

**Conway v Marcum & Kliegman LLP**

2016 NY Slip Op 31933(U)

October 11, 2016

Supreme Court, New York County

Docket Number: 652236/2014

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

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SIMON CONWAY AND DAVID WALKER, in  
their capacity as the Joint Official Liquidators of  
AJW OFFSHORE LTD., AJW MASTER FUND  
LTD., AJW OFFSHORE II, LTD., and AJW  
MASTER FUND II, LTD.,

**DECISION AND  
ORDER**

Plaintiffs,

Index No.: 652236/2014  
Mot. Seq. 007

-against-

MARCUM & KLIEGMAN LLP, MARCUM &  
KLIEGMAN (CAYMAN), and MARCUM LLP.

Defendants.

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HON. ANIL C. SINGH:

Plaintiffs, Simon Conway and David Walker (“Plaintiffs”), move pursuant to CPLR 3025(b) for leave to amend their complaint against defendants, Marcum & Kliegman LLP, Marcum & Kliegman (Cayman), and Marcum LLP (“Defendants”) to include, *inter alia*, accounting malpractice/negligence, new claims of gross negligence, fraud, breach of contract, or alternatively, unjust enrichment. Defendants oppose the motion.

The above captioned matter is in the discovery phase of the litigation. Note of Issue has not yet been filed. Plaintiffs seek to amend the complaint to include a fraud claim based on the same allegations used to “support[] a gross negligence claim in connection with the 2007 audits.” Plaintiffs’ Memorandum in Support of Motion p.

12. Plaintiffs seek to augment previously asserted claims and to assert new claims based on invoices recently received during discovery.

Under CPLR 3025, “[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom.” MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d 499, 500 (1st Dept 2010). While plaintiffs are not required to establish the merits of proposed new allegations, the proposed amendments must not be “palpably insufficient or patently devoid of merit” Id. “A party opposing leave to amend must overcome a heavy presumption of validity in favor of permitting amendment.” McGhee v. Odell, 96 A.D.3d 449, 450 (1st Dept 2012) (internal quotations omitted).

Plaintiffs’ proposed amendments are not palpably insufficient or clearly devoid of merit. See Pier 59 Studios L.P. v. Chelsea Piers L.P., 40 A.D.3d 363, 366 (1st Dept 2007) (“Once a prima facie basis for the amendment has been established, that should end the inquiry.”) (citation omitted). The proposed amendments were supported by a sufficient showing of merit through the submission of an affirmation by counsel, a redline of the proposed changes to the complaint, along with relevant documents including invoices produced by the Defendants related to the 2009 and 2010 audits. In fact, Defendants do not contend, in their reply, that the proposed amendments are without merit.

Defendants contend that Plaintiff's motion should be denied because of undue delay. Defendants contend that Plaintiffs should have brought this case in 2012, or even as early as 2011. However, this Court and the First Department have held that the original complaint was filed in a timely manner when this action was commenced in July 2014. Stokoe v. Marcum & Kliegman LLP, No. 6552236/2014, 2015 WL 1306995, at \*5 (Sup. Ct. N.Y. Cty. Mar. 16, 2015), aff'd, 135 A.D.3d 645 (1st Dept 2016). Plaintiffs' contend that the new information in the amended complaint relates to allegations concerning the 2009 and 2010 audits, which they assert they became aware of in February 2016. See AC ¶¶ 129-30, 151, 168, 217-18, 224-49 (new allegations concerning 2009 and 2010 Audits); Gross Reply Aff. ¶¶ 12-13; see also Gross Moving Aff., Exh. Z.

After receiving these invoices, Plaintiffs requested additional documents from Defendants that were received in mid-June. Thus, the motion to amend, filed on June 15, 2016 was four months after the production of the invoices and only days after the receipt of the additional requested documents. Further, "delay alone in seeking leave to amend is not grounds for denial of the motion. Delay coupled with prejudice or surprise is required." Schron, 39 Misc.3d 1213(A) at \*3 (Sup. Ct. N.Y. Cnty. Apr. 9, 2013).

Defendants can claim prejudice only if they are "hindered in preparation of [their] case or ha[ve] been prevented from taking some measure in support of [their]

position.” Id. Defendants contend that the Amended Complaint will require them to engage in further discovery and will greatly expand the scope and time frame of this litigation. Although both parties may intend to seek additional discovery as a result of the proposed amendments, “the need for additional discovery does not constitute prejudice sufficient to justify denial of an amendment.” Jacobson v. Croman, 107 A.D.3d. 644, 645 (1st Dept 2013). Like Jacobson, Plaintiffs’ proposed amendments in this case are “based on facts and documents within defendants’ knowledge and possession.” Id. at 645-46. In that case, the First Department held that both parties would be able to obtain discovery should it be needed. Id. at 646. Thus, any need for further discovery in the instant case does not hinder a motion for leave to amend.

Consequently, Plaintiffs’ proposed amendments are not palpably insufficient nor do they impose undue prejudice or surprise.

Accordingly, it is,

**ORDERED** that the Plaintiffs’ motion for leave to amend the complaint is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

**ORDERED** that the Defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service.

Date: October 11, 2016  
New York, New York

  
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Anil C. Singh