

United Graphics, Inc. v Lazar

2010 NY Slip Op 30985(U)

April 20, 2010

Supreme Court, New York County

Docket Number: 104412/09

Judge: Eileen A. Rakower

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

HON. EILEEN A. RAKOWER

DECENT.

Index Number : 104412/2009

PART 15

UNITED GRAPHICS

vs

LAZAR, JAY

Sequence Number : 002

AMEND

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2,3

4

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

APR 23 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/20/10

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
UNITED GRAPHICS, INC.,

Plaintiff,

-against-

Index No.
104412/09

DECISION
and ORDER

JAY LAZAR, EDITH LAZAR, BRIAN LAZAR, JEFFREY
LAZAR and LAZAR, SONS & PARTNERS
ADVERTISING, INC.,

Mot. Seq.
002

Defendant

FILED
APR 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. EILEEN A. RAKOWER:

Plaintiff United Graphics, Inc. ("United") brings this action against Defendant Lazar, Sons & Partners Advertising, Inc. ("Lazar") for breach of contract and account stated. According to United's Complaint, from about October 31, 2007 through December 31, 2008, Lazar requested that United "provide [Lazar] with various commercial printing services for use in various advertising campaigns and promised to pay [United] for said work, labor and services upon receipt of an invoice." United claims that despite this promise, a sum of \$148,876.50 remains due and owing, with interest accruing therefrom as of October 31, 2007.

Presently before the Court is a motion by United for leave to amend its Complaint to add Anvil Knitwear, Inc., Arezzo Jewelry, Inc., Damiani USA Corporation, J.C. Penney Company, Inc., JG Kronenberger Fine Jewelry, Royal Chain, Inc., and Universal Pacific Diamonds & Jewelry, Inc. as additional defendants (collectively "proposed additional defendants"). United also seeks to amend the caption to remove the individually named defendants, as United's third cause of action (piercing the corporate veil) was dismissed by the Hon. Walter B. Tolub by Order dated October 19, 2009. United submits an attorney's affirmation and the affidavit of United President John Giblin in support of its motion. Annexed to these documents as exhibits are copies of invoices allegedly sent to Lazar; United's Summons and Complaint; Lazar's Answer; Justice Tolub's 10/19/09 Order; and United's proposed Supplemental Summons and Amended Complaint.

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According to the Giblin affidavit, submitted in support of United's motion, Lazar is an advertising agency which hired United on behalf of, and as agent for, the proposed additional defendants "to produce printed products for assorted advertising and promotional campaigns of said principals."

Lazar does not oppose the removal of the individually named defendants from the caption, but opposes the joinder of the proposed additional defendants. Lazar submits an attorney's affirmation, the affidavit of Jay Lazar, President of Lazar, and a memorandum of law in opposition. Annexed to these documents as exhibits are copies of a 11/13/09 Preliminary Conference Order ("PC Order") and copies of e-mails which Lazar claims represent the typical process by which Lazar's clients order services from Lazar. In the Lazar affidavit, Lazar states that his company "has never acted in an agency capacity for the production of print materials for any customer." Lazar also contends that the motion should be denied because the facts forming the basis for the instant motion were known to United at the commencement of this action. In addition, United made the instant motion after December 1, 2009, the date set forth by the PC Order by which to move to amend.

Lastly, Lazar claims that it will be prejudiced by the addition of the proposed additional defendants. Specifically, Lazar claims that United's attempt to join the proposed additional defendants is designed solely to "embarrass[] and harm[] Lazar's reputation and business." Lazar states that if the proposed additional defendants are joined in the action, counsel for Lazar might have to become a witness and provide testimony about a telephone conversation between opposing counsel wherein counsel for United threatened to join the proposed additional defendants unless Lazar settled the case. Lazar also claims that the joinder of the proposed additional defendants might necessitate a cross-claim against United for tortious interference with business relations.

Pursuant to CPLR 3025(b), "A party may amend his pleading... at any time by leave of court.... Leave shall be freely given upon such terms as may be just...." "CPLR 3025 allows liberal amendment of pleadings absent demonstrable prejudice" (*Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000]). Notwithstanding the absence of prejudice, leave to amend a pleading must be denied where the proposed amendment is plainly lacking in merit (*see Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 A.D.2d 636 [1st Dept. 1993]).

Here, the Court finds that United is entitled to amend its Complaint. The record indicates that depositions have not yet occurred, and there are no other

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indications that Lazar would be prejudiced or unfairly taken by surprise. As for Lazar's allegations that joinder of the proposed additional defendants prejudices its rights by subjecting it to embarrassment and (possibly) requiring that Lazar bring a cross-claim for tortious interference with business relations, the Court notes that, assuming *arguendo* that Lazar's allegations are true, Lazar will be in no different a position had the proposed additional defendants actually been named and served in the first instance.

As to the merits, the Giblin affidavit sufficiently demonstrates that the proposed amendments to United's Complaint are not patently meritless, such that leave should be denied by the Court. While the Giblin affidavit would be insufficient to demonstrate the existence of principal-agent relationships between the proposed additional defendants and Lazar for purposes of opposing a motion for summary judgment, that is not the standard to be applied on a motion to amend a pleading (*see Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 2007 NY Slip Op 4179, *2 [1st Dept. 2007]) (“[I]n considering the proposed amendment, ‘the court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face. 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’”).

Wherefore, it is hereby

ORDERED that United's motion for leave to amend its Complaint is granted, and the Amended Complaint in the proposed form annexed to the moving papers shall be deemed served on Lazar upon service of a copy of this Order with notice of entry thereof; and it is further

ORDERED that United shall duly serve its Supplemental Summons and Amended Complaint upon the proposed additional defendants within 30 days after receipt of a copy of this Order with notice of entry thereof; and it is further

ORDERED that the caption is hereby amended to reflect the caption as contained in the Supplemental Summons and Amended Complaint.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: April 20, 2010



EILEEN A. RAKOWER, J.S.C.

FILED
APR 23 2010
NEW YORK
COUNTY CLERK'S OFFICE