

Byron Chem. Co., Inc. v Candela

2009 NY Slip Op 30549(U)

February 26, 2009

Supreme Court, Nassau County

Docket Number: 000744/2005

Judge: Ira B. Warshawsky

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

E

SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

BYRON CHEMICAL COMPANY, INC.,

Plaintiff,

INDEX NO.: 000744/2005
MOTION DATE: 01/14/2009
MOTION SEQUENCE: 006

-against-

LAURA CANDELA,

Defendant.

LAURA CANDELA,

Third-Party Plaintiff,

-against-

NICHOLAS COLA,

Third-Party Defendant.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed	1
Attorney's Affidavit in Opposition of Laurie Styka Bloom & Exhibits Annexed	2
Defendant Laura Candela's Memorandum of Law in Opposition to Plaintiff's	
Motion to Amend the Complaint	3
Reply Affirmation in Further Support of Thomas Telesca & Exhibit Annexed	4
Byron Chemical Company, Inc.'s Memorandum of Law in Further Support	
of its Motion to Amend the Complaint	5

Motion by plaintiff Byron Chemical Company, Inc. ("Byron") for leave to amend the complaint, as set forth in the proposed amended complaint (Exhibit M to the moving papers) is granted.

The original complaint in this action was filed on January 17, 2005. It contains seven causes of action against defendant Laura Candela, a former employee, officer, and director of Byron. The complaint sought various forms of injunctive relief, together with "damages in an amount to be determined at trial," based upon Ms. Candela's alleged breaches of her fiduciary duties to Byron and the various restrictive covenants contained in her Employment Agreement and Shareholders Agreement, as well as claims for tortious interference with contract and constructive trust.

Discovery herein took place over the course of several years while a separate action, *Candela v Byron*, Index # 328/04 ("the Candela Action") was litigated. Various decisions in both cases have been rendered by this Court. After the trial decision was rendered by this Court in the Candela Action in July, 2006, discovery in this action continued. This action is now scheduled to go to trial in March, 2009.

In December, 2008, Byron brought the instant motion. Byron alleges the same seven causes of action against Ms. Candela in the proposed amended complaint. However Byron now seeks to add certain allegations of fact regarding an entity named U&I Pharmaceuticals Ltd. ("U&I") to its claims for breach of fiduciary duty, tortious interference with contractual relations, and constructive trust.

As set forth in this Court's Decision After Trial in the Candela Action (Exhibit B to the moving papers), Byron was formed in 1947, and operated as an agent for foreign manufacturers and distributors of active pharmaceutical ingredients. Candela became an employee of Byron in 1976. It is not disputed that U&I was formed solely by Candela in 1999, and operated solely by her out of Byron's offices until 2004, during which time she was an employee and officer of Byron. U&I was allegedly formed with Byron's consent for the purpose of marketing finished dosage products. U&I does business with Byron's customers. This Court expressly determined that "the specific owner of U&I Pharmaceuticals is reserved" for the instant action (Decision after Trial, at p. 63), and noted that the stock certificates for U&I were never completed and no

name was ever placed on the certificates (Decision after Trial at p. 64).

In the original complaint Byron alleged that Candela established U&I (Complaint, par. 87), and that U&I was in direct competition with Byron (Complaint par 89). Byron further alleged that “although Candela operated the competing U&I business for several years, she never withdrew any sums from its accounts until after the death of Mr. Pappas, when she paid herself approximately \$2.3 million” (Complaint, par. 90). In addition, Byron alleged that “Candela did not offer Byron the opportunity to share in U&I’ separate business, instead appropriating that corporate opportunity to her own account” (Complaint, par. 94), and that “Candela’s actions as aforescribed constitute a breach of her fiduciary duties to Byron (Complaint, par. 97).

Now in the amended complaint, Byron seeks to incorporate additional facts regarding the creation of U&I, and Ms. Candela’s alleged subsequent operation of U&I for her own benefit.

Leave to amend a pleading should be liberally granted absent prejudice to the opposing party, as long as the proposed amendment is not palpably insufficient to state cause of action [*Dialcom, LLC v AT&T Corp.*, 50 AD3d 727 (2nd Dept. 2008); *RCLA, LLC v 50-09 Realty, LLC*, 48 AD3d 538 (2nd Dept. 2008)]. A defendant may not claim prejudice where the proposed amendment arises out of the same facts as those underlying the original complaint, as exposure to additional liability does not, in and of itself, constitute prejudice [*Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 23 (1981); *RCLA, LLC v 50-90 Realty, LLC* at 539]. Rather, there must be some indication that the defendant has been hindered in the preparation of his case [*Loomis v Civetta Corinno Const. Corp.*, at 23]. Indeed, even on the eve of trial, when judicial discretion to allow amendments must be “circumspect, prudent and cautious,” leave to amend may be granted where the plaintiff meets the standard set forth above [*Thomsen v Suffolk County Police Dept.*, 50 AD3d 1015, 1018 (2nd Dept 2008)]. It is the plaintiff’s burden to demonstrate to the court that the proposed amendment is not palpably insufficient [*Zelesnik v MSI Const. Inc.*, 50 AD3d 1024 (2nd Dept. 2008)].

On this record, even though this action is scheduled for trial, there has been no showing of the requisite prejudice to defendant Candela. There is no need for a “renewed and refocused investigation of the events” because the same theories are pled and facts previously alleged pursuant to one theory are now allegedly falling within the parameters of other theories.

Furthermore, many of the facts about U&I were explored in the Candela Action. In short, this is not new territory. Therefore the Court turns its attention to the sufficiency of the proposed amendment.

Defendant Candela argues first that any attempt to recoup the payment of \$2.3 million pursuant to the breach of fiduciary duty cause of action is time-barred. This argument fails to take into account that the precise fact of the payment of the \$2.3 million to defendant Candela and the allegation that this payment constituted a breach of defendant Candela's fiduciary duties, are plainly set forth in the original complaint as noted above. Consequently defendant Candela's reliance upon the expiration of the limitations period misses the mark completely.

Next defendant Candela insists that the proposed amendment is patently without merit. As to the first cause of action for breach of fiduciary duty, Candela argues that there is no factual basis for a finding that any monies generated by U&I were the property of Byron. This conclusory opposition does not suffice, as the ownership of U&I is one of the core questions presented by this case.

As to usurpation of corporate opportunities, "an officer or director of a corporation may not, without consent, divert and exploit for [his or her] own benefit any opportunity that should be deemed an asset of the corporation" [*Yu Han Young v Chiu*, 49 AD3d 535 (2nd Dept. 2008)]. Candela was an officer of Byron, and it is in this capacity that she is sued for misappropriating the corporate opportunity to sell finished dosage products in the United States, and further, for maintaining a business that directly competes with Byron. On this record triable issues of fact are presented as to usurpation. Overall, Byron has met its burden of showing that the proposed amendments to the first cause of action are not palpably insufficient.

In the sixth cause of action for defendant Candela's alleged tortious interference with Byron's exclusive agency contracts with Cipla and Sumitomo, defendant Candela complains that there is no allegation of actual breach or damages in the proposed amended complaint. This is factually incorrect. The amended complaint contains both (actual breach of the Sumitomo contract at par. 79; damages at par. 89). Here again, Byron has met its burden of showing that the proposed amendment to the sixth cause of action is not palpably insufficient.

The seventh cause of action alleges a claim for a constructive trust over defendant

Candela's ownership interest in, and interest derived from, U&I, in an amount of no less than the \$2.3 million that defendant Candela allegedly took improperly from U&I(Complaint, par. 98). The proposed amendment alleges additional facts about U&I, its purpose, and its business, in support of this cause of action.

Defendant Candela argues that the proposed amendment alleges neither a promise, nor a transfer in reliance on a promise, two of the four key elements of a cause of action for imposition of a constructive trust [*Sharp v Kosmalski*, 40 NY2d 119, 121 (1976)]. However a constructive trust may be imposed without an express promise or a formal writing [*Sharp v Kosmalski* at 122], and the elements must be viewed flexibly [*Cruz v McAneney*, 31 AD3d 54 (2nd Dept. 2006); *Matter of Wieczorek*, 186 AD2d 204 (2nd Dept. 1992)]. The purpose of a constructive trust is to prevent unjust enrichment [*Simonds v Simonds*, 45 NY2d 233, 242 (1978)].

In the proposed amended complaint Byron sufficiently alleges that the \$2.3 million at issue belong to it and were improperly diverted by defendant Candela without consideration, thereby unjustly enriching her [*Fellner v Morimoto*, 52 AD3d 352 (1st Dept. 2008)]. Under these circumstances, there has been no showing that the proposed amendment to the seventh cause of action is palpably insufficient, and as a result, the proposed amendment is granted.

Dated: February 26, 2009


J.S.C.

ENTERED
MAR 03 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE