

**Lowenthal v European Soaps, LLC**

2010 NY Slip Op 32244(U)

August 13, 2010

Supreme Court, New York County

Docket Number: 602347/2009

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

PRESENT:

Index Number : 602347/2009

PART 17

LOWENTHAL, MARK

vs

EUROPEAN SOAPS, LLC

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*granted*

*no decision*

**FILED**

AUG 23 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 8/13/10

*[Signature]*

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):

J.S.G.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

-----X  
MARK LOWENTHAL,

Plaintiff,

-against-

EUROPEAN SOAPS, LLC and  
SJ CAPITAL PARTNERS III, LLC,

Defendants.

-----X  
**EMILY JANE GOODMAN, J.S.C.:**

In this breach of contract, wrongful termination, and tortious interference with contract action, plaintiff Mark Lowenthal moves, pursuant to CPLR 3025 (b), to amend the complaint.

The following allegations are taken from the complaint. Defendant European Soaps, LLC (European Soaps or the LLC) is a Delaware limited liability company that distributes bath and body products.

Defendant SJ Capital Partners III, LLC (SJ Capital) is a Delaware corporation, with its principal place of business in New York City. SJ Capital is in the business of creating and managing private equity funds.

Lowenthal is a Member of European Soaps, and formerly served as the corporation's Chief Executive Officer (CEO).

In January of 2008, plaintiff, SJ Capital, and other persons executed a limited liability company agreement (LLC Agreement) and formed European Soaps. Pursuant to the LLC Agreement, SJ Capital maintained a 75% majority interest in the company. Plaintiff also entered into a Subscription and Repurchase Option Agreement (Subscription Agreement) with European

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Soaps that required him to make a capital contribution to European Soaps in the amount of \$250,000. Plaintiff's investment of \$250,000 gave him a 12.5% interest in the company.

Pursuant to the Subscription Agreement, on January 17, 2008, plaintiff entered into an employment agreement (Employment Agreement) for a two-year term whereby plaintiff would serve as European Soaps' CEO. The Employment Agreement entitled plaintiff to a base salary of \$250,000 in addition to bonus compensation and other benefits.

Plaintiff alleges that, between December 2008 and April 2009, Scott Johnson, acting Chairman of the Board of European Soaps, asked plaintiff to voluntarily reduce his base salary by 50% in order to address the corporation's financial pressures. Johnson also sought to obtain plaintiff's consent to a reduced benefit package. Plaintiff refused Johnson's demand to renegotiate the terms of his Employment Agreement, and, on April 28, 2009, plaintiff was terminated. Plaintiff alleges that the termination letter, issued by Johnson, was also approved by Phillips. Thus, plaintiff alleges that he was terminated without cause, and as a pretext for defendants to avoid financial obligations and without the requisite notice under the Employment Agreement.

As a result, plaintiff commenced this action asserting claims for: (1) breach of contract, (2) tortious interference with contract, and (3) breach of Article 6 of the New York Labor Law.<sup>1</sup> Plaintiff seeks lost wages, specific performance of paragraph 4 of the Subscription Agreement, requiring the repurchase of plaintiff's membership interest in the company, punitive damages, attorney's fees, costs, and disbursements incurred in this action.

Plaintiff moves to amend the complaint seeking to add (1) a cause of action against the

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<sup>1</sup>Plaintiff indicates in his moving papers that this cause of action is withdrawn.

\* 4]  
individuals Johnson and Phillips, for breach of the LLC Agreement, (2) a claim for unpaid accrued vacation under the Employment Agreement, and (3) a claim for breach of the LLC Agreement concerning production of books and records.

Under CPLR 3025, the decision to allow a plaintiff to amend his or her pleading is within the court's discretion and permission to amend a pleading should be freely granted (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95, 99 [2d Dept 2007], *aff'd* 10 NY3d 941 [2008]; *Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1<sup>st</sup> Dept 2003]). New York courts will freely grant leave to amend a pleading absent a showing of prejudice or surprise resulting directly from the delay (*Ancrum v St. Barnabas Hosp.*, 301 AD2d at 475).

Cases involving CPLR 3025 (b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard (*see MBIA Ins. Co. v Greysotne & Co., Inc.*, 901 NYS2d 522 [1<sup>st</sup> Dept 2010] ["Plaintiff need not establish the merit of its proposed new allegations...but simply that the proffered amendment is not palpably insufficient or clearly devoid of merit"]; *Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]).<sup>2</sup> The contention that plaintiff's request for leave to amend lacks merit is not supported. Defendants correctly point out that Section 4.1.4 of the LLC Agreement cannot be the basis for the proposed breach of contract cause of action as it merely provides that the Board of Managers are not liable to the LLC or to Members for actions taken "within the scope of authority

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<sup>2</sup>The origin of this misapplied standard can be traced to cases where a defendant already made a CPLR 3211 (a) (7) motion to dismiss part of a plaintiff's complaint based on the legal insufficiency of the allegations and the plaintiff subsequently requested leave to replead (*Lucido*, 49AD3d 220, *supra*).

conferred on it by this Agreement, if such action is omitted or taken in good faith” but are liable for actions “arising out of or resulting from its gross negligence or willful misconduct.” As that provision does not delineate the acts which are within the scope of authority under the Agreement or otherwise indicate what acts would constitute a breach of the Agreement, plaintiff must point to another provision in the LLC Agreement to support an alleged breach. Plaintiff’s claim, that the individual Members breached Section 10.3 of the LLC Agreement, by improperly refusing to permit plaintiff to inspect the company’s books and records, is such an act which may support a breach. Moreover, defendants’ argument that the Paragraph 4.1.4 of the LLC Agreement only protects the LLC or other Members (as opposed to employees), is of no import where the alleged breach under Section 10.3 is asserted by plaintiff as a Member and is sufficiently particularized, although it is asserted in connection with his claim that the Employment Agreement was breached. Further, defendants’ argument that a breach cannot be asserted under Section 10.3, because defendants were justified in refusing inspection and offered plaintiff the opportunity to inspect the books and records, under certain conditions, is not a basis to oppose amendment. Defendants’ contention has yet to be proven, actually supports plaintiff’s claim, and has nothing to do with whether plaintiff can amend his complaint to assert the *allegation* that the individuals breached this provision.<sup>3</sup> Similarly, defendants’ argument that plaintiff cannot assert a claim for unused vacation time because plaintiff has not demonstrated that he was fired without cause, has nothing to do with whether plaintiff can allege such a claim.

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<sup>3</sup>Defendants cite no cases to support its argument that plaintiff cannot assert that he suffered consequential damages to his business reputation, because he has not identified the circumstances under which these damages occurred. Defendants are entitled to discovery on this issue, but have not shown that the damages alleged are without merit.

Accordingly, it is

ORDERED that Mark Lowenthal's motion for leave to amend the complaint herein is granted, and the amended complaint in the 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 defendants European Soaps, LLC and SJ Capital Partners III, LLC are directed to serve their answers to the complaint or otherwise respond thereto within 20 days from the date of said service.

**This Constitutes the Decision and Order of the Court.**

Dated: August 13, 2010

ENTER:

  
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 J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
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