

Iny v Delmar Intl., Inc.
2010 NY Slip Op 32263(U)
August 16, 2010
Supreme Court, Nassau County
Docket Number: 025096/09
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ROBERT INY, HERBERT WILLIAM JURLICH,
TERESA TERRILL and DELMAR
INTERNATIONAL (N.Y.) INC.,

Plaintiffs,

-against-

DELMAR INTERNATIONAL, INC., DELMAR
INTERNATIONAL (N.Y.) INC., ROBERT
CUTLER, MICHAEL WAGEN and HARRISON
CUTLER,

Defendants.

DELMAR INTERNATIONAL, INC., DELMAR
INTERNATIONAL (N.Y.) INC., ROBERT
CUTLER, MICHAEL WAGEN and HARRISON
CUTLER,

Counterclaim-Plaintiffs,

-against-

ROBERT INY, HERBERT WILLIAM JULICH,
TERESA TERRILL and DELMAR INTERNATIONAL
(N.Y.) INC., MALLORY ALEXANDER
INTERNATIONAL LOGISTICS, LLC and MALLORY
ALEXANDER INTERNATIONAL LOGISTICS (NY),
LLC,

Counterclaim-Defendants.

TRIAL/IAS, PART 2
NASSAU COUNTY

INDEX No. 025096/09

MOTION DATE: June 14, 2010
Motion Sequence # 002, 003

The following papers read on this motion:

Notice of Motion.....	X
Cross-Motion.....	X
Affirmation in Opposition.....	XX
Affirmation in Support.....	X
Reply Affirmation	X
Memorandum of Law.....	XX
Reply Memorandum of Law.....	X

Motion by defendants for leave to amend is **granted**. Cross-motion by counterclaim defendants Mallory Alexander International Logistics, LLC and Mallory Alexander International Logistics NY to dismiss the counterclaims for failure to state a cause of action is **granted** in part and **denied** in part.

This is an action for breach of fiduciary duty by minority shareholders. Defendant Delmar International (NY) Inc (“Delmar NY”) is a corporation engaged in the international freight forwarding business. Defendant Delmar International Inc (“Delmar International”) is a Canadian corporation which owns 59.09% of the stock of Delmar NY. Defendants Robert Cutler and Harrison Cutler are shareholders of Delmar International, officers of Delmar NY, and members of the board of directors of both corporations. Defendant Michael Wagen is an officer of Delmar NY and a member of the board of Delmar NY and Delmar International.

Plaintiffs Robert Iny, Herbert Julich, and Teresa Terrill each own 13.64% of the stock of Delmar NY. On April 1, 1994, Delmar NY entered into employment agreements with Iny, Julich, and Terrill. The employment agreements were for a term of two years and were to continue “year to year upon consent of the parties.” The agreements contained a covenant-not-to-compete provision which provided that the employee was not to engage in any similar business for two years from the date of “expiration of this agreement.” It appears that the employment agreements were not expressly renewed.

However, plaintiffs continued to work for Delmar NY for a number of years. On October 27, 2009, Iny and Terrill were terminated effective March 31, 2010. Although defendants assert that Julich was terminated on the same date, plaintiffs assert that Julich’s employment was terminated on March 1, 2010.

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Plaintiffs commenced the present action on December 9, 2009. In the first cause of action, plaintiffs seek a declaratory judgment that the employment agreements expired on March 31, 1996 and the covenants not-to-compete are no longer in effect. In the second cause of action, plaintiffs seek a declaratory judgment that the majority shareholder has engaged in oppressive conduct toward the minority shareholders. More specifically, plaintiffs claim that Delmar International suspended dividends, caused Delmar NY to be charged excessive transaction fees, and demanded that the minority shareholders each contribute an additional \$4 million to the capital of the corporation. In the third cause of action, plaintiffs seek judicial dissolution of Delmar NY pursuant to § 1104-a of the Business Corporation Law. In the fourth cause of action, plaintiffs allege that Delmar International breached its fiduciary duty to the minority shareholders. In the fifth cause of action, plaintiffs allege that defendants Robert Cutler, Harrison Cutler, and Michael Wagen breached their fiduciary duties which they owed to Delmar NY and the minority shareholders. In the sixth cause of action, plaintiffs allege that defendants Delmar International, Robert Cutler, Harrison Cutler, and Michael Wagen usurped a corporate opportunity of Delmar NY, namely the acquisition of a company known as the Rical Group. Plaintiffs seek the imposition of a constructive trust on the Rical Group in favor of Delmar NY.

On April 16, 2010, defendants filed an amended answer, asserting counterclaims for breach of the employment agreements, breach of fiduciary duty, and tortious interference with contractual relations. Defendants allege in essence that plaintiffs, acting through counterclaim defendants Mallory Alexander International Logistics, LLC and Mallory Alexander International Logistics NY, solicited Delmar NY's customers. Defendants did not obtain leave of court to serve an amended answer. Plaintiffs have rejected the amended answer, and defendants seek leave to amend on the present motion.

Counterclaim defendants Mallory Alexander International Logistics and Mallory Alexander International Logistics NY cross-move to dismiss the fourth, fifth, and sixth counterclaims for failure to state a cause of action. In the fourth counterclaim, defendants allege that Mallory and Mallory NY tortiously interfered with Delmar's contracts with Dietrich and Alisped. In the fifth counterclaim, defendants allege that Mallory and Mallory NY tortiously induced plaintiffs to breach the covenant-not-to compete provisions in their employment agreements. In the sixth counterclaim, defendants allege that Mallory and Mallory NY tortiously induced plaintiffs to breach their fiduciary duties to Delmar.

CPLR 3025(b) provides that leave to amend shall be freely given upon such terms as may be just. The statute further provides that a motion to amend may be made "at any time."

The better practice would have been for defendants to have sought leave before serving an amended answer. However, absent a showing of prejudice, leave may be granted after the purported amended pleading has been served and rejected by the plaintiffs. Defendants' motion for leave to amend is **granted**. The amended answer with counterclaims is deemed served in the form annexed as exhibit 1 to defendants' motion.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference (*AG Capital Funding Partners v. State Street Bank and Trust Co.*, 5 NY3d 582, 591 [2005]). The elements of a cause of action for tortious interference are the existence of a valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages (*White Plains Coat & Apron Co v Cintas Corp.*, 8 NY3d 422, 426 [2007]).

Defendants have alleged the existence of valid contracts with third parties Dietrich and Alisped, who are presumably importers. On this motion to dismiss, the court must assume that counterclaim defendants knew of these contracts and improperly caused Dietrich and Alisped to breach their contracts by transferring their business to Mallory Alexander and Mallory Alexander NY. Counterclaim defendants' motion to dismiss the fourth counterclaim for failure to state a cause of action is **denied**.

However, Iny, Julich, and Terrill's employment agreements were with defendant Delmar NY rather than a third party. While plaintiffs may have breached the covenant not-to-compete provisions by forming Mallory Alexander and Mallory Alexander NY, those companies did not tortiously induce a breach of the employment contracts. Counterclaim defendants' motion to dismiss the fifth counterclaim for failure to state a cause of action is **granted**.

Finally, Iny, Julich, and Terrill had no fiduciary duty to Delmar NY once their employment with the company was terminated. Since plaintiffs had no fiduciary duties, Mallory Alexander and Mallory Alexander NY could not tortiously induce plaintiffs to breach their fiduciary duties to Delmar. Counterclaim defendants' motion to dismiss the sixth counterclaim for failure to state a cause of action is **granted**.

Counterclaim defendants shall serve their reply to the first four counterclaims within 15 days of service of a copy of this order.

So ordered.

Dated AUG 16 2010

ENTERED
AUG 18 2010
NASSAU COUNTY
Stephen...
COUNTY CLERK'S OFFICE
J.S.C.