

Stuart's LLC v Edelman
2011 NY Slip Op 33533(U)
December 27, 2011
Sup Ct, Nassau County
Docket Number: 012560/2009
Judge: Ira B. Warshawsky
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SHORT FORM ORDER**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU****HON. IRA B. WARSHAWSKY,
Justice.****TRIAL/IAS PART 7**

STUART'S LLC and WAYNE GALVIN,**Plaintiffs,****- against -****INDEX NO.: 012560/2009
MOTION DATE: 10/20/2011
SEQUENCE NO.: 001****STUART EDELMAN, LEVEL 8 APPAREL, LLC, WORLD
CROSS CULTURE, INC., WORLDWIDE SOURCING
GROUP, LLC, KUK JA KIM a/k/a SAM KIM, PETER
LISTER, MICHAEL HONG, nd MARY-LEE EDELMAN,****Defendants**

The following documents were read on this motion:

Motion by Worldwide Sourcing Group and Peter Lister for Leave to Amend Answer	1.
Plaintiffs' Affirmation in Opposition to Motion for Leave to Amend	2.
Memorandum of Law in Opposition to Motion for Leave to Amend	3.
Affirmation on behalf of Stuart Edelman and Mary-Lee Edelman in Opposition	4.
Reply Affirmation in Further Support of Motion for Leave to Amend	5.

PRELIMINARY STATEMENT

Defendants Worldwide Sourcing Group and Peter Lister move to amend their Answer and Counterclaims to assert additional matters, including cross-claims. The stated purpose of the amendment is to clarify certain counterclaims, and add cross-claims against co-defendants Stuart Edelman, Kuk Ja Kim a/k/a Sam Kim and Level 8 Apparel, LLC. Movants seek to add a third and fourth counterclaim for breach of contract on a promissory note and repayment of unsecured loans.

Plaintiffs and co-defendants Stuart Edelman, Mary-Lee Edelman, Sam Kim, Level 8, LLC, and World Cross Culture, Inc. oppose the motion. Edelman's claims are that he would be prejudiced by imposition of a cross-claim since the parties have had extensive strategy discussions with respect to the defense of the action. He further claims that the Third Cross-claim is insufficient as a matter of law, in that the material terms and conditions of the purported \$59,000 loan, are vague and lack definiteness. They also claim that the facts regarding the alleged loan were known by movants at the time of the initiation of the action some two years ago. There was apparently no written agreement, and defendants contend that the loan was for Stuart's LLC to make payroll, and Galvin and Edelman, as alleged guarantors, would have to have signed a written agreement under the Statute of Frauds.

Plaintiffs contend that the motion to amend must be denied. The proposed Third Counterclaim is based upon a May 2008 note of Stuart's LLC in favor of Worldwide Sourcing Group ("WSG") in the amount of \$900,000. (¶ 138). It also claims that, pursuant to the note, Lister and WSG loaned Stuart's and Galvin up to \$2,800,000, of which \$1,200,000 remains unpaid. Opponents contend that there is no basis for the imposition of liability upon Galvin, since he was not a party to the note. They anticipate a claim that movants are entitled to pierce the corporate veil, but they have not alleged any independent tortious conduct, nor any conduct by Galvin which constituted an abuse of the privilege to proceed in a corporate form.

Plaintiffs further assert that the movants have failed to establish the meritorious nature of their claims, and that the proposed third counterclaim is subject to dismissal for indefiniteness.

Sam Kim, Level 8, LLC and World Cross Culture, Inc. ("WCC") contend that the First Cross-claim against Kim and Level 8 is barred by the Statute of Frauds, in that every agreement which, by its terms, is not to be performed within one year, must be in writing. Further, they claim, even if not precluded by GOL § 5-701 (a)(1), it is unenforceable for vagueness. The claimed agreement was for "profits participation"

BACKGROUND

Based upon analysis of the Complaint, (Exh. "A" to Complaint), the parties were engaged in the production, distribution and sale of clothing, particularly men's outerwear. Stuart's LLC had two members, Wayne Galvin, the majority owner and manager, and Stuart Edelman. Until approximately March 2009, Stuart's operated at 247 W. 36 Street, New York, NY.

Level 8, LLC is also in the business of production, sale and distribution of men's leather and outerwear goods. Plaintiff alleges that Level 8 was formed by one or more of the defendants, including Edelman, Peter Lister, and Sam Kim. World Cross Culture, Inc. ("WCC") is a manufacturer of men's, women's and children's clothing, located at 213 W. 35 Street, Suite 603, New York, NY. Prior to 2009, WCC manufactured clothing for Stuart's, which it sold to customers such as Aeropostale.

Worldwide Sourcing Group, LLC ("WWS"), of 120 Springy Bank Road, East Hampton, NY was created to serve as a funding arm for Stuart's. Defendant Lister is a member of WWS.

On December 29, 2005 Galvin and Edelman signed a \$265,190.29 promissory note on behalf of Stuart's to Galvin. The note was for loans made by Galvin between May 4, 2004 and December 29, 2005. The note was "collateralized by any and all of the assets of Stuart's LLC".

Stuart's entered into a licensing agreement with Tumi, Inc., a distributor of trademarked luggage. Pursuant to this agreement Stuart's was authorized to develop, market and sell trademarked products of Tumi, in return for which Stuart's paid royalties.

Stuart's obtained financing through Hana Financial, Inc. ("Hana") a factor. Edelman and Galvin personally guaranteed repayment and, the complaint alleges, the debt now exceeds \$561,000.

The complaint also alleges a "Differential Agreement" between Edelman and Galvin, whereby the parties equalized their salaries and fringe benefits by way of creating a debt owed by the party receiving the greater amount to the other. Edelman allegedly owes Galvin \$52,729 pursuant to the agreement.

On or about June 4 and June 6, 2007, Stuart Edelman and Mary-Lee Edelman signed a promissory note in favor of Galvin for loans allegedly made by him to them. The complaint also references a non-disclosure agreement signed by one Michael Hong. The June 18, 2009

complaint goes on to allege Nine Causes of Action as follows:

- FIRST: Breach of contract against Edelman, in that, despite the operating agreement to the contrary, he made various management decisions involving the assets of Stuart's including the Tumi licensing agreement and concerning the relationship with Aeropostale, without consulting Galvin. He also allegedly transferred assets to Level 8 Apparel, including the Tumi licensing agreement and acted contrary to the best interests of Stuart's;
- SECOND: Plaintiff alleges breach of fiduciary duty by Edelman in that he had such a duty to Stuart's and Galvin, and breached it by transferring assets to Level 8 and World Cross Culture;
- THIRD: Tortious interference with contractual relations by Level 8, World Cross Culture, Worldwide Sourcing, Sam Kim and Peter Lister;
- FOURTH: Tortious interference with advantageous business relations by Stuart Edelman, Level 8, World Cross Culture, Worldwide Sourcing, Sam Kim and Peter Lister.
- FIFTH: Breach of Contract against Michael Hong;
- SIXTH: Declaratory judgment that Level 8, the recipient of the assets of Stuart's without adequate consideration, is a successor corporation of Stuart's and is liable for Stuart's debts and obligations. These include Stuart's debt to Galvin under the 12/29/05 promissory note (\$265,190.29), Stuart's debts to Hana (in excess of \$561,000) as well as other obligations;
- SEVENTH: Against Stuart Edelman and Mary-Lee Edelman on the 6/4/07 promissory note in the amount of \$9,931.56;
- EIGHTH: Breach of contract against Stuart Edelman on the Differential Agreement in the amount of \$52,729;
- NINTH: Against Stuart Edelman for Unjust Enrichment based upon the Differential Agreement.

Defendants Lister and WWS answered the complaint by Answer dated July 24, 2009. It included a preamble to the counterclaims, alleging that plaintiff Galvin so dominated Stuart's so as to constitute an alter ego and be personally responsible for the debts of Stuart's. The First

Counterclaim alleges that Stuart's contracted with WSG to purchase goods from them in the amount of \$1,500,000, for which payment has not been made. The Second Counterclaim alleges Fraud in the Inducement by Galvin.

Defendants Lister and WSG now seek to amend the answer to include a third counterclaim against plaintiffs, and insert cross-claims against co-defendants Stuart Edelman, Sam Kim and Level 8. The Third Counterclaim alleges that Galvin is personally liable on the promissory note of Stuart's in favor of WSG. Plaintiffs contend that the absence of Galvin's signature on the note, as a maker or a guarantor, precludes a claim of liability on his part, and the Counterclaim fails to state a claim upon which relief can be granted.

With respect to the cross-claims, the co-defendants assert that they would be prejudiced since the movants and the co-defendants have discussed the defense of the action and their position will now be compromised. Movants seek to place Edelman in the same position as Galvin in the first and second cross-claim. The third cross-claim involves a claimed loan by WSG to Galvin, Edelman and Stuart's in the amount of \$59,000. These parties object to the proposed third cross-claim in that there is no new evidence upon which it is based, and the information was available to defendant movants at the time of the original answer. Co-defendants Kim and Level 8 make the same arguments with respect to the proposed amendments against them.

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.¹

While this action was commenced in 2009, it has not proceeded pursuant to a preliminary conference order. There can be no argument that the plaintiffs or the co-defendants have limited their discovery premised on the absence of the proposed amendments. There is no doubt but that it will take significant evidence to justify the piercing of the corporate veil so as to make Galvin individually liable for the debts of Stuart’s. But it is not necessary for the Court to consider the likelihood of success on the merits, only whether or not the proposed amendment states a claim.

Nor is it determinative that at some later date, upon the completion of discovery, a cause of action, counterclaim, or cross-claim may be dismissed. At the early pleading stage, at which state this action remains, despite a 2009 filing date, the Court is compelled to grant substantial

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

leeway to enable the parties to air their grievances in their entirety.

Because the proposed counterclaims and cross-claims are not “palpably insufficient” or “patently devoid of merit”

The motion by Worldwide Sourcing Group, LLC and Peter Lister to amend the answer to include the proposed counterclaim and cross-claims is granted.

This constitutes the Decision and Order of the Court.

Dated: December 27, 2011


J.S.C.

ENTERED

DEC 29 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**