

Krigsfeld v Feldman

2007 NY Slip Op 31948(U)

June 18, 2007

Supreme Court, Kings County

Docket Number: 0004901/2004

Judge: Gloria Dabiri

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At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of June 2007.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

-----X

JANA KRIGSFELD, ET ANO.,

Plaintiffs,

- against -

Index No. 4901/04

ARKADI FELDMAN, ET AL.,

Defendants.

-----X

The following papers numbered 1 to 4 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross-Motion and Affidavits (Affirmations) Annexed_____	1_____
Opposing Affidavits (Affirmations)_____	2 - 3_____
Reply Affidavits (Affirmations)_____	4_____
_____ Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, filed December 8, 2006, plaintiffs Jana Krigsfeld (Jana) and Ilan Krigsfeld (Ilan) (collectively, the Krigsfelds) move, pursuant to CPLR 3025(b), for an order permitting them to serve the proposed amended complaint annexed to their motion papers.

BACKGROUND

By verified complaint dated February 11, 2004, the Krigsfelds commenced this lawsuit against defendants alleging fraud, breach of contract and breach of fiduciary duty, in connection with purported misrepresentations made by defendants Arkadi Feldman (Arkadi) and Nehama Feldman (Nehama) (collectively, the Feldmans) for the purpose of inducing plaintiffs to invest in defendant J&I Furniture Inc. (J&I), a newly-formed corporation that was to operate a retail furniture business.

As alleged by plaintiffs in said complaint, in the early part of 2003, the Feldmans, who at the time were operating an existing furniture business, made specific representations to plaintiffs for the aforesaid purpose. It is claimed that Arkadi represented to Jana that the business would be able to generate an annual net income of \$360,000, and showed Jana a monthly statement from his existing furniture business that declared income in the amount of \$60,000. In reliance upon this and other representations plaintiffs, in March 2003, gave the Feldmans \$190,000 in exchange for a 50% interest in J&I. Although no stock certificates were ever issued, plaintiffs assisted in opening a corporate bank account and began working at the store.

The complaint alleged that Arkadi did not permit them the agreed-upon equal role in the business. It is also alleged that the Feldmans, regularly, falsely listed the prices, costs, sales and expenses of furniture and other inventory in the corporation's books and records, and diverted business funds and assets to their personal.

According to plaintiffs, in October 2003 the Feldmans informed them that the business was operating at a loss, prohibited plaintiffs' participation in the business and denied plaintiffs access to any information about the business. Plaintiffs aver that defendants have sold the business, or plan to do so, without their consent.¹

Thereafter, the defendants moved, pursuant to CPLR 3211, to dismiss the complaint. By order dated January 12, 2005, this court granted the motion to the extent of dismissing plaintiffs' first cause of action (fraud) and third cause of action (breach of fiduciary duty), without prejudice to replead.

THE PRESENT MOTION

Plaintiffs' contentions

Plaintiffs assert that the proposed amendments are based upon evidence disclosed during discovery, and that the amendments will not prejudice defendants.² Plaintiffs provide transcripts of the deposition testimony of the parties, and the affidavit of Felix Nudel (Nudel) dated December 5, 2006. Nudel avers that, from May of 2002 to July of 2003, he was

¹In their supporting papers, plaintiffs allege that defendants "retaliated" by bringing an action against "Shurick Krigsfeld", also known as Shalom Krigsfeld, the husband of Jana, entitled *Feldman v Krigsfeld* under Index Number 9610/05. Pursuant to a stipulation entered on May 20, 2005, that action was joined with the instant one for discovery and trial.

²Plaintiffs' Proposed Amended Complaint contains a total of nine causes of action: (1) against Arkadi Feldman for breach of contract; (2) against Arkadi Feldman for breach of the covenant of good faith and fair dealing; (3) against Arkadi Feldman for fraudulent inducement; (4) against Arkadi Feldman for fraudulent conversion; (5) against Arkadi Feldman for unjust enrichment; (6) against Arkadi Feldman, A&F and M&L for an accounting; (7) against Arkadi Feldman for rescission; (8) against Nehama Feldman for aiding and abetting Arkadi Feldman's breach of contract and breach of the covenant of good faith and fair dealing; and (9) against Arkadi Feldman for fraudulent transfer of assets.

employed by Idea Furniture and Design Center (Idea), under which name J&I conducted business, and that during this time he observed that: Arkadi and Nehama were the “bosses”; Nehama dealt with customers and supervised employees; Nehama prevented Ilan from working in the business; Arkadi “constantly” changed the cost basis of merchandise sold, thus affecting the reported profits of the business; during almost the entire time he was employed at Idea, the Feldmans paid him off-the-books without deducting payroll taxes from his salary or commissions; that the only time his pay was, in fact, reported and taxes were paid was at the insistence of the Krigsfelds; and that the Feldmans knowingly sold counterfeit furniture.

Defendants’ opposition

Defendants note that, with only one claim remaining in the complaint, the plaintiffs, on or about June 28, 2006, filed a note of issue and, on or about December 7, 2006, filed a second note of issue. They point out that this motion was made almost six months after filing of the first note of issue, and contend that on the eve of trial plaintiff, essentially, is attempting to commence a completely different lawsuit. Defendants maintain that under these circumstances they will incur substantial expenses for additional pretrial discovery, including demands for Discovery and Inspection, written interrogatories and depositions.

Moreover, defendants argue, plaintiffs have failed to provide the name of any customer who complained about counterfeit furniture in order to substantiate their allegation

that the Feldmans sold counterfeit furniture. Nor, argue defendants, have plaintiffs provided evidence that defendants “increased inventory cost figures on sold furniture,” over-billed, or used irregular accounting practices.

Defendants oppose the addition of Shalom Krigsfeld as a party plaintiff, arguing that the fact that he may have provided funding for plaintiffs’ venture is irrelevant. Defendants refer to Shalom’s deposition testimony that he was not, and never intended to be, a shareholder in J&I and argue that the only shareholders in J&I were Jana, Ilan and Arkadi,

Defendants oppose the addition of A&F and M&L as defendants on the ground that the Krigsfelds had no relationship with these entities. They assert that although Arkadi was the sole shareholder of both entities, Ilan and Jana decided to form J&I rather than purchase stock in A&F which was doing business as Idea. Defendants allege that, in forming the new corporation, Jana and Ilan agreed to pay \$250,000.00 in return for Arkadi’s agreement to provide his expertise and experience in the retail furniture business and to contribute all merchandise formerly owned by A&F. Defendants maintain that there is no evidence that any part of the \$250,000.00 was to be paid to A&F, or that any customer or supplier has attempted to pierce the corporate veil and hold J&I responsible for any claims against A&F. Defendants argue that although M&L provided furniture to J&I, there is no claim that either of the original or proposed new plaintiffs had any relationship with M&L.

With respect to Nudel’s affidavit, defendants assert that: his statements regarding ownership of Idea, made “on information and belief,” are inaccurate; he fails to acknowledge

that J&I was doing business as Idea for approximately 18 months at the same location; and his allegations concerning the reduction of profit due to inflation of the costs by defendants fails to account for exchange rates, customs duties, storage and other expenses. As to Nudel's allegation that counterfeit furniture was being sold, defendants challenge his personal knowledge and argue that since plaintiffs fail to come forward with independent evidence verifying the alleged practice, they have not provided a sufficient predicate for this amendment.

Defendants oppose plaintiffs' first proposed amended cause of action, which alleges breach of contract by Arkadi,³ contending that the allegations are different in the proposed complaint and that there is no new evidence to support the change.

With respect to the proposed second clause of action, defendants maintain that there was nothing improper in paying employees in cash and that Jana admits that she did not file appropriate Employee Withholding tax returns on behalf of J&I. They suggest that rather than being forgeries, such furniture may have been merely similar in design to the furniture of other manufacturers.

Defendants, citing Jana's deposition testimony that her first experience with Arkadi was as a disgruntled customer, urge the court to reject the proposed cause of action for

³Plaintiffs allege in paragraph "70" that "Feldman breached the . . . agreement (a) by intentionally and willfully failing to provide more than token instruction to Ilan Krigsfeld concerning the requirements of the retail furniture business, (b) by excluding Ilan Krigsfeld and Jana Krigsfeld from placing orders with furniture manufacturers or distributors, and (c) by purposefully creating a hostile working environment. . . ."

fraudulent inducement, arguing that Jana cannot allege that she was fraudulently led to believe that the Feldmans had a good reputation in light of her claimed prior experience with Arkadi. Moreover, they submit that Feldman's practice of paying employees "off-the-books," if true, has no bearing on his contract negotiations with the Krigsfelds and that the Krigsfelds, as "active participants" in the sale of the alleged counterfeit furniture, are guilty of unclean hands.

In support of their contention that the proposed fourth cause of action for fraudulent conversion should be rejected, defendants again assert that although Ilan was asked at his deposition on March 21, 2006 to provide a list of items purchased from M&L or A&F, he has failed to do so. Defendants reiterate that the payment of \$250,000.00 was for plaintiffs' interest in the new corporation rather than payment for the assets of an existing corporation, and that extensive discovery would be required on this proposed claim.

Defendants characterize plaintiffs' fifth cause of action for unjust enrichment as an attempt to salvage the investment they made for their son who abandoned the business after only eight weeks. Characterizing the Krigsfeld's payment of \$190,000.00 and inability to handle the business as simply a bad business decision, defendants urge that the motion be denied. With respect to the proposed sixth cause of action for an accounting they argue, once again, that there is no relationship between plaintiffs and either A&F or M&L. They argue that no new evidence supports the proposed seventh cause of action for rescission.

As to the proposed eighth cause of action, in which plaintiffs seek to recover

\$190,000.00 from Nehama, defendants cite the lack of evidence of any ownership interest on her part in J&I, or testimony that plaintiffs gave any money to Nehama. Finally, as to plaintiffs' proposed ninth cause of action, alleging a fraudulent transfer of assets by Arkadi, defendants claim that at no time prior to the filing of either the first or second note of issue did plaintiffs raise any such claims and that it is now too late in the litigation to raise this claim.

In a supplemental affirmation, defendants' counsel avers that "on January 31, 2007, Felix Nudel came into my office to sign an affidavit acknowledging [that] many of the allegations alleged on December 5, 2006 were . . . false." In an affidavit, annexed to defendants' papers, Nudel substantially recants his previous affidavit alleging that he received payments both in cash and by check from J&I, that Jana was the person responsible for making cash payments to store personnel, that he had no knowledge of overpricing, that the only hostility he observed was between Shalom and Ilan, that Nehama only came into the store from time to time, and that he had no knowledge that any furniture sold at Idea was not produced by the manufacturer whose name appeared on the label. Nudel avers that, at no time, did he witness any conduct by Arkadi or Nehama that would be considered hostile to Ilan or Jana.

In reply, plaintiffs argue that controlling authority does not support the claimed need for additional discovery as a basis for denying a motion to amend the complaint, and that the deposition testimony supports the amendments sought.

With respect to naming M&L and A&F as additional defendants and their request for an accounting, plaintiffs refer to Jana's deposition testimony with respect to invoice number 5672 obtained from an Italian manufacturer, which led them to believe that M&L was overcharging J&I. They dispute defendants' contention that such increases were due to hidden expenses, noting that defendants provide no documentation to support this assertion. Plaintiffs maintain that the testimony demonstrates that \$75,000 of the total \$250,000.00 investment was allocated to pay for one-half of the existing floor inventory of A&F, the corporation under which Feldman had previously operated the business, but that Arkadi deceived the Krigsfelds into paying him the "M&L" cost of furniture pieces sold by J&I that were part of the original J&I inventory, so that the Krigsfelds actually paid twice for the same pieces of furniture. They aver that to the extent that the Krigsfelds are in privity with Arkadi, they are in privity with A&F and M&L, because Arkadi's fraudulent use of these entities is grounds for piercing the corporate veil.

Plaintiffs reiterate their assertion that Nehama aided and abetted Arkadi in the breach of contract and in breaching the covenant of good faith and fair dealing. They assert that the ninth cause of action, which alleges the sale by Arkadi of the remaining inventory of J&I to a third party without the consent of the Krigsfelds, is supported by Arkadi's deposition testimony wherein he "admitted" that he sold the remaining J&I inventory to a third party, who paid him personally for said inventory.

With respect to that portion of their motion which seeks leave to add Shalom as an

additional plaintiff, they point out that in their counterclaim, defendants allege that “at all times, [Shalom] Krigsfeld was acting as an agent on behalf of Plaintiffs,” and defendants, in their separate, and now consolidated, action against Shalom, allege that Shalom, wife and son were acting as agents on his behalf in forming the corporation with Arkadi, and Shalom breached *his* contract with Arkadi.

Finally, Jana Krigsfeld, in reply, provides an affidavit wherein she asserts her belief that Nudel recanted after being threatened or “blackmailed” by Arkadi. Her stated basis for this belief is telephone conversations had with Nudel. She avers that his statement that he did not fully understand the contents of the first affidavit is false.⁴

DISCUSSION

Amendment of the complaint

Permission to amend pleadings should be freely given (CPLR 3025[b]; *see generally Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 959 [1983]), provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (*see Buckholtz v Maple Gardens Apts., LLC*, 38 AD3d 584 [2007]; *Santori v Met Life*, 11 AD3d 597, 598 [2004]). “Mere lateness is not a barrier to [an] amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the *laches* doctrine” (*Edenwald Contracting Co.*, 60 NY2d at 959, citing Siegel,

⁴Jana states that Nudel and her attorneys discussed the possibility that Arkadi would pressure him to change his sworn statements, but, with full understanding of the nature of the litigation and the possibility that consequences would ensue, he authorized the use of his first affidavit.

Practice Commentaries, McKinney's Con. Laws NY, Book 7B, CPLR 3025:5, p 477; *see also, Abrahamian v Tak Chan*, 33 AD3d 947 [2006], [while the delay was substantial and largely unexplained, the parties to be added were defendants in related action and failed to demonstrate genuine prejudice]).

Defendants have failed to establish that they will suffer unfair surprise if plaintiffs' motion to amend the complaint is granted, since the amended complaint only changes the theory of liability (*Foresite Properties, Inc. v Halsdorf*, 172 AD2d 929 [1991]; *see also, Carco, Inc. v Beltrone Construction Co., Inc.*, 183 AD2d 984 [1992]; *262-64 Higbie Lane, Inc. v Town Bd. of Town of Islip*, 267 AD2d 377, 378 [1999]). Moreover, a defendant's claim that further discovery will be necessary and more time will be extended to defend the additional claims will not justify denial of the motion (*Perkins v New York State Electric & Gas Corp.*, 91 AD2d 1211 [1983]; *see also, McFarland v Michel*, 2 AD3d 1297, 1300 [2003]; *Rutz v Kellum*, 144 AD2d 1017, 1018 [1988]).⁵ Any unnecessary expenditure of time and money by the defendants constitutes a form of prejudice which is curable through the imposition of costs directly attributable to unreasonable delay (*Bernstein v Spatola*, 122 AD2d 97, 100 [1986]). Thus, unless the proposed amendments are either palpably insufficient or patently without merit leave should be granted (*Abrahamian v Tak Chan*, 33 AD3d 947 [2006], citing *Edenwald Construction Corp. v City of New York*, 60 NY2d 957,

⁵It is not disputed that both in its decision and order of January 2005 and at a conference of August 2006 the Court granted plaintiffs leave to make the instant motion. Plaintiffs withdrew their first Note of Issue. A second Note of Issue was filed on December 8, 2006, the same date the instant motion was filed.

959 [1983]; *Matter of Salon Ignazia, Inc.*, 34 AD3d 821 [2006]).

Plaintiffs' proposed first cause of action alleging breach of contract finds adequate support in the record. Plaintiffs allege that their agreement with Arkadi required, in part, that in return for a cash contribution, he train Ilan in all aspects of the retail furniture business and give Ilan and Jana an equal role in running Idea. Plaintiffs also set forth the specific conduct giving rise to the alleged breach (*see Maffea Ippolito*, 247 AD2d 366, 367 [1998]; *Fred Tuck & Co., Inc. v Bronxville Properties, Inc.*, 267 AD2d 423 [1999]). However, the request to add the proposed second cause of action is denied. Every contract is subject to an implied covenant of good faith and fair dealing (*Wood v Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 90-91 [1917]; *Aventine Investment Management, Inc. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 [1999]; *Jaffe v Paramount Communications Inc.*, 222 AD2d 17, 22-23 [1996]). This covenant is breached "when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*Jaffe*, 222 AD2d at 22-23; *Skillgames, LLC v Brody*, 1 AD3d 247, 252 [2003]; *see also, Dalton v Educational Testing Service*, 87 NY2d 384, analogous [1995] ["neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."]) However, a breach of the covenant claim will be dismissed as redundant where, as here, the conduct allegedly violating the implied covenant is also the predicate for a claim for breach of the underlying contract (*In re Houbigant, Inc.*, 914 F. Supp. 964, 989 [1995]; *see also,*

Parker East 67th Associates, L.P. v Minister, Elders and Deacons of Reformed Protestant Dutch Church of City of New York, 301 AD2d 453, 454 [2003]), *appeal denied*, 100 NY2d 502 [2003]).

The proposed third cause of action seeks to allege a claim for fraudulent inducement. In this regard it is claimed that in order to encourage the Krigsfelds to enter into the agreement, Arkadi represented or implied that he was an honest businessman, but that during the time he operated Idea, under A&F, he paid employees off-the-books, sold “counterfeit” merchandise and failed to pay suppliers. As this court previously noted, “[t]o sufficiently allege fraud in the inducement, the cause of action must allege a representation of present fact, not of future intent . . . collateral to, but which was the inducement for the contract” (*see Sandra Greer Real Estate, Inc. v Johansen Organization*, 182 AD2d 468, 469 [1992], quoting *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956). The allegations of this claim are embraced by the proposed causes of action for breach of contract and fraudulent conversion. In addition, “one to whom an allegedly false representation is made may not rely thereon if the means of obtaining the truth are available by the exercise of ordinary intelligence” (*Matter of Jack Kent Cooke, Inc.*, 222 AD2d 334, 335 [1995]; *Huron Street Realty Corp. v Lorenzo*, 19 AD3d 450, 452 [2005]; *see also, L. Fatato, Inc. v Decrescente Distributing Co., Inc.*, 86 AD2d 600 [1982], citing *Brick v Cohn-Hall-Marx Co.*, 276 N.Y. 259 [1937]; *Deerfield Communications Corp.*, 68 NY2d at 956 [1986]).

Plaintiffs' proposed fourth cause of action for fraudulent conversion is sufficient. Integral parts of an action for conversion are a claim of legal ownership or an immediate superior right of possession to converted property, and an unauthorized exercise of dominion over that property by the defendant (*see Eight In One Pet Products v Janco Press, Inc.*, 37 AD3d 402 [2007]; *Gold Medal Prods. v Interstate Computer Servs.*, 80 AD2d 600 [1981]). Here, plaintiffs state, with reasonable specificity, the bases for their claim that Arkadi misrepresented the value of J&I's inventory and caused plaintiffs to pay twice for the same merchandise (*see M & A Oasis, Inc. v MTM Associates, L.P.*, 307 AD2d 872 [2003]). Such allegations also furnish the basis for the proposed fifth cause of action for unjust enrichment (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]; *Ultramar Energy Limited v Chase Manhattan Bank, N.A.*, 179 AD2d 592 [1992] [on summary judgment motion, triable issue of fact raised where plaintiff demonstrated that defendant retained funds to which is was not entitled]), and the proposed sixth cause of action for an accounting of the books and records of J&I, A&F and M&L, the corporate entities Arkadi controlled and which, it is alleged, served as his alter egos (*id.*; *see Lester v Ennis*, 25 Misc2d 334 [1960], *aff'd* 12 AD2d 921 [1961]).

As a general rule, rescission of a contract is permitted for such a breach as is "so substantial and fundamental as to strongly tend to defeat the object of the parties making the contract" (*see Lenel Systems Intern., Inc. v Smith*, 34 AD3d 1284 [2006]; quoting *Callan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 N.Y. 268, 284 [1910]; *RR*

Chester, LLC v Arlington Bldg Corp. 22 AD3d 652 [2005]). Accordingly, plaintiffs' motion is granted as to the proposed seventh cause of action. Notwithstanding allegations contained in Nudel's first affidavit, the plaintiffs fail to support the proposed eighth cause of action against Nehama for aiding and abetting Arkadi's breach.

Finally, plaintiffs' request for leave to interpose the proposed ninth cause of action, which alleges fraudulent transfer of assets to a third party, is granted (*see Miller v Miller*, 276 AD2d 758 [2000]).

Based upon the plaintiffs' *prima facie* showing, and the defendants' failure to demonstrate any significant prejudice, those portions of the motion as seeks leave to add Shalom Krigsfeld as a plaintiff, and A&F and M&L as defendants are granted (*see Ledy v Wilson*, 38 AD3d 214 [2007]; *Transaction Advisory Services, LLC v Silver Bar*, 38 AD3d 241 [2007]; *Neggy Travel Service, Inc. v Sabena Belgian World Airlines*, 56 AD2d 537 [1977]). However, as noted above, plaintiffs have established no basis for Nehama's inclusion as a party defendant. Accordingly, it is

ORDERED that the motion for leave to amend the complaint is granted to the extent of (1) amending the caption to add Shalom Krigsfeld as a plaintiff, and A&F Furniture and Design Center, Inc. and M&L Import Furniture, Inc., as defendants; and (2) amending the first, fourth, fifth, sixth, seventh and ninth causes of action in the proposed form annexed to the moving papers, and it is further

ORDERED that leave to amend the caption to add Nehama Feldman as a defendant

is denied; and it is further

ORDERED that leave to amend the complaint to add the proposed second, third and eighth causes of action is denied; and it is further

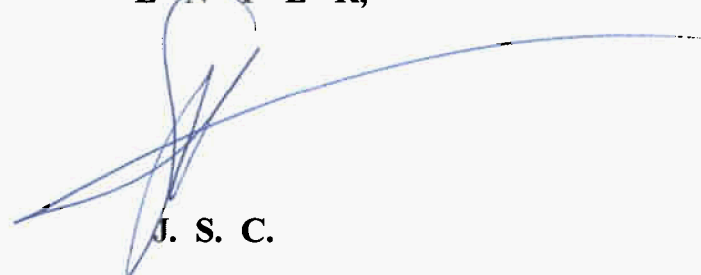
ORDERED that plaintiff is directed to serve a copy of this Order with notice of entry upon the County Clerk and the Motion Support Office and all parties, and it is further

ORDERED, that plaintiff is to serve the amended complaint in the proposed form annexed to the moving papers, with the modifications directed herein, and with a copy of this order on all existing and proposed parties within 30 days of entry of this order; and it is further

ORDERED that the defendants shall answer the amended complaint within 20 days from the date of said service; and it is further

ORDERED, that all parties are to appear for a conference in Part 39, Civil Term of this Court, on September 14, 2007 at 9:30 A.M.

E N T E R,

A handwritten signature in blue ink, appearing to be 'G. Dabiri', is written over the text 'J. S. C.' and 'HON. GLORIA DABIRI'. The signature is stylized and somewhat illegible.

J. S. C.

HON. GLORIA DABIRI