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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

ALSID ISLAMI,

Plaintiff,

-against-

STAGHORN STEAKHOUSE, LLC, and JOHN BERISHA

Defendants.

INDEX NO. 150633/14
MOTION DATE 03-15-2017
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 5
Replying Affidavits	6-7

Cross-Motion: X Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants John Berisha (herein "Berisha") and Staghorn Steakhouse, LLC's (herein "Staghorn") motion dismissing the Complaint and motion to strike the Complaint are denied. Berisha's motion for summary judgment is denied, and Plaintiff Alsid Islami's (herein "Islami") cross-motion is denied in its entirety.

Alsid Islami alleges that the Defendants are his former employers, and that they did not pay him minimum hourly wages, minimum tip wages, and overtime wages for hours worked over forty hours per week during the course of his employment. He commenced this action by summons and complaint dated January 22, 2014 against Staghorn, Mr. Berisha, and Robert Caravaggi, whom Mr. Islami alleges are the owners of Staghorn and his former employers. The allegations against Robert Caravaggi has since been discontinued.

Defendants now move to dismiss the Complaint as asserted against them under separate theories, or in the alternative, to strike Mr. Islami's Complaint for failure to respond to multiple discovery orders, and ask for sanctions against Mr. Islami. Mr. Berisha further moves for summary judgment dismissing the complaint as against him for failure to state a cause of action. Mr. Islami cross-moves for a protective order from Defendants' discovery demands and to compel discovery.

Defendants move to dismiss the Complaint claiming Mr. Islami has perpetrated a fraud upon the court and allegedly proffered false testimony. A fraud on the court is "misconduct so serious that it undermines...the integrity of [a judicial proceeding]" (Baba-Ali v State 799 NYS2d 101 [2005]). Fraud on a court is intolerable (In re Raquel

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

Marie X, 76NY2d 387 [1990]). For a party seeking to dismiss a claim based on a fraud upon the court, the moving party must show "that the offending party has acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case and his adversary's defense of the action" (CDR Creances S.A.S. v Cohen, 991 NYS2d 519 [2014]). Perjured testimony is grounds for striking a pleading and entering judgment against the offending party (Id.).

Defendants have failed to meet their burden to show Mr. Islami has perpetrated a fraud upon the court. Throughout this entire litigation, Mr. Islami has held himself out to be Alsid Islami. Mr. Islami has testified that he has never used another name, or was employed by Staghorn under a different name (Moving Papers Ex. K). The only proof Defendants offer to contradict Mr. Islami's testimony is a conversation Mr. Islami's counsel had with Defendants' counsel where Defendants alleged she "called [their] office and advised [them] that her client, Mr. Islami, had revealed to her that if he had worked for Staghorn, he used fraudulent documents and/or a stolen identity and operated under the name of 'Arben Kanjelli'". While Mr. Islami's counsel does not expressly deny the allegations made, she has contended that these discussions were subject to settlement privilege, pursuant to CPLR §4547, and thus off the record. Although suspicious that Defendants would assert this claim without any merit, the evidence offered to the court is not conclusive enough for an extreme decision of dismissing the action and issuing sanctions.

At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted (CPLR §3211[e]). The "single motion rule prohibits parties from making successive motions to dismiss a pleading" pursuant to CPLR §3211(a) (Bailey v Peerstate Equity Fund, L.P., 126 AD3d 738, 7 NYS3d 142 [App. Div. 2015]). "The rule bars both repetitive motions to dismiss a pleading pursuant to CPLR §3211(a), as well as subsequent motions to dismiss that pleading pursuant to CPLR §3211(a) that are based on alternative grounds" (Id.)

Defendants next move to dismiss the Complaint based on a statute of limitations theory, as defined under CPLR §3211 (a)(5). Defendants have already moved for the exact relief in 2015, claiming that the action was time-barred, and that the complaint failed to state a cause of action, which the court denied (Moving Papers Ex. I). The "single motion" rule bars Defendants from now attempting to bring the same motion a second time.

The penalty of striking a pleading for failure to comply with an order of disclosure is extreme, and is only warranted when a party is willful and contumacious (Delaney v Automated Bread Corp., 110 AD2d 677, 487 NYS2d 402, 1985 NY App. Div. LEXIS 48574 [NY App. Div. 2d Dept. 1985]). While the nature and degree of sanctions to be imposed pursuant to CPLR §3126 for failure to provide appropriate discovery is generally a matter left to the sound discretion of the trial court, the drastic sanction of striking the pleading should not be invoked unless the resisting party's default is shown to be deliberate and contumacious (Rossi v Lin, 189 AD2d 868, 592 NYS2d 976, 1993 NY App.

Div. LEXIS 646 [NY App. Div. 2d Dept. 1993]). Because of the court's overriding policy to decide cases on the merits, the extremely severe and drastic sanction of striking a defendant's answer for noncompliance with orders compelling disclosure is to be sparingly imposed (Baker v General Mills Fun Group, Inc., 101 Misc. 2d 193, 420 NYS2d 820, 1979 NY Misc. LEXIS 2653 [NY Sup. Ct. 1979]). The burden of proving willful or contumacious conduct is on the moving party (Scardino v Town of Babylon, 248 AD2d 371 [2nd Dept. 1998]).

While delays in discovery are frustrating, courts have an overriding policy to decide the case on its merits and a party may be given a final chance to comply with outstanding discovery demands (see Bredin v Buchman, 32 AD2d 518, 298 NYS2d 748, 1969 NY App. Div. LEXIS 4262 [NY App. Div. 1st Dept. 1969]). Mr. Islami has engaged in pretrial discovery including production of discovery and appearing for depositions. Defendants have not demonstrated that Mr. Islami has acted willfully or contumaciously in his failure to produce the documents Defendants seek.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583; Martin v Briggs, 235 AD2d 192, 663 NYS2d 184 [App. Div. 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (Kornfeld v NRX Tech., Inc., 93 AD3d2d 772, 461 NYS2d 342 [1983], affd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]). It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Epstein v Scally, 99 AD2d 713, 472 NYS2d 318 [1984]). Summary Judgment is "issue finding" not "issue determination"(Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the jury to resolve (Brunetti v Musallam, 11 AD3d 280, 783 NYS2d 347 [1st Dept. 2004]). The affidavit of an attorney without personal knowledge of the facts is of zero probative value (Zuckerman v City of New York, 49 NYS2d 595 [1980]).

Mr. Berisha has failed to make a prima facie case entitling him to judgment as a matter of law. Mr. Berisha failed to submit an affidavit that he was not an owner of Staghorn during the period Mr. Islami alleges to have been employed and has only relied on an affidavit submitted by his attorney Christopher R. Murray, which offers zero probative value. Furthermore, the K-1 submitted as evidence that Mr. Berisha was no longer a partner at Staghorn is unavailing (Moving Papers Ex. N). The Complaint alleges Mr. Islami was employed by Staghorn in 2008, while the K-1 submitted by Mr. Berisha to show his ownership share in Staghorn only highlights the 2007 year. This issue of fact must be resolved at a trial.

Mr. Islami's motion for a protective order pursuant to CPLR §3103 is denied. The burden of showing that discovery is improper falls on the party seeking a protective order (Sage Realty Corp. v Proskauer Rose L.L.P., 251 AD2d 35, 675 NYS2d 14, 1998 NY App. Div. LEXIS 6437 [NY App. Div. 1st Dep't 1998]). Here, as Defendants point out, Mr. Islami seeks a protective order to an item of discovery that Defendants have not requested for nearly three (3) years, specifically, documents related to Mr. Islami's immigration status (Moving Papers Ex. 3). As to seeking a protective order from Mr. Islami's bank records, W-2s, 1099s, pay stubs and other records indicating his alleged wages and work, it is well settled that such records, which would be in Mr. Islami's possession, are the primary items of discovery utilized in addressing the claims and defenses in this case (Moreno v Future Care Health Servs., Inc., 992 NYS2d 159 [Sup. Ct. 2014]).

Mr. Islami's cross-motion to compel disclosure pursuant to CPLR §3124 is also denied. The draft settlement agreement Mr. Islami seeks from a separate, unrelated action is a publicly filed record available on PACER. Mr. Islami can view the full docket of the action at issue, as it is available to the entire public.

Accordingly, it is ORDERED, that defendants STAGHORN STEAKHOUSE, LLC and GJON BERISHA's motion to dismiss the complaint due to fraud and/or the statute of limitations is denied, defendants STAGHORN STEAKHOUSE, LLC and GJON BERISHA's motion to strike the complaint is denied, defendant GJON BERISHA's motion for summary judgment is denied, and the plaintiff ALSID ISLAMI's cross-motion for a protective order and cross-motion to compel are denied, and it is further,

ORDERED, that within thirty (30) days from the date of this Order, plaintiff Alsid Islami shall serve upon defendants: (i) a signed copy of his deposition transcript dated February 16, 2016, with an errata sheet attached, and (ii) photos or videos documenting plaintiff working at Staghorn Steakhouse, LLC, and (iii) witness statements and/or witness identifications, and (iv) plaintiff's W-2 tax returns or 1099 forms, and pay stubs for the year while working at Staghorn Steakhouse, LLC, and it is further,

ORDERED, that the parties appear for a Status Conference on June 7, 2017 at 9:30 a.m. in IAS Part 13 at 71 Thomas Street, New York, NY 10013.

ENTER:

Dated: April 10, 2017

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE