Tricarico v Baer
2017 NY Slip Op 31343(U)
June 16, 2017
Supreme Court, Suffolk County
Docket Number: 031988/2013
Judge: James Hudson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Supreme Court of the County of Suffolk
State of New York - Part XLVI
Memorandum Decision

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

INDEX NO.:031988/2013

MOT. SEQ. NOS. 009-MOT D
010-MG
011-MD
012-MG
013-MD
014-MD
015-MD

x----------x

DONNA TRICARICO, Individually and doing business as THE SPA 25,

Plaintiff,

-against-

FLORENCE BAER, individually and doing business as THE SPA 25,
JON BAER, Individually and doing business as JDFB, INC.,
RUTH ELLEN SCIARRINO and LAWRENCE SCIARRINO, JR., individually and doing business as SPA 25 OF SELDEN INC.,

Defendants.

x----------x

JOHN H. MULVEHILL, ESQ.
Attorney for Plaintiff
220 Cambon Avenue
St. James, New York 11780-3048

FLORENCE BAER,
Defendant *Pro Se*
2201 Townhouse Drive
Coram, New York 11727

THE SPA 25
2201 Townhouse Drive
Coram, New York 11727

PETER C. WALSH, SR., PC
Attorney for Defendants JDFB, INC. & Jon Baer
407 East Main Street, Suite 4
Port Jefferson, New York 11777

Gold Benes, LLP
Attorney for Defendants Sciarrino
1854 Bellmore Ave.
Bellmore, New York 11710

This decision encompasses a series of motions in the matter *sub judice*. To avoid confusion, all the respective motions shall be decided in this single Order. The motions are as follows:

Motion sequence no.:009 seeks a default against Florence Baer on the basis of her failure to provide disclosure and failing to respond to interrogatories.

Motion sequence no.:010 is by Plaintiff and seeks a default against Defendants Jon Baer and JDFB, Inc.; an order of preclusion; an order imposing sanctions as well as an order granting leave to amend her pleading.

Motion sequence no.:011 is by Defendants Jon Baer and JDFB Inc. for an order dismissing Plaintiff's "second unauthorized complaint."

Motion sequence no.:012 is by Defendants Jon Baer and JDFB Inc. It asks for sanctions against Plaintiff and Plaintiff's counsel and for estoppel of Plaintiff's motion (sequence no.:013).

Motion sequence no.:013 is by Plaintiff and requests an order of preclusion as against Jon Baer, JDFB Inc. and Florence Baer for failing to adequately answer interrogatories.

Motion sequence no.:014 is by Defendant JDFB Inc. for an order directing Plaintiff to remit an attorneys check for $4,223.85, representing funds from Bankruptcy Trustee from assets of Sciarrino's Estate in bankruptcy and/or for dismissal of Plaintiff's case.

Motion sequence no.:015 is a cross-motion by Plaintiff for the imposition of sanctions under CPLR 3126/3124 CPLR 8303a and Rule 130-1 against Defendants Jon Baer and JDBF Inc.; against defense Counsel and for an order directing the release of Plaintiff's funds from an Interest on Lawyers Account ("IOLA/trust account").

The matter at hand is a dispute arising from the purported sale of a business. Plaintiff, Donna Tricarico contends, *inter alia*, that in April of 2013 she entered into a contract with Defendant Florence Baer (DBA "The Spa 25") to form a partnership doing business at 750 Middle Country Road, Selden, New York. This agreement was reduced to writing (Plaintiff's Exhibit 1 of motion sequence no.:010) and each made a contribution to the business. Thereafter, Plaintiff contends, Defendant Florence Baer breached the agreement and committed other acts such as fraud, breach of fiduciary duty and negligence. Plaintiff filed this lawsuit against Defendant Florence Baer as well as Defendants Jon Baer, the corporation JDFB Inc. and Ruth Ellen Sciarrino and Lawrence Sciarrino. It is undisputed

that the latter four Defendants were not signatories to the contract or otherwise members of the partnership. The theory of liability against Jon Baer, JDFB Inc. and the Sciarrinos is that they conveyed the assets of JDFB, Inc. (which consisted of the property used by the Partnership to operate its business) to an entity known as "Spa 25 of Selden" which was owned and/or controlled by the Sciarrinos. The Sciarrino Defendants filed for and ultimately received a discharge in bankruptcy.

The Plaintiff has made a motion (sequence no.:009) to strike Defendant Florence Baer's answer on the basis of her failing to provide disclosure, a bill of particulars and respond to Plaintiff's interrogatories (CPLR §3126). CPLR §3101(a) sets forth the general policy that "...full disclosure of all evidence material and necessary in the prosecution or defense of an action." CPLR Article 31 has "...traditionally been liberally construed to require disclosure 'of any facts bearing on the controversy which will assist [parties'] preparation for trial'" (***Cynthia B. v. New Rochelle Hosp. Med. Ctr.***, 60 N.Y.2d 452, 461, [1983] quoting ***Allen v. Crowell-Collier Pub. Co.***, 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, [1968]). The measure applied in determining the extent of discovery is one of "usefulness and reason" (***Id.***). Sanctions for failure to provide discovery will only be imposed when it is demonstrated that the non-movant has acted willfully or contumaciously ***(Caballero v. Montefiore Medical Center***, 167 A.D.2d 219 [1st Dept 1990]).

A perusal of the moving and responding papers demonstrates to the Court's satisfaction that Defendant, Ms. Baer, has failed to comply with Plaintiff's demands. Her responding papers (which were filed late) consist of a response to the interrogatories which are, for the most part, conclusory and lack sufficient detail to be of utility. Moreover, the Respondent has not addressed the failure to provide disclosure. In short, the behavior of the Defendant Ms. Baer can only be deemed wilful (***Ritter Found., Inc. v. Tebele***, 222 A.D.2d 355, 635 N.Y.S.2d 628 [1st Dept.1995]).

To reprove the Defendant's conduct, Plaintiff seeks the Court to declare Ms. Baer in default and strike her answer. Rather than resort to the drastic remedy of striking a pleading, the Court will preclude the Defendant Ms. Baer from "...offering evidence at trial with respect to information sought in discovery" which was not provided (***SRN Realty, LLC v. Scarano Architect, PLLC***, 116 A.D.3d 693, 693, 983 N.Y.S.2d 276, 277, [2nd Dept.2014] leave to appeal dismissed, 24 N.Y.3d 1030, 997 N.Y.S.2d 680 [2014]).

The Court now turns to motion sequence no.:010. Justice Pines' Decision dated June 16, 2015, denied an earlier motion by Plaintiff for a default judgment against Jon Baer individually and against JDFB Inc. The Court found that the motion was defective concerning Mr. Baer because "...his time to appear had not yet expired at the time the motion

was made." In the same Decision, the Court denied the motion as against the Corporation because "...the plaintiff has not submitted an affidavit of service upon that entity pursuant to CPLR 311. The plaintiff only submits an affidavit of service upon individual defendant Jon Baer pursuant to CPLR 308[2]. Such service does not amount to service upon JDFB, Inc." Once again, Plaintiff moves for a default against Defendant Jon Baer and JDFB Inc. (motion sequence no.:010). The practice of making successive dispositive motions each of which are based on factual assertions and proofs which were available to the movant from outset, is to be discouraged ***Powell v. Trans-Auto Sys., Inc.***, 32 A.D.2d 650, 300 N.Y.S.2d 747 (2nd Dept. 1969). Plaintiff is engaging in "...piecemeal motion practice, which increases the expense of litigation, and places an undue burden on the parties and judicial system" (***Robinson v. Management***.,____Misc.2d ____, 2004 WL 5412986 [Supreme Ct. NY Co.2004]). Plaintiff already had the opportunity to make a motion predicated on the Defendants' default. It was denied. The Court will not entertain another application by Plaintiff for the same relief.

Initially the Court agrees with defense counsel's contention that Plaintiff's motion (sequence no.:013) is an essential repetition of the request for relief sought in Plaintiff's motion (sequence no.:10). A perusal of the two different sets of motion papers indicates that defense counsel is correct. Accordingly, Plaintiff's motion (sequence no.: 013) for an order of preclusion as against Jon Baer and JDFB Inc. and Florence Baer for failing to adequately answer interrogatories is denied.

The Court will consider Plaintiff's motion (sequence no.:010) to amend her complaint and Defendants' motion (sequence no.:011) to dismiss the second amended complaint. CPLR Rule 3025[a] provides that "A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." In the matter at hand it is apparent that Plaintiff, due to the passage of time, cannot amend her complaint as of right.

Justice Pines' issued a Decision on June 17, 2015. In that opinion the learned Court granted Defendant JDFB Inc.'s motion to dismiss to the extent that it found the first nine causes of action applied solely to Defendant Florence Baer. It further dismissed Plaintiff's 10th and 12th causes of action for legal insufficiency. A fair reading of the proposed complaint demonstrates that it attempts to remedy the failings pointed out by the Court on June 17, 2015. Plaintiff argues that Defendants opened the door for the amended complaint by asserting a counterclaim in his answer. We disagree, Plaintiff cannot have a second bite of the apple under the guise of responding to a counterclaim and use it to circumvent CPLR 3025(a). In allowing an amended complaint to address a counterclaim, case law clearly contemplated a narrow response tailored to the counterclaim itself (***DeMille v. DeMille***, 5 Misc. 3d 355, 361, 784 N.Y.S.2d 296, 300 (Sup. Ct. Nassau Co. 2004), aff'd as modified,

32 A.D.3d 411, 820 N.Y.S.2d 111 (2006); *see* Siegel N.Y. PRAC. 229 [3d ed.]). Accordingly, the second amended complaint served without the Court's permission is dismissed.

The question now becomes whether to grant Plaintiff's motion to serve an amended complaint pursuant to CPLR Rule 3025[b]. "Leave to amend a pleading should be freely given...provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit" (***Aurora Loan Servs., LLC v. Dimura***, 104 A.D.3d 796, 796, 962 N.Y.S.2d 304, 305 [2nd Dept. 2013], quoting ***Sheila Props., Inc. v. A Real Good Plumber, Inc.***, 59 A.D.3d 424, 426, 874 N.Y.S.2d 145; *see* ***Gitlin v. Chirinkin***, 60 A.D.3d 901, 901-902, 875 N.Y.S.2d 585). Defendant, Mr. Baer claims that this would be prejudicial because of the time that has passed since the filing of this lawsuit. This contention is chimerical.

"In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered" (***Yong Soon Oh v. Hua Jin***, 124 A.D.3d 639, 640, 1 N.Y.S.3d 307, 310 (N.Y. App. Div. 2015) quoting ***Cohen v. Ho***, 38 A.D.3d 705, 706, 833 N.Y.S.2d 542 [2nd.2007]; *see* ***American Cleaners, Inc. v. American Intl. Specialty Lines Ins. Co.***, 68 A.D.3d 792, 794, 891 N.Y.S.2d 127 [2nd Dept.2009]). In the matter at hand, Plaintiff was attempting to bring the proposed claims against Mr. Baer and JDFB Inc., but was thwarted by an inadequately drafted complaint. Presented with a contrary Decision of the Court, Plaintiff, this time misinterpreting applicable procedural law, filed an amended complaint. The Defendant cannot claim that he was not aware of the additional claims against him as his attorney prepared a defense for the remaining claim of conversion. We also note that this matter is not on the eve of trial, further undermining Defendant's claim of prejudice (***Am. Cleaners, Inc. v. Am. Int'l Specialty Lines Ins. Co.***, 68 A.D.3d 792, 794, 891 N.Y.S.2d 127, 129 (2nd Dept. 2009) citing ***Morris v. Queens Long Is. Med. Group, P.C.***, 49 A.D.3d 827, 828, 854 N.Y.S.2d 222 [2nd Dept.2008]; *see* ***Comsewogue Union Free School Dist. v. Allied-Trent Roofing Sys., Inc.***, 15 A.D.3d 523, 525, 790 N.Y.S.2d 220 [2nd Dept.2005]; ***Rosse-Glickman v. Beth Israel Med. Ctr.-Kings Hwy. Div.***, 309 A.D.2d 846, 766 N.Y.S.2d 67 [2nd Dept.2003]). Accordingly, motion sequence no.:010 to amend the complaint will be granted.

The Court now turns to that aspect of Plaintiff's motion (sequence no.:010) to preclude Defendants Jon Baer and Florence Baer for failing to answer interrogatories in a timely fashion. The question of Ms. Baer's actions has been discussed in the Court's Decision concerning motion sequence no:009. Mr. Baer has not responded to the interrogatories at all. A review of the interrogatories, however, shows them to be 125 in

number. 22 NYCRR §202.70 Rule 11-a limits interrogatories to 25 in number "...unless another limit is specified in the preliminary conference order." The Court is unable to find such authorization. Accordingly, the interrogatories served on Mr. Baer are stricken for failing to comply the Rules of the Commercial Division. Mr. Mulvehill may not serve another set of interrogatories on Mr. Baer. As noted in connection with motion sequence no.:009, the Court will, however, grant Plaintiff's motion to the extent that Defendant Florence Baer is precluded from offering evidence at trial concerning information sought in discovery but was not provided.

Both Mr. Mulvehill and Mr. Walsh have moved for sanctions against their respective clients. 22 NYCRR §130-1.1 allows a court to sanction an attorney or party if their conduct is frivolous. The rule states in relevant part that "...conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (Id. at subdivision [c]).

A review of the reams of papers submitted in connection with the various applications demonstrates that language of a less than civil character has been employed in correspondence between counsel to which the Court has been copied. Messrs. Mulvehill and Walsh are respectfully directed to a recent decision ***Barr v. Attorney Gen. of State of N.Y.***, 54 Misc. 3d 1222(A) (N.Y. Sup. Ct. 2017), in which this Court held that abusive language used in communications between counsel can be met with the imposition of financial sanctions. The letters exchanged between the attorneys herein do not rise to the level requiring a tangible manifestation of the Court's disapprobation. The repetitive motions brought by Mr. Mulvehill, however, are a different matter. As noted, Plaintiff's motion (sequence no.:013) originally returnable September 15, 2016, seeks the same relief which was requested as part of Plaintiff's motion (seq. no. 10) originally returnable April 13th, 2016. The Court must also note that the Plaintiff has sought a default against Ms. Baer in three separate motions which were made sequentially without giving the Court the opportunity to rule on the earliest application (motion sequence no.:009). There is no adequate explanation for why this was done. Needlessly making a motion for identical relief while a motion for the same relief is pending is repetitive, vexatious and frivolous (***Bergstein v. Bergstein***, 207 A.D.2d 285, 615 N.Y.S.2d 382 [1st Dept. 1994]). Accordingly, Defendant's motion for the Court to impose monetary sanctions is granted.

22 NYCRR 130.1–1(d) and attendant case law state that the person against whom the court is considering sanctions must be afforded "... a reasonable opportunity to be heard" and that the "form of the hearing shall depend upon the nature and conduct and circumstances

of the case" (*see* ***Wagner v. Goldberg***, 293 A.D.2d 527, 528, 739 N.Y.S.2d 850, 851 [2nd Dept. July 24, 2002]; ***Cangro v. Cangro***, 272 A.D.2d 286, 707 N.Y.S.2d 895 [2nd Dept.2000]).

Based on the forgoing, the Court will conduct a hearing at the conclusion of this case at which time Mr. Walsh will be allowed to produce an affirmation of legal services representing the time expended in responding to Mr. Mulvehill's frivolous motion. Mr. Mulvehill will be given the opportunity to be heard.

Finally, the Court must address the request by the defense for an order directing the Plaintiff to deposit a sum of money into escrow and Plaintiff's motion for an order directing defense counsel to render up the moneys held in escrow.

This subject was addressed by a "So-Ordered" stipulation of September 8, 2014. The Court's (Pines J.) Order reads in pertinent part "...agreed, any payments made by the Sciarrinos to JDFB, Inc. pursuant to the note executed on June 2, 2014, if any shall be deposited in the interest bearing escrow account...after the date of this stipulation, any payments made by JDFB, Inc. may only be made by Order of this Court."

Plaintiff received this money from the trustee in bankruptcy who found her to be entitled to same. This Court will not disturb this determination prior to the final adjudication on the merits. Likewise, the Plaintiff will have to prove her entitlement to the escrowed monies before the Court will order it released.

We have considered the remaining contentions of the Plaintiff and the Defendants and find them to be without merit. Therefore, it is

ORDERED, that the motion (sequence no.:009) by Plaintiff seeking a default judgment against Defendant Florence Baer is granted to the extent that she shall be precluded from adducing evidence at trial with respect to information sought in discovery which was not provided. It is further

ORDERED, that the motion (sequence no:010) by Plaintiff seeking a default against Defendants Jon Baer and JDFB, Inc., as well as seeking leave to amend her pleading, for an order of preclusion as against Defendants Jon Baer, JDFB, Inc. and Florence Baer and for sanctions is granted to the extent that Defendant Florence Baer is precluded from adducing at trial evidence as referenced in motion sequence no.:009. Ms. Baer's untimely response is inadequate and not accepted by the Court. That aspect of the motion for leave to amend her complaint is granted. Said amended complaint to be filed within thirty (30) days from

service of a copy of this Decision. The answer shall be filed in accordance with CPLR Sec.3012. It is further

ORDERED, that the motion (sequence no.:011) of Defendants Jon Baer and JDFB Inc. to dismiss Plaintiff's "second unauthorized complaint" is granted under the circumstances presented. Plaintiff, however, will be permitted to submit a reply containing a denial to Defendants' counterclaim. If Plaintiff attempts to serve and file an amended complaint which is not in conformance with this decision, her pleading will be dismissed. It is further

ORDERED, that the motion (sequence no.:012) by Defendants Jon Baer and JDFB Inc. for sanctions against Plaintiff and Plaintiff's counsel and for estoppel of Plaintiff's motion as it pertains to JDFB Inc. is granted under the circumstances presented. Motion (sequence no.:013) of Plaintiff originally returnable September 15, 2016, has been found to be repetitive and vexatious (22 NYCRR § 130–1.1). The Court will impose a monetary sanction against Plaintiff representing attorneys fees for responding to Plaintiff's frivolous motion (sequence no.:013). Said sanction to be determined at a hearing at the conclusion of this case. It is further

ORDERED, that the motion (sequence no.:013) by Plaintiff seeking an order of preclusion as against Jon Baer and JDFB Inc. and Florence Baer for failing to adequately answer interrogatories, having been found to be repetitive and vexatious, is denied. It is further

ORDERED, that the motion (sequence no.:014) by Defendant JDFB Inc. for an order directing Plaintiff to remit an attorneys check for $4,223.85 representing funds from the Bankruptcy Trustee is denied. It is further

ORDERED, that the cross-motion (sequence no.:015) by Plaintiff for imposition of sanctions under CPLR 3126/3124 CPLR 8303a and Rule 130-1 and for an order directing the release of Plaintiff's funds from an IOLA/trust account is denied.

The foregoing memorandum is also the Order of the Court.

DATED: JUNE 16, 2017
RIVERHEAD, NY

HON. JAMES HUDSON, A.J.S.C.