

**Augustus Butera Photography, Inc. v MCA Creative
Servs., Inc.**

2014 NY Slip Op 32974(U)

October 21, 2014

Supreme Court, New York County

Docket Number: 651984/11

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. NANCY M. BANNON
Justice

PART 42

AUGUSTUS BUTERA PHOTOGRAPHY, INC.

INDEX NO. 651984/11

- v -

MOTION DATE 5/21/14

MCA CREATIVE SERVICES, INC. a/k/a
MARGE CASEY ASSOCIATES, INC.

MOTION SEQ. NO. 004

[and a third-party action]

The following papers were read on plaintiff's motion to amend the complaint (CPLR 3025) and defendant's cross-motion for partial summary judgment (CPLR 3212).

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law-----	No(s). <u>1</u>
Answering Affirmation(s) — Affidavit(s) — Exhibits -----	No(s). <u>2</u>
Replying Affirmation — Affidavit(s) — Exhibits -----	No(s). <u>3</u>
Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law-----	No(s). <u>4</u>
Answering Affirmation(s) — Affidavit(s) — Exhibits -----	No(s). <u>5</u>
Replying Affirmation — Affidavit(s) — Exhibits -----	No(s). <u>6</u>

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

In this breach of contract action, the plaintiff corporation, Augustus Butera Photography, Inc., seeks, *inter alia*, to recover unpaid professional fees from defendant MCA Creative Services, a/k/a Marge Casey Associates ("MCA"), its former agent. The complaint includes causes of action for conversion and unjust enrichment and seeks damages of \$45,000, punitive damages, an accounting and judgment declaring that the parties had a valid contract which was breached by the defendant. The defendant, who had had a 13-year business relationship with the plaintiff's principal, the photographer Augustus Butera, answered and asserted a cross-claim seeking damages for tortious interference with prospective business relations. In a third-party action, MCA seeks damages in excess of \$150,000 from Augustus Butera, individually, upon the same theory as well as breach of contract for failure to pay contractual commissions. Butera answered and asserted several counterclaims approximating the claims in the complaint. The action was commenced in 2011 and discovery has been ongoing.

The corporate plaintiff now moves pursuant to CPLR 3025 and 1003, for leave to amend the complaint to add parties, factual allegations and causes of action. Specifically, the plaintiff seeks to add: (1) third-party defendant Augustus Butera individually, as co-plaintiff in the main action or, in the alternative, leave to amend the third-party answer and counterclaims; (2) seventeen transactions to the factual allegations of the complaint; (3) claims for constructive trust and fraudulent conveyance; and (4) Patrick Casey, Casey Creative Group, Ltd. and Casey Creative Placeholders Corp. as defendants. The defendant cross-moves for partial summary judgment pursuant to CPLR 3212.

Motion to Amend

Leave to amend is freely given absent prejudice or surprise resulting directly from the delay and where the evidence submitted in support of the motion indicates that the amendment may have merit. See CPLR 3025(b); McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp., 59 NY2d 755 (1983); 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552 (1st Dept. 2011); Smith-Hoy v AMC prop. Evaluations, Inc., 52 AD3d 809, 811 (1st Dept. 2008). The motion court should examine the sufficiency of the proposed amendment since leave to amend should not be granted where the proposed is totally without merit or is "palpably insufficient or clearly devoid of merit." MBIA Ins. Corp. V Greystone & Co., Inc., 74 AD3d 499, 500 (1st Dept. 2010); see Hill v 2016 Realty Associates, 42 AD3d 432 (2nd Dept. 2007). The court also "should consider how long the amending party was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered." Haller v Lopane, 305 AD2d 370, 371 (2nd Dept. 2003).

The corporate plaintiff seeks to add its principal Augustus Butera individually as a plaintiff or, in the alternative, for leave to amend the third-party defendant's answer and counterclaims. The plaintiff does not proffer an explanation for its failure to include Butera individually in the original complaint or for its failure to move for this relief until now, more than two years after commencing the action. See Keating v Nanuet Board of Educ., 44 AD3d 623 (2nd Dept. 2007); J.B. Stauffer Constr. Co., v Mailloux, 35 AD3d 1207 (4th Dept. 2006); Wise v Greenwald, 194 AD2d 850 (3rd Dept. 1993). Nor can it reasonably argue that it only became aware of the individual through recent discovery since Butera is its principal. The court notes that this portion of the motion is not opposed by defendant MCA which has already named Butera as a defendant in the third-party action on the basis that Butera, and not his corporation, was the signatory on the parties' agreements. This portion of the motion is nonetheless denied for the above reasons, and because the contract claim is presently not the only cause of action in the complaint and counterclaim.

Nor can the alternative relief be granted on the papers submitted as the plaintiff has not complied with CPLR 3025(b). Any motion to amend a pleading must be accompanied by a proposed amended pleading "clearly showing the changes or additions to be made to the pleading" (CPLR 3025[b]) such that the court can review and approve the pleading in a final form for service upon the other parties. See Dragon Head LLC v Elkman, 102 AD3d 552 (1st Dept. 2013); Haller v Lopane, 305 AD2d 370 (2nd Dept. 2003); Sirohi v Lee, 222 AD2d 222 (1st Dept. 1995). The plaintiff

has attached only a redlined version of a lengthy and somewhat scattered complaint in an effort to show its proposed amendments, and submits no version of any proposed amended third-party answer. Nor does it clearly state the manner in which it seeks to amend that answer. This is not sufficient for the court to render an informed decision. See Miller v Cruise Fantasies, Ltd., 74 AD3d 921 (2nd Dept. 2010); Matter of Hattie G., 70 AD3d 830 (2nd Dept. 2010).

The original complaint appears to allege causes of action for conversion, unjust enrichment, breach of fiduciary duty and professional negligence, and seeks a judgment declaring that the parties had a valid agreement and that the defendant breached the agreement, money damages of \$45,000, punitive damages of \$135,000, and an accounting and further disclosure. The corporate plaintiff now seeks to amend this complaint to add specific transactions, dates and amounts, as well as causes of action for constructive trust and fraudulent conveyance and three additional parties - Patrick Casey, and two companies, Casey Creative Group, Ltd. and Casey Creative Placeholders Corp. The plaintiff alleges that recent discovery, and in particular, the deposition of Patrick Casey in October of 2013, as well as a federal court action commenced by another photographer against Casey and others revealed that Casey, who was associated with MCA before its demise, redirected certain funds to new entities controlled by him and that the proposed amendments are based on these new facts. However, this portion of the motion to amend cannot be determined at this juncture in light of the plaintiff's non-compliance with CPLR 3025(b), as discussed above. The denial of the motion is without prejudice to renew upon proper papers, in accordance with this decision.

Cross-Motion for Partial Summary Judgment

The defendant cross-moves for partial summary judgment pursuant to CPLR 3212, seeking dismissal of the causes of action for conversion, unjust enrichment, negligence, breach of fiduciary duty and breach of contract. The motion, in essence, seeks dismissal pursuant to CPLR 3211(a)(1) and (7). The motion is granted to the extent that the causes of action for negligence is dismissed, and the remainder of the motion is denied without prejudice to renew after any motion by the plaintiff to renew its motion to amend as directed herein.

The plaintiff alleges that the defendant was negligent in its "billing, invoicing and licensing of photographic works" which resulted in a loss to him of professional fees totaling \$45,000. To the extent that the plaintiff is attempting to assert a type of "professional malpractice" claim, it provides no factual support or legal authority for doing so and thus states no cognizable tort claim. See Clark-Fitzpatrick, Inc. v Long Island R.R. Co., 70 NY2d 382 (1987); Harrogate House Limited v Jovine, 2 AD3d 108 (1st Dept. 2003). To the extent the plaintiff is alleging that the defendant failed to meet its obligations under the parties' agreement, it is duplicative of the breach of contract claim. See Clark-Fitzpatrick, Inc. v Long Island R.R. Co., *supra*; Sebastion Holdings, Inc. v Deutsche Bank, AG., 108 AD3d 433 (1st Dept. 2013). The defendant is entitled to summary dismissal of that claim.

In regard to the remaining causes of action, the parties are reminded that “[c]onversion is the ‘unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights.’” Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tx., 87 NY2d 36, 44 (1995); *quoting* Employers’ Fire Ins. Co. v Cotten, 245 NY 102, 105 (1927); *see* Thyroff v Nationwide Mutual Ins. Co., 8 NY3d 283 (2007); State v Seventh Regiment Fund, Inc., 98 NY2d 249, 259 (2002). Thus, where the a party is rightfully in possession of property in the first instance, its continued custody of the property until the person demanding its delivery proves a superior right to possession does not amount to a conversion. *See* Green Complex, Inc. v Smith, 107 AD3d 846 (2nd Dept. 2013). Further, an action for conversion cannot be validly maintained where damages are merely being sought for breach of contract.” Peters Griffin Woodward, Inc., v WCSC, Inc., 88 AD2d 883, 884 (1st Dept. 1982); *see* Orek Edem v Grandbelle Intern., Inc., 118 AD3d 848 (2nd Dept. 2014); Melcher v Apollo Medical Fund Management, LLC, 25 AD3d 482 (1st Dept. 2006).

The claim for breach of fiduciary duty is also subject to dismissal as duplicative of the breach of contract claim to the extent that it is based upon the same allegations and seeks the same damages. *See* Ullmann-Schneider v Lacher & Lovell-Taylor, P.C., 121 AD3d 415 (1st Dept. 2014); Orek Edem v Grandbelle Intern., Inc., *supra*. Further, while an unjust enrichment claim may be plead where the validity of the contract is at issue (*see* Green Complex, Inc. v Smith, *supra*; Resource Finance Co. v Cynergy Data, LLC, 106 AD3d 562 [1st Dept. 2013]), it is well settled that the existence of a valid and enforceable contract will defeat any unjust enrichment cause of action. *See* Clark-Fitzpatrick, Inc. v Long Island R.R. Co., *supra*; Saunders v AOL Time Warner, Inc., 18 AD3d 216 (1st Dept. 2005).

In filing any further papers, all parties are to be guided by the rules of pleading contained in CPLR 3013 through 3019, including the requirement of “clear and concise statements.” (CPLR 3014).

Accordingly, and upon the foregoing papers, it is,

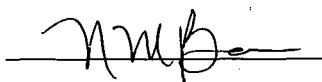
ORDERED that the portion of the plaintiff’s motion which seeks leave to amend the complaint to add Augustus Butera, individually, as a plaintiff is denied, and the motion is otherwise denied without prejudice to renew upon proper papers; and it is further,

ORDERED that the plaintiff shall file any such motion within 30 days of service of this order with notice of entry, and it is further,

ORDERED that the defendant’s cross-motion for partial summary judgment is granted to the extent that the cause of action for negligence is dismissed, and the motion is otherwise denied without prejudice to renew thereafter.

This constitutes the Decision and Order of the court.

Dated: October 21, 2014

 JSC

HON. NANCY M. BANNON

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- CROSS-MOTION IS: GRANTED DENIED GRANTED IN PART OTHER