VanHanehan v St. Thomas
2018 NY Slip Op 32971(U)
November 30, 2018
Supreme Court, Wayne County
Docket Number: 79398
Judge: John B. Nesbitt

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WAYNE

DAVID VANHANEHAN, INDIVIDUALLY AND UPSTATE FORESTRY & LOGGING SERVICE,

Plaintiff

vs.

Index No: 79398

GARY ST. THOMAS, MICHAEL ST. THOMAS MARY CHAPMAN AND DENNIS SMOLINSKI,

Defendants.

APPEARANCES: Douglas M. Jablonski, Esq.
Attorney for Plaintiff

Mark M. Campanella, Esq.
Attorney for Defendants Gary St. Thomas, Michael St. Thomas, Mary St. Thomas

J. Michael Wood, Esq.
Attorney for Defendant Dennis Smolinski

MEMORANDUM – DECISION

The above action by plaintiff against the named defendants was commenced by filing of a summons and complaint in the office of the Wayne County Clerk on February 5, 2016. The Complaint alleges four (4) causes of action against the various defendants. Taking these alleged causes of action *seriatim:*

1. Plaintiff's first cause of action alleges breach of contract by the defendant, Gary St. Thomas.

2. Plaintiff's second cause of action alleges a fraudulent transfer of assets to the defendants, Mary Chapman and Michael St. Thomas, by virtue of a deed that runs from Gary St. Thomas to Mary Chapman and Michael St. Thomas, violating §§ 270 and 276 of the NY Debtor and Creditor Law.

3. Plaintiff's third cause of action, against defendants, Gary St. Thomas and Dennis Smolinski, alleges that plaintiff was a partner of said defendants, and that these defendants refused to cooperate in a land sale of property located in Clinton County, New York, causing a loss to

plaintiff of $50,000. No basis of a duty to sell is alleged other than whatever obligations were assumed under an agreement between plaintiff and Gary St. Thomas dated December 13, 2013, a copy of which is attached to the complaint.

4. Plaintiff's fourth cause of action alleges a fraudulent transfer of assets, assumed by the Court to be different from those identified in the second cause of action, to the defendants, Mary Chapman and Michael St. Thomas, by virtue of a deed running from Gary St. Thomas to Mary Chapman and Michael St. Thomas, which deed plaintiff alleges violated §§ 270 and 276 of the NY Debtor and Creditor Law.

MOTION I BY DEFENDANT, DENNIS SMOLINSKI

By notice of motion dated January 23, 2018, Defendant Dennis Smolinski ("Smolinski") moves for summary judgment pursuant to CPLR § 3212 dismissing the third cause of action in the complaint. The supporting affidavits of Smolinski and his attorney, J. Michael Wood, allege that the plaintiff and moving defendant were never partners. Although Smolinski admits that he owns the "subject property" with plaintiff, he states that he has never agreed to sell the property either orally or in writing (Smolinski affidavit 9,10).

Discovery to date includes Interrogatories, a notice of inspection, and demand for Bill of Particulars (Wood affirmation, 5). In opposition to Smolinski's motion, plaintiff alleges that depositions of the parties have not yet been conducted and requests denial of the motion without prejudice to renewal after completion of discovery (Jablonski affidavit, 7). Interestingly, while plaintiff seeks completion of discovery prior to any dispositive motion by defendants, he asks the Court, on the present record, to strike the Answer of the defendants and to appoint a temporary receiver and Referee at the expense of the defendants (Jablonski affidavit, 9). This shall be discussed later.

Regarding discovery to date, Smolinski argues that the responses given by plaintiff are evasive and improper. In response to an Interrogatory asking that the terms of the agreement to sell be set forth, plaintiff's response was that "The information demanded is known to the defendant." (Exhibit F to the moving papers). Similarly, Smolinski's demand for a Bill of Particulars is initially met with repeated responses that the "information demanded is in the possession of the defendant" until, having apparently wearied of this 9 word response, plaintiff eventually replaces it with "Ibid" (Exhibit H to the moving papers).

The Court agrees that these responses were improper (*see, LeFrois Foods Corp. v. Policy Advancing Corp.*, 59 AD 2d 1013 [4th Dept. 1977]) where the Court determined:

> It is well settled that "(t)he granting of a bill of particulars depends upon what the aggrieved party claims the facts are, and not upon the adversary's knowledge thereof, nor upon the actual facts" (*Solomon v. Travelers Fire Insurance Co.*, 5 A.D.2d 1017; *Dwyer v. Slattery*, 118 App.Div. 345). That [defendant] might appear to have knowledge of the information sought is immaterial".

Thus, the purpose of the Bill of Particulars is to give notice of what the claimant asserts are the facts, not the facts as they actually may be. Nonetheless, as improper as these responses may have been, Smolinski has not applied to the Court for any of the relief authorized by CPLR 3042(c) or 3124. Rather, he is now essentially seeking CPLR 3126 relief where there exists no prior order.

Smolinski also provides some proof of a statute of frauds defense to any action seeking to compel sale of the subject property. However, from the complaint as drawn, it is impossible to identify sufficient operative facts or the theories of liability supported thereby. The third cause of action merely alleges some type of co-ownership or partnership between plaintiff and Smolinski, that they cannot agree to the use or disposition of the subject property, and that plaintiff and Gary St. Thomas retained a realtor to sell the property but that Smolinski failed to cooperate and participate in the sale.

In any event, the moving papers do not make a sufficient showing to warrant summary judgment as a matter of law. It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (CPLR § 3212 [b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor (*see, Bush v. St. Clare's Hospital*, 82 NY2d 738 [NY 1993]). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *(see, Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 [1985]). This standard requires that the proponent of the motion tender sufficient evidence to eliminate any material issues of fact from the case, "by evidentiary proof in admissible form" *(see, Zuckerman v. New York*, 49 NY2d 557 [1980]). The burden is not met by a conclusory

denial of responsibility (*see, Vasquez v City of New York*, 210 AD2d 156), nor is the burden met by pointing to gaps in plaintiffs' proof (*see, Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615).

Although the lack of written contract of sale is alleged, Smolinski offers no proof of the absence of other factors that might take the case out of the statute of frauds, such as the absence of part performance or promissory estoppel. The result might be different if Smolinski had the benefit of a preclusion order.

Further, were this a CPLR 3211 motion by Smolinski on its first affirmative defense of failure to state a cause of action, the Court might well grant such a motion. However, this motion is made pursuant to CPLR 3212 which would require dismissal on the merits. While CPLR 3211 provides that the Court, on notice, may treat a motion to dismiss as one for summary judgment (CPLR 3211(c)), there is no reciprocal provision in CPLR 3212. The Court is not willing to adopt such a drastic solution on the present state of the record.

Finally, summary judgment should not be granted against a plaintiff who, despite being unable to establish the merit of its theory of liability pleaded in the complaint, has made out a viable cause of action in its submissions on the motion (*see, Alvord and Swift v. Stewart M. Muller Construction Co., Inc.*, 46 NY2d 276 [1978]; *Ayala v. V&O Press Co.*, 126 AD2d 229 [2d Dept 1987]). "Instead, the court must scrutinize the plaintiff's submissions in order to determine whether any viable cause of action has been alleged and supported by admissible evidence therein, in which case, leave to amend the complaint should be granted and summary judgment denied" (*Ayala* at 234).

Here, the parties seem to admit co-ownership of the subject parcel with a dispute as to its division or sale. Plaintiff may be able to state a cause of action for partition or similar relief, even though the damages sought here might not be available. Accordingly, the motion is denied without prejudice to renewal after completion of discovery.

MOTION II - ST. THOMAS AND CHAPMAN DEFENDANTS FOR PARTIAL SUMMARY JUDGMENT

The defendants, Gary St. Thomas, Mary Chapman (daughter of Gary St. Thomas), and Michael St. Thomas (collectively, the St. Thomas defendants), by notice of motion dated February 15, 2018, move to dismiss plaintiff's third and fourth cause of action.

The third cause of action is as described above dealing with the Smolinski motion; however, the gravamen of the St. Thomas defendants' attorney's affirmation seeks dismissal of this cause of action more as a failure of plaintiff to provide proof of the allegations through discovery rather than on any asserted affirmative defense. In this regard, it should be noted that these defendants did not raise any defense in their Answer as would support a CPLR 3211(a)(7) motion; such failure to plead does not appear within the waivers set forth in CPLR 3211(e).

The Court does agree that plaintiff's responses were improper. Plaintiff's Bill of Particulars and discovery responses set forth as exhibits F and G to the moving papers show a failure by Plaintiff to provide required discovery and are reminiscent of the responses to Smolinski, as above described. Plaintiff's response to the Interrogatories propounded by these defendants is not much better. For example, in response to an Interrogatory asking for the date of the purchase offer referenced in paragraph 32 of the complaint, plaintiff responds that he does not know the date and "does not want to speculate as to this information." Likewise, plaintiff's response to Interrogatory 5 is that he "does not recall" the name of the potential buyer. The reluctance of a plaintiff to "speculate" on the operative facts alleged in his complaint are generally best resolved prior to filing the complaint, not in his discovery responses.

For the reasons discussed relating to the Smolinski motion, the motion by the St. Thomas defendants dismissing the plaintiff's third cause of action is denied without prejudice to a motion to dismiss pursuant to CPLR 3211, if still available under that provision, or a motion pursuant to CPLR 3042(c) or (d) or CPLR 3124, or amendment of the pleadings by plaintiff.

The St. Thomas defendants also move to dismiss plaintiff's fourth cause of action which alleges a transfer of assets in fraud of creditors. There appears to be no exception in the New York Debtor and Creditor Law exempting actions commenced pursuant to its provisions from the pleading requirements of CPLR 3016. However, the present motion is not based on CPLR 3211(a)(7); rather, these defendants seek summary judgment dismissing the cause of action based on the failure of the plaintiff to make sufficient discovery to support the allegations in the complaint. As is set forth above, such a motion is premature in the absence of preclusion or other sanction for failure to make discovery.

Viewing the motion as one requesting dismissal of the complaint, the motion does not show prima facie entitlement to summary judgment sufficient to require the plaintiff to rebut. It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (CPLR § 3212 [b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor (See *Bush v. St. Clare's Hospital*, 82 NY2d 738, (1993)). "The proponent of a summary judgment motion is required to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to do so requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 (NY 1985)). This standard requires that the proponent of the motion tender sufficient evidence to eliminate any material issues of fact from the case, "by evidentiary proof in admissible form" *Zuckerman v. New York*, 49 NY2d 557 (1980). Here, the moving parties have not come forward with any showing that the transferor, Defendant Gary St. Thomas, was not rendered insolvent by the transfer nor that the asset would be available to satisfy any judgment.

Further, the Court notes that there is an inherent contraction between the causes of action and that there may be an action for partition obscured by the manner in which the complaint was drafted. Such a cause of action, if available and pursued by plaintiff, might be inconsistent with his second and fourth causes of action as the damages claimed therein might not be available in a partition action. The motion of the defendants, Gary St. Thomas, Michael St. Thomas and Mary Chapman is denied without prejudice to renewal after completion of discovery.

CROSS MOTION BY PLAINTIFF

Plaintiff's new counsel, in opposition to the motions for summary judgment, requests additional time to achieve "full command of this file." In light of the decision of the Court on the summary judgment motions, it is not necessary for the Court to address plaintiff's request.

Plaintiff also moves for the appointment of a temporary receiver pursuant to CPLR 6401 and a referee pursuant to CPLR Article 43. However, Plaintiff makes no showing that the real property, which is the subject of this action, is in "danger of being removed from the state, or lost, materially injured or destroyed" as is required by CPLR 6401. Any application for the appointment of a referee pursuant to Article 43 is premature. Accordingly, both motions are denied.

REPLY PAPERS OF THE DEFENDANTS

As regarding the reply papers submitted by the defendants, Gary St. Thomas, Michael St. Thomas, and Mary Chapman, the Court agrees with the defendants that the errors in their Answer are not material and should be disregarded at this time (CPLR 2001).

Insofar as the papers attempt to supplement the motion in chief, it may not be considered. See *Gross v Hertz Local Edition Corp.*, 72 A.D.3d 1518 (4th Dept, 2010) where the Fourth Department said:

> Supreme Court properly denied that part of the motion of each defendant seeking summary judgment dismissing the negligence cause of action against it insofar as that cause of action is based on the alleged failure to obtain medical attention for decedent promptly after his fall. Neither Culligan nor Hertz addressed that basis for the negligence cause of action in each complaint in their initial submissions in support of their respective motions, and thus the burden never shifted to plaintiff to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). "Defendants' reply papers could not serve to supplement their initial moving papers inasmuch as **it is well established that [t]he function of [reply papers] is to address arguments made in opposition to the position taken by the movant[s] and not to permit [them] to introduce new arguments in support of the motion**" (*Paul v Cooper*, 45 A.D.3d 1485, 1486, 845 N.Y.S.2d 905). *Emphasis added.*

As the moving papers did not meet the required prima facie entitlement to summary judgment, any deficiency could not be cured by the reply papers.

As regarding the reply papers submitted by the defendant, Dennis Smolinski, the Court notes that Smolinski attaches a copy of the deed to the subject property which shows that Gary St. Thomas, David VanHanehan and Dennis Smolinski are owners to the property as "tenants in common." As is set forth above, reply affidavits may be used to challenge proof offered by the opposing papers but may not supplement the moving papers. The remainder of the reply focuses on gaps in the plaintiff's proof, however, they do not cure the lack of prima facie entitlement to summary judgment at this stage of the proceedings.

All motions are denied without prejudice to renewal or such other motions as the parties may pursue. This constitutes the decision and Order of the Court.

Dated: November 30, 2018
Lyons, New York

Hon. John B. Nesbitt
Acting Justice of the Supreme Court