

Meshman v Benjaminov
2017 NY Slip Op 30950(U)
May 4, 2017
Supreme Court, New York County
Docket Number: 652343/2015
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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SCHANDEL MESHMAN

Plaintiff,

DECISION/ORDER
Index No. 652343/2015

-against-

ARKADY BENYAMINOV,

Defendant.

-----X
HON. CYNTHIA KERN, J.:

Plaintiff Schandel Meshman commenced the instant action arising out of a contract she entered into with defendant Arkady Benyaminov. Plaintiff now moves to clarify and modify a decision issued by this court. For the reasons set forth below, plaintiff's motion is denied.

The relevant facts and procedural history of this case are as follows. Plaintiff owned and operated Amicable World, LLC (the "Amicable"), a special education teaching business, from February 2008 when it was formed until September 2014, and employed defendant as a special education teacher at Amicable. In early 2010, Amicable entered into a Requirements Agreement with the Board of Education of the City School District of the City of New York (the "City") to provide services for preschool students with disabilities through a Special Education Itinerant Teacher ("SEIT") program, which is regulated by the City.

In or around January 2014, plaintiff was notified by her accountant that Amicable has "a potential liability of \$223,240" due to recoupment of funds under the contract with the City and that plaintiff should "consider all of [her] options, including consulting a lawyer about closedown/transfer of" Amicable. In a second e-mail, plaintiff's accountant informed her that Amicable does "not have the funds that should have been left over for mandated services that [Amicable] did not provide for." Thereafter, plaintiff unsuccessfully attempted to sell Amicable to two different purchasers.

In or around March 2014, plaintiff, as seller, and defendant, as purchaser, entered into a Purchase of Business Agreement (the "Agreement"). Pursuant to the Agreement, plaintiff would sell and transfer to defendant her interest in Amicable and the business it operated for the purchase price of \$425,000.00. The Agreement provided that after an initial deposit, defendant would pay the balance of the purchase price in installments. Additionally, the Agreement provided a representation by plaintiff that Amicable's assets are "free and clear of any liens, charges, encumbrances, or rights of others," that "there is no pending or anticipated claim against the Assets [of Amicable]" and that "[n]o third party contract is outstanding that could result in a claim against or affecting the Assets [of Amicable] in whole or in part either now or in the future."

Plaintiff continued to manage Amicable after the Agreement was signed during a transition period while plaintiff was acquiring the approval of certain state agencies for the transfer of the business. On or about September 5, 2014, plaintiff transferred the business to defendant pursuant to the Agreement. Defendant made the first few installment payments to plaintiff pursuant to the Agreement but stopped making payments beginning in February 2015 when he alleges he became aware that Amicable was an insolvent business and that at the time the parties entered into the Agreement, plaintiff did not accurately reflect Amicable's liabilities on the audited financial statements provided by plaintiff to defendant during due diligence. Specifically, defendant asserts that the SEIT rate calculation sheets filed by the plaintiff in 2014 prior to the transfer of Amicable showed a liability of \$0 for fiscal year 2014 and showed a recoupment liability that had accrued prior to fiscal year 2013 which was in the process of being paid back to the City via an installment agreement. However, defendant asserts that Amicable had accrued liabilities to the City of New York of approximately \$409,304.00 based on the SEIT rate calculation sheets defendant received in February 2015 for fiscal years 2013 and 2014, although no mention of such liabilities was made in the Agreement.

Plaintiff commenced the instant action asserting claims for breach of contract, unjust enrichment and quantum meruit based on defendant's failure to make all of the required payments under the Agreement.

Defendant interposed an answer in which he asserted counterclaims for breach of contract, breach of the

covenant of good faith and fair dealing and fraud based on plaintiff's failure to transfer Amicable to defendant free of liabilities and encumbrances. Thereafter, plaintiff moved for summary judgment on her complaint and to dismiss defendant's counterclaims. Defendant separately moved for summary judgment on his counterclaims and to dismiss plaintiff's complaint.

In a decision dated March 22, 2017, this court granted defendant summary judgment dismissing plaintiff's claims for unjust enrichment and quantum meruit; granted defendant summary judgment on his breach of contract counterclaim; and granted plaintiff summary judgment dismissing defendant's counterclaims for fraud and breach of the implied covenant of good faith and fair dealing (the "Decision"). The Decision also granted defendant the remedy of rescission of the Agreement and held that defendant is entitled to recover the amounts he has already paid to plaintiff for the purchase of Amicable and that plaintiff is entitled to recover ownership of Amicable. Plaintiff now moves to clarify and modify the portion of this court's Decision that rescinded the Agreement.

Pursuant to CPLR § 2221(a), a party may move for leave to modify a prior order issued by a court. In this action, plaintiff's motion for leave to clarify and modify this court's Decision is denied. Plaintiff asserts that "the Decision needs to be clarified and modified to require complete and legally proper rescission." Specifically, plaintiff argues that the Decision does not provide for a complete rescission because defendant is getting a windfall as he is able to keep the salary he received while he was the Director of Amicable for one and a half years and because defendant will be returning Amicable, now an inactive business, to plaintiff, saddling plaintiff with the debt Amicable owes and with a business that cannot be operated. However, such argument is unavailing. As an initial matter, defendant is not getting a windfall because he is permitted to keep the salary he earned while he was operating Amicable. It is undisputed by the parties that as a Director of Amicable, the defendant was entitled to a salary for his services. Requiring defendant to return to plaintiff the salary he earned would mean that he would not be paid for one and a half years of work. Further, Amicable's liabilities existed when Amicable was transferred from plaintiff to defendant in September 2014. Thereafter, defendant affirms that he was caused to close down Amicable

NYSCEF DOC. NO. 166

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because it could no longer be operated due to said liabilities. The fact that Amicable is being returned to plaintiff saddled with debt is not evidence that defendant is getting a windfall.

Accordingly, plaintiff's motion is denied. This constitutes the decision and order of the court.

DATE: 5/4/17

CK
KERN, CYNTHIA S., JSC
HON. CYNTHIA S. KERN
J.S.C.