SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Index Number : 157054/2012
ROBBINS, RONALD S.
vs
DIVERSIFIED PRIVATE EQUITY
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 12.11.2012
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion sequence 001 is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the application of Plaintiff Ronald S. Robbins for an Order pursuant to CPLR 3212, granting summary judgment in favor of plaintiff as against defendant Diversified Private Equity Corporation, Inc., is granted. And it is further

ORDERED that the Clerk of the Court may enter judgment accordingly. And it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with notice of entry within twenty (20) days of entry on counsel for defendant.

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

Dated: 12.13.2012

J.S.C.
HON. CAROL EDMEAD

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

RONALD S. ROBBINS,

Plaintiff,

-against-

DIVERSIFIED PRIVATE EQUITY CORPORATION, INC.,

Defendant.

Index No. 157054/2012

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff Ronald S. Robbins (plaintiff) moves for an Order pursuant to CPLR 3212, granting summary judgment in favor of plaintiff as against defendant Diversified Private Equity Corporation, Inc. (DPEC or Defendant).

Plaintiff's Contentions

On or about April 6, 2011, DPEC terminated Mr. Robbins's employment, and on July 8, 2011, DPEC and Mr. Robbins entered into the Severance Agreement attached to the Verified Complaint as Exhibit A. Under the express terms of the Severance Agreement, DPEC agreed to purchase, or arrange for the purchase of, all of Mr. Robbins's non-managing membership units of The WOW Group, LLC, for $200,000, payable in four equal annual installments beginning on March 31, 2012.

Just two months later, in September 2011, the parties agreed to accelerate the payments required under the Severance Agreement. They entered into the letter agreement dated September 12, 2011 attached as Exhibit B to the Verified Complaint amending the terms of the Severance

Agreement. At that time, DPEC arranged for the purchase of a portion of Mr. Robbins's WOW membership units, for which Mr. Robbins received a payment of $95,000 on or about September 20, 2011. In exchange for that accelerated payment, Mr. Robbins agreed to reduce the remaining balance owing under the Severance Agreement to $60,000, which payment, the parties agreed, was due on or before June 30, 2012. The June 30 deadline for the admittedly due payment came and went without payment from DPEC.

By letter dated August 23, 2012, Mr. Robbins notified DPEC of its breach and demanded prompt payment of the full amount due under the amended Severance Agreement. Hearing no response at all from DPEC. Following an agreed-upon stipulation allowing DPEC additional time to respond, DPEC filed its Answer on November 13, 2011.

Plaintiff alleged, and Defendant admits, the existence, validity, and binding nature of the Severance Agreement and its subsequent amendment. (Verified Complaint at ¶ 18; Verified Answer at 18).

Plaintiff alleged, and Defendant does not deny, that Plaintiff has performed, and continues to perform, his obligations under the contract. Defendant's denial of "knowledge or information sufficient to form a belief as to the truth of th[ose] allegations" (Verified Answer at ¶ 19) lacks any credibility, as Defendant is the only other party under the amended Severance Agreement and the only party to whom Plaintiff owed any performance; if Plaintiff failed to perform his obligations to Defendant, Defendant surely would know.

Plaintiff alleged, and Defendant admits, that Defendant did not pay Plaintiff the $60,000 admittedly due under the contract by June 30, 2012.

Although Defendant purports to deny Plaintiff has been damaged by nonpayment of that

$60,000 (Verified Answer at 21), Defendant's own admissions that that amount was, in fact, "due" and was not paid (Verified Answer at 15) totally belie its denial, and plainly establish Plaintiff's damages.

Defendant alleges no facts to contradict the allegations in the Verified Complaint and raises no affirmative defenses, other than the obligatory, perfunctory, unsupported, and unsupportable defense that Complaint fails to state a claim upon which relief can be granted. This bare assertion of a defense is not sufficient to withstand a motion for summary judgment, especially in light of Defendant's own admissions and the clear evidence supporting Plaintiff's claim.

Defendant's Opposition

Plaintiff's motion is extremely premature; it was filed two days after defendant filed its Answer. It fails to consider that the defendant might want or need to take discovery, or that discovery was recently initiated and has not been completed. Further it fails to consider and in fact unjustifiably assumes away certain issues regarding full and complete performance by plaintiff under the contract in question, thus leaving unaddressed the possible existence of one or more disputed issues of material fact.

Plaintiff is correct in asserting that there is no dispute as to some factual issues. However, in the effort to hyper-fast track this case and preclude the chance for defendant to engage in legitimate discovery, plaintiff tries to brush under the carpet the fact that not all of the material facts relevant to the breach of contract claim are undisputed. For example, on page 4 of Plaintiff's Motion for Summary Judgment, plaintiff simply rejects the response in defendant's Answer to the allegation that plaintiff has performed all of his obligations under the contract. The fact is

defendant does not presently know if plaintiff has performed all of his obligations (some of which are described below), which is precisely why it seeks to take discovery to ascertain whether or not that is the case.

The contract that plaintiff attached to the Complaint speaks to, among other things, a number of plaintiff's obligations. For example, para. 8 states as follows: "You [Robbins] agree that you will not publicly disparage the Company, its current and former officers, directors and employees, or make or cause to be made any comments, statements, or the like to the media or other similar entities that may be considered to be derogatory or detrimental to the good name or business reputation of any of the aforementioned persons or entities." Further, paragraph 9 states: "You [Robbins] represent and warrant that you have turned over to the Company any and all files (including, without limitation, electronic files and documents or copies thereof), documents, books, records, notes, manuals, computer disks, diskettes and other property you have in your possession or under your control belonging to the Company or Releasees or containing confidential or proprietary information concerning the Company or Releasees or their customers or operations." And paragraph 10 provides in pertinent part: "You [Robbins] agree that this Agreement and its terms shall be kept confidential." It is not clear whether plaintiff has complied with these and other obligations, and if he has failed to meet these obligations, the question of whether or not he can prevail in this case becomes very much in doubt. For these reasons, some discovery in the case is necessary.

Similarly, in its haste to move for summary judgment, plaintiff pooh-poohs the "denies having knowledge or information" response to the allegation that plaintiff has been damaged by the alleged non-payment. In so doing, plaintiff ignores the critical fact that the contract in

question did not merely require defendant to make a payment to the plaintiff, it called for a payment to be made in conjunction with the sale by plaintiff to defendant or its designees of the balance of the 20,000 non-managing membership units of The WOW Group, LLC that he continues to own (that is, 7,742 units). Accordingly, discovery is needed to determine whether or not plaintiff is legally in a position to deliver those securities and complete that sale (facts which have not been alleged, let alone verified). For example, if plaintiff has pledged those securities, or assigned an interest in all or any part of them, or otherwise impaired his ability to deliver the securities, he may be unable to consummate a transaction that would require defendant to make an additional payment to him under the agreement he sues under. Further, discovery is also needed to determine whether plaintiff has made any efforts to sell those securities to any party other than the defendant, and if so, whether plaintiff wrongly relinquished an opportunity to mitigate or eliminate the purported damages.

Plaintiff also improperly seems to think that there is some kind of burden on the defendant to assert in its Answer its theory of the case and allege why it is not liable for breach of contract. In fact, all that is required in such a responsive pleading is a response to the plaintiff's allegations. CPLR 3018. Only through discovery can defendant ascertain whether or not the facts establish or fail to establish that plaintiff is entitled to prevail on a breach of contract claim. The effort to deprive defendant from having that opportunity, i.e., of having a reasonable opportunity to take discovery to defend its position, plainly is unsustainable.

Just three weeks after filing its Answer, defendant served a notice to take the deposition

of the plaintiff. That deposition is presently scheduled for December 27, 2012, and whether it will trigger the need to take other depositions or seek other discovery remains to be seen.

Plaintiff's rush to judgment (1) was launched before a Note of Issue was filed and the associated fee paid in accordance with CPLR § 8020, (2) was not supported by an affidavit, as required by CPLR 3212, and (3) did not include within the motion papers the pleadings as required by CPLR 3212. Such steps, all of which are typically completed at or about the time discovery has been completed, were not taken, emphasizing just how premature the motion pending before the Court actually is.

Plaintiff's Reply

Prior to its opposition papers, defendant had not interposed a single contract-based reason for withholding payment under the amended Severance Agreement. It did not raise any such issues in its correspondence with plaintiff about the payment due or nonpayment thereof. It did not raise any such issues after plaintiff made formal demand for payment. It did not raise any specific factual issues or defenses in its Answer. The fact that Defendant waited until the very day it served its opposition papers to commence discovery—discovery it now tries to claim (in all caps) "HAS COMMENCED AND IS ONGOING" (Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at p. 4)—only serves to emphasize its real purpose in opposing summary judgment. It does not legitimately seek discovery; it seeks only further delay.

Summary judgment is appropriate in the absence of a *genuine* issue of fact requiring a trial. In the face of a clear and unambiguous contractual obligation Defendant does not dispute,

surely this obligates Defendant to do more than simply point to other contractual provisions and state, without even a hint of support, that those contractual provisions—in and of themselves—raise issues of fact. If this were the law, contract parties could delay payment by creating trumped up contractual "violations" without even the flimsiest of support. But, here, Defendant does not propound even flimsy support. Nowhere in its papers does Defendant suggest that Plaintiff did *anything* that *might* implicate those provisions. Defendant's naked assertion of factual issues arising out of thin air from a simple reading of the contract fails to raise a *genuine* issue of fact requiring a trial.

The nub of Defendant's argument is that it is inappropriate, apparently under any circumstances, for a party to move for summary judgment before the close of discovery. The CPLR, however, flatly contradicts that notion, and the only case Plaintiff cites allegedly in support of that notion does not actually support Defendant's position.

Defendant's view that Plaintiff is trying "to hyper-fast track this case" ignores the fact that the CPLR's summary judgment provision comes in the article of the CPLR specifically denoted "*Accelerated* Judgment."

Defendant's opposition papers themselves fail to raise any *genuine* issues of fact. Reciting three obligations of Plaintiff under the Severance Agreement, Defendant first claims only that it does not know whether Plaintiff has complied with the agreement. These three provisions obligate Plaintiff to refrain from publicly disparaging the company he worked for, turn over all company property, and keep the terms of the agreement confidential. Plaintiff acknowledges

those obligations. But one would expect Defendant, in the context of a motion for summary judgment, to do more than simply quote the terms of the agreement and claim lack of knowledge of these matters. Significantly, however, Defendant does not allege that Plaintiff violated the agreement; it does not allege even an expectation, a suggestion, a hint, or a whisper that Plaintiff might have violated the agreement. The only conclusion one may draw in the absence of even the faintest suggestion of Plaintiff's violation is that Defendant has absolutely no basis upon to claim as a factual matter that Plaintiff may have violated the agreement.

Defendant's next argues, essentially, that it needs discovery to assist in the closing of the most basic of corporate transactions. Noting that Plaintiff must deliver securities in exchange for the payment Defendant owes him, Defendant suggests that it needs discovery to determine whether Plaintiff has the ability to deliver those securities. That is an absurd proposition. A contract party's title to property and ability to deliver property at a closing is an issue in every corporate transaction. But parties to a corporate transaction do not conduct discovery; they may conduct due diligence, rely on contractual representations and warranties, or take the risk at face value, presumably in reliance on the notion that possession is nine-tenths of the law.

Finally, Defendant claims Plaintiff's Motion violates three rules of the CPLR. None of these allegations require any real response. The issuance of a Note of Issue is not a prerequisite for a motion for summary judgment; § 3212(a) itself makes that clear enough. Verified pleadings *do* constitute affidavits and obviously may be used as such in connection with a motion for summary judgment. CPLR § 105(a). And whatever effect Plaintiff's failure to attach the

pleadings to its Motion may have had has been rectified by its submission of the papers herewith.

DISCUSSION

Summary Judgment

As the proponent of the motion for summary judgment, plaintiff must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR §3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman* at 563; *Prudential Securities Inc. v Rovello*, 262 AD2d 172, 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his

or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562).

The defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" *(Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient *(Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]).

In this case, the court finds that plaintiff is entitled to summary judgment. Plaintiff has established the existence, validity, and binding nature of the Severance Agreement and its subsequent amendment. Plaintiff further established that Plaintiff has performed, and continues to perform, his obligations under the contract. Defendant's denial of "knowledge or information sufficient to form a belief as to the truth of th[ose] allegations" (Verified Answer at ¶ 19) lacks any credibility.

And, defendant fails to raise a genuine issue of material fact. As plaintiff points out, simply pointing to contractual provisions and stating, without even a hint of support, that those contractual provisions—in and of themselves— raise issues of fact is inadequate to raise a genuine issue of material fact. Nowhere in its papers does Defendant suggest that Plaintiff did *anything* that *might* implicate those provisions. Defendant's naked assertion of factual issues arising out of thin air from a simple reading of the contract fails to raise a *genuine* issue of fact requiring a trial.

Finally, CPLR § 105(u) provides that a verified pleading may be utilized as an affidavit whenever the latter is required.

Insufficient Discovery

A "claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment" *(Hariri v Amper*, 51 AD3d 146, 854 NYS2d 126 [1st Dept 2008]). " (*Heritage Hills Soc., Ltd. v Heritage Development Group, Inc.*, 56 AD3d 426, 427 [2d Dept 2008] (An argument opposing summary judgment on the grounds of insufficient discovery "is unavailing where the nonmoving party has failed to 'produce some evidence indicating that further discovery will yield material and relevant evidence'") *quoting Fleischman v Peacock Water Co., Inc.*, 51 AD3d 1203, 1205 [3d Dept 2008]); *Hayden v City of New York*, 809 NYS2d 75, 76 [1st Dept 2006] [". . . plaintiff failed to show that the representatives already deposed had insufficient knowledge or were otherwise inadequate, or that further discovery was warranted by reason of a substantial likelihood that

additional persons sought for deposition possessed information material and necessary to oppose the motion"]; *Prestige Decorating and Wallcovering, Inc. v U.S. Fire Ins. Co.*, 49 AD3d 406, 407 [1st Dept 2008] ["Based on the record, the discovery that has already taken place, and the lack of a showing of what further evidence might be unearthed, the asserted need for further discovery reduces itself to a 'mere hope,' which is insufficient to defeat summary judgment"]; *Steinberg v Abdul*, 230 AD2d 633, 633 [1st Dept 1996] ["We add that the mere hope, expressed by plaintiffs, that evidence sufficient to establish defendants' assumption of a duty to plaintiffs' decedent may be obtained during discovery does not fulfill their obligation to demonstrate the likelihood of such disclosure (CPLR 3212[f]) and, thus, is insufficient to defeat defendants' motions for summary judgment"]; *Frierson v Concourse Plaza Associates*, 189 AD2d 609, 610 [1st Dept 1993] ["Neither can [defendants] avoid summary judgment by claiming a need for discovery. The 'mere hope' of defendants that evidence sufficient to defeat such a motion may be uncovered during the discovery process is not enough . . . . Defendants were bound to show there was a likelihood of discovery leading to such evidence, *i.e.*, that facts "may" exist but cannot be stated at that time (CPLR 3212[f]). This they failed to do"]; *Pro Brokerage, Inc. v Home Ins. Co.*, 472 NYS2d 661, 662 [1st Dept 1984] ["The plaintiff's later assertion that further discovery was necessary, not only was set forth in mere conclusory terms, but no attempt was made to explain what further discovery was necessary and to what extent such further discovery would overcome the legal insufficiency of the complaint."]).

The mere hope that evidence sufficient to defeat a motion for summary judgment may be

uncovered during the discovery process is insufficient to deny such a motion *(Flores v City of New York*, 66 AD3d 599, 888 NYS2d 27 [1st Dept 2009]).

This court finds defendant's assertion that discovery is not only necessary but required in the instant case, lacks merit.

CONCLUSION

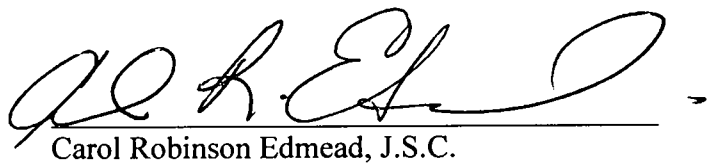
Based on the foregoing, it is hereby

ORDERED that the application of Plaintiff Ronald S. Robbins for an Order pursuant to CPLR 3212, granting summary judgment in favor of plaintiff as against defendant Diversified Private Equity Corporation, Inc., is granted. And it is further

ORDERED that the Clerk of the Court may enter judgment accordingly. And it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with notice of entry within twenty (20) days of entry on counsel for defendant.

Dated: December 13, 2012



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD