

**McKinnon Doxsee Agency, Inc. v Gallina**

2011 NY Slip Op 34286(U)

March 18, 2011

Supreme Court, Nassau County

Docket Number: 022005-07

Judge: Timothy S. Driscoll

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SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER

Present:

HON. TIMOTHY S. DRISCOLL

Justice Supreme Court

-----x  
MCKINNON DOXSEE AGENCY, INC. &  
MILLENNIUM ALLIANCE GROUP, LLC

Plaintiffs,

-against-

FRANK G. GALLINA, DANIEL MARKLIN,  
A.C. EDWARDS FINANCIAL SERVICES, LLC,

Defendants.  
-----x

TRIAL/IAS PART: 20  
NASSAU COUNTY

Index No: 022005-07  
Motion Seq. No: 3  
Submission Date: 2/4/11

Papers Read on this Motion:

- Notice of Motion, Affirmation in Support and Exhibits.....x
- Affirmation in Opposition.....x
- Reply Affirmation in Support.....x

This matter is before the court on the motion by Plaintiffs filed on December 15, 2010 and submitted on February 4, 2011. For the reasons set forth below, the Court grants the motion and directs Plaintiff to file and serve an amended complaint conforming with this Order on or before April 22, 2011. The Court further directs Defendants to serve an answer to the amended complaint on or before May 27, 2011. The Court directs counsel for the parties to appear for a Certification Conference before the Court on June 8, 2011 at 9:30 a.m. **Counsel will not be required to appear at the Certification Conference on March 23, 2011 that was previously scheduled by the Court.**

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR § 3025, permitting Plaintiffs McKinnon Doxsee Agency, Inc. ("McKinnon Doxsee") and Millennium Alliance Group, LLC

("Millennium") (collectively "Plaintiffs") to file a Second Amended Complaint. Defendants Frank G. Gallina ("Gallina") and Daniel Marklin ("Marklin") (collectively "Defendants") oppose Plaintiffs' motion.

B. The Parties' History

Counsel for Plaintiffs affirms as follows in support of the motion:

Plaintiffs seek to amend the complaint to 1) more specifically allege damages for Defendants' alleged intentional diversion of corporate opportunities and facts relating to Defendants' alleged breach of their duty of loyalty to Plaintiffs; and 2) delete references to Defendant A.C. Edwards Financial Services, LLC ("Edwards") who is no longer a party to the action.

The initial complaint ("Initial Complaint") (Ex. A to Abelove Aff. in Supp.), filed on or about December 10, 2007, sought damages against Gallina and Marklin, *inter alia*, for their allegedly wrongful appropriation of over 500 insurance accounts from Plaintiffs. On or about December 21, 2010, the Initial Complaint was amended as of right to add Defendant Edwards. The Amended Complaint (Ex. B to Abelove Aff. in Supp.) alleged, *inter alia*, that Edwards aided and abetted Gallina and Marklin's alleged breaches of their fiduciary duties to Plaintiffs by knowingly using Plaintiffs' trade secrets in soliciting Plaintiffs' clients and acting as the Broker of Record on accounts that formerly belonged to Plaintiffs.

During discovery, Plaintiffs learned information that suggested that Defendants, while employed by Plaintiffs, were "secretly" (Abelove Aff. in Supp. at ¶ 5) writing insurance policies for their own account, using Plaintiff's equipment and personnel. Following Defendants' initial resistance to producing tax returns requested by Plaintiffs, the Court (Austin J.) signed a so-ordered stipulation dated January 16, 2009 (Ex. E to Abelove Aff. in Supp.) that directed Defendants to produce certain tax returns ("Tax Returns"). Plaintiffs reviewed the Tax Returns which demonstrated that Defendants were receiving compensation directly from insurance companies for placing business with brokers other than Plaintiffs and contradicted Defendants' prior responses to Plaintiffs' interrogatories on this issue. Defendants subsequently modified their responses to the interrogatories to reflect that they believed that such policies were placed but could not identify specific policies or customers.

Plaintiffs' counsel affirms that, in an effort to resolve this issue without motion practice, he provided a copy of the proposed new amended complaint to Defendants' counsel and the attorneys discussed the issue further. Ultimately, Defendants' counsel would not consent to the filing of a second amended complaint.

In opposition, counsel for Defendants notes that this action was discontinued against Defendant Edwards on November 21, 2008, and that Plaintiffs took no steps to amend the caption at that time. Counsel for Defendants submits, further, that Plaintiffs had adequate information in 2009 to determine whether they should add causes of action regarding Defendants' alleged placing of business with other than Plaintiffs.

Defendants' counsel also argues that the documents submitted in support of the proposed amendment do not support Plaintiffs' allegation that an employer-employee relationship existed between Plaintiffs and Defendants. Thus, there is no basis to infer a duty of loyalty, which is the theory of the proposed amendment. Defendants submit that Plaintiffs have not provided any sworn allegation by an individual with personal knowledge supporting their claim that there was an employer-employee relationship between Plaintiffs and Defendants. Finally, Defendants contend that Plaintiffs have not identified the documents that purportedly support the proposed amendment.

### C. The Parties' Positions

Plaintiffs submit that the Court should permit the filing of a second amended complaint in light of 1) the liberal amendment policy set forth in case law, 2) the absence of prejudice to Defendants by the proposed amendment, and 3) the fact that the proposed amendment would not necessitate additional written discovery, and depositions have not yet been conducted.

Defendants oppose Plaintiffs' motion submitting, *inter alia*, that 1) Plaintiffs have been aware of the information on which they now rely in support of their motion and have unduly delayed in seeking the proposed amendment; and 2) the documentation provided by Defendants does not support the proposed amendment.

In reply, Plaintiffs submit, *inter alia*, that 1) it was Defendants' conduct in providing inaccurate responses to Plaintiffs' interrogatories, and their resistance to providing the Tax Returns, that created the delay to which Defendants now refer; 2) Defendants' argument regarding the absence of an affidavit from Plaintiffs is misplaced as it was the failure of Defendants to provide accurate and complete information during discovery that prevented Plaintiffs from seeking the amendment in a more timely manner.

#### RULING OF THE COURT

Leave to amend a complaint shall be freely given unless the proposed amendment would cause prejudice to the opposing party. CPLR § 3025(b); *Benyo v. Sikorjak*, 50 A.D.3d 1074 (2d Dept. 2008); *39 College Point Corp v. Transpac Capital Corp.*, 27 A.D.3d 454 (2d Dept. 2006). No evidentiary showing of merit is required for leave to amend a pleading under § CPLR 3025(b); the court need only determine whether the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit. *Lucido v. Mancuso*, 49 A.D.3d 220, 229 (2d Dept. 2008); *see Dickinson v. Ignoni*, 76 A.D.3d 943 (2d Dept. 2010); *DeMato v. Mallin*, 68 A.D.3d 711 (2d Dept. 2010). Leave to amend a pleading to add a duplicative cause of action should be denied. *Hylan Elec. Contracting, Inc. v. MasTec North America Inc.*, 74 A.D.3d 1148 (2d Dept. 2010).

The Court concludes that leave to amend is appropriate based on the Court's conclusion that 1) the proposed amendment is not palpably insufficient or patently devoid of merit; 2) Plaintiffs will not be prejudiced by the amendment; and 3) Plaintiffs' delay in seeking the amendment was attributable, at least in part, to Defendants' initial response to Plaintiffs' interrogatories and Defendants' delay in providing the Tax Returns.

Accordingly, the Court grants Plaintiff leave to file and serve an amended complaint conforming with this Order on or before April 22, 2011. The Court directs Defendants to serve an answer to the amended complaint on or before May 27, 2011.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear for a Certification Conference before the Court on June 8, 2011 at 9:30 a.m. **Counsel will not be required to appear at the Certification Conference on March 23, 2011 that was previously scheduled by the Court.**

DATED: Mineola, NY  
March 18, 2011

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**

MAR 23 2011

NASSAU COUNTY  
COUNTY CLERK'S OFFICE