

Praeger v Aaron Group

2009 NY Slip Op 32504(U)

October 16, 2009

Supreme Court, New York County

Docket Number: 112814/08

Judge: Madden

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.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. McEwen
Justice

PART 11

Index Number : 112814/2008
PRAEGER, LARRY
vs.
THE AARON GROUP
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

INDEX NO. 112814-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order.

FILED
OCT 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 16, 2009

J
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X
LARRY PRAEGER,

Plaintiff,

Index No. 112814/08

-against-

THE AARON GROUP,

Defendant.
-----X

FILED
OCT 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

MADDEN, J.:

In this action for commissions due under an agreement, defendant the Aaron Group (Aaron) moves to dismiss the complaint of plaintiff Larry Praeger, dated September 18, 2008 (Complaint), on the grounds that: (a) pursuant to CPLR 3211, Praeger lacks legal standing to individually prosecute the claims set forth in the Complaint because said claims belong to a partnership comprised of Praeger and non-party Eitan Zelevsky; or (b) alternatively, pursuant to CPLR 1001 and 1003, Praeger has failed to name a necessary and indispensable party to this action, to wit, Zelevsky.

Praeger opposes the motion and cross-moves, pursuant to CPLR 3025 (b), for leave to amend the Complaint, in the proposed form annexed to Praeger's cross motion.

For the reasons discussed below, the cross motion to amend is granted, and the motion to dismiss is denied.

BACKGROUND

Praeger is a New York state resident. Zelevsky is a citizen of the State of Israel, and resides in Istanbul, Turkey. He is neither a citizen nor a resident of the United States.

Aaron is in the business of distributing paper, paperboard, packaging and other fiber products from mills worldwide.

On or about July 15, 2005, Praeger and Zelevsky entered into a written agreement with Aaron entitled the Compensation Agreement (Agreement). Under the Agreement, Praeger and Zelevsky each agreed to act as Aaron's "salesperson[s]/agent[s]," and to receive commissions (usually, five percent) for customers they brought to Aaron.

Praeger commenced this action on or about September 19, 2008 seeking unpaid commissions allegedly due from Aaron. Praeger asserts various theories in the Complaint, including breach of contract, unjust enrichment and quantum meruit.

On or about January 15, 2009, Aaron served its answer (Answer). In the Answer, Aaron admits certain allegations and denies others. Since the Complaint did not name Zelevsky as a party to this action, Aaron asserted Praeger's lack of standing as well as his failure to name an indispensable party as affirmative defenses. These affirmative defenses (and the motion before the court) are based on the premises, inter alia, that Praeger and Zelevsky were partners, and that Zelevsky is a necessary party to this action.

Praeger denies that Zelevsky and he had a partnership. Rather, he submits that they were each sales persons for Aaron. While Praeger and Zelevsky admit that they shared commissions, they deny that they ever agreed to share losses, ever contributed capital or loans, or ever shared expenses. They further dispute that they ever held themselves out or identified themselves as partners with regard to their work under the Agreement.

Praeger submits that he is fully authorized to pursue this action on his own behalf and on behalf of Zelevsky, pursuant to a written assignment agreement between Praeger and Zelevsky, dated "as of May 1, 2007" (Assignment Agreement). Under the Assignment Agreement: (a) Zelevsky appointed Praeger as his agent, with full authority to investigate and

[* 4]
of expenses.

Aaron contends that, even if the business between Praeger and Zelevsky did not constitute a partnership, Zelevsky is a necessary and indispensable party whose joinder cannot be excused. Praeger disagrees - - he contends that Zelevsky is not a necessary, let alone, an indispensable party.

Pursuant to CPLR 1001 (a), a plaintiff is required to join all parties who are necessary for "complete relief . . . to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action." If a plaintiff fails to join such a party, the complaint may be subject to dismissal under CPLR 1003, unless joinder is excused.

Under the circumstances presented, and taking into account Zelevsky's assignment of rights to Praeger under the Assignment Agreement, the court holds that Zelevsky is not a necessary party to this action. None of the evidence submitted by Aaron suggests otherwise.

Aaron's argument to the effect that, even if the Assignment Agreement is valid, Zelevsky still must be joined as a party because he is necessary in order for the parties to fully and fairly determine liability herein, is conclusory and unsupported by the evidence. In fact, as stated above, the evidence appears to point to the opposite conclusion - - that Zelevsky is not a necessary party to this action.

Even if there were any merit to Aaron's claim that Zelevsky is a necessary party to this action, Praeger contends that Zelevsky's joinder should be excused because he is not subject to the long-arm jurisdiction of this court. In this regard, Praeger asserts that Zelevsky is not

amenable to being made a party to this action, and that he, Praeger, is fully qualified to litigate the claims asserted here on both his own behalf and on Zelevsky's behalf. Praeger submits an affidavit by Zelevsky, sworn to April 27, 2009, wherein Zelevsky states he has appointed Praeger to be his agent and authorizes Praeger to litigate this action on his behalf. As set forth in Zelevsky's affidavit, and not contradicted by Aaron, other than one trip to the United States to attend a meeting with respect to the Agreement, Zelevsky's contacts with the United States were minimal, at best. Moreover, since the court holds that Aaron has not established that Zelevsky is a necessary party to this action, there is no reason to explore whether jurisdiction can or cannot be attained over him.

Praeger's cross motion for leave to amend is granted. In general, leave to amend a pleading should be freely given, absent prejudice or surprise (CPLR 3025 [b]; *McCaskey, Davies and Assocs., Inc. v New York City Health & Hosp. Corp.*, 59 NY2d 755 [1983]; *Ebasco Constructors, Inc. v Aetna Ins. Co.*, 260 AD2d 287 [1st Dept 1999]). The court must first examine the sufficiency of the proposed amendment and determine if the movant has made an evidentiary showing of the merit of the proposed amendment (*Tishman Const. Corp. of New York v City of New York*, 280 AD2d 374 [1st Dept 2001]; *Citarelli v American Ins. Co.*, 282 AD2d 494 [2^d Dept 2001]; *Ferran v Williams*, 281 AD2d 819 [3^d Dept 2001]). While the court should examine the sufficiency of the proposed new pleading, it need not decide the merits of the proposed pleading unless it is patently insufficient on its face (*Hospital for Joint Diseases Orthopaedic Inst. v James Katsikis Env'tl. Contrs., Inc.*, 173 AD2d 210 [1st Dept 1991]). "Once a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment" (*id.*, citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B,

CPLR 3025:11).

In *Estate of Horan v Town of Smithtown* (282 AD2d 498 [2d Dept 2001]), the Second Department, affirming the order of the IAS Court granting a plaintiff's motion for leave to serve and file an amended complaint, stated:

The Supreme Court providently exercised its discretion in granting that branch of the plaintiff's motion which was for leave to serve and file an amended complaint asserting additional factual allegations and two new causes of action (*see, Edenwald Contr. Co., Inc. v. City of New York*, 60 NY2d 957 [1983]; CPLR 3025[b]). The proposed amendment does not fundamentally change the nature of the allegations which must be proven by the plaintiff or diminish the defenses available to the defendants (*see, Nassi v DiLemme Constr. Corp.*, 250 AD2d 658 [2d Dept 1998]). Moreover, the defendants did not demonstrate any prejudice or surprise as a result of the delay (*see, Fahey v County of Ontario*, 44 NY2d 934 [1978]; *Kalish v Manhasset Med. Center Hosp.*, 100 AD2d 507 [2d Dept 1984]).

(*Id.*).

Here too, Praeger contends that his request for leave to amend should be granted - because the proposed amended pleading simply clarifies the allegations which were already asserted in the Complaint, and, as such, cannot come as a surprise to Aaron. In the proposed amended complaint, Praeger seeks to add the following italicized language into the caption "Larry Praeger, on behalf of himself and Eitan Zelevsky," and comparable language in the body of the Complaint, as well as a statement that "*Pursuant to a so-called Assignment Agreement, dated as of May 1, 2007, Eitan Zelevsky assigned and authorized Larry Praeger to commence, prosecute and resolve a lawsuit against the Aaron Group on behalf of himself and Larry Praeger.*" Other than this (and the omission of counsel fees from the demand in the proposed amended complaint), Praeger submits that the Complaint and the proposed amended complaint are virtually the same. Praeger maintains that the proposed amended complaint merely clarifies his authority to prosecute this action, and that it does not change the substantive claims, and, as such, there is no prejudice to Aaron by permitting the proposed amended complaint. Praeger also

claims that the requested amendment is limited in nature, and should be granted.

Upon review, the court is satisfied that Praeger has demonstrated a prima facie basis for the proposed amendment. None of Aaron's arguments in opposition pass muster, and nor has it shown that the proposed pleading is patently insufficient on its face (*see Hospital for Joint Diseases Orthopaedic Inst. v James Katsikis Envtl. Contrs., Inc., supra*). Rather, Aaron's opposition to the cross motion is based on propositions more properly submitted in connection with a motion for summary judgment, rather than in response to a motion to amend a pleading.

CONCLUSION

In view of the above, it is

ORDERED that the motion by defendant the Aaron Group to dismiss the complaint is denied; and it is further

ORDERED that the cross motion by plaintiff Larry Praeger for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that plaintiff Larry Praeger shall serve a copy of the amended complaint and a copy of this decision and order on the Clerk of the Trial Support Office (room 158) who is directed to mark his records to reflect that the name of plaintiff in the caption has been changed from Larry Praeger to Larry Praeger, on behalf of himself and Eitan Zelevsky; and it is further

ORDERED that defendant Aaron Group shall serve an answer to the amended complaint within 20 days from the date of this decision and order; and it is further

ORDERED that a preliminary conference shall be held on December 10, 2009, at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: October 16, 2009

J.S.C.

FILED
OCT 28 2009
COUNTY CLERK'S OFFICE
NEW YORK