

Lahey v Wu

2011 NY Slip Op 31332(U)

May 2, 2011

Supreme Court, Nassau County

Docket Number: 006155/2009

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

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

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

RAYMOND LAHEY,

Plaintiff,

- against -

LESTER WU and VLADIMIR ZANAN,

Defendants.

TRIAL/IAS PART 7

INDEX NO.: 006155/2009
MOTION DATE: 2/19/11
SEQUENCE NO.: 01, 02

The following documents were read on this motion:

- Motion for Leave to Amend Complaint 1.
- Cross-Motion to Dismiss Complaint and Opposition to Motion 2.
- Affirmation in Opposition to Cross-Motion 3.
- Affirmation in Reply to Opposition to Cross-Motion 4.

PRELIMINARY STATEMENT

Plaintiff moves to amend its original complaint dated March 13, 2009. Defendant cross-moves, opposing the motion to amend and for dismissal of the original complaint for failure to state a cause of action pursuant to Civil Practice Law and Rules § 3211 (a)(7).

BACKGROUND

Plaintiff and defendants were allegedly social friends, who traveled together and socialized on a regular basis. Defendants were in the automobile dealership business and, according to plaintiff, induced him to invest \$700,000 in a new dealership venture.

The original summons and complaint are annexed to the motion as Exh. "A". The preamble to the complaint alleges that, between April 2006 and November 2006, plaintiff gave the defendants \$700,000. ¶ 5 states that "(t)he foregoing payments constituted a loan

from the plaintiff to the defendants, jointly and separately (sic.)”, while ¶ 6 claims that “(t)he foregoing payments constituted advances from the plaintiff to the defendants, jointly and separately (sic.), in anticipation of the plaintiff receiving an ownership interest in an entity organized for the intended purpose of operating a motor vehicle dealership”. The complaint goes on to assert that defendants misrepresented to the plaintiff the circumstances and background of Tri-County Motors, Inc. (the proposed dealership) as well as their personal and professional financial status as principals of dealerships. A further claim is that defendants refused to provide an accounting, and that their conduct constituted “negligent misrepresentation”.

Plaintiff then asserts three “claims for relief”: plaintiff is entitled to a return of the \$700,000, consequential damages and legal fees; plaintiff is entitled to an accounting from defendants; plaintiff would not have invested with defendants were it not for falsehoods and misrepresentations, their personal and business status, the background of their business dealings and history and their intended manner of operating the dealership, for which plaintiff is entitled to the return of his \$700,000, consequential damages and legal fees.

The proposed Amended Complaint is annexed to the motion as Exh. “B”. The preamble is unchanged. The First “Claim for Relief” is now designated as a First Cause of Action entitled “Fraudulent Inducement”. It goes on to enunciate five affirmative statements attributable to the defendants and itemizes two failures of defendants to reveal prior indebtedness of the company in which plaintiff was allegedly entitled to a 20% interest and that the defendants and their dealerships were under investigation by a number of agencies, including the New York City and Nassau County Departments of Consumer Affairs, the Department of Motor Vehicles, and the Attorney General’s Office.

The Second “Claim for Relief” demands an accounting, while the Third alleges Breach of Contract. The latter asserts that between April 25, 2006 and April 9, 2007, defendants promised to return to plaintiff \$700,000 in the event defendants failed to

execute the necessary documents to effectuate the transfer of a 20% ownership interest in Tri-County Motors, Inc., that the defendants breached the foregoing promise, and that they are now indebted to plaintiff in the sum of \$700,000.

DISCUSSION

Plaintiff seeks leave to serve an amended complaint and defendants cross-motion requests denial of the motion to amend and dismissal of the original complaint for failure to state a cause of action. Amendment of pleadings is governed by Civil Practice Law and Rules § 3025, which provides in pertinent part as follows:

Rule 3025. Amended and supplemental pleadings

(a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

...

The language of the statute, and cases interpreting it, make it abundantly clear that amendment of pleadings is to be freely granted unless the proposed amendment is “palpably insufficient” to state a cause of action or defense, or it is patently devoid of merit. To the extent that prior decisions led to the conclusion that the movant was under a burden to establish the merit of the amendment, they erroneously stated the standard to be followed.¹

Defendants correctly claim that “leave to amend a complaint should be freely given absent

¹ *Lucido v. Mancuso*, 49 A.D.3d 220, 230 (2d Dept. 2008).

prejudice or surprise resulting from the delay . . .”² Defendants then assert in their cross-motion that they would be prejudiced if the complaint were amended to include additional factual allegations because they had not been sufficiently alerted to these contentions, and have therefore not been afforded an opportunity to preserve evidence relevant to defending the claims.³

Moon, however, involved an application to amend a complaint after a Note of Issue had been filed. That is hardly the circumstance in this case. The Court’s file reflects a November 5, 2010 stipulation between counsel, “so ordered” by the Court, which called for the following:

- Plaintiff to serve motion to amend complaint within 2 weeks (11/19);
- Defendant to respond within 30 days (12/20);
- Plaintiff to reply within 1 week (12/31);
- Defendant to serve demand for Bill of Particulars by 12/15/10;
- Plaintiff to serve document demand not later than 12/15/10;
- Deposition of plaintiff on 3/8/11 and continuing;
- Deposition of defendants on 3/8/11 or 3/9/11 on call;
- Compliance conference on 4/6/11.⁴

It is notable that a preliminary conference on August 4, 2010 called for the service of a demand for a bill of particulars by 9/10/10, discovery and inspection demands within 37 days of the Order, depositions to commence on 11/8/10 and a compliance conference was set for 10/28/10. Sadly, the November 5, 2010 stipulation evidences that nothing required by the Preliminary Conference Order was done, and the parties effectively started over three months later. Far from being ready for trial, as was the case in *Moon*, discovery had not even begun as of the November 19, 2010 service of the motion, and, very possibly has not yet begun.

It cannot be said that defendants are somehow caught by surprise by the itemization of the

² *Leszczynski v. Kelly & McGlynn*, 21 A.D.2d 519, 520 (2d Dept. 2001).

³ *Moon v. Clear Channel Communs, Inc.*, 307 A.D.2d 628, 629 (3d Dept.2003).

⁴ Adjourned on Consent to 5/3/11.

alleged misrepresentations and withholding of information as claimed by plaintiff.

“On a motion to dismiss the complaint pursuant to C.P.L.R. 3211 (a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory”.⁵ Neither the original nor the amended complaints are beacons of clarity; but affording them the liberal construction which is mandated, it cannot be denied that the defendants allegedly either breached a contract with plaintiff, or are guilty of unjust enrichment. “To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) a that party’s expense, and (3) that ‘it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered’ ”.⁶

Plaintiff’s motion to amend the complaint in the form annexed to the motion is granted. Defendants are directed to respond within twenty days of receipt of a copy of this Order with Notice of Entry.

In view of the fact that the motion to amend the complaint is granted, the original complaint is rendered a nullity and the cross-motion to dismiss it is denied as moot.

This constitutes the Decision and Order of the Court.

Dated: May 2, 2011

Sub Winstanley
J.S.C.
ENTERED
MAY 09 2011

NASSAU COUNTY
CLERK'S OFFICE

⁵ *Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703 (2d Dept.2009); *Martinez*, 84 N.Y.2d 83, 87 (1994).

⁶ *Anesthesia Associates of Mount Kisco v. Northern Westchester Hospital Center*, 59 A.D.3d 473, 481 (2d Dept.2009)(internal citations omitted).