

Perelson Weiner, LLP v Allison

2010 NY Slip Op 31679(U)

June 29, 2010

Supreme Court, New York County

Docket Number: 118390/06

Judge: Emily Jane Goodman

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7-1-10

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 118390/2006

PERELSON WEINER

vs.

ALLISON, MARK

SEQUENCE NUMBER : 003

AMEND

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 *is decided per*
attached

FILED
JUL 02 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/28/10

EJG

EMILY JANE GOODMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
PERELSON WEINER, LLP,

Plaintiff,

-against-

Index No.: 118390/06

MARK ALLISON,

Defendant.

-----X
EMILY JANE GOODMAN, J.S.C.:

FILED
JUL 02 2010
NEW YORK
COUNTY CLERK'S OFFICE

In this case, plaintiff, Perelson Weiner, LLP, an accounting firm, seeks unpaid fees for performing tax preparation work for defendant, Mark Allison. Defendant counterclaims for malpractice, and here moves to amend his verified answer and counterclaim.

Defendant, in his original counterclaim, which was interposed with his answer in January 2007, alleged that plaintiff, in preparing defendant's tax returns, failed to identify and properly calculate how two Passive Foreign Investment Companies (PFIC) affected defendant's income for tax purposes. Defendant claims that this alleged failure resulted in his overpayment of \$61,000 in taxes in 2002. It is undisputed that defendant eventually received a refund from the IRS of the \$61,000 overpayment.

In the proposed pleading, defendant seeks to assert the defense of setoff and to supplement his counterclaim with respect to the nature and amount of damages he alleges he suffered due to plaintiff's work in connection with the preparation of his tax returns, and its alleged failure to identify and properly characterize a PFIC held by a trust. Such damages include costs that defendant claims to have incurred in engaging another tax preparation firm,

Beers Hamerman, to redo certain tax return work.

In addition, defendant seeks to expand his pleading to include additional factual allegations concerning the tax work. Specifically, defendant seeks to add a claim that plaintiff overcharged him by performing unnecessary work, and/or by spending more time than was necessary to perform work. Regarding this claim, defendant contends that through his engagement of Beers Hamerman, he discovered plaintiff's excessive, or inflated, billing. Defendant also alleges that plaintiff improperly billed him for the time it spent in correcting its own mistake in failing to ascertain that defendant's major investments were PFICs.

Defendant further claims that plaintiff, having held itself out to him as a sophisticated accounting firm with experience in advising clients in connection with offshore investments, is liable to him for failing to adequately advise him concerning litigation in the Cayman Islands regarding the rescinding of certain tax-structure actions concerning defendants' trusts. Defendant asserts that this litigation was pointless because, while the Cayman Islands Court granted his application, the IRS was not bound by that Court's decision.

In opposition, plaintiff argues that defendant's original counterclaim is without merit because it prepared defendant's tax returns properly with the information it was given and because defendant testified that he received the \$61,000 tax refund. Plaintiff further argues that defendant improperly seeks to raise new issues when discovery is almost complete. Plaintiff also contends that defendant does not provide an excuse for his delay in seeking leave to amend, and fails to demonstrate that there is any reason for the court to allow the proposed amendment.¹

¹In its opposition papers, plaintiff objected to defendant's failure to submit an affidavit, other than an attorney affidavit, or to otherwise make an evidentiary showing. While indeed defendant submitted his affidavit for the first time only in reply, plaintiff has been permitted the

It is well settled that, pursuant to CPLR 3025 (b), leave to amend pleadings “shall be freely given,” absent prejudice or surprise to the opposing party (*McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]). Nevertheless, in order to conserve judicial resources, the court is required to examine the underlying merits of the proposed claims (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept], *lv dismissed* 12 NY3d 880 [2009]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). Leave to amend should be denied where the proposed pleading clearly lacks merit (*Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st Dept 2007]; *Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001]). In other words, the proposed amendment should be sustained unless its “alleged insufficiency or lack of merit is clear and free from doubt” (*Miller v Staples Off. Superstore E., Inc.*, 52 AD3d 309, 313 [1st Dept 2008] [citation and internal quotation marks omitted]).

“Where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay” (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 [1st Dept 2003] [internal quotation marks omitted]). However, “[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine” (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983] [internal citation and quotation marks omitted]). In fact, prejudice requires “some indication that the [opposing party] has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position” (*Cherebin v*

opportunity to address that affidavit. Plaintiff has submitted the affidavit of one of its shareholders, Mitchell J. Eichen, in order to do so.

Empress Ambulance Serv., Inc., 43 AD3d 364, 365 [1st Dept 2007], quoting *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, *rearg denied* 55 NY2d 801 [1981]; see *11 Essex St. Corp. v Tower Ins. Co. of N.Y.*, 70 AD3d 402 [1st Dept 2010] [reversing denial of motion to amend answer after three-year delay]).

Regarding defendant's attempt to amend his counterclaim and assert the defense of setoff for what he claims was the cost of plaintiff's faulty work, including the cost of obtaining a refund from the IRS, plaintiff cannot claim surprise, and certainly has not demonstrated that it has been hindered in preparing its case (*Cherebin*, 43 AD3d at 365). Defendant merely expands upon what he contends were the damages caused by plaintiff's alleged failure to identify and properly account for a PFIC. This was the very subject of the original counterclaim.² Plaintiff also does not demonstrate prejudice concerning the other allegations defendant seeks to assert, all of which purportedly arise out of plaintiff's tax work for defendant. In fact, plaintiff's claim of prejudice concerns only discovery, which, at this juncture, remains on-going.

In addition, defendant's new allegations are not, as a matter of law, so clearly lacking in merit so as to warrant denial of the motion, except as to the conclusory claim that plaintiff overcharged defendant by performing unnecessary work, and/or by spending more time than was necessary to perform work, which strikes the court as hollow, given that defendant states he discovered plaintiff's excessive billing in connection with his engagement of Beers Hamerman

²Plaintiff argues that defendant had already received the \$61,000 refund at the time he asserted the counterclaim, but there is otherwise no indication in the record as to when plaintiff received the refund, and plaintiff does not provide evidence or an explanation as to the basis of its knowledge about this. While plaintiff contends that, based on its review of documents and conversations with the IRS, there was no malpractice on its part, plaintiff does not provide any documents or other evidence demonstrating its contentions.

in 2005, did not assert such a claim in his January 2007 answer, but seeks to assert it now, without an affidavit from Beers Hamerman explaining what billing was excessive and why. The mere fact that plaintiff billed more hours or otherwise charged more than Beers Hamerman is not a sufficient basis on which presume the work was unnecessary or that excessive time was taken in performing the work.³ Defendant's argument that the plaintiff's billings were significantly greater than the estimate defendant was given is similarly insufficient.⁴ However, Defendant's allegation, that plaintiff billed him for correcting plaintiff's own error, in connection with the alleged failure to identify investments as PFICs, and regarding the Cayman Islands matter, stands on different footing. Accordingly, the motion to amend to assert the overcharge claim, based on excessive billing (as opposed to billing for work that was incorrect) is denied, with leave to renew upon an affidavit from Beers Hamerman.

Regarding defendant's claim that plaintiff was negligent in failing to adequately advise him concerning what he maintains was a useless application to the Cayman Islands court concerning his trusts, defendant submits his affidavit stating that he engaged plaintiff to advise him concerning that very application. While plaintiff contends that the matter was handled by defendant's tax attorney, and that defendant did not seek advice from plaintiff concerning whether to rescind the trusts, or concerning the legal process associated with the trust rescission, this evidence merely conflicts with plaintiff's averment, raising fact issues, but is not dispositive,

³Employing defendant's logic regarding the mere difference in the amount of time expended by the respective firms, the conclusion that the second firm did not perform necessary work could also be drawn.

⁴Plaintiff also submits its 2002 retainer letter with defendant, which provides for hourly billing, but its argument as to the significance of this submission is vague.

or a sufficient ground to deny defendant's application.⁵

Plaintiff also argues that defendant is confusing the issues surrounding the identification of his assets as a PFIC and the trust rescission application. Plaintiff, however, does not explain the manner in which this purported confusions bears on this motion.

Also, apparently relating to defendant's allegations about the Cayman Islands litigation, plaintiff objects to what it characterizes as defendant's allegation that plaintiff is liable for defendant's bank and tax attorney fees, as plaintiff contends that it had no duty to oversee the bank or the tax attorney, and had no control over them. In his proposed pleading, defendant seeks to recover costs, including attorney's fees, that he claims to have incurred due to plaintiff's alleged mis-characterization of the PFIC (*see* Pl. Mov. Aff., Exh. A, at 7, ¶ 53-54). It is not clear how plaintiff's argument about the lack of a duty to oversee defendant's tax attorney or the bank bears on this allegation. In any event, plaintiff is not prejudiced by the inclusion of this claim inasmuch as leave to amend is otherwise being granted (*see 11 Essex St. Corp.*, 70 AD3d at 403).

Plaintiff contends that defendant has not offered a reasonable excuse for his delay in seeking leave to amend. It is undisputed that plaintiff provided services to defendant from 2002 to 2004. Based on this fact, plaintiff argues that defendant was aware of the information needed to assert his proposed amended counterclaim for over five years, and prior to service of his

⁵Of course, if plaintiff can properly demonstrate that the scope of its engagement did not include advising defendant concerning the trust rescission application, which plaintiff asserts was undertaken after its dealings with defendant, this determination does not preclude plaintiff from seeking summary judgment on this issue, if appropriate.

original answer and counterclaim in January 2007.⁶ Responding, defendant asserts only that he became aware of the overcharging after he asserted his counterclaim, without much elaboration as to *when*. In his memorandum of law, defendant maintains that the facts concerning the alleged overcharge are based, in part, on the tax preparation work that Beers Hamerman performed for him over several years, citing to his reply affidavit and the proposed counterclaim for support. In the proposed counterclaim, defendant discusses work Beer Hamerman performed on his 2005 and 2006 tax returns. Defendant's reply affidavit adds little of substance on this issue. Pointing to alleged events that occurred in 2005 and 2006 does not support what appears to be defendant's implicit contention that there was no significant delay in seeking leave to amend until 2010. As previously discussed, however, delay, where it is not coupled with significant prejudice, is not dispositive. Such prejudice has not been demonstrated here. Moreover, at the parties' next discovery conference the court will address expedited and equitable discovery accommodations necessary to remedy delays in this case, as may be just (*see* CPLR 3025 [b]), and the parties are directed to present this order when they then appear.

Accordingly, it is

ORDERED that the motion to amend is granted except as to the conclusory claim that plaintiff overcharged defendant by performing unnecessary work, and/or by spending more time than was necessary to perform work; and it is further

ORDERED that defendant may renew his motion to amend, as to the claim that plaintiff overcharged defendant by performing unnecessary work, and/or by spending more time than was

⁶In paragraph 9 of his affidavit in reply, defendant avers that Beers Hamerman has performed his tax returns since 2004.

necessary to perform work, upon an affidavit of Beers Hamerman; and it is further

ORDERED that the defendant's amended verified answer and counterclaim in the proposed form annexed to the moving papers (but deleting references to plaintiff overcharging defendant by performing unnecessary work, and/or by spending more time than was necessary to perform the work), shall be served on plaintiff within 10 days of receipt of a copy of this Decision and Order.

This Constitutes the Decision and Order of the Court.

Dated: June 29, 2010

ENTER: _____
J.S.C. 

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JUL 02 2010
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