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

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

ANTHONY LAZZARINO,
Plaintiff,
-against-
WARNER BROS. ENTERTAINMENT, INC., et al.,
Defendants.

INDEX NO. 602029/2005
MOTION DATE
MOTION SEQ. NO. 009

The following papers, numbered 1 to ____ were read on this motion to/for Amend Complaint and other relief

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... No (s). ____
Answering Affidavits — Exhibits ____ No (s). ____
Replying Affidavits ____ No (s). ____

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Plaintiff's motion for leave to amend is denied to the extent set forth in the accompanying order dated June 3, 2013.

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

Dated: 6-3-13

Marcy S. Friedman, J.S.C.
MARCY S. FRIEDMAN, J.S.C.

1. Check one: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy S. Friedman, JSC

ANTHONY LAZZARINO
Individually and as successor-in-interest
to Windwood/Glen Productions, Inc.

Index No.: 602029/2005

Plaintiffs,

DECISION/ORDER

- against -

WARNER BROS. ENTERTAINMENT, INC., WARNER BROS. PICTURES, INC., UNIVERSAL STUDIOS, INC., UNIVERSAL PICTURES COMPANY, INC., HYPNOTIC, THE KENNEDY/MARSHALL COMPANY, FRANK MARSHALL, HENRY MORRISON, DOUGLAS LIMAN, THE ESTATE OF ROBERT LUDLUM, JEFFREY M. WEINER, As Personal Representative, MARCUM & KLIEGMAN, L.L.P., and JEFFREY M. WEINER, Individually,

Defendants.

In this action, plaintiff Anthony Lazzarino seeks damages for breach of a contract for production of a motion picture. Plaintiff's Administrator moves for substitution as plaintiff, and for leave to amend the complaint, vacate a stay of the action, and expedite discovery. The branch of the motion for substitution is granted on consent.

It is well settled that the decision whether to permit amendment of pleadings is committed to the discretion of the court. (Edenwald Contr. Co. v City of New York, 60 NY2d 957, 959 [1983].) In general, leave to amend a pleading should be freely granted absent prejudice or surprise resulting from the delay. (CPLR 3025 [b]; Crimmins Contr. Co. v City of New York, 74 NY2d [1989].) "Mere lateness is not a barrier to the amendment. It must be lateness coupled

with significant prejudice to the other side." (Edenwald Contr. Co., 60 NY2d at 959 [internal quotation marks and citation omitted].)

It is further settled that the amendment should be denied if the amendment "plainly lacks merit." (Crimmins Contr. Co., 74 NY2d at 170 [1989]; Herrick v Second Cuthouse, Ltd., 64 NY2d 692, 693 [1984].) Courts applying this standard have undertaken an analysis, akin to that on a motion to dismiss pursuant to CPLR 3211(a)(7), of whether the amendment states a cause of action. (See Lucido v Mancuso, 49 AD3d 220, 225 [2d Dept 2008] [surveying evolution of standards for leave to amend, and noting courts' application of motion to dismiss analysis]; Crimmins Contr. Co., 74 NY2d at 170 [interpreting contract in order to determine whether amendment asserting defense based on contract lacked merit]; Norwood v City of New York, 203 AD2d 147, 148 [1st Dept 1994] [in defamation action, considering scope of qualified privilege in order to determine whether defense based on such privilege was stated based on statements at issue].) Recent First Department cases have similarly held that on a motion for leave to amend a pleading, movant "need not establish the merit of its proposed new allegations, but [must] simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.'" (MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 500 [1st Dept 2010] [approvingly citing Lucido, 49 AD3d at 227; accord Miller v Cohen, 93 AD3d 424, 425 [1st Dept 2012], quoting MBIA; Kocourek v Booz Allen Hamilton Inc., 85 AD3d 502, 505 [1st Dept 2011].) The courts will, however, require at least some evidentiary showing in support of the motion to amend. (See MBIA, 74 AD3d at 500 ["proposed amendment was supported by a sufficient showing of merit" through submission of counsel's affirmation and transcript of relevant deposition testimony]; Milkis v Condominium Lloyd 54 Condominium, 24 Misc 3d 56, 57 [App Term 1st Dept 2009]["movant must make some evidentiary showing that the proposed

amendment has arguable merit"].)[1]

The facts and pleaded allegations are discussed at length in two prior decisions of this Court (Fried, J.), dated October 30, 2006 (Lazzarino v Warner Bros. Entertainment, Inc.,13 Misc 3d 1230[A], 831 NYS2d 354) (2006 Decision), and September 15, 2008 (Lazzarino v Warner Bros. Entertainment, Inc., 2008 NY Slip Op 32691[U]) (2008 Decision). In brief, plaintiff was a screenwriter and packager of motion pictures. The late Robert Ludlum, whose estate is sued, was the author of the novel "The Bourne Identity." Defendant Morrison was Ludlum's literary agent. In 1980, Lazzarino, Morrison, and a third party entered into a joint venture known as Windwood/Glen Productions, Inc. (Windwood) to package a film based on Ludlum's book, for which Lazzarino wrote the screen treatment. On July 24, 1981, Windwood entered into an agreement with Orion Pictures Company (Orion), a film producer, which contemplated

---

[1]In Lucido v Mancuso (49 AD3d 220, supra), the Second Department sharply criticized the case law that had developed, requiring the proponent of leave to amend to make an evidentiary showing of merit. Noting the legislature's express policy that leave to amend be "freely granted," the Court held: "No evidentiary showing of merit is required under CPLR 3025(b). The court need only determine whether the proposed amendment is 'palpably insufficient' to state a cause of action or defense, or is patently devoid of merit . . . If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing. (see CPLR 3212)." (Id. at 229.)

In this Department, a body of case law had also developed requiring the proponent of a motion for leave to amend not only to show that the amendment stated a cause of action or defense and therefore was not palpably insufficient or devoid of merit, but also to support the motion for leave with "an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment." (Nab-Tern Constructors v City of New York, 123 AD2d 571, 572 [1st Dept 1986]; accord Non-Linear Trading Co., Inc. v Braddis Assocs., Inc., 243 AD2d 107, 116 [1st Dept 1998]; Zaid Theatre Corp. v Sona Realty Co., 18 AD3d 352, 355 [1st Dept 2005].)

As indicated above, this Department, although approvingly citing Lucido, has held that the proponent of the motion for leave to amend need not establish the merits of the pleading, but has continued to require some showing of merit. (MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, supra.) However, the Department has also continued, on motions for leave to amend, to cite cases which hold that a motion for leave to amend must be supported by the showing required on a motion for summary judgment. (See Nichols v Curtis, 104 AD3d 526, 528 [1st Dept 2013], citing Non-Linear Trading Co., Inc. v Braddis Assocs., Inc., 243 AD2d 107, supra.) Appellate clarification as to the quantum of the showing of merit would thus be welcome.

production of the film. This agreement (Agreement or Windwood-Orion Agreement), which is the basis for this action, transferred all of Windwood's rights to the motion picture and "allied rights" in the book and screen treatment, in consideration for specified payments. The Agreement provided for an up-front payment of $300,000, deferred payments of $75,000 and 3.75% of gross receipts (after "break-even") "derived from" the film, and a "presentation credit." (Id., ¶¶1 [B],[C], 4.) The Agreement further provided that in the event the actor Burt Reynolds, who was also involved in developing the film, withdrew from the film project, Windwood could "elect to place the project in turn-around" – i.e., place it elsewhere – or, if it could not do so within a six month period, then Orion would "have the sole and exclusive right to determine the disposition of the project thereafter," subject to a further payment to Windwood. (Id., ¶ 5.) Finally, the Agreement provided: "If Orion shall subsequently determine to sell its interest in said feature film project to a third party, you [Windwood] shall have the right to match the sales price for which Orion is prepared to sell its interest in the project to said third party. . . ." (Id., ¶ 5.)

Other agreements were executed concurrently with the Windwood-Orion Agreement, including agreements between Lazzarino and Orion and between Ludlum and Orion transferring the rights to the screen treatment and motion picture rights in the book, respectively, and an agreement between Reynolds' company and Orion to develop and possibly produce the film. (See 2006 Decision at * 2-3 [and citations to Complaint therein].)

As pleaded in the original complaint and noted in the 2006 Decision, the parties to the joint venture subsequently had a falling out and entered into a stipulation of settlement dated April 27, 1982 (1982 Settlement), under which Lazzarino became the sole shareholder of Windwood, and Morrison and Blair (the other joint venturer) agreed that "they shall do nothing to interfere or diminish Orions [sic] obligations to and to [sic] Lazzarino." (Id., ¶ 22.) In 1982,

the Warner Bros. defendants succeeded to Orion's rights and obligations under the 1981 agreement. (2006 Decision at * 4.) Neither Orion nor Warner Bros. ever produced a film based on Ludlum's book. Rather, a Warner Bros. entity and Ludlum entered in an agreement, dated December 9, 1998 but executed on May 4, 1999, providing for reversion to Ludlum of "The Bourne Identity" feature film rights. (Morrison Aff., ¶ 16; Ex. I [Agreement].)[2] On November 2, 1999, Ludlum executed a contract with Universal Pictures under which Ludlum granted Universal the option to "produce, exploit and distribute" one motion picture based on "The Bourne Identity." (Id., Ex. J [Agreement, ¶ 7.) On June 14, 2002, Universal Pictures released a feature length film based on this book. (Amended Compl., ¶ 135.)

The 2006 and 2008 Decisions addressed the sufficiency of the pleadings and the viability of a statute of limitations defense to most of the causes of action. The 2006 Decision denied a motion to dismiss by defendant Morrison and the Warner Bros. and Ludlum defendants, ordered limited discovery on statute of limitations issues, and authorized plaintiff to file an amended complaint. Plaintiff, who had previously been represented but subsequently chose to proceed pro se, filed an amended complaint dated January 4, 2007. The 2008 Decision granted motions for summary judgment, dismissing all causes of action against all of the parties, except the fifth cause of action against defendant Morrison for breach of contract. The Decision also granted a stay of the action at plaintiff's request, apparently because he notified the Court of his intent to proceed in federal court.

The fifth and sole remaining cause of action in the Amended Complaint alleges that "[b]y negotiating Ludlum's sale of the feature film rights to Universal in or about November 1999

---

[2]In 1986 or 1987, Ludlum apparently also entered into other agreements with a Warner Bros. entity regarding film rights to "The Bourne Identity." (See 2006 Decision, at * 5-6.)

Defendant Morrison wilfully and maliciously breached the provision of the 1982 Settlement in which he 'agreed not to interfere or diminish Orion's obligations to Windwood and Plaintiff as set forth in the agreements of July 24, 1981.'" (Amended Compl., ¶ 198.) Plaintiff's claim that this sale to Universal breached his rights under the 1981 Windwood-Orion Agreement was in turn based on a claim that he had a "right to match" the sale of the film rights to a third party. (See Amended Compl., ¶¶ 163, 182; 2008 Decision at 3 [stating that Lazzarino's claim of a "right to match" was "[a]t the heart of Lazzarino's complaint"].)

In denying the motions for summary judgment dismissing this cause of action, the Court reasoned that the claim was not barred by the statute of limitations because the negotiation for the transfer of rights to Universal occurred less than six years before this action was commenced on June 6, 2005. The Court, however, found the statute of limitations a bar to causes of action based on claims that other transfers of the film rights effectively undermined Lazzarino's right to match under the Windwood–Orion Agreement, where the transfers occurred more than six years before the commencement of the action. The Court thus granted the motions for summary judgment dismissing the fourth cause of action for breach of contract against Morrison which alleged that, by negotiating the May 4, 1999 agreement providing for the reversion of film rights from Warner Bros. to Ludlum, Morrison breached the 1982 Settlement Agreement not to diminish Orion's obligations to Windwood. The court also dismissed the twelfth cause of action against the Warner Bros. defendants, which alleged that they breached the 1981 Windwood-Orion Agreement by entering into the May 4, 1999 agreement. The Court reasoned: The six year statute of limitations on any contract claim based on Lazzarino's alleged right to match in the Windwood-Orion agreement "had to have started running when Ludlum allegedly executed the last agreement with Warner involving the film rights on May 4, 1999," over six years before

plaintiff filed the lawsuit on June 6, 2005. (See 2008 Decision at 8.)

Plaintiff seeks to amend the fifth cause of action against Morrison to allege that Morrison breached the 1982 Settlement not only by failing, at the time of the sale of the film rights to Universal, to offer Windwood the right to match, but also by failing to "incorporate" (apparently: to make the sale to Universal subject to) Windwood's rights to a 3.75% interest in the revenue from the film and a presentation credit, as allegedly provided for in the Windwood-Orion Agreement. (Proposed Second Amended Compl., ¶¶ 25, 26.) The issue is therefore whether these additional elements of damages may be asserted in the breach of contract cause of action against Morrison. Determination of this issue in turn requires interpretation of the Windwood-Orion Agreement.

Under settled principles of contract interpretation, "[a]ll parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency." (National Conversion Corp. v Cedar Bldg. Corp., 23 NY2d 621, 625 [1969].) "In determining the scope of contractual obligations, the reasonable expectation of the parties is a factor to be considered," and "courts must interpret a contract so as to give meaning to all its terms." (Greater New York Mut. Ins. Co. v Mutual Mar. Off., 3 AD3d 44, 50 [1st Dept 2003].)

The court finds that the Windwood-Orion Agreement contemplates payment of the 3.75% interest in the film's revenues and provision of a presentation credit only in the event the film was produced by Orion. The Agreement provides for an up-front payment of $300,000 and two deferred payments. The Agreement expressly states that the first deferred payment of $75,000 will be "payable out of the net receipts derived from the first feature film produced or caused to be produced by Orion." (Id., ¶1[B].) The Agreement provides for a second deferred payment of: "A sum equal to 3.75% of the gross receipts derived from the first feature film based on the Book

after actual break-even." (Id., ¶ 1[C].) While this provision does not repeat that the film is to be "produced or caused to be produced by Orion," the remainder of the provision regarding the second deferred payment clearly contemplates Orion's production of the film, and thus states: "It is agreed that said gross percentage interest shall not be reduced by reason of Orion's application of 'supplemental profits' or the cross-collateralized recoupment of the costs of any other motion picture or of abandoned properties."

Significantly, also, the Agreement provides completely separate remedies to Windwood in the event Reynolds withdraws from the film project or Orion does not produce the film. Specifically, it provides Windwood with a right to elect to place the film elsewhere in the event of Reynolds' withdrawal from the project; and it provides Windwood with a "right to match" in the event that Orion elects to sell its interest in the film rights to a third party. (Id., ¶ 5.)

Giving meaning to all of the provisions of the Agreement, the court holds as a matter of law that Windwood cannot claim as an element of damages for transfer of the film rights to a third party either a 3.75% interest in the revenues from the film or damages for failure to give Windwood a presentation credit. Rather, Windwood is limited to damages based on deprivation of the "right to match." The requested amendment to the Morrison cause of action will therefore be denied as plainly lacking in merit.

Plaintiff further seeks to amend the complaint to add a cause of action against the Warner Bros. defendants and a Warner Bros. entity not previously named in the complaint (Warner Bros. Television Production Inc.) for failure to pay Windwood a 3.75% interest in the revenue derived from the film"The Bourne Identity," after its release by Universal in 2002, and for its failure to give Windwood a presentation credit. (Proposed Second Amended Compl., ¶¶ 28-33.)

As noted above, the 2008 Decision dismissed the claim against the Warner Bros.

defendants as time barred, based on the Court's holding that any breach of contract by Warner Bros. occurred at the latest on May 4, 1999 when it executed the last agreement with Ludlum, transferring rights to the film back to him without preserving Windwood's rights. Moreover, as held above, the Windwood-Orion Agreement does not obligate Orion (or its successor) to pay deferred damages in the event Orion (or its successor) does not produce a film based on the Ludlum book but, rather, limits plaintiff's damages to those for failure to afford Windwood a "right to match." It is the law of the case that this claim is barred as against the Warner Bros. defendants (and the new Warner Bros. entity) because they executed the last agreement with Ludlum, without preserving the right to match, on May 4, 1999, more than six years before the commencement of this action. The branch of the motion for leave to amend to add a claim against the Warner Bros. defendants will accordingly be denied as plainly without merit.

The stay that was obtained at plaintiff decedent's instance will be vacated at his Administrator's request.

It is accordingly hereby ORDERED that the branch of the plaintiff's Administrator's motion to vacate the stay of the action is granted; and it is further

ORDERED that the branch of the Administrator's motion to substitute Lois Lazzarino, the Administrator of Anthony Lazzarino's estate, in place and stead of Anthony Lazzarino as plaintiff is granted on consent; and it is further

ORDERED that the branch of the Administrator's motion to amend the complaint is denied in its entirety; and it is further

ORDERED that the Administrator is granted leave to amend the caption to read as follows:

x

THE ESTATE OF ANTHONY LAZZARINO, individually and as successor-in-interest to Windwood/Glen Productions, Inc., by and through LOIS LAZZARINO, Administrator,

Plaintiff,

– against –

HENRY MORRISON,

Defendant.

x

Index No. 602029/2005

and it is further

ORDERED that the Administrator shall serve a copy of this order, with notice of entry, on the Clerk of the Court and the Clerk of the Trial Support Office (Room ~~158~~ 119), who are directed to amend their records to reflect the change in the caption herein; and it is further

ORDERED that the parties shall appear in Part 60 for a preliminary conference on June 27, 2013 at 2:30 p.m. They are directed to meet and confer in advance and to appear with a proposed discovery order pursuant to the Rules of the Commercial Division and Part 60 Practices.

This constitutes the decision and order of the court.

Dated: New York, New York
June 3, 2013

MARCY S. FRIEDMAN, J.S.C.

MARCY S. FRIEDMAN, J.S.C.