

<b>Healthcare I.Q., LLC v Tsai Chung Chao</b>
2011 NY Slip Op 33701(U)
November 4, 2011
Supreme Court, New York County
Docket Number: 108230/2010
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY  
PRESENT: Hon. Eileen Bransten, Justice PART 3

-----X  
HEALTHCARE I.Q., LLC,

Plaintiff,

-against-

Index No.: 108230/10  
Motion Date: 7/1/11  
Motion Seq. Nos.: 002

DR. TSAI CHUNG CHAO, M.D. d/b/a  
NATURO-MEDICAL HEALTH CARE, P.C.,

Defendant.  
-----X

The following papers, numbered 1, was read on this motion for leave to amend Defendant's amended answer.

Papers Numbered

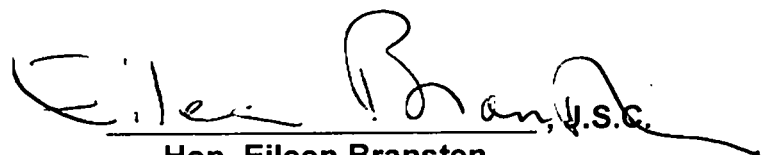
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	<u>1</u>
Answering Affidavits - Exhibits	<u>2</u>
Replying Affidavits	<u>3</u>

Cross-Motion:  Yes  No

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: November 4, 2011

  
Hon. Eileen Bransten

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE  SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

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

-----X  
HEALTHCARE I.Q., LLC,

Plaintiff,

-against-

DR. TSAI CHUNG CHAO, MD d/b/a  
NATURO-MEDICAL HEALTH CARE, P.C.,

Defendant.

-----X

BRANSTEN, J.

Index No. 108230/2010  
Motion Date: 7/1/11  
Motion Seq. No.: 002

Defendant Dr. Tsai Chung Chao, MD d/b/a Naturo-Medical Health Care, P.C. (“Naturo-Medical” or “Defendant”) moves for leave to amend its amended answer pursuant to CPLR 3025(b). Plaintiff Healthcare I.Q., LLC (“Healthcare” or “Plaintiff”) opposes the motion.

**BACKGROUND**

Plaintiff entered into a practice management and licensing agreement with Defendant on or about February 1, 2007. Affirmation of Charles B. Manuel, Jr. in Opposition to Defendant’s Motion for Leave to Amend (“Manuel Affirm.”), ¶ 2.

On or about June 15, 2010, Plaintiff filed the instant complaint against Naturo-Medical. Manuel Affirm., ¶ 3. Plaintiff seeks damages for Defendant’s alleged breach of contract. Plaintiff’s Memorandum of Law in Opposition to Defendant’s Second Motion for Leave to Amend the Answer (“Pl. Mem.”), p. 3. Defendant filed an answer on July 29, 2010, and an amended answer on August 18, 2010. Manuel Affirm., ¶¶ 4-5.

On January 14, 2011, Defendant filed a motion to amend the answer. Affirmation of Tristan C. Loanzon in Support of Defendant's Motion by Order to Show Cause for Leave to Amend ("Loanzon Affirm."), ¶ 3. Defendant sought to interpose counterclaims. *Id.* On May 26, 2011, this court denied without prejudice Defendant's motion for leave to amend. Manuel Affirm., Ex. 2 ("5/26/11 Order"). This court's 5/26/11 order stated, "The papers submitted by defendant did not include an affidavit of merit..." *Id.*

Defendant now moves again for leave to amend its amended answer. On June 14, 2011, Defendant filed a second motion for leave to amend the amended answer. Manuel Affirm., ¶ 8. Defendant included a proposed verified second amended answer. Loanzon Affirm., Ex. A ("Proposed Verified Second Answer"). Therein, Defendant asserts three counterclaims against Plaintiff: 1) breach of contract; 2) faithless servant; and 3) unjust enrichment. *Id.* Defendant's principal, Dr. Tsai Chung Chao, verified that the proposed second amended answer and counterclaims were "true to his own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true." *Id.*, p. 10. Defendant did not provide an affidavit of merit.

Plaintiff opposes the motion.

On or about September 12, 2011, Plaintiff filed a note of issue. *See* Document No. 29 filed on NYSEF on September 12, 2011.

### ANALYSIS

Defendant argues that leave to amend its answer to assert counterclaims should be granted because this motion was not unduly delayed, not made in bad faith and Plaintiff will not be prejudiced by the new answer and counterclaims. Defendant's Memorandum of Law in Support of its Motion by Order to Show Cause for Leave to Amend the Complaint ("Def. Mem."), p. 1. Defendant argues that because Plaintiff filed a breach of contract claim, its own counterclaims asserting breach of contract, faithless servant and unjust enrichment are proper.

In opposition, Plaintiff argues that a motion for leave to amend must be supported by an affidavit of merit. Pl. Mem., p. 4. Plaintiff contends that without such an affidavit of merit, which would provide some evidentiary basis for the counterclaims, leave to amend must be denied. *Id.*

Moreover, Plaintiff argues that this court already decided that an affidavit of merit was needed by denying, without prejudice, Defendant's prior motion for leave to amend. 5/26/11 Order. Plaintiff argues that the proposed verified second amended answer does not overcome Defendant's burden to provide proof to support its motion for leave to amend. *Id.* at 10.

Plaintiff also argues that Defendant's proposed counterclaims are not meritorious causes of action. First, Plaintiff argues that the allegation that Plaintiff commandeered Defendant's employees to work on other accounts, without Defendant's knowledge and

consent, does not amount to a breach of contract claim. *Id.* at 7. Second, Plaintiff argues that Defendant has not provided any basis to establish a fiduciary relationship between Plaintiff and Defendant and, therefore, Defendant's second counterclaim for faithless servant is without merit. Plaintiff also contends that the faithless servant rule is generally litigated in the context of employee and employer scenarios. *Id.* at 8. Third, Plaintiff states that Defendant has not sufficiently pled a claim for unjust enrichment and that the allegations stated are not supported by any evidentiary proof as required by an affidavit of merit. *Id.* at 9-10.

In reply, Defendant contends that under CPLR § 105(u), a verified pleading may be used where an affidavit is required. Defendant's Reply Memorandum of Law ("Def. Reply Mem."), p. 1. Further, Defendant argues that the factual allegations asserted in its first cause of action sustain a breach of contract claim. *Id.*, p. 2. With respect to Defendant's second proposed counterclaim for faithless servant, Defendant points to paragraph twenty-one of the proposed verified second amended answer which alleges that Plaintiff and its principal owed Plaintiff a fiduciary duty. *Id.*, p. 3. Similarly, Defendant points to the factual allegations in support of its third cause of action for unjust enrichment. *Id.* at 4. Defendant contends these facts provide a sufficient basis for each claim.

This court recognizes that a party may move to amend its pleadings under CPLR 3025(b). Under CPLR 3025(b), "[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.” CPLR 3025(b). Rule 3025(b) continues to state, “Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.” *Id.*

In determining whether a motion to amend should be granted, “the court should consider the merit of the proposed defense and whether the plaintiff will be prejudiced by the delay in raising it.” *Norwood v. City of New York, et al.*, 203 A.D.2d 147, 148 (1st Dep’t 1994). The First Department stated, “[a]lthough leave to amend a pleading is freely granted, such leave should ‘not be granted upon mere request, without appropriate substantiation.’” *Hoppe v. Bd. of Dir. of the 51-78 Owners Corp. et al.*, 49 A.D.3d 477, 477 (1st Dep’t 2008). The standard is not a high one as the moving party only needs to show that the amendment “is not palpably insufficient or devoid of merit.” *MBIA v. Greystone & Co., Inc., et al.*, 74 A.D.3d 499, 500 (1st Dep’t 2010) (stating “[o]n a motion for leave to amend, plaintiff need not establish the merits of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit”).

An affidavit of merit in support of a motion to amend the pleadings shows that the moving party has a reasonable excuse for the delay and the proposed amendment is not meritless. *Cherebin v. Empress Ambulance Service, Inc.*, 43 A.D.3d 364, 365 (1st Dep’t 2007). The First Department has held that “[w]here there is ‘extended delay in moving to

amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion.” *Id.* Thus, the purpose of an affidavit of merit is two-fold: 1) to show excuse for the delay or a lack of prejudice to the non-moving party and 2) to show that the proposed amendment has merit.

First, Defendant has not shown any reason for the delay in filing its motion for leave to amend. Defendant initially filed a motion to amend its answer on January 14, 2011; that motion was denied without prejudice on the basis of Defendant’s lack of an affidavit of merit. 5/26/11 Order. Defendant’s current second motion to amend its answer also does not include an affidavit of merit. Instead, Defendant submitted a proposed verified second amended answer signed by Defendant’s principal. The proposed verified second answer does not include any statements to address Defendant’s delay. Defendant’s attorney’s affirmation also does not provide any reasons for the delay.

In *Schulte Roth & Zabel, LLP v. Kassover*, the First Department upheld the lower court’s denial of defendant’s motion to amend his answer to assert a counterclaim. *Schulte Roth & Zabel, LLP v. Kassover*, 28 A.D. 3d 404, 404-5 (1st Dep’t 2006). Defendant had supported his motion to amend with his attorney’s affirmation attempting to “negate the existence of surprise or prejudice.” *Id.* Defendant attempted to remedy the deficiency with his affidavit in reply. *Id.* However, the court found that defendant’s submissions in support of his motion to amend were insufficient and failed to raise an issue of fact. *Id.*

As in *Schulte*, Naturo-Medical's submissions are inadequate to support its motion for leave to amend. Whereas in *Schulte* defendant's attorney included an affirmation addressing the lack of surprise or prejudice, Defendant, in this matter, has not offered any reason for the delay. A note of issue has already been filed in this action on or about September 12, 2011. Thus, discovery is complete and Plaintiff would be prejudiced if the proposed counterclaims were permitted. Without providing any basis for the delay in moving for a second amended answer, Defendant cannot overcome the presumption that Plaintiff would be prejudiced.

Second, the verified pleading signed by Defendant's principal does not take the place of an affidavit of merit in showing that the proposed amendments are not "palpably insufficient or devoid of merit." *MBIA v. Greystone & Co., Inc., et al.*, 74 A.D.3d at 500. The proposed verified pleading does not include statements made by a party with personal knowledge supporting an evidentiary basis for the proposed counterclaims. Defendant's principal only verifies the truth of the pleading but does not provide any evidentiary basis for the merit of the proposed counterclaims.

For these reasons, Defendant's motion for leave to amend its amended answer is denied.

The court has reviewed the parties' other arguments and find them without merit.

(Order on following page.)

**ORDER**

**ORDER**

Accordingly, it is hereby:

ORDERED that Defendant's motion for leave to amend the amended answer is denied.

Dated: New York, New York  
November 4, 2011

ENTER:



Hon. Eileen Bransten, J.S.C.