SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

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TIMOTHY MEYER,

Plaintiff,

-against-

BLUE SKY ALTERNATIVE INVESTMENTS LLC, BLUE SKY ALTERNATIVE INVESTMENTS LIMITED, BSAI INTERNATIONAL PTY. LTD., and DIGBY BEAUMONT,

Defendants.

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INDEX No.: 653451/2019

MOT. DATE: 8/24/2020

MOT. SEQ. No.: 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32
were read on this motion to/for AMEND COMPLAINT

Plaintiff Timothy Meyer ("Meyer") moves to amend his complaint, add a party, and serve an amended summons pursuant to CPLR 1003 and 3025(b). The proposed amended complaint asserts two additional claims: (i) successor liability as against proposed new defendant RBP Partners, LLC as successor to defendant Blue Sky Alternative Investments LLC, and (ii) violation of notice and recordkeeping requirements under New York Labor Law § 195.

Leave to amend a pleading pursuant to CPLR § 3025 "shall be freely given," in the absence of prejudice or surprise (*see e.g. Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354 [1st Dept 2005]). Mere lateness in seeking such relief is not in itself a barrier to obtaining judicial leave to amend (*see Ciarelli v Lynch*, 46 AD3d 1039 [3d Dept 2007]). Rather, when unexcused lateness is coupled with significant prejudice to the other side, denial of the motion for leave to amend is justified (*see Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 958 [1983]). Prejudice in this context is shown where the nonmoving party is "hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Loomis v Civetta Corinno Const. Co.*, 54 NY2d 18, 23 [1981]).

In order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated (*Thompson*, *supra*, 24 AD3d at 205; *Zaid*, *supra*, 18 AD3d at 355). Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*see Aerolineas Galapagos, S.A. v Sundowner Alexandria*, 74 AD3d 652 [1st Dept 2010]; *Thompson*, *supra*, 24 AD3d at 205). Thus, a motion for leave to amend a pleading must be supported by an affidavit of merit or other evidentiary proof (*Delta Dallas Alpha Corp. v S. St. Seaport Ltd. Partnership*, 127 AD3d 419, 420 [1st Dept 2015]).

As the party seeking the amendment, plaintiff has the burden in the first instance to demonstrate their proposed claims' merits, but defendants, as the parties opposing the motion, "must overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged in the moving papers are obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 W. 40th St. LLC*, 42 AD3d 82, 86 [1st Dept 2007]). Where there has been extended delay in seeking leave to amend, the party seeking to amend a pleading must establish a reasonable excuse for the delay (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 [1st Dept 2003]).

In support, plaintiff argues that his proposed amended complaint successfully states a claim for successor liability against new defendant RBP, alleging that RBP is a mere continuation of defendant Blue Sky which, since June 2019, has become an empty shell with its assets stripped and transferred to RBP (Pl. Br. at 6 [Doc. No. 13]); Proposed Compl. ¶¶ 75-76, 80-83, 94-99 [Doc. No. 15]; Meyer Aff. ¶¶ 2-7 [Doc. No. 24]). Plaintiff further argues that his proposed complaint successfully states a claim for violation of New York Labor Law § 195(1) which mandates that "at the time of hiring," an employer must provide its new employee a Notice containing certain information, including "the rate or rates of pay and basis thereof . . . the regular pay day designated by the employer . . . the name of the employer . . . the physical address of the employer's main office . . . [and] the telephone number of the employer" (NYLL § 195(1); Proposed Compl. ¶¶ 100-103).

In opposition, defendants argue that successor liability is not a cognizable claim under New York law, but merely a theory for imposing liability on a defendant based on a predecessor's conduct (Def. Br. at 4-5 [Doc. No. 18]; *Marcum LLP v Fazio, Mannuzza, Roche, Tankel, Lapilusa, LLC*, 65 Misc3d 1235(A) [NY Sup Ct 2019]). Defendants argue that, even if

the proposed complaint pleaded cognizable claims, plaintiff has failed to allege a transaction between the predecessor entity and the alleged successor in the form of a stock purchase agreement, an asset purchase agreement, or a contract between predecessor and successor, which is a necessary predicate for a successor liability claim (Def. Br. at 5-7; *see e.g. Schumacher v Richards Shear Co.*, 59 NY2d 239 [1983]; *Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291 [1984]). Finally, defendants argue that, even if plaintiff alleged the requisite predicate, the successor liability claims fail as a matter of law because (i) plaintiff has failed to allege Blue Sky transferred any assets to RBP, (ii) Blue Sky LLC still exists, (iii) RBP did not assume Blue Sky's name, (iv) Blue Sky and RBP do not share the same corporate officers or directors, and (v) there is no continuation of the same business (Def. Br. at 7-13; *see Burgos v Pulse Combustion, Inc.*, 227 AD2d 295, 295-296 [1st Dept 1996]; *Miot v Miot*, 24 Misc3d 1224(A) [Sup Ct 2009]).

In reply, plaintiff reiterates its previous arguments and newly argues that defendants' opposition is legally defective (Pl. Reply [Doc. No. 23]). First, plaintiff argues that case law suggests a cognizable claim for successor liability exists (*id.* at 4; *see Advantage Printing, Inc. v MD Hospitality LLC*, 2018 NY Misc LEXIS 402, at *8 [Sup Ct New York County 2018]); *State Farm Fire & Cas. Co. v Main Bros. Oil Co.*, 101 AD3d 1575, 1579 [3d Dept 2012]). Second, plaintiff argues that, to the extent RBP is not owned by exactly the same individuals who owned Blue Sky, the "de facto merger test requires continuity, not uniformity of ownership" which plaintiff believes he will be able to show after discovery (Pl. Reply at 4-5; *At Last Sportswear, Inc. v Newport News Holding Corp.*, 2010 NY Misc LEXIS 4866, at *9 [Sup Ct New York County 2010]). Third, plaintiff disputes defendants' characterization that some transaction or contract is needed between Blue Sky and RBP to plead successor liability, arguing that courts only rely upon the five indicia of corporate "mere continuation" in a flexible manner (Pl. Reply at 5-6; *Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 175-176 [1st Dept 2013]; *Cullens v A.O. Smith Water Prods. Co.*, 2013 NY Misc LEXIS, at *7-8 [Sup Ct New York County 2013]; *Advantage Printing, Inc. v MD Hospitality LLC*, 2018 NY Misc LEXIS 402, at *10-11 [Sup Ct New York County 2018]). Finally, plaintiff argues that Blue Sky's continued existence as a corporate entity, even if true, is not decisive as courts have rejected the notion that "there could be no de facto merger where the [predecessor] is not legally dissolved" (Pl. Reply at 6-7; *Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 575 [1st Dept 2001]).

Here, plaintiff's motion to amend shall be granted. The proposed complaint successfully states a claim of successor liability against proposed defendant RBP. In his claim for successor liability, plaintiff specifically alleges that RBP is a "mere continuation" of Blue Sky and should be held liable to plaintiff in the same way as Blue Sky. Factors the court considers to conclude that a corporation is a "mere continuation" of its predecessor include: (i) all of substantially all assets are transferred to the successor corporation, (ii) only one corporation exists after the transfer, (iii) assumption of an identical or nearly identical name, (iv) retention of the same corporation officers or directors, and (v) continuation of the same business (*Miot v Miot*, 2009 NY Misc LEXIS 1940, *15 [Sup Ct New York County 2009]). Here, the proposed complaint alleges that (i) Blue Sky ceased to exist and had its assets stripped and transferred to RBP (Proposed Compl. ¶ 77), (ii) Blue Sky has retained all of Blue Sky's principals, named Fabian Roche, Digby Beaumont, and Harry Picone, who have become principals and corporate officers at RBP (which is, itself, an acronym of Roche, Beaumont, and Picone) (*id.* ¶ 81), (iii) RBP is located in the same building and office suite as Blue Sky (*id.* ¶ 82), and (iv) RBP invests in the same sectors targeted by Blue Sky and anticipates investing in the same companies that Blue Sky was once invested in (*id.* ¶ 83).

Although defendant argues that successor liability is merely a theory of liability and not a cognizable cause of action, New York Courts have acknowledged the legitimacy of a successor liability claim in several cases (*Advantage Printing, Inc. v MD Hospitality LLC*, 2018 WL 746156 [Sup Ct New York County 2018]; *MBIA Insurance Corporation v Countrywide Home Loans, Inc.*, 40 Misc3d 643 [Sup Ct New York County 2013]). Further, while defendant argues that a transaction between the successor and predecessor corporations is a necessary predicate to a finding of successor liability, neither of the cases cited espouse such a standard and the facts of each case are distinguishable (*see e.g. Schumacher v Richards Shear Co.*, 59 NY2d 239, 245-246 [1983] factors constituting successor liability held not present]; *Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296 [1984] [in a products liability case, court held plaintiff's argument failed as it commenced with the faulty premise that successor liability was related to indemnification]).

Plaintiff's complaint further successfully states a claim for the violation of New York Labor Law § 195 (Proposed Compl. ¶¶ 100-103). Defendant do not contest this claim.

The motion to amend the complaint is **GRANTED**. The amended summons and complaint shall be served and e-filed within thirty days of service of this decision and order with notice of entry.

12/14/2020
DATE

O. PETER SHERWOOD, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE