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SHORT FORM ORDER

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice,

TRIAL/IAS PART 7

AMS PRODUCTS d/b/a OBJECT DESIGN MANUFACTURING,

Plaintiff,

INDEX NO.: 005590/2008
MOTION DATE: 7/28/2011
SEQUENCE NO.: 05

- against -

PAUL J. SIGNORILE,

Defendant.

The following documents were read on this Motion:

Motion for Leave to Amend Answer	1.
Affirmation in Opposition to Motion	2.
Reply Affirmation	3.

PRELIMINARY STATEMENT

Defendant seeks to amend his answer in the form attached to the motion. Plaintiff objects to the form of the amendment in that the Court previously authorized defendant to amend the answer to include a counterclaim, but defendant also seeks to add six affirmative defenses: justification; failure to join an indispensable party; breach of asset purchase agreement by plaintiff; breach of the

security agreement by plaintiff; frustration of the purpose of the Shared Transfer Agreement as a result of breaches by plaintiff; and that plaintiff is guilty of culpable conduct. Plaintiff contends that defendant has failed to establish the merits of the counterclaims. Defendant replies that plaintiff cannot be surprised by the counterclaims, will suffer no prejudice, and that additional discovery would be minimal, and, in any event, there are outstanding discovery demands to which plaintiff has not yet responded.

BACKGROUND

This action involves a January 8, 2007 agreement between plaintiff and defendant for the purchase and sale of the assets of a business conducted under the name "Object Design Manufacturing", including its goodwill and customer list. The agreement contained a restrictive covenant executed by Paul J. Signorile, in which he agreed not to engage in any business, trade or occupation in which the business sold is engaged, for a period of five years. The restriction was to include the "entire New York City Metropolitan area, including Connecticut, New Jersey, 5 boroughs, Long Island and adjoining counties".

The complaint alleges that subsequent to March 7, 2007 and continuing to the date of the complaint, defendant has continued to engage in the same business as Object Design Manufacturing, in direct violation of the agreement.

DISCUSSION

Amendment of Pleadings

The amendment of pleadings is governed by Civil Practice Law and Rules § 3025 of the Civil Practice Law and Rules, which provides 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.

(c) Amendment to conform to the evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.

(d) Responses to amended or supplemental pleadings. Except where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. Service of such an answer or reply shall be made within twenty days after service of the amended or supplemental pleading to which it responds.

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

Some of the proposed amendments in the form of affirmative defenses are duplicative of the counterclaims, or fail to state recognizable claims under the laws of the State of New York. The Court will consider the proposed affirmative defenses seriatem.

The Sixth Affirmative Defense asserts that the action is barred by the "doctrine of justification". The only context in which this doctrine has been found by the Court is the area of criminal law, in which conduct which would otherwise constitute an offense, may be justified as an emergency measure to avoid an imminent public or private injury which is caused by no fault of the actor, and which is such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by a statute. A classic example is the need to moor a boat at a private dock in the course of a dangerous storm, likely to cause a boat to founder.

In addition, the justification claim is incorporated in the counterclaims, alleging a breach of the agreement by movant and an oral modification of the restrictive covenant.

The motion to amend the Answer is denied with respect to the Sixth Affirmative Defense.

Defendant does not identify the necessary party he asserts that the plaintiff has failed to include. CPLR § 1001 identifies parties who should be joined as

"(p)ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action". In the absence of the identification of such parties who may be necessary to afford complete relief, or who may be inequitably affected by a proceeding to which they are not a party, the Court cannot find that movant has met the burden of establishing the merit of their proposed affirmative defense.

For this reason the motion to amend the answer is denied as to the Seventh Affirmative Defense.

The breach of the Asset Purchase Agreement is simply a reiteration of the First Counterclaim. The motion to add the Eighth Affirmative Defense is denied.

The Ninth Affirmative defense alleges that Plaintiff breached the Promissory Note ("Security Agreement"). While this is arguably incorporated in the allegation of a breach of the Asset Purchase Agreement, that is, plaintiff has failed to make payments as provided for by promissory notes, and therefore breached the Agreement, the Court will permit this affirmative defense to stand. The motion to amend the complaint is granted with respect to the Ninth Affirmative Defense.

In the Tenth Affirmative Defense, defendant contends that the breach of the Agreement by plaintiff frustrated the purpose of the Agreement, and that the complaint should therefore be dismissed. "For a party to a contract to invoke frustration of purpose as a defense for nonperformance, 'the frustrated purpose must be so completely the bias of the contract that, as both parties understood, without it, the transaction would have made little sense'. " (*PPF Safeguard, LLC v. BCR Safeguard Holding, LLC,* 85 A.D.3d 506 [1st Dept. 2011], quoting *Crown IT Servs., Inc. v. Koval-Olsen,* 11 A.D.3d 263, 265 [1st Dept. 2004]).

As stated in *Crown IT Servs., Inc.,* the principle of frustration is a very

narrow one, and the frustration must completely frustrate the purpose of the contract. While it is difficult to envision defendant meeting this standard, the Court will not preclude him from interposing such a claim. The motion to amend the answer so as to include the newly interposed Tenth Affirmative Defense is granted.

The Eleventh Affirmative Defense asserts that plaintiff is guilty of culpable conduct. This allegation is fully incorporated in the First Counterclaim. The motion to include the Eleventh Affirmative Defense in the Amended Answer is denied.

This constitutes the Decision and Order of the Court.

Dated: September 26, 2011

J.S.C.