

Albucker v Edirs

2016 NY Slip Op 31960(U)

October 14, 2016

Supreme Court, New York County

Docket Number: 653736/2013

Judge: Gerald Lebovits

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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

STEVEN ALBUCKER,

Plaintiff,

-against-

HAMID EDIRS, S & S INTERNATIONAL
FASHIONS, INC., UNIQUE MENSWEAR AND
H E INTERNATIONAL FASHIONS, INC.,

Defendants.

Index No.: 653736/2013
DECISION/ORDER
Motion Sequence No. 05

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff’s motion to amend the caption under CPLR 3025 (b).

Papers	Numbered
Plaintiff’s Order to Show Cause	1
Defendant’s Affirmation in Opposition	2
Plaintiff’s Reply Affirmation in Support of the Motion to Amend the Caption.....	3
Plaintiff’s Supplemental Affirmation in Support.....	4

Donald M. Zolin, Esq., New York City, for plaintiff.
Law Offices of Lawrence J. Silberman, P.C., New York City (Lawrence J. Silberman of counsel), for defendants.

Gerald Lebovits, J.

Plaintiff commenced this case on October 25, 2013. A trial is scheduled before this court on October 21, 2016. Plaintiff now moves to amend its caption under CPLR 3025 (b) to substitute “Steven Albuquer” with “Steven Albuquer, assignee of San Malone Enterprises, Inc.” In support of his motion, plaintiff provides a document titled “Assignment” that purports to provide that San Malone Enterprises, Inc. (San Malone), “assigns all right, title and interest” to plaintiff. A corporate officer of San Malone signed the document on July 14, 2016. (Plaintiff’s Order to Show Cause.)

Plaintiff states that defendants knew that San Malone owned the merchandise and that Albuquer was “a sales representative.” (Plaintiff’s Complaint ¶ 3; Plaintiff’s Affirmation in Support at ¶ 18.) When plaintiff filed this case, defendants therefore knew, plaintiff contends, that a business relationship existed between plaintiff and San Malone. Plaintiff further argues that the proposed amendment would neither prejudice nor surprise defendants because former San Malone president, Lewis Jia, now deceased, signed a letter dated December 2, 2014, in which he authorized plaintiff to seek redress against defendants: “[O]ur salesman Steven Albuquer personal grantee which means Steven is fully responsible for the money and it is

up to Steven if he wants to take action to sue the customer . . .” (Plaintiff’s Affirmation in Support for Leave to Amend the Complaint, at ¶ 4; Exhibit B.)

Defendants raise several arguments why this court should deny plaintiff’s motion. Defendants contend that they would be prejudiced because plaintiff waited three years to provide an assignment of rights with San Malone and that plaintiff made this motion only when the court pointed out this deficiency in plaintiff’s complaint. No disclosure regarding the assignment has been conducted. If the court grants the motion, defendants argue, this trial will be delayed because defendants will seek to interpose an amended answer and seek additional disclosure. (Defendant’s Affidavit in Opposition at ¶ 5.) According to defendants, they did not have prior notice of a formal assignment between plaintiff and San Malone. Defendants asked plaintiff about the specifics of his business relationship with San Malone during his examination before trial (EBT) on August 25, 2014. Plaintiff stated that he is a salesman of San Malone and that he was a “representative” of San Malone. (Defendants Affidavit in Opposition, Exhibit B, at 9, lines 9-25). When defendants asked plaintiff at his EBT to provide written documents about policies or procedures about their business relationship, plaintiff stated that no such documents existed. The only document reflecting a business relationship between plaintiff and San Malone are invoices bearing San Malone’s letterhead, defendants urge. (Defendants Affirmation in Opposition, Exhibit B, at 21, ln 22-25; at 22-47.)

Plaintiff’s motion for leave to amend the caption under CPLR 3025 (b) is denied. Under CPLR 3025 (b), “[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court.” A court has broad discretion to grant a motion for leave to amend a pleading. (*Lucido v Mancuso*, 49 AD3d 220, 227 [2d Dept 2008] [“[T]he drafters of the Civil Practice Law and Rules believed it appropriate to provide expressly for a liberal standard” under CPLR 3025 [b]].) A motion to amend, however, should be denied if the proposed amendment would cause surprise or prejudice to the opposing party or if the proposed amendment is palpably insufficient or patently devoid of merit. (*Clarke v Laidlaw Tr., Inc.*, 125 AD3d 920, 922 [2d Dept 2015]; *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011] [“It is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party. Mere delay is insufficient to defeat a motion for leave to amend. Prejudice requires ‘some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.’”] [internal citation omitted]; *Lucido*, 49 AD3d at 245 [“Where the proposed amended pleading is palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise, the motion for leave to amend should be denied.”].)

A court’s discretion is further limited if an amendment needlessly complicates disclosure or if an amendment is made on the eve of trial. (*Garguilo v Port Auth. of N.Y. & N.J.*, 137 AD3d 708, 708-709 [1st Dept 2016] [“When an amendment to a pleading or a bill of particulars is sought at or on the eve of trial, judicial discretion in allowing such amendment should be discreet, circumspect prudent and cautious.”] [internal citation omitted]; *Katechis v Our Lady of Mercy Med. Cr.*, 36 AD3d 514, 516 [1st Dept 2007] [“Where the proposed amendment clearly lacks merit and serves no purpose but to needlessly complicate discovery and trial, such a motion should be denied.”].) A movant must provide a reasonable excuse for the delay if there is an

extended delay in moving to amend. (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007] [“Where there is extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion.”] [internal citation omitted].) A movant need not establish the merit of its proposed new amendment. (*Lucido*, 49 AD3d at 245.)

In determining whether a party would be prejudiced by a motion to amend under CPLR 3025 (b), a court considers whether the opposing party has been hindered in preparing the case, such that the opposing party knew about the issue raised and is thus able prepare a proper defense, and whether the amendment affects the opposing party’s rights. (*Kocourek*, 85 AD3d at 504.) An amendment in which the nonmoving party had prior notice that the moving party would be seeking leave to amend would not result in prejudice or surprise to the nonmoving party. (*Cherebin* 43 AD3d at 365 [finding no prejudice or surprise because plaintiff knew of the same facts because defendants’ existing records and depositions]; *Castle v Gaseteria Oil Corp.*, 263 AD2d 523, 524 [2d Dept 1999] [finding no prejudice or surprise resulting from defendants’ delay in seeking to amend its answer where plaintiffs knew a written release existed and had notice that defendants contended that the release was enforceable.]; *Grissom v NY-Presbyterian Hosp.*, 2015 NY Slip Op 31411 [U], *3, 2015 WL 4554458, at *3 [Sup Ct, NY County 2015] [finding no prejudice or surprise where defendants knew the facts giving rise to the plaintiff’s new theory of liability for the same amount of time plaintiff did].)

Although mere delay is insufficient to defeat a motion to amend, a motion for leave to amend the pleadings a few months after litigation proceedings begins is not prejudicial; it does not affect the opposing party’s ability to prepare a proper defense. (*Kocourek*, 85 AD3d at 504 [finding no prejudice where the litigation is in its initial phase]; *Santori v Met Life*, 11 AD3d 597, 598 [2d Dept 2004] [finding no prejudice where defendant moved for leave to amend answer a few months after learning of plaintiff’s bankruptcy proceeding]; *Quiros v Polow*, 135 AD2d 697, 699 [2d Dept 1987] [finding no prejudice where a motion to amend was made only six months after issue was joined].)

An amendment to include an assignment approximately three years after litigation began alters the opposing party’s rights and is therefore prejudicial. (*McHenry v Fifth Ave. Synagogue*, 16 AD2d 773, 774 [1st Dept 1962] [finding plaintiff’s amendment to include an assignment approximately three years after litigation began and was assigned to trial altered the party’s rights].) An amendment that does not change a party’s litigation position or deny the opposing party’s rights is proper. (*MK W. St. Co. v Meridien Hotels*, 184 AD2d 312, 313-314 [1st Dept 1992] [“It is well settled that an amendment which would shift a claim from a party without standing to another party who could have asserted that claim in the first instance is proper.”].) For example, an amendment to memorialize an already-existing assignment or to correct the spelling error of a party in the caption would be proper. (*Post v Cnty. of Suffolk*, 80 AD3d 682, 685 [2d Dept 2011] [granting a motion to amend caption to reflect hospital’s correct name]; *FTBK Inv. II LLC v Mercy Holding LLC* 43 Misc 3d 1215 [A], *12, 2014 NY Slip Op 50654 [U], *12, 2014 WL 1612373, at *13 [Sup Ct, Kings County 2014] [finding that plaintiff’s leave to amend answer to reflect an assignment from a mortgage loan in default was not prejudicial because a later assignment served to memorialize an earlier transfer and assignment].)

A court may deny a motion to amend a complaint if the proposed amendment is palpably insufficient or patently devoid of merit. A plaintiff's motion to amend a complaint to include an assignment was denied when plaintiffs delayed in providing supporting documents containing information that differed from the original complaint. (*See Bennett v First Nat'l Bank of Glens Falls*, 146 AD2d 882 [3d Dept 1989] [finding plaintiff's motion to obtain an assignment of an alleged prior contract for sale of property on the eve of trial devoid of merit because more than three passed years from the required date of performance and the date of assignment and because the description of the property was different from what was in the complaint].)

Plaintiff's motion to amend the caption will, if granted, prejudice defendants. Defendants will be hindered in preparing a defense because they did not know that an assignment between plaintiff and San Malone existed. Although defendants might have understood that plaintiff was a representative of San Malone and that San Malone authorized plaintiff to sue defendants, plaintiffs never provided defendants with supporting documents or notified defendants during the EBT that they would obtain an assignment. (Plaintiff's Complaint ¶ 3; Defendant's Affidavit in Opposition, Exhibit B.) Plaintiff's proposed amendment does more than merely memorialize an already-existing assignment or correct an error; it asserts legal rights. (*See Kocourek*, 85 AD3d at 502; *Cherebin*, 43 AD3d at 365; *Grissom*, 2015 NY Slip Op 31411 [U], *3, 2015 WL 4554458, at *3; *FTBK Inv. II LLC*, 43 Misc 3d 1215 [A], *12, 2014 NY Slip Op 50654 [U], *12, 2014 WL 1612373, at *13 [Sup Ct, NY County 2014].)

Plaintiff's proposed amendment also alters defendants' rights. Plaintiff did not obtain any written assignment of rights from San Malone to plaintiff until July 2016, three months prior to trial and three years after this litigation began. By granting the motion, defendants seek time to interpose their amended answer. Defendants do not have enough time to prepare a proper defense on the eve of trial. (*See McHenry*, 16 AD2d at 773.)

Plaintiff's proposed amendment would further needlessly complicate disclosure. Defendants raise arguments about the merits of plaintiff's assignment; the claim assigned and the exact value of the assignment is unclear. (Defendants Affirmation in Opposition ¶ 4) Plaintiff provides a separate supplemental affirmation in support of his motion to amend stating that plaintiff erred in identifying the person who signed the assignment. Plaintiff states that the correct signatory was not the President of San Malone Enterprises, Inc., but rather a different corporate officer. (Plaintiff's Supplemental Affirmation in Support ¶ 3.) Determining the validity of the assignment will be difficult given the recent death of San Malone's president. Disclosure related to the validity of the assignment will needlessly delay the trial.

Plaintiff's motion to amend is, moreover, palpably insufficient and devoid of merit because plaintiff erred in identifying the correct signatory and failed adequately to explain to the court what the proposed changes are. (*See Bennett*, 146 AD 2d at 882.) Plaintiff provides only an amended complaint without explaining the proposed amendments. The amended complaint not only replaces "Steven Albuquer" with "Steven Albuquer, assignee of San Malone Enterprises, Inc.," but also adds additional paragraphs about the legal relationship between Steven Albuquer and San Malone and includes another legal document. (Plaintiff's Order to Show Cause, Exhibit C, ¶¶ 28-32.)

Finally, the court's discretion is limited because plaintiffs moved to amend on the eve of trial. Plaintiff does not explain why he waited to move to amend the caption. (*See Cherebin* 43 AD3d at 364.)

Accordingly, it is

ORDERED that plaintiff's motion for leave to amend the caption is denied; and it is further

ORDERED that counsel for defendants is directed to serve a copy of this order with notice of entry on plaintiff.

ORDERED that this matter remains on the trial calendar for October 21, 2016, at 10:00 a.m. in Part 7, Room 583, at 111 Centre Street.

Dated: October 14, 2016



J.S.C.

HON. GERALD LEBOVITS
J.S.C.