

68 Burns New Holdings Inc. v Burns St. Owners Corp.

2007 NY Slip Op 31559(U)

May 30, 2007

Supreme Court, Queens County

Docket Number: 0023816/2000

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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68 BURNS NEW HOLDINGS INC.,

Plaintiff,

Index No: 23816/00
Motion Date: 3/21/07
Motion Cal. No: 54

-against-

BURNS STREET OWNERS CORP., and
CENTURY MANAGEMENT,

Defendants.

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The following papers numbered 1 to 15 read on this motion for an order, pursuant to CPLR § 3025(b), granting amendment of the complaint and reinstatement of this action back to the general calendar.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Answering Affidavit-Exhibits.....	5 - 11
Reply.....	12 - 15

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

Plaintiff owns certain shares of stock to certain units located at defendants' premises. Pursuant to the By-laws and proprietary leasehold agreement, defendants were to credit plaintiff for any Senior Citizen Rent Increase Exemptions ("SCRIE") for the respective units when defendants received the benefit of a tax credit. However, there have been discrepancies with regard to the proper amount to be credited to plaintiff's account over a period of several years. As a result, plaintiff withheld maintenance fees, and in response, defendants refused to permit plaintiff to sell the shares allocated to three apartments until it paid the late and legal fees incurred as a result of the maintenance arrears. Upon defendants' refusal to allow plaintiff to transfer the aforementioned shares, plaintiff moved for injunctive relief, which was denied by order of this Court dated November 27, 2000, and the action was dismissed. Subsequently, notwithstanding the dismissal, a status conference was scheduled by the Court on February 15, 2002, which resulted in the action being marked inactive. Plaintiff served notice of entry of the November 27, 2000 order in December 2003, and subsequently moved to reargue that decision, which was denied by order of this Court

dated April 15, 2004. Thereafter, by decision of the Appellate Division, Second Department, dated May 31, 2005, the Appellate Division upheld this Court's dismissal of the first and fourth causes of action for fraud and tortious interference with contract, and modified the November 27, 2000 order to reinstate the second and third causes of action for a declaratory judgment and breach of contract, respectively, finding that the claims "contain discernible factual allegations which manifest causes of action cognizable at law." It is upon foregoing that plaintiff now moves for an order, pursuant to CPLR § 3025(b), granting it leave to amend the complaint and reinstating this action back to the general calendar.

In opposition to that branch of the motion for restoration, defendants contend that before the Court can reach the amendment issue, there must first be a determination as to whether "this matter is eligible to be restored to the calendar in light of the 2002 dismissal pursuant to 22 NYCRR § 202.27, which authorized a dismissal due to plaintiff's failure to appear for a court conference." NYCRR § 202.27, entitled "Defaults," provides the following:

At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately..., the judge may note the default on the record and enter an order as follows:

(a) If the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest.

(b) If the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or cross-claims.

(c) If no party appears, the judge may make such order as appears just.

Here, after neither party appeared for a status conference scheduled by the Court on February 15, 2002, the action was marked inactive and/or dismissed. As a general proposition, "to be relieved of the default in appearing, the plaintiff was required to demonstrate both a reasonable excuse for the default and a meritorious cause of action (citations omitted)." McClaren v. Bell Atlantic, 30 A.D.3d 569 (2nd Dept. 2006); Bollino v. Hitzig, 34 A.D.3d 711 (2nd Dept. 2006). Nevertheless, as the instant action was dismissed in its entirety as a result of this Court's November 27, 2000 order, any subsequent dismissal or inactive marking was perfunctory. Consequently, the February 15, 2002 dismissal/inactive marking was of no effect since the matter had already been dismissed. In light of this, and the Appellate Division's reinstatement of the complaint in 2005, defendants cannot rely upon this alleged default and dismissal as a basis to deny that branch of plaintiff's motion to restore this matter. Accordingly, that branch of the motion to restore this matter to the active calendar is granted, and the case shall be restored to the active calendar upon the filing of a copy of this order with notice of entry and proof of service with the Clerk of this Part.

With respect to the branch of the motion to amend the complaint, from the outset, defendants contend, inter alia, that plaintiff's significant delay in seeking to amend is prohibitive of the instant application. They state that although the Appellate Division issued its decision in May 2005, plaintiff fails to explain the sixteen (16) months that elapsed between the decision and plaintiff's instant application. Moreover, defendants further state that "other than some of the allegations contained in the first and ninth causes of action [for fraud and a shareholders' derivative action], there are no allegations of fact referring to events that have occurred since October 2000. Thus any facts plaintiff hopes to establish in support of the other seven causes of action have been known to it for over six years and its failure to seek permission to amend within a reasonable time is a factor to be considered by the Court and respectfully should be considered fatal to the application." Notwithstanding these contentions to the contrary, and the glaring pattern of delay in prosecuting this action, "[t]he mere delay in seeking to amend to simply add a new legal theory of recovery is not sufficient to warrant denial of the motion since the original complaint[] gave notice of the occurrence giving rise to the proposed new cause[s] of action (citations omitted)." Goldstein v. Brogan Cadillac Oldsmobile Corp., 90 A.D.2d 512, 513 (2nd Dept.1982); see, Beverage Marketing USA, Inc. v. South Beach Beverage Co., Inc., 20 A.D.3d 439 (2nd Dept.2005); Sample v. Levada, 8 A.D.3d 465 (2nd Dept. 2004). Consequently, this Court will consider that branch of the motion seeking to amend the complaint.

In the case at bar, plaintiff's original complaint asserted four causes of action sounding in fraud, declaratory judgment, breach of contract, and tortious interference with contract, of which, the second and third claims for declaratory judgment and breach of contract, respectively, were reinstated by order of the Appellate Division, Second Department. Plaintiff's proposed amended complaint seeks to assert nine causes of actions: the first cause of action based upon fraud; the second cause of action for breach of contract; the third cause of action for breach of contract; the fourth cause of action asserting tortious interference with contract; the fifth cause of action for conversion; the sixth cause of action based upon breach of fiduciary duty; the seventh cause of action for an accounting; the eight cause of action alleging negligence; and the ninth cause of action for a shareholders' derivative action.

It is well settled that leave to amend or supplement pleadings "shall be freely given," unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment. See, Melendez v. Bernstein, 29 A.D.3d 872, 872 (2nd Dept. 2006); Adams v. Jamaica Hosp., 258 A.D.2d 604 (2nd Dept.1999); East Patchogue Contr. Co. v. Magesty Sec. Corp., 181 A.D.2d 714 (2nd Dept. 1992); Nissenbaum v. Ferazzoli, 171 A.D.2d 654 (2nd Dept. 1991); see, also, McCaskey, Davies & Assocs. v. New York City Health & Hosps.Corp., 59 N.Y.2d 755 (1983); CPLR 3025(b). Moreover, "[w]hile [] leave to amend a pleading shall be freely granted, leave to amend should not be granted 'upon the mere request of a party without a proper basis' [Morgan v. Prospect Park Assocs. Holdings, 251 A.D.2d 306, 674 N.Y.S.2d 62 (2nd Dept.1998); Citarelli v. American Ins. Co., 282 A.D.2d 494, 722 N.Y.S.2d 895 (2nd Dept.2001); see, also, Nissenbaum v. Ferazzoli, 171 A.D.2d 654, 567 N.Y.S.2d 135(2nd Dept.1991)]. Rather, it is incumbent upon the movant to make 'some evidentiary showing that the claim can be supported' (citations omitted)." Joyce v. McKenna Associates, Inc., 2 A.D.3d 592, 594

(2nd Dept. 2003). “A court hearing a motion for leave to amend will not examine the merits of the proposed amendment ‘unless the insufficiency or lack of merit is clear and free from doubt. In cases where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave should be denied’ (citations omitted).” Ricca v. Valenti, 24 A.D.3d 647, 648 (2nd Dept. 2005).

Here, plaintiff’s first cause of action sounding in fraud is insufficient as a matter of law. To plead a prima facie case of fraud, plaintiff must allege representation of a material existing fact, falsity, scienter, deception and injury, and a complaint that does not allege these essential elements of a fraud claim fails to satisfy the specificity and particularity requirements of CPLR 3016(b). See, Fredriksen v. Fredriksen, 30 A.D.3d 370 (2nd Dept.2006); Aranki v. Goldman & Associates, LLP, 34 A.D.3d 510 (2nd Dept.2006); Cohen v. Houseconnect Realty Corp., 289 A.D.2d 277 (2nd Dept. 2001); Barclay Arms, Inc. v. Barclay Arms Associates, 74 N.Y.2d 644, 647 (1989). Each of these essential elements must be supported by factual allegations sufficient to satisfy the requirement of CPLR 3016(b), that the circumstances constituting the wrong shall be stated in detail when a cause of action based upon fraud or breach of trust is alleged. Complaints based on fraud which fail in whole or in part to meet this factual pleading standard have consistently been dismissed. See, Barclay Arms v. Barclay Arms Assocs., *supra*; Walden Terrace, Inc. v. Broadwall Management Corp., 213 A.D.2d 630 (2nd Dept. 1995). Moreover, “[a]bsent a present intent to deceive, a statement of future intentions, promises or expectations is not actionable as fraud (citation omitted).” Lane v. McCallion, 166 A.D.2d 688, 690 (2nd Dept.1990); *see, Crafton Bldg. Corp. v. St. James Const. Corp.*, 221 A.D.2d 407 (2nd Dept.1995). Here, the first cause of action is not pled with the requisite specificity to met the CPLR 3016(b) standards for an allegation of fraud, and lacks, inter alia, the requisite showing of the present intent to deceive on the part of defendants. Accordingly, this amendment is not warranted.

Likewise insufficient as a matter of law is the fourth cause of action for tortious interference with contract. “‘Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant’s knowledge of that contract, defendant’s intentional procurement of the third-party’s breach of the contract without justification, actual breach of the contract, and damages resulting therefrom’ [Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 424, 646 N.Y.S.2d 76, 668 N.E.2d 1370(1996)].” Fusco v. Fusco, 36 A.D.3d 589 (2nd Dept. 2007). Here, other than the allegations of defendants’ refusal to transfer the shares under the Linda B. Lefferts contract with plaintiff, lacking is a showing that defendants intentionally procured any breach by Ms. Lefferts. In fact, the record indicates that the contract was eventually consummated for \$17,000.00 over the original sales price. Consequently, there is no showing of an actual breach of the contract by Ms. Leffert as a result of defendants’ procurement thereof, and subsequent damages suffered by plaintiff. Consequently, amendment of the complaint to add the fourth cause of action for tortious interference with contract does not lie.

Additionally, plaintiff failed to adequately plead and particularize facts demonstrating the right to maintain the ninth cause of action for a shareholders’ derivative action. “A shareholder’s derivative action is an action ‘brought in the right of a domestic or foreign corporation to procure

a judgment in its favor, by a holder of shares or of voting trust certificates of the corporation or of a beneficial interest in such shares or certificates' (Business Corporation Law § 626[a]). 'Derivative claims against corporate directors belong to the corporation itself' (citation omitted). 'The remedy sought is for wrong done to the corporation; the primary cause of action belongs to the corporation; recovery must enure to the benefit of the corporation. The stockholder brings the action, on behalf of others similarly situated, to vindicate the corporate rights and a judgment on the merits is a binding adjudication of these rights ([citations omitted]).' Marx v. Akers, 88 N.Y.2d 189, 193 (1996). "Business Corporation Law § 626(c) provides that the plaintiff in a shareholders' derivative action 'shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board [of directors] or the reason for not making such effort.' The question of whether the demand requirement of Business Corporation Law § 626(c) has been met is a matter within the discretion of the court (citations omitted)." PDK Labs, Inc. v. Krape, 277 A.D.2d 212 (2nd Dept. 2000).

The demand requirement rests on 'basic principles of corporate control-- that the management of the corporation is entrusted to its board of directors, who have primary responsibility for acting in the name of the corporation and who are often in a position to correct alleged abuses without resort to the courts' (citations omitted). The demand requirement thus relieves courts of unduly intruding into matters of corporate governance by first allowing the directors themselves to address the alleged abuses. The requirement also provides boards with reasonable protection from harassment on matters clearly within their discretion, and it discourages 'strike suits' commenced by shareholders for personal rather than corporate benefit [Marx v. Akers, 88 N.Y.2d at 194, 644 N.Y.S.2d 121, 666 N.E.2d 1034 (1996)]. Bansbach v. Zinn, 1 N.Y.3d 1, 8-9 (2003).

In the case at bar, plaintiff alleges generally that complaints were made to the Board of Directors by shareholders which were ignored, and as a result, "it would have been futile to request the Board to initiate a shareholders' action." Moreover, plaintiff further alleges, inter alia, that "defendant's continuous conduct of fraud and outright lies are proof that the Board would not have acted on behalf of the shareholders." These allegations, however, are insufficient to meet plaintiff's burden. On its face, the complaint fails to allege and particularize facts which even tend to show the futility of making demand to the Board to initiate a derivative action.

Demand is excused because of futility when a complaint alleges with particularity that a majority of the board of directors is interested in the challenged transaction. Director interest may either be self-interest in the transaction at issue (citations omitted), or a loss of independence because a director with no direct interest in a transaction is "controlled" by a self-interested director. (2) Demand is excused because of futility when a complaint alleges with

particularity that the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances (citations omitted). The “long-standing rule” is that a director “does not exempt himself from liability by failing to do more than passively rubber-stamp the decisions of the active managers” (citations omitted). (3) Demand is excused because of futility when a complaint alleges with particularity that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors. Marx v. Akers, 88 N.Y.2d 189, 201 (1996); see, Bansbach v. Zinn, 1 N.Y.3d 1 (2003).

Consequently, plaintiff failed to adequately plead and particularize facts demonstrating the right to maintain the ninth cause of action for a shareholders’ derivative action, and therefore, this amendment is also insufficient as a matter of law.

Accordingly, that branch of the motion seeking to amend the complaint to asserts nine causes of actions is granted to the extent that the first cause of action based upon fraud, the fourth cause of action asserting tortious interference with contract, and the ninth cause of action for a shareholders’ derivative action hereby are stricken as insufficient as a matter of law. Plaintiff is granted leave to serve upon defendants a supplemental summons and an amended complaint in the form annexed to the moving papers reflecting the appropriate claims stricken by this order within twenty (20) days of service of a copy of this order with notice of entry. Defendants have the statutorily prescribed time to interpose responsive papers. The parties are directed to appear for a Preliminary Conference in the Preliminary Conference Part at 11:30a.m. on July 31, 2007, to address all discovery concerns.

Dated: May 30, 2007

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J.S.C.