

**Koch v Acker, Merrall & Condit Co.**

2013 NY Slip Op 31572(U)

July 10, 2013

Supreme Court, New York County

Docket Number: 601220/08

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C. Justice

PART 1

Index Number : 601220/2008
KOCH, WILLIAM I.
vs.
ACKER, MERRALL & CONDIT
SEQUENCE NUMBER : 007
AMEND SUPPLEMENT PLEADINGS

INDEX NO. 601220/08
MOTION DATE
MOTION SEQ. NO. 007

The following papers, numbered 1 to 2, were read on this motion to/amend

Notice of Motion/Order to Show Cause - Affidavits - Exhibits A No(s) 1

Answering Affidavits - Exhibits A-BB No(s) 2

Replying Affidavits No(s)

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

Dated: July 10th, 2013

MARTIN SHULMAN 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

-----X

WILLIAM I. KOCH,

Plaintiff,

-against-

ACKER, MERRALL & CONDIT COMPANY,

Defendant.

-----X

Index No. 601220/08

**DECISION AND  
ORDER**

MARTIN SHULMAN, J.:

*"Wine is bottled poetry [or not]."*<sup>1</sup> *Robert Louis Stevenson*

**Factual and Procedural Background**

Plaintiff William I. Koch ("plaintiff" or "Koch") moves to amend his complaint to include: 1) 211 additional bottles of alleged counterfeit wine defendant Acker, Merrall & Condit Company ("defendant" or "Acker") sold to him; and 2) facts pertaining to Acker's business dealings with Rudy Kurniawan ("Kurniawan"),<sup>2</sup> an alleged wine counterfeiter. Acker opposes the motion.

In April 2008 Koch, a collector of fine wines, brought this action against Acker, an auction house that sells fine and rare wines, alleging that five bottles he purchased from defendant in 2005 and 2006 for an aggregate price of \$77,925 were counterfeit. By decision and order dated April 8, 2009, this court granted Acker's prior motion dismissing Koch's first and fifth causes of action and denied the portion of that motion seeking dismissal of the second and third

<sup>1</sup> Bracketed matter added.

<sup>2</sup> In March 2012, Kurniawan was arrested on multiple counts of fraud in connection with the sale of counterfeit wine.

causes of action for General Business Law (“GBL”) §§ 349 and 350 violations and the fourth cause of action for breach of contract.

On May 27, 2010 the Appellate Division reversed and dismissed both GBL causes of action. *Koch v Acker, Merrall & Condit Co.*, 73 AD3d 661 (1<sup>st</sup> Dept 2010). On June 20, 2011 the parties entered into a Stipulation of Discontinuance (the “Stipulation”) discontinuing the remaining fourth cause of action for breach of contract with prejudice and dismissing the action without prejudice to plaintiff’s appeal of the Appellate Division’s decision dismissing the GBL causes of actions. This court signed an Order to that effect on June 22, 2011 (the “Order”) and on August 26, 2011 judgment was entered (the “Judgment”).<sup>3</sup> See Meister Aff. in Opp. at Exhs. I, J and K.

On March 27, 2012 the Court of Appeals reversed the Appellate Division, denying the motion to dismiss, restoring the second and third causes of action for GBL violations and remitting the case to this court. *Koch v Acker, Merrall & Condit Co.*, 18 NY3d 940 (2012). Remittitur was entered in the office of the New York County Clerk on May 3, 2012.

### **Proposed Amended Complaint**

At various times after commencing this action, Koch claims to have identified an additional 211 allegedly counterfeit bottles of wine he purchased

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<sup>3</sup> Under CPLR §5602, Koch required a final judgment in order to be able to seek leave to appeal to the Court of Appeals.

from Acker.<sup>4</sup> Plaintiff purchased all 216 bottles for an aggregate price of over \$2.1 million. Koch claims he acquired 99% of the 216 bottles of wine at issue from defendant at two auctions in April 2005 and January 2006, and at two private sales in May and July 2005.<sup>5</sup> Koch further alleges that Kurniawan consigned most, if not all, of the 216 bottles of wine to Acker. Since filing this action in 2008, Koch alleges he learned that Acker and its principal, John Kapon (“Kapon”), maintained a close personal and professional relationship with Kurniawan, lending him money secured by his wines, which were sold to repay the loans. Acker never disclosed this information to its customers and plaintiff claims to have only recently discovered this information during the course of his own civil action against Kurniawan.<sup>6</sup>

Koch thus seeks to amend his complaint to add new allegations pertaining to the additional 211 bottles of alleged counterfeit wine and specific allegations of deceptive trade practices against Acker based upon its relationship with Kurniawan. In proposing this amendment, plaintiff claims not to seek relief for any new causes of action, but to merely provide additional details in support of his original GBL causes of action. Koch contends Acker will not be prejudiced by

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<sup>4</sup> Specifically, paragraph 10 of the proposed amended complaint (Regan Aff. in Supp. at Exh. A) alleges that Koch discovered 12 more counterfeit bottles in September 2009, 3 more in November 2009, 129 in early 2011 and 67 in 2012.

<sup>5</sup> The proposed amended complaint also includes wines purchased at private sales in June and September 2005.

<sup>6</sup> *Koch v Kurniawan*, Superior Court of the State of California, County of Los Angeles, Case No. BC 421581 (2009).

the amendment because no trial date has been set in this case and the new allegations have long been within defendant's knowledge and involve the same operative facts (i.e., Acker has always known what wines it sold to Koch, that it acquired them from Kurniawan and knew of Kurniawan's "dire financial straits and motive to sell counterfeit wine").

In opposition to Koch's motion to amend, Acker raises the following points:

- **The Stipulation, Order and Final Judgment Bar New Claims**

Plaintiff is barred from bringing new claims in this action and can only litigate the two GBL causes of action as pleaded. Any new GBL claims must be brought in a separate action, but in this case they are time barred.

- **The Statute of Limitations Bars the New Claims**

The statute of limitations for GBL claims is three years from accrual and begins to run at the time plaintiff is injured. Here, Koch's claims accrued in 2005 and 2006 when the alleged misrepresentations occurred and thus are untimely. Even assuming *arguendo* that the statute of limitations for GBL causes of action begins to run when a plaintiff discovers a misrepresentation, Koch's claims are still time barred because they accrued, at the latest, in 2007 when he suspected he may have bought counterfeit wine and hired experts to examine his collection. Finally, CPLR §203(f), the "relation back doctrine", is unavailing to plaintiff because the original complaint fails to notify Acker of the transactions underlying the additional 211 bottles.<sup>7</sup>

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<sup>7</sup> As Acker notes, Koch objected to Acker's discovery demands seeking information pertaining to wines other than the five bottles described in the original

- **Plaintiff Fails to Submit an Affidavit of Merit or Evidentiary Proof**

Koch only submits an attorney's affirmation and memorandum of law with the proposed amended complaint, which is not verified. Nor does he submit any evidentiary proof in support of the proposed new claims.

- **Acker Will Suffer Significant Prejudice if Amendment is Permitted**

Defendant claims prejudice as a result of plaintiff's significant delay in bringing his new claims. Citing a May 9, 2008 *Vanity Fair* interview, Acker contends Koch knew as early as that date that his experts had discovered an additional 200 counterfeit bottles of wine in his collection. Defendant further notes that it has been seven years since plaintiff's purchases, a key witness (Kurniawan) is now incarcerated and the chain of custody is uncertain with respect to the 211 new bottles. Finally, discovery is complete with respect to those claims alleged in the initial complaint and the case is trial ready.

- **Allegations of Acker's Alleged Complicity with Kurniawan**

Koch's proposed allegations attempting to portray Acker as having acted in complicity with Kurniawan are unsworn and wholly unsupported and, in any event, Acker was a victim of Kurniawan's schemes, as the criminal complaint and the U.S. Attorney's Office have previously indicated.

In response to Acker's opposition, Koch counters that:

- the proposed amendment is not barred by the 2011 Stipulation, Order and Judgment as it merely provides further specificity as to the original GBL claims and amplifies damages;

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complaint.

- the original complaint was not limited to five bottles of wine as evidenced by its allegations that defendant's alleged deceptive practices caused plaintiff to buy "at least" five bottles of counterfeit wine at auctions and private sales in 2005 and 2006 and that Koch's investigation was "ongoing", and as further evidenced by its numerous general references to counterfeit bottles of wine, without limiting the number to five, and to defendant's sale of same to the general public;
- the original complaint does not allege Koch's experts inspected or came to any conclusion as to the authenticity of any of the additional bottles identified in the proposed amended complaint;
- 99% of the additional 211 bottles were bought in the same four transactions described in the original complaint (to wit, auctions in April 2005 and January 2006 and private sales in May and July 2005) and as such the proposed amendments are not time barred because they relate back to the same wrong alleged in the original complaint with respect to the original five bottles;<sup>8</sup>
- no affidavit of merit is required in this case;
- Acker will not be prejudiced by the proposed amendment given that plaintiff could not have amended earlier than May 2012 due to the appellate process and the deceptive nature of defendant's business practices which prevented plaintiff from discovering further details of the alleged GBL violations; and
- Acker will not be prejudiced by including the additional counterfeit bottles of wine in this action because there is no trial date set and the risk of increased damages and the need to conduct additional discovery are insufficient reasons to deny the amendment.

### Discussion

Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted absent prejudice or surprise resulting from the delay. *Edenwald Contr. Co., Inc. v City of New York*, 60 NY2d 957, 959 (1983); *Probst v Cacoulidis*, 295

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<sup>8</sup> More specifically, Kurniawan consigned virtually all of the new bottles of wine identified in the proposed amended complaint to Acker. These wines were listed on the same invoices, paid for at the same time and delivered at the same time.

AD2d 331, 331-332 (2d Dept 2002). While the decision to allow or disallow an amendment is left to the court's sound discretion (*see Edenwald, supra*), a court need not grant leave to amend a pleading where the proposed amendment is totally devoid of merit or palpably insufficient as a matter of law. *Probst, supra; Reuter v Haag*, 224 AD2d 603, 604 (2d Dept 1996) (proposed amendment lacked merit where statute of limitations barred claim).

Mere lateness does not establish grounds to reject a proposed amendment. Instead, a delayed request must be accompanied by extreme prejudice as well. *Edenwald, supra*. In this context, the courts define prejudice as "some special right lost in the interim, some change of position, or some significant trouble or expense which could have been avoided had the original pleading contained what the amended one wants to add." *Barbour v Hospital for Special Surgery*, 169 AD2d 385, 386 (1<sup>st</sup> Dept 1991) (citations omitted).

Prejudice may also be demonstrated where a party "is hindered in its preparation of its case, where there is significant expansion of the claims, or where the amendment is sought after the parties have completed discovery (citations omitted)." *JP Morgan Chase Bank v Orleans*, 2007 WL 6882391 (Sup Ct, NY County). However, "while delay alone is not a sufficient ground to deny a motion to amend '[l]ateness in making a motion to amend, coupled with the absence of a satisfactory excuse for the delay and prejudice to the opposing party, justifies denial of such a motion' (internal citations omitted)." *Moon v Clear Channel Communications, Inc.*, 307 AD2d 628, 629-630 (3d Dept 2003).

At the outset, this court first addresses Acker's argument that Koch's motion to amend must be denied because he fails to submit an affidavit of merit. This seemingly minor point has been the subject of recent debate.<sup>9</sup> Briefly, Acker relies upon *Non-Linear Trading Co., Inc. v Braddis Assoc., Inc.*, 243 AD2d 107, 116 (1<sup>st</sup> Dept 1998), for the proposition that motions to amend pleadings must be supported by an affidavit of merit and evidentiary proof that could be considered on a summary judgment motion. Koch relies upon the First Department's subsequent decision in *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 (1<sup>st</sup> Dept 2010), holding that a movant need not establish the merit of its proposed amendment but rather must merely demonstrate that it is not palpably insufficient or clearly devoid of merit.<sup>10</sup>

However, the case at bar is distinguishable from *MBIA* because the proposed amendment in that case was supported by an affirmation of counsel and a deposition transcript. By contrast, Koch's motion is supported only by a

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<sup>9</sup> Compare *Schron v Grunstein*, 39 Misc3d 1213(A), 2013 WL 1688929, \*3 (Sup Ct, NY County, Sherwood, J.) and *Lazzarino v Warner Bros. Entertainment, Inc.*, 2013 WL 2455005 (Sup Ct, NY County, Friedman, J.), at fn 1.

<sup>10</sup> In *MBIA*, the First Department approvingly cites to *Lucido v Mancuso*, 49 AD3d 220, 229 (2d Dept 2008), wherein the Second Department stated: "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." However, as recently as March 2013, in *Nichols v Curtis*, 104 AD3d 526 (1<sup>st</sup> Dept 2013), the First Department reiterated its holding in *Non-Linear Trading, supra*, requiring an affidavit of merit and an evidentiary showing. This apparent contradiction prompted the court in *Lazzarino, supra*, to remark that "[a]ppellate clarification as to the quantum of the showing of merit would . . . be welcome."

memorandum of law and a bare bones affirmation from counsel attaching only the proposed amended complaint, which is unverified.<sup>11</sup>

While plaintiff's scant showing would ordinarily doom his motion to amend, significantly, Acker does not deny selling Koch the additional 211 bottles of wine detailed in the proposed amended complaint. As a practical matter, with respect to this portion of the proposed amendment, the purpose of an affidavit of merit is obviated.

The portion of the proposed amendment alleging the details of Acker's relationship with Kurniawan, which Acker denies (albeit via its memorandum of law rather than by an affidavit based on personal knowledge), is not as readily resolved. The original complaint makes no mention of Kurniawan. However, he has been the subject of discovery in this action (see Meister Aff. in Opp. at Exh. T) and it is undisputed that he consigned wines to defendant for sale, including most if not all of those referenced in the original complaint and the proposed amended complaint. Moreover, his arrest and alleged malfeasance have been widely reported. Having had a relationship with Kurniawan and knowing of his arrest and the charges against him, Koch's latest claims cannot come as a complete surprise to Acker. See *English v Ski Windham Operating Corp.*, 263 AD2d 443, 444-445 (2d Dept 1999) (one factor the court considered in granting the amendment where no affidavit of merit was submitted was defendant's notice of the facts on which the amendment was based as a result of defendant having

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<sup>11</sup> The proposed amended complaint also fails to show the changes and additions to be made to the original complaint, as CPLR 3025 (b) now requires.

prepared various accident/incident reports). Given the foregoing, defendant will not be prejudiced by this court considering the merits of plaintiff's motion to amend despite the motion papers' deficiencies.

Turning to Acker's substantive arguments, this court rejects Acker's claim that the Stipulation, Order and Judgment bar any and all amendments per se. Defendant cites no authority for this proposition, nor can this court find any. Plaintiff's two GBL causes of action were remitted to this court for determination and the action, now limited to those claims, is to "pick up where it left off." The action was discontinued without prejudice pending appeal and upon prevailing at the Court of Appeals, plaintiff did not lose the right to seek leave to amend the two remaining causes of action.

Turning to Acker's remaining arguments, the portion of the proposed amendment seeking to add details of defendant's relationship with Kurniawan is granted. These allegations are not separate and distinct claims, nor do they constitute a new theory of recovery. Rather, they merely add further relevant factual allegations giving greater specificity to the original GBL consumer protection causes of action for deceptive acts and practices and false advertising. Defendant will suffer no prejudice as the original causes of action are not being expanded to include any new obligations and/or liabilities. Further, the fact that discovery is complete will not prejudice Acker since the parties should be able to expeditiously complete discovery on this limited issue.

The portion of plaintiff's proposed amendment seeking to include an additional 211 bottles of alleged counterfeit wine discovered after this action was

commenced must be denied as palpably insufficient and clearly devoid of merit since these claims are barred by the statute of limitations.<sup>12</sup> As Acker notes, actions brought pursuant to GBL §349 must be commenced within three years of the date of accrual, which occurs when plaintiff is injured by the deceptive act or practice that violated the statute. See CPLR § 213; *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201 (2001); *M&T Mortg. Corp. v Miller*, 2009 WL 3806691 \*2 (EDNY 2009). Such injury occurs “when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief.” *Gaidon*, at 35. Accrual is not dependent upon any date when discovery of the alleged deceptive practice is said to occur. *M&T Mortg. Corp.*, *supra*; *Wender v Gilberg Agency*, 276 AD2d 311, 312 (1st Dept 2000); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 2007 WL 1601491 \*14 n. 121 (SDNY 2007).

Moreover, CPLR § 203 (f)'s relation back provision does not save Koch's proposed amendment seeking to add an additional 211 bottles of allegedly counterfeit wine to the existing complaint. Under CPLR § 203 (f), a claim in an amended pleading “is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.” When the amendment

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<sup>12</sup> While plaintiff could not have moved to amend the complaint in this action due to its discontinuance without prejudice pending appeal, he could have commenced a separate action for the additional counterfeit bottles discovered within the limitations period.

introduces a claim upon a different obligation or liability it does not relate back to the original pleading. *Herold v Wills*, 119 NYS2d 525, 528 (Sup Ct NY County 1953), *revd in part on other grounds* 282 AD 670 (1<sup>st</sup> Dept 1953).

Here, Koch's claim to recover for the 211 additional bottles of alleged counterfeit wine as stated in the proposed amended complaint does not arise from a transaction or occurrence already being litigated. The issue being litigated from this case's inception involved five claimed counterfeit bottles of wine. The complaint's reference to "at least" five bottles and a purported "ongoing" investigation are insufficient to place Acker on notice of the additional counterfeit bottles of wine.

Nor are defendant's sales of 211 additional bottles to plaintiff part of the same transaction or occurrence as the original five bottles. Notwithstanding that many of the wines in question were purchased on the same date, invoiced together and delivered to Koch simultaneously, the sale of each bottle is a separate and distinct obligation. Permitting the proposed amendment to include 211 new claims would constitute a significant expansion of plaintiff's claims. See *Thibeault v Palma*, 266 AD2d 616, 617 (3d Dept 1999); *Moon v Clear Channel Communications, Inc.*, *supra*. Such a significant expansion of plaintiff's claims does not relate back to the original complaint's allegations predicated upon five bottles of counterfeit wine and Acker would be substantially prejudiced if these untimely claims were allowed.

For all of the foregoing reasons, it is


ORDERED that plaintiff's motion to amend is granted solely to the extent of permitting plaintiff to interpose additional allegations as set forth in the proposed amended complaint with respect to defendant's relationship with Kurniawan, and is otherwise denied; and it is further

ORDERED that plaintiff shall revise his proposed amended complaint in accordance with this decision and order and shall serve same upon defendant's counsel on or before July 19, 2013, and defendant's amended answer shall be served within 20 days of such service.

Counsel for the parties shall appear for a status conference on September 3, 2013 at 9:30 a.m., at 60 Centre Street, Room 325, New York, New York.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been provided to counsel for the parties.

Dated: New York, New York  
July 9, 2013



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HON. MARTIN SHULMAN, J.S.C.