

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-60115-CIV-DIMITROULEAS

ARTHUR VANMOOR,

Plaintiff,

vs.

BRIAN F. KING, ROBERT IRVING JARKOW,
JAMES A. GREHL, CARLOS MOREAU,
CONLEY CATHY, JAMES BOYCE MEYER,
and CONCORD CAMERA CORP.,

Defendants.

FINAL ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Defendant Brian F. King's Motion for Summary Judgment. [DE-54]. The Court has carefully considered the Motion, Defendant's Notice of Filing Declaration of Robert W. Gottlieb [DE-55], Plaintiff's Memorandum of Law in Opposition to Defendant's Motion [DE-59], Defendant's Reply [DE-61], and is otherwise fully advised in the premises.

I. BACKGROUND

On January 25, 2006, Plaintiff Arthur Vanmoor ("Vanmoor") brought this action alleging claims for Fraud in the Inducement, Breach of Duty of Good Faith, Breach of Contract, and Defamation against Defendants Brian King, Robert Irving Jarkow, James A. Grehl, Carlos Moreau, Conley Cathy, and James Boyce. Plaintiff also alleged these claims against Defendant Concord Camera Corporation ("Concord") on the basis that former Concord employee and co-Defendant, Brian King, was the authorized agent of Concord when he committed the alleged contract-related and defamation claims. Plaintiff filed suit in the federal court, after voluntarily

dismissing a similar suit brought in the Florida state court, based on diversity jurisdiction.

Prior to filing this action, in June 2003, Plaintiff Vanmoor was arrested by Broward County law enforcement and charged with violations of the Florida RICO statute, Conspiracy to commit RICO violations and Money Laundering. Vanmoor was charged with, *inter alia*, associating with an enterprise for the purpose of engaging in illegal and criminal activities including hiring, employing or procuring women to work as prostitutes through escort services, and conspiring to obtain monies from customers of the prostitution enterprise for sexual services offered and rendered. Ex. B to Decl. of Robert Gottlieb, Information in Florida v. Vanmoor, Case No. 03-9794 CF10A (Fla. 17th Cir. Ct. Information filed June 11, 2003). A plea agreement was reached in the criminal prosecution and Vanmoor pleaded no contest to the racketeering and RICO conspiracy counts and was adjudicated guilty on both counts on July 28, 2004.

Plaintiff's claims in the instant Complaint arise out of the alleged use by Defendants of a licensed dating/escort service operated by Plaintiff in Broward County, Florida and statements allegedly made by Defendants to Broward County law enforcement officers during the state criminal prosecution. Plaintiff alleges that Defendants fraudulently induced Vanmoor's dating and escort service to enter into a contract to provide escort services to Defendants by misrepresenting that they would not use those services for illegal activity. Vanmoor alleges that Defendants signed a credit card slip which stated "cardholder states that this transaction is not for illegal activity" and then breached that agreement by engaging in criminal acts with the females or males provided by the escort service, of which acts Vanmoor asserts he was not aware.

Currently before the Court is Defendant King's Motion for Summary Judgment as to the Plaintiff's claims for breach of contract and breach of duty of good faith. The Court previously

dismissed all claims against Defendant Concord Camera Corp. [DE-34]. The Court also dismissed Vanmoor's defamation claims and fraud in the inducement claims as to all Defendants. [DE-60]. Defendant moves for summary judgment arguing that Vanmoor is estopped from seeking the relief requested in the remaining claims based on his no contest plea in the prior state action. Defendant also contends that Vanmoor was not a party to the contract which Defendant allegedly breached, which King asserts was an agreement between only the credit cardholder and the card issuer, not Vanmoor.

II. DISCUSSION

A. Summary Judgment Standard

The Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support

the nonmoving party's case. Id. at 325.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). According to the plain language of Rule 56(e), the nonmoving party "may not rest upon the mere allegations or denials of the adverse party's pleading," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 587.

Essentially, so long as the nonmoving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. Anderson, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the nonmoving party "is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted).

B. Defendant's Motion

Defendant King moves for summary judgment on Plaintiff's claims for breach of contract and breach of duty of good faith, arguing that Plaintiff is estopped from seeking relief against alleged customers of the escort service based on his no contest plea to the criminal charges in state court. Plaintiff argues that the issues underlying these claims were determined by the state court and Vanmoor cannot deny in this action matters that were necessarily decided in favor of the State in his criminal proceeding. Under Florida law, "a defendant who is adjudicated guilty

pursuant to a plea of nolo contendere is collaterally estopped from seeking affirmative relief . . . that is based on the same conduct that gave rise to the prior prosecution.” Gonzalez v. Florida Dep’t of Highway Safety, 237 F. Supp. 2d 1338, 1363 (S.D. Fla. 2002) (quoting Starr Thyme, Inc. v. Cohen, 659 So.2d 1064, 1068 (Fla. 1995)). Here, the state court adjudicated Vanmoor guilty on the racketeering and RICO conspiracy counts pursuant to his no contest plea and the factual basis demonstrated by the State. Necessary to that adjudication was a conclusion that Vanmoor hired women to work as prostitutes through the escort service and that he was aware of the illegal conduct occurring with customers of the escort service. Thus, Plaintiff cannot assert in this case that he was not engaged in or aware of such conduct, as these matters were decided in favor of the State in the criminal prosecution. See Id. (“[Defendant] is estopped as to all matters that necessarily were decided in favor of the State in the prior proceeding.”).

Plaintiff argues that Starr Thyme does not apply in this case because it is limited to proceedings arising under Chapter 772 of the Florida Statutes. The Court in Gonzales, however did not read Starr Thyme’s holding to be limited in this way, applying the rule in a case not arising under Chapter 772. Moreover, although the Florida Supreme Court has not addressed the precise issue raised in this case, the rationale underlying the holding in Starr Thyme applies equally here. “Most courts give judgment based on a guilty plea the same collateral effect as any other criminal conviction.” Matter of Raiford, 695 F.2d 521, 523 (11th Cir. 1983). This is because a court cannot enter judgment on a guilty plea unless it determines that a factual basis for it exists. Id. Likewise, under Florida law “before a defendant can be adjudicated guilty pursuant to a plea of nolo contendere [or no contest], the facts underlying the offense pled must be judicially determined.” Starr Thyme, 659 So.2d at 1068 (citing Fla. R. Crim. P. 3.172(a)). Thus, Florida

courts have held that an adjudication of guilt pursuant to a plea of nolo contendere is a final judgment that may have collateral estoppel effects. Id. at 1067-68; Behm v. Campbell, 925 So.2d 1070, 1074 (Fla. 5th DCA 2006). Where the state court has already decided the matters underlying Plaintiff's remaining claims, Plaintiff should not be permitted to deny those matters in effort to gain affirmative relief based on the same conduct that gave rise to the criminal prosecution. See Gonzalez, 237 F. Supp. 2d at 1363.

Plaintiff also argues that evidence of a plea of nolo contendere is inadmissible under § 90.410, Florida Statute (2006).¹ The court in Behm, however, held that § 90.410 does not apply to "shield a defendant from his own actions in entering a no contest plea in a criminal setting and then repudiating that declaration in a civil setting." Behm, 925 So.2d at 1075; see also Starr Thyme, 659 So.2d at 1068 ("section 90.410 speaks only to the admission into evidence of the plea itself; it does not address the collateral estoppel effect of a final judgment resulting from the plea"). Thus, § 90.410 does not apply to bar evidence of Vanmoor's no contest plea where he is now affirmatively seeking relief in this civil action based on the same matters already decided in the criminal case. Plaintiff's arguments are unavailing here and summary judgment will be entered as to Plaintiff's remaining claims for breach of contract and breach of duty of good faith.

III. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** as follows:

¹That statute states in relevant part that "[e]vidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding." Fla. Stat. § 90.410.

1. Defendant King's Motion for Summary Judgment [DE-54] is hereby **GRANTED**;²
Plaintiff's Complaint is **DISMISSED**.
2. Defendant Robert Jarkow's Counterclaim against Vanmoor remains pending.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this
20th day of November, 2006.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Allen M. Levine, Esq.
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Bonnie J. Losak-Jimenez, Esq.
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Robert Jarkow, Pro Se

²Because the Court finds that Plaintiff is estopped from seeking the affirmative relief requested in this action based on his plea in the criminal prosecution, Gonzalez, 237 F. Supp. 2d at 1363, the Court need not reach Defendant's alternative basis for summary judgment regarding whether Vanmoor was a party to the contract allegedly breached by Defendant.