying activity. With respect to Legislative Law § 1-c, plaintiffs demonstrate that there was no lobbying because there were no meetings with public state or local officials to pass, defeat or modify legislation; or affect rule-making, rate-making, or procurement activity (*see* Legislative Law § 1-c [c]). With respect to 2 USC § 1602, plaintiffs demonstrate that plaintiff WMLM's contacts and activities did not fall into the 20% within three months requirement (2 USC § 1602 [10]).

The Court in *Szczerbiak v Pilat* (90 NY2d 553, 556 [1997]) stated:

> A trial court's grant of a CPLR 4401 motion for judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party (citation omitted). In considering the motion for judgment as a matter of law, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant (citation omitted).

(cf. *Sweeney v Bruckner Plaza Assoc.*, 57 AD3d 347, 349 [1st Dept 2008] [same on a motion for a directed verdict].) As noted, this court previously denied defendants' oral request for similar relief. Defendants still have not demonstrated that they should be granted a judgment on their motion.

Therefore, the instant motion was denied by this court's separate September 21, 2012 decision and order. Pursuant to CPLR 8106 and 8202, plaintiffs were awarded a total of $100 motion costs against defendants, to abide the event.

Dated: New York, New York
September 26, 2012

RICHARD F. BRAUN, J.S.C.