2SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

BRAINWAVE SCIENCE, INC., et al., INDEX NO. 153867/2019

MOT. DATE

- v -

LAWRENCE A. FARWELL et al MOT. SEQ. NO. 003

The following papers, numbered to ____ were read on this motion to/for dismiss and cross-motion for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits No(s).____

Notice of Cross-Motion/Answering Affidavits — Exhibits No(s).____

Replying Affidavits No(s).____

Defendants Lawrence A. Farwell, Brain Fingerprinting Laboratories, Inc., and Brain Fingerprinting LLC (collectively Farwell) move to dismiss plaintiff's complaint pursuant to CPLR 3216 for failure to proceed with the prosecution of this matter. Plaintiff Brainwave Science, Inc. (Brainwave) cross-moves for summary judgment on its 1st, 3rd and 5th causes of action and opposes defendants' motion to dismiss. The court's decision is as follows.

Procedural History

Plaintiff commenced this action against defendants in or about April 15, 2019 for defamation, breach of contract, tortious interference and a declaratory judgment with respect to certain intellectual property which the parties both claim to own. Plaintiff filed an amended complaint on July 1, 2019 and issue was joined by 3 of the 4 defendants on July 22, 2019. Defendant American Scientific Innovations, LLC has not appeared in this case to date. A preliminary conference was held on August 20, 2019. A second amended answer and reply to counterclaims were filed by the parties, respectively, in September 2019. A status conference was held virtually on January 28, 2020 directing all parties to respond to discovery requests with dates certain and to schedule deposition dates. The virtual status conference scheduled for March 18, 2020 did not occur because of the COVID-related shutdown.

On March 4, 2021, the Court issued an order directing plaintiff to resume prosecution of this case within 90-days or face dismissal. On June 17, 2021, defendants filed a motion to dismiss and on July 9, 2021, plaintiff filed its cross-motion for summary judgment and in opposition to defendants' motion.

Dated: 11/17/21

HON. LYNN R. KOTLER, J.S.C.

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

Defendants contend that discovery requests were served by both sides, but responses have not been provided by ether plaintiff or defendants.

The March 4, 2021 order provides in relevant part as follows: "[i]f discovery is outstanding, the parties are directed to meet and confer and present a proposed stipulation setting deadlines for all outstanding discovery to the court to be so ordered."

As per defendants, "while the parties met and conferred, no proposed order was executed until June 16, 2021 (the day after Plaintiff emailed defense counsel a proposed order) and none has been filed to the date of this writing." The stipulation requires plaintiff to file its note of issue on or before August 31, 2021 and produce discovery and complete depositions on or before certain dates. Plaintiff did not file a note of issue nor did it move to extend its time to file a note of issue. Instead, plaintiff filed a cross-motion compelling defendants to comply with plaintiff's discovery demands "now outstanding for over two years" or be precluded from offering any evidence at the time of trial and for summary judgment on certain causes of action and counterclaims.

The court will address defendants' motion first since it will impact the decision on plaintiff's' motion for summary judgment.

Defendants' motion to dismiss

CPLR § 3216 provides that a defendant may serve plaintiff with a demand to resume prosecution and to file a note of issue within ninety days if issue has been joined and more than one year has elapsed since the joinder of issue. If the plaintiff fails to serve and file a note of issue within ninety days of receiving the demand, the court may grant defendant's motion to dismiss the complaint for want of prosecution unless the plaintiff "shows justifiable excuse for the delay and a good and meritorious cause of action." (CPLR § 3216[e]; see also *Baczkowski v. D.A. Collins Construction Company*, 89 N.Y.2d 499, 655 N.Y.S.2d 848 [1997]).

Defendants assert that the March 4, 2021 court order not only places the burden on plaintiff to resume prosecution, but also informs plaintiff what will happen if he fails to comply with the order. Defendants further contend that it received a Proposed Order on June 15, 2021 and returned it to Plaintiff's counsel the following day, which is well beyond the Court's 90-day time limit to resume prosecution.

Plaintiff opposes the motion and argues that defendants' motion should be denied because "Plaintiff's inability to certify that discovery has been completed is solely occasioned by Defendants' Counsel's refusal to comply with discovery deadlines…" and the fact that "[a]s a result of Defendants' withholding of this information, Plaintiff is unable to seek leave to appropriately amend its pleading and/or for an extension of time to effect service upon ASI or any successor in interest to ASI." Plaintiff further argues that he acted reasonably and that any delay in prosecuting this case has been the result defense counsel's willful failure to comply with stipulations and discovery directives by this court. Plaintiff requests that this court sanction defendants for their willful failure to provide discovery, and direct defendants to comply with discovery or in the alternative, order preclusion.

On March 4, 2021, the court issued its order which provides, in part, "Plaintiff is hereby directed to resume prosecution of this action within 90 days from the date of this order. Plaintiff's failure to comply with this order shall result in an order dismissing this action for unreasonably failing to prosecute pursuant to CPLR 3126. If discovery is outstanding, the parties are directed to meet and confer and present a proposed stipulation setting deadlines for all outstanding discovery to the court to be so ordered."

Defendant's motion to dismiss is denied. While plaintiff's counsel did not file its note of issue by the court directed deadline of June 25, 2021, plaintiff did meet and confer with defense counsel by telephone and email communications in order to resolve discovery issues and resume prosecution of this case. Plaintiff finally filed an untimely stipulation extending discovery deadlines on June 17, 2021, which failed to include a date to file its note of issue. While it may be plaintiff's burden to resume prosecution, defendants have not come to the table with clean hands. In an effort to resume prosecution, plaintiff reached out to defense counsel on March 5, 2021, the day after the court's March 4, 2021 order, to get the case back on the right discovery track only to be thwarted by counsel that his client was out of the country and had limited access to internet. Cases should be decided on their merits. Both parties have unnecessarily burdened the court with discovery disputes that could have been resolved either between themselves or if not, by motion practice after good faith efforts have failed and not wait years before requesting said relief.

Based on the foregoing, defendants motion to dismiss is denied. Relatedly, plaintiff's request for sanctions, to compel and/or preclusion is denied without prejudice to renewal after making a *bona fide* good faith attempt to set a discovery schedule.

Plaintiff Brainwave's cross-motion for summary judgment

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Plaintiff argues that each defendant executed the Brainwave IP Assignment Agreements in their individual capacity or by and through their authorized corporate representatives, that Farwell does not dispute signing the Brainwave IP Assignment Agreements in his individual capacity or affirmatively representing he had authority to sign, and that defendants received substantial consideration for the execution of the IP Acknowledgment and Assignment Agreements. Plaintiff further argues that defendants' affirmative defense, fraudulent inducement, fails as a matter of law and that defendants remaining affirmative defenses are baseless and/or lack merit.

Plaintiff contends it is entitled to summary judgment on its 1st cause of action for a permanent injunction, on its 3rd cause of action for defamation, on its 4th cause of action for a declaratory judgment and on defendants' first, second, third and fourth counterclaims "as defendant does not have clean hands".

Defendants oppose the motion on the grounds that it is premature and that issue has not been joined with respect to defendant ASI. Defendants further argue that instead of moving for a default judgment against defendant ASI, plaintiff places blame on defendant Farwell for refusing to "accept service" on its behalf and for an entity defendant claims he has no interest in.

The court agrees with defendants.

To make a prima facie showing, the moving party must "demonstrate its entitlement to summary judgment by submission of proof in admissible form" (*Viviane Etienne Med. Care, P.C. v. Country—Wide Ins. Co.*, 25 NY3d 498, 14 NYS3d 283; *see Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595). Admissible evidence may include "affidavits by persons having knowledge of the facts [and] reciting the material facts" (*GTF Mktg. v. Colonial Aluminum Sales*, 66 NY2d 965, 498 NYS2d 786; *see CPLR 3212[b]; (Bank of New York Mellon v. Gordon*, 171 AD3d 197, 97 NYS3d 286 [2 Dept., 2019]).

Plaintiff failed to meet its burden and establish entitlement to summary judgment as a matter of law. There is no affidavit or testimony from a representative of plaintiff having any knowledge of the facts of this case. A review of the record reveals both the complaint and amended complaint lack any verification from someone with personal knowledge. Further, summary judgment is premature when "facts essential to justify opposition may exist but cannot then be stated" (CPLR 3212[f]). At this stage of the litigation, little discovery has been exchanged and no depositions have been held. Moreover, issue has not joined with respect to defendant ASI.

For at least these reasons, the cross-motion is denied without prejudice to renew at the completion of discovery.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that defendants motion to dismiss is denied; and it is further

ORDERED that the parties are directed to meet and confer in good faith to address all outstanding discovery and submit a stipulation to the court on or before December 2, 2021; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied without prejudice to renew at the completion of discovery.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 11/23/21

HON. LYNN R. KOTLER, J.S.C.