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

PRESENT: HERMAN CAHN PART

0603259/2003

MANHATTAN REAL ESTATE
vs
PINE EQUITY, INC.,

SEQ 3

DISMISS ACTION

INDEX NO.

MOTION DATE 11/12/04

MOTION SEQ. NO. 03

MOTION CAL. NO. 25

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

APR 04 2005

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

Dated: 4/1/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SETTLE ORDER ☐ SUBMIT ORDER ☐ REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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MANHATTAN REAL ESTATE EQUITIES GROUP LLC,

Plaintiff,

- against - Index No. 603259/2003

PINE EQUITY NY, INC., PINE EQUITY INTERNATIONAL, LLC, WORLDWIDE PROPERTIES LLC, ROY INVESTMENT NY CORP., OXFORD CAPITAL, LLC, MANHATTAN LANDMARK REALTY LLC, OREN YERUSHALMY, OFER RESLES, TALI GEVA, BEN FRIEDMAN and DOV RON,

Defendants.

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HERMAN CAHN, J.:

In this action alleging defendants' breach of restrictive covenants contained in an agreement for the sale of certain business interests, two motions are consolidated for disposition in accordance with the following decision and order.

In motion sequence number 002, defendant Ben Friedman moves to dismiss the complaint as against him, CPLR 3211, or for a more definite statement, CPLR 3024. Plaintiff cross-moves for an order: (1) pursuant to CPLR 3212, granting it partial summary judgment on all of the complaint's causes of action; or (2) alternatively, granting it a default judgment on account of defendants' failure to answer, CPLR 3215; and (3) in either event, granting plaintiff leave to serve an amended complaint, CPLR 3025 (b).

In motion sequence number 003, the defendants other than Friedman, Tali Geva, and Dov Ron (the Pine Defendants; and, collectively with Friedman, the Moving Defendants) move to dismiss the complaint as against them, CPLR 3211, or for a more definite statement, CPLR 3024.

FACTUAL ALLEGATIONS AND BACKGROUND

Defendant Worldwide Properties LLC (Worldwide) and non-party Dashkal Corp. (Dashkal) each owned 50% of plaintiff Manhattan Real Estate Equities Group LLC, a company engaged in the business of selling condominium apartments in the New York City area to Israeli residents.

Worldwide and Dashkal entered into a Transfer of Membership Interests Agreement, dated January 17, 2002 (the Transfer Agreement), pursuant to which Worldwide sold its 50% ownership interest in plaintiff to Dashkal.

The Transfer Agreement contained restrictive covenants which, for a specified time and to a specified extent, prohibited certain of the defendants from competing with plaintiff, and from hiring plaintiff's employees. The complaint alleges that defendants breached the Restrictive Covenants in various respects, and asserts 13 causes of action, seeking damages, injunctions, and other related relief.

Plaintiff filed the summons and complaint in October 2003, and allegedly served defendants on December 10, 2003. The Moving Defendants did not answer or obtain any extension of time in which to answer or move to dismiss within the statutorily prescribed time period. Instead they served motions to dismiss on October 20, 2004. Plaintiff served the Moving Defendants with its notice of cross motion on January 20, 2005. On February 16, 2005, the Pine Defendants and Friedman served plaintiff with papers in further support of their motions, and in opposition to plaintiff's cross motion, which included copies of their respective proposed answers to the complaint.

DISCUSSION

Insofar as the Moving Defendants' motion to dismiss, the motions are denied. The dismissal motions are untimely, because they were served more than nine months after the time when service of the Moving Defendants' answers was required (*see* CPLR 3211 [e]). The Moving Defendants have failed to either offer any reasonable excuse for their failure to move in a timely manner, or to show any "good cause" (CPLR 2004) for an extension of time in which to move (*see e.g. Miceli v State Farm Mut. Automobile Ins. Co.*, 3 NY3d 725 (2004); *Kihl v Pfeffer*, 94 NY2d 118 (1999); *Wenz v Smith*, 100 AD2d 585, 586 [2d Dept 1984]; *Smith v Pach*, 30 AD2d 707, 708 [2d Dept 1968]; 7 Weinstein-Korn-Miller, NY Civ Prac ¶ 3211.02). Plaintiff's opposition to the Moving Defendants' motions on the merits does not constitute a waiver of its right to contest late service of

those motions, inasmuch as plaintiff has asserted an objection to the untimeliness of the motions (*see* Roschelle Affirm. in Supp., ¶¶ 8, 57-58; *cf. Adler v Gordon*, 243 AD2d 365, 365 [1st Dept 1997]).

The branches of the Moving Defendants' motions which seek service of a more definite statement of the allegations set forth in the complaint are also denied as untimely (*see e.g. Twine v Belling*, 173 AD2d 815, 815 [2d Dept 1991]). The notice of motion for a more definite statement must be served "within twenty days after service of the challenged pleading" (CPLR 3024 [c]). The Moving Defendants did not serve their notices of motion until more than 10 months after they had been served with the complaint. And, again, the Moving Defendants have neither moved for any extension of time in which to serve their motions, nor shown any "good cause" for such an extension (CPLR 2004).

Inasmuch as the Pine Defendants and Friedman have included proposed answers to the complaint with the papers submitted in support of their respective motions, the court will deem each of those motions to include a request for leave to serve a late answer. In view of the strong policy in favor of resolving claims on the merits, and the particular circumstances of this case -- including the Moving Defendants' potentially meritorious defenses to at least certain of plaintiff's causes of action, the lack of any apparent prejudice accruing to plaintiff as a result of the Moving Defendants' delay, and plaintiff's own delay in moving for a default judgment -- the court grants the Moving Defendants leave to vacate their defaults by serving late answers to the complaint.

Plaintiff's cross motion is denied in its entirety. CPLR 3215 (c) provides that:

> If [a] plaintiff fails to take proceedings for the entry of [a default] judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.

Plaintiff's cross motion is accordingly denied, insofar as plaintiff seeks a default judgment, because plaintiff failed to move for such a judgment within one year after the Moving Defendants defaulted in answering. However, the Moving Defendants have waived any right they may have had to seek dismissal of the complaint under CPLR 3215 (c), by their voluntary participation in the action, as

evidenced by the service of their belated answers and discovery demands (*see Gildston v Travelers Ins. Co.*, 168 AD2d 481, 482 [2d Dept 1990]; *Myers v Slutsky*, 139 AD2d 709, 710 [2d Dept 1988]).

The branch of plaintiff's cross motion which seeks partial summary judgment is denied as premature. A party may move for summary judgment only "after issue has been joined" (CPLR 3212 [a]), and issue had not been joined when plaintiff brought its cross motion.

Plaintiff seeks leave to amend the complaint to name an entity known as Vision Group LLC (Vision), and all affiliates of defendant Pine Equity NY, Inc. (Pine) which are not already named, as defendants. Plaintiff asserts that Vision is "a Pine affiliate that expressly undertook to be bound by the provisions of the Transfer Agreement" (Roschelle Reply Affirm., ¶ 12), and that Vision is violating the Restrictive Covenants by selling New York City apartments to Israeli residents, and by hiring and employing Friedman.

While it is generally true that leave to amend should be freely given, a "party seeking amendment has the burden of establishing the merit of the proposed amendment" (*Hynes v Start El., Inc.*, 2 AD3d 178, 181 [1st Dept 2003]), and "[l]eave to amend will be denied ... where the proposed claim is palpably insufficient" (*Tishman Constr. Corp. of New York v City of New York*, 280 AD2d 374, 377 [1st Dept 2001]). Plaintiff has failed to establish that the proposed amendment has merit.

The parties apparently agree that the principal of Vision is Amir Yerushalmy, a non-party to this action, and the brother of defendant Oren Yerushalmy (*see* Roschelle Reply Affirm., ¶ 15; Pine Def. Mem. of Law in Opp., at 5). The Transfer Agreement provides that "WWP Group" shall comply with the Restrictive Covenants (Transfer Agreement, ¶¶ 9.1-9.3). Vision would be encompassed within the term "WWP Group," because that term is defined to include "Amir Yerushalmy and any company which is under the control of ... Amir Yerushalmy or their Affiliates," and "Affiliate" is defined to include, "with reference to any [person or entity], any other [person or entity] of which such [person or entity is] a principal ... or any other [person or entity] directly or indirectly ... controlled by or under direct or indirect common control with such [person or entity]" (Transfer Agreement, ¶¶ 1.1, 1.22). Thus, as plaintiff asserts, the Transfer Agreement does

ostensibly provide that Vision shall comply with the Restrictive Covenants.

However, neither Amir Yerushalmy nor Vision was a party to the Transfer Agreement, and plaintiff has failed to adequately allege any basis for a departure from the generally applicable rule that non-parties to an agreement are not bound by it (*see e.g. National Survival Game of New York, Inc. v NSG of LI Corp.*, 169 AD2d 760, 761 [2d Dept 1991]; *17 East 80th Realty Corp. v 68th Assoc.*, 173 AD2d 245, 248 [1st Dept 1991]). Although plaintiff conclusorily asserts that Vision is "simply an extension of Pine" (Roschelle Affirm. in Supp., ¶ 52), plaintiff has failed to allege any facts which would indicate that Vision should be bound by the Transfer Agreement (*see e.g. Itamari v Giordan Dev. Corp.*, 298 AD2d 559, 560 [2d Dept 2002]). Leave to amend to name as defendants all Pine affiliates which are not already named is also denied, inasmuch as plaintiff has failed even to identify the proposed additional defendants.

CONCLUSION AND ORDER

For the foregoing reasons, it is

ORDERED that defendant Ben Friedman's motion (sequence number 002) is granted, in part, to the extent that Friedman is granted leave to serve a verified answer to the complaint, on or before April 11, 2005; and it is further

ORDERED that plaintiff's cross motion (sequence number 002) is denied in its entirety; and it is further

ORDERED that the motion by the defendants other than Tali Geva, Ben Friedman, and Dov Ron (sequence number 003) is granted, in part, to the extent that those defendants are granted leave to serve a verified answer to the complaint, on or before April 11, 2005.

Dated: April 1, 2005

ENTER:

J.S.C.