

**Melcher v Apollo Med. Fund Mgt. L.L.C**

2005 NY Slip Op 30121(U)

August 29, 2005

Supreme Court, New York County

Docket Number:

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----x  
JAMES L. MELCHER,

Plaintiff,

Index No.  
604047/03

-against-

APOLLO MEDICAL FUND MANAGEMENT L.L.C.  
and BRANDON FRADD,

Defendants.

-----x  
**Cahn, J.:**

Motion sequence numbers 003 and 004 are consolidated for disposition.

In motion sequence 003, plaintiff moves for leave to serve a third amended complaint, to correct what he describes as a drafting error in paragraphs 49 and 50, of the second amended complaint, in order to conform the paragraphs to the rest of the complaint, CPLR 3025.

In motion sequence 004, defendants move for a default judgment against plaintiff on their counterclaim, CPLR 3215, and to enter judgment in their favor against Melcher in the sum of \$1,609,245.00. Plaintiff, James L. Melcher, cross-moves, pursuant to CPLR 2004, 2005 and 3012 (d), for an order extending his time to serve a reply to the counterclaim to the date on which such reply was served, and compelling defendants' acceptance of such reply.

Melcher describes the instant action as a dispute between himself and defendant Brandon Fradd, who co-owned and co-managed

defendant Apollo Medical Fund Management (Apollo Management). When Melcher joined Apollo Management in 1998, it operated a hedge fund, Apollo Medical Partners, L.P. (Apollo Partners), which invested primarily in biotechnology stocks. Apollo Management received a fee of 20% of the gains achieved in the hedge fund, which fee was then divided between Melcher and Fradd.

Melcher's third cause of action contains the paragraphs he now wishes to amend. He states that the cause of action is based on the setting up by Fradd of an offshore hedge fund, Apollo Medical Offshore Ltd. (Apollo Offshore), in 2001. Melcher alleges that, Apollo Offshore invested in the same stocks as Apollo Partners. He explains that setting up such offshore hedge funds is customary, because it allows pension funds to invest in hedge funds and still keep certain tax advantages, which they would not have if they invested in a domestic fund.

Fradd arranged for Apollo Offshore to be managed by a management company other than Apollo Management. Thus, according to Melcher, the 20% fees earned from the gains in Apollo Offshore were paid to a different management company, in whose profits Melcher did not share, instead of being paid to Apollo Management, in whose profits Melcher shared.

The third cause of action sounds in breach of fiduciary duty, for Fradd's allegedly diverting the 20% fee earned on Apollo Offshore from Apollo Management to another company. Melcher

asserts that motion sequence 003 is necessary because of a drafting error, and that defendants relied on the drafting error to refuse to produce a broad range of documents at a discovery conference before Hon. Beverly Cohen, the Special Master appointed to supervise disclosure herein. Thus, Melcher makes the instant motion because he believes that if the amendments he seeks are allowed, Special Master Cohen will order the discovery of Apollo Offshore's documents.

Melcher states that, because of the drafting error, paragraphs 49 and 50 do not conform to the rest of the complaint. He explains that the paragraphs incorrectly alleges that the wrong committed was diverting investors into Apollo Offshore, instead of alleging that the wrong was diverting investors to a company not managed by Apollo Management.

According to Melcher, the complaint as a whole correctly describes the wrong alleged. In the factual section of the complaint, the wrong allegedly committed by Fradd is specifically and correctly described as the diversion of investors into a company not managed by Apollo Management. In paragraph 48, the first paragraph in the third cause of action, the wrong is likewise correctly described. In paragraphs 49 and 50, however, there is a drafting error, according to Melcher, so that the allegation is that the wrong is diverting investors into Apollo Offshore itself.

Melcher maintains that there is no doubt that Fradd knew that

he was being sued for diverting investors into a company not managed by Apollo Management. Melcher argues that, pursuant to CPLR 3025, amendment should be freely allowed in the absence of actual prejudice, and since there is no prejudice to defendants, leave should be granted.

In opposition, defendants argue that, in any case, the third cause of action for breach of fiduciary duty is insufficient as a matter of law. They further argue that the court should deny the motion to amend because the proposed amendments are devoid of merit and are based on facts that have been known to Melcher from the outset of the litigation.

Defendants argue that "the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed amendment that is plainly lacking in merit will not be permitted." Curran v Auto Lab Serv. Ctr., Inc., 280 AD2d 636, 637 (2d Dept 2001).

They argue that Melcher's attempt to characterize the proposed amendments as correcting a "drafting error" cannot mask the fact that they are without merit because Melcher simply proposes using different words to state the same insufficient cause of action. The proposed amendments do not alter the substance of the allegations in the third cause of action. Defendants argue that the meaning of the cause of action is clear by the words that Melcher has used to plead it in the complaint, the first amended

complaint and the second amended complaint, such that there is no purpose in an amendment as proposed by the motion to amend.

Melcher motion, sequence 003, for leave to amend the second amended complaint, is denied. "In general, leave to amend should be freely granted in the absence of prejudice or surprise, upon showing that the proposed amendment has merit." Centrifugal Assoc., Inc. v Highland Metal Indus., Inc., 193 AD2d 385, 385 (1<sup>st</sup> Dept 1993). In the instant case, however, after having already amended the complaint two times, Melcher seeks to change some of the wording of two paragraphs in order to attempt to persuade the Special Referee to allow certain additional discovery. When the paragraphs at issue are read in the context of the entire complaint, the substance of the allegations in the third cause of action is clear. Thus, the court sees no reason to permit the amendments, since if such allegations are clear to the parties, no doubt they were also clear to the Special Referee when she made her rulings.

#### MOTION 004

Defendants move, in motion sequence 004, for a default judgment against Melcher on their counterclaim for breach of contract. In their answer and counterclaim, served on Melcher on October 13, 2004, defendants allege that, for more than five and a half years, Melcher failed to fulfill his responsibilities as a manager of Apollo Management as set forth in the Operating

Agreement of Apollo Management. They further allege that his breaches were intentional, willful, reckless and wrongful.

Defendants state that, as of April 2003, Melcher's capital in Apollo Partners reached its maximum amount at \$1,609,245.00 before he began making withdrawals. They state that this amount was not based on any cash contributions made by him. They argue that he withdrew this sum between April 2003 and the time that he was removed as a manager of Apollo Management. Thus, defendants seek a judgment in their favor of \$1,609,245.00.

Melcher did not serve a reply to defendants' counterclaim. Defendants argue that the time for Melcher to reply has long expired, as it should have been served on or before November 2, 2004. They assert that Melcher never sought an extension of time within which to serve a reply, and that he is in default in pleading.

Melcher cross-moves for leave to file a late reply. Jeffrey A. Jannuzzo Esq., Melcher's attorney, states that the failure to file the reply on time is his fault, not Melcher's. Jannuzzo states that, although he was diligently pursuing all other matters relating to this action and to the counterclaim, through law office failure he neglected to serve the reply.

Jannuzzo did not enter the date the reply was due into his computer diary, and thus did not serve a reply, even though he was otherwise actively engaged in this action, including: (a) serving

timely and prompt discovery demands about the counterclaim; (b) responding promptly to defendants' discovery requests about the counterclaim; (c) communicating actively with defendants' counsel about matters relating to the case, including the counterclaim; (d) agreeing to extensions of defendants' time to serve papers; (e) appearing before Special Master Cohen on discovery regarding the counterclaim; and (f) engaging in mediation regarding the counterclaim.

Jannuzzo further points out that at the time when the reply should have been served, or when a failure to do so could easily have been cured, he was preparing for and having surgery to treat a shoulder injury.

Jannuzzo does not seek to minimize the obligation to timely serve and file a reply, but candidly acknowledges the error.

He further argues that defendants have not been prejudiced. No depositions have yet been held, and defendants have not missed any opportunity to question Melcher about their counterclaim. Jannuzzo further asserts that, in addition to document discovery, the parties have spent time in mediation, and he notes that the defendants' counterclaim was discussed at length. He argues, in addition, that there is no merit to the counterclaim.

CPLR 2004 grants the courts the authority to extend time, whether before or after the time expires, "upon such terms as may be just and upon good cause shown." CPLR 2005 provides that this

includes law office failure.

Defendants have not shown they would be prejudiced by permitting the reply to be served at this time. To the extent that the counterclaims in the reply raise new issues, the Special Referee will certainly permit some additional new discovery on such new issues.

The cross-motion to permit service of the reply is granted. The motion for a default judgment is denied.

Accordingly, it is

ORDERED that plaintiff's motion for leave to amend the complaint, motion sequence 003, is denied; and it is further

ORDERED that defendants' motion for a default judgment, motion sequence 004, is denied; and it is further

ORDERED that plaintiff's cross motion, motion sequence 004, is granted, and plaintiff's time to serve a reply to defendants' counterclaim is extended to the date on which such reply was served, and defendants are directed to accept such reply.

Dated: August 29, 2005

ENTER:

 NEW YORK  
COUNTY CLERK'S OFFICE  
J.S.C.

**FILED**

**AUG 31 2005**