

**3 East 54th St. N.Y. LLC v Patriarch Partners Agency
Serv., Inc.**

2011 NY Slip Op 34003(U)

October 21, 2011

Sup Ct, New York County

Docket Number: 600176/09

Judge: Paul Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

3 E. 54th Street New York LLC

INDEX NO. 600176/09 E

- v -

Petry Media

MOTION DATE _____

MOTION SEQ. NO. 012

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for R/O

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
<u>138 - 162</u>	<u>E Filed Docs</u>
<u>167, 168,</u>	
<u>174 - 176</u>	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion
**MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.**

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

Dated: 10/26/2011

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
3 EAST 54TH STREET NEW YORK LLC, a
New York Limited Liability Company,
Plaintiff,

Index No.: 600176/09
Mot. Seq. Nos. 012 & 013
Submission Date 8/24/11

-against-
PATRIARCH PARTNERS AGENCY SERVICES LLC,
LYNN TILTON, PETRY MEDIA CORP., PETRY
TELEVISION, INC., BLAIR TELEVISION,
INC., ARK INVESTMENT PARTNERS, II, LP,
ARK CLO 2001-1, LIMITED, SANDLER
MEZZANINE T.E. PARTNERS, L.P., SANDLER
MEZZANINE FOREIGN PARTNERS, L.P., ZOHAR
II CDO 2003-1, LIMITED, ZOHAR II
2005-1, LIMITED, RICHARD INTRATOR,
ARNOLD SHEIFFER, TIMOTHY MCAULIFF, VAL
NAPOLITANO, LEE MACCOURTNEY, and
MOIRA MITCHELL,
Defendants.

DECISION & ORDER

-----X

Appearances:

Plaintiff

Itzkowitz and Hardwood
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New York, NY 10007 •
(646) 822-1801

**Defendants Patriarch Partners
& Lynn Tilton**

Brune & Richard, LLP
By: Charles Michael, Esq.
Hillary Richard, Esq.
One Battery Park Plaza, 34th fl.
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(212) 668-1900

**Defendants Petry Media Corp.,
Petry Television, Inc., and Blair
Television, Inc.**

Fox Rothschild, LLP
By: Stephanie Resnick, Esq.
John A. Wait, Esq.
Daniel A. Schnapp, Esq.
100 Park Ave., 15th fl.
New York, NY 10017
(212) 878-7900

PAUL G. FEINMAN, J.:

Motion sequence numbers 012 an 013 are consolidated for disposition.

In motion sequence number 012, plaintiff moves, pursuant to CPLR 2221 (d) (2), for
leave to reargue that portion of a decision of this court, dated January 11, 2011, which dismissed
the causes of action asserted as against Lynn Tilton (Tilton) and deemed that Petry Holding, Inc.

(Petry Holding) was not a party to this action and, in the alternative, pursuant to CPLR 1002 (b), 1003 and 3025 (b), for leave to file a second amended complaint.

In motion sequence number 013, defendant Patriarch Partners, LLC (Patriarch) moves, pursuant to CPLR 2221 (d), for leave to reargue that portion of a decision of this court, dated January 11, 2011, that denied dismissal of the cause of action asserted as against Patriarch based on a theory of alter ego liability, and for an order relieving Patriarch from any obligation to participate in discovery pending the determination of the instant motion.

BACKGROUND

The facts of this case have been detailed in this court's previous decisions and will not be reiterated herein. It is noted that the court's prior decision is currently on appeal to the Appellate Division.

Motion sequence number 012

The thrust of plaintiff's argument for its motion to reargue is that the court overlooked or misapprehended the law with respect to the causes of action asserted as against Tilton, because the court allowed the cause of action based on a theory of alter ego liability to proceed as against Patriarch, and Tilton controlled Patriarch. Plaintiff also claims that the court misapprehended the law in deeming that Petry Holding was not a party to this action, even though Petry Holding did not appear in the caption of plaintiff's amended complaint, because the complaint consistently refers to Petry Holding and counsel for Petry Holding provided argument on Petry Holding's behalf.

As for its alternative argument, plaintiff states that it should be permitted leave to file a second amended complaint naming Petry Holding in the caption because there will be no

prejudice or surprise to any party by such amendment and because Petry Holding was inadvertently omitted by plaintiff in the caption of the amended complaint.

In opposition, Petry Holding maintains that the amended complaint only stated that "Petry Holding was and is the holding company and successor of Petry Television, Petry Media and Blair," but alleges no other action taken or wrongdoing by Petry Holding. Hence, Petry Holding asserts that plaintiff has failed to articulate any legitimate reason why Petry Holding should be added as a defendant at this stage in the proceedings.

In opposition to plaintiff's motion, Tilton avers that reargument should be denied because the amended complaint fails to allege that Tilton was Petry's alter ego and, therefore, it cannot be brought up on a motion for leave to reargue for the first time.

In reply, plaintiff reiterates that either Petry Holding should be deemed a defendant or that leave to file a second amended complaint naming Petry Holding as a defendant should be allowed. The basis of this argument is that, under New York law, mistakes and irregularities in the pleadings should be ignored by the court. With respect to Tilton, plaintiff claims that the complaint sufficiently includes Tilton when it asserts its cause of action based on a theory of alter ego liability against all the defendants.

Motion sequence number 013

Patriarch contends that the court overlooked the fact that, in part of its prior decision, it found that "no evidence has been forthcoming from plaintiff that would evidence fraud," but still permitted the cause of action based on a theory of alter ego liability to proceed because a question of fact remained as to whether and to what extent Patriarch dominated Petry. Patriarch maintains that, to maintain such a cause of action, a two-pronged test must be met: (1)

domination; and (2) fraud perpetrated as against plaintiff. Patriarch states that, since no fraud was evidenced, the second prong is missing and, consequently, this cause of action should have been dismissed as against Patriarch.

Further, Patriarch argues that plaintiff has failed to allege any fraud involved with the use of the corporate form, which would also preclude a cause of action based on alter ego liability.

In opposition, plaintiff states that this same argument was previously presented to the court and was rejected, because the standard used to apply a theory of alter ego liability is domination and “injustice,” and a showing of fraud is unnecessary.

In reply, Patriarch reasserts that fraud must be alleged, under both Delaware and New York law, and that plaintiff has failed in that respect. Therefore, states Patriarch, the cause of action asserted as against it based on alter ego liability must be dismissed.

DISCUSSION

CPLR 2221 (d) (2) permits a party to move for leave to reargue a decision of a court upon a showing that the court misapprehended the law in rendering its initial decision.

“A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision. Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted [internal citations and quotation marks omitted]”

(William P. Pahl Equipment Corp. v Kassis, 182 AD2d 22, 27 [1st Dept 1992]).

The court grants plaintiff’s motion to reargue (motion sequence number 012) and, upon reargument, adheres to its prior decision.

With respect to that branch of this motion relating to Petry Holding, the court finds that the first amended complaint not only failed to name Petry Holding as a defendant, but that it also failed to allege any specific wrongdoing on the part of Petry Holding other than its being a holding company and successor to other named defendants. Therefore, the court cannot deem Petry Holding to be a named defendant.

CPLR 3025 (b) provides that

“[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.”

As stated in *Seidman v Industrial Recycling Properties, Inc.*, (83 AD3d 1040, 1040-1041 [2d Dept 2011]):

“Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend.”

Since plaintiff fails to provide sufficient allegations against Petry Holding specifically, the court also denies that portion of its leave to file a second amended complaint.

With respect to that portion of plaintiff’s motion seeking to reinstate a cause of action as against Tilton based on a theory of alter ego liability, the court finds that plaintiff has failed to show that the court did not consider or misapprehend such argument in the earlier motion and, therefore, denies this branch of the motion.

The court also grants Patriarch’s motion to reargue (motion sequence number 013) and, upon reargument, also adheres to its earlier decision with respect to Patriarch.

Contrary to Patriarch’s argument, under both New York and Delaware law, in order to

assert a cause of action based on a theory of alter ego liability, the plaintiff must assert both domination and control, and *either* fraud *or* injustice; fraud is not the dominating criterion.

Matter of Morris v New York State Department of Taxation and Finance, 82 NY2d 135 (1993);

Case Financial, Inc. v Alden, 2009 WL 2581873, 2009 Del Ch LEXIS 153 (Del Ch 2009);

Mason v Network of Wilmington, Inc., 2005 WL 1653954, 2005 Del Ch LEXIS 99 (Ct Ch 2005).

Since a question of fact exists with respect to Patriarch's domination and control of the other entities, and a question also exists as to whether an injustice to plaintiff has occurred, said question being an issue for the jury (*see generally SJSJ Southold Realty, LLC v Fraser*, 33 AD3d 784 [2d Dept 2006]), the court confirms its prior decision and does not dismiss this cause of action.

Lastly, that portion of Patriarch's motion seeking to relieve it from participating in discovery pending determination of this motion is hereby rendered academic.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of plaintiff's motion for leave to reargue (motion sequence number 012) is granted and, upon reargument, the court adheres to its prior decision, dated January 11, 2011; and it is further

ORDERED that the portion of plaintiff's motion seeking leave to file a second amended complaint (motion sequence number 012) is denied; and it is further

ORDERED that the portion of Patriarch Partners, LLC's motion for leave to reargue (motion sequence number 013) is granted and, upon reargument, the court adheres to its prior decision, dated January 11, 2011; and it is further

ORDERED that the portion of Patriarch Partners, LLC's motion (motion sequence number 013) seeking to relieve it from participating in discovery pending determination of this motion is denied as academic.

Dated: October 21, 2011



J.S.C.

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