

<b>Stuart's LLC v Edelman</b>
2013 NY Slip Op 34203(U)
June 19, 2013
Supreme Court, Nassau County
Docket Number: 012560-09
Judge: Vito M. DeStefano
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,  
Justice

TRIAL/IAS, PART 15  
NASSAU COUNTY

STUART'S LLC and WAYNE GALVIN,

Decision and Order

Plaintiffs,

MOTION SUBMITTED:

-against-

MOTION SEQUENCE:03  
INDEX NO.:012560-09

STUART EDELMAN, LEVEL 8 APPAREL, LLC,  
WORLD CROSS CULTURE, INC., WORLDWIDE  
SOURCING GROUP, LLC, SEUNG BON KIM  
a/k/a SCOTT KIM a/k/a SAM KIM, PETER LISTER,  
MICHAEL HONG and MARY-LEE EDELMAN,

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Order to Show Cause	1
Affirmation in Opposition	2
Affirmation in Opposition	3
Affirmation in Opposition	4
Memorandum of Law in Opposition	5
Memorandum of Law in Opposition	6
Reply to Defendant Michael Hong's Counterclaim	7
Reply to Defendant Stuart Edelman's Counterclaims	8
Reply to Defendants Worldwide Sourcing and Peter Lister's Counterclaims	9

The Plaintiffs move pursuant to CPLR 2221 to reargue a prior motion ("underlying motion") which sought leave to amend their complaint. The underlying motion was resolved by order of this court dated January 11, 2013.

For the reasons that follow, the motion to reargue is granted and, upon reargument, the underlying motion for leave to amend the complaint is granted in part and denied in part.

### *Underlying Motion*

On August 3, 2012, the Plaintiffs moved for an order pursuant to CPLR 3025(b) granting them leave to file an amended complaint. In the proposed amended complaint, the Plaintiffs sought, *inter alia*, to add as Defendants Sam Kim, Missy Moon, and Robert Spiegel and to assert additional causes of action against the existing and proposed Defendants.

In an order dated January 11, 2013, the court granted in part and denied in part the Plaintiffs' motion. The Plaintiffs now move to reargue those branches of the underlying motion which were denied. The court grants reargument and, upon reargument, grants branches "e", "g", "h", "m", and "n" of the Plaintiffs' underlying motion but only to the extent as provided herein. The instant motion is in all other respects denied.

### **The Court's Determination**

It is well settled policy that motions for leave to amend pleadings should be freely granted in the absence of prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit (*Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008]). In addition, "[t]he legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt" (*Id.* at 227 quoting *Sample v Levada*, 8 AD3d 465, 467-468 [2d Dept 2004]).

### *Proposed Causes of Action for Unfair Competition, Conversion, and Tortious Interference with Contract against the Existing and Proposed Defendants (Branches "e", "g" and "m" of the Underlying Motion).<sup>1</sup>*

In its prior order, the court denied those branches of Plaintiffs' motion which sought to add causes of action for, *inter alia*, unfair competition, conversion, and tortious interference with contract. Upon reargument, the court grants those branches of the underlying motion seeking to add these causes of action but only to the extent the causes of action are asserted against the

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<sup>1</sup> Branch "m" of the underlying motion sought to add a cause of action against all of the Defendants other than Edelman for tortiously interfering with Defendant Michael Hong's contractual relationship with Stuart's.

existing Defendants.<sup>2</sup>

‘A claim asserted 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.’ This principle, termed the “relation-back doctrine,” permits a plaintiff to interpose a claim or cause of action which would ordinarily be time-barred, where the allegations of the original complaint gave notice of the transactions or occurrences to be proven and the cause of action would have been timely interposed if asserted in the original complaint. A new legal theory of recovery may be asserted, so long as it arises from the same transactions alleged in the original complaint.

The *sine qua non* of the relation-back doctrine is notice. Where the allegations of the original complaint gave the defendants notice of the facts and occurrences giving rise to the new cause of action, the new cause of action may be asserted. However, where the original allegations did not provide the defendants notice of the need to defend against the allegations of the amended complaint, the doctrine is unavailable (*Pendleton v City of New York*, 44 AD3d 733 [2d Dept 2007] [citations omitted]).

Here, the allegations in the proposed causes of action for unfair competition, conversion, and tortious interference arise from the same transactions and occurrences as that alleged in the original complaint and, thus, those causes of action may be asserted against the existing Defendants. However, to the extent the proposed cause of action for conversion seeks punitive damages, that branch of the underlying motion is denied (*Uadi, Inc. v Stern*, 67 AD3d 899 [2d Dept 2009]; *Kinzer v Bederman*, 59 AD3d 496 [2d Dept 2009]).

#### *Violation of Debtor and Creditor Law § 273 and § 276*

In the underlying motion, the Plaintiffs sought to add: a cause of action for a “declaratory judgment holding that the defendants’ transfer of the assets of Stuart’s to Level 8 was a

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<sup>2</sup> In its prior order, the court denied the branch of the underlying motion seeking leave to add as defendants Sam Kim, Missy Moon, and Robert Spiegel on the basis that Plaintiffs failed to meet their burden in establishing these individuals were united in interest with the co-Defendants (*see Flederbach v Fayman*, 57 AD3d 474 [2d Dept 2008]; *LeBlanc v Skinner*, 103 AD3d 202 [2d Dept 2012] [“defendants are not united in interest if there is the mere possibility that the new party could have a different defense than the original party” and, accordingly, “joint tortfeasors are generally not united in interest, since they frequently have different defenses, in that one tortfeasor usually will seek to show that he or she is not at fault, but that it was the other tortfeasor who is liable”]).

fraudulent transfer in violation of New York's Debtor & Creditor Law § 273 and/or § 276"; and a cause of action for attorneys' fees based upon the fraudulent transfer pursuant to Debtor and Creditor Law § 276-a.

To the extent the proposed eighth cause of action alleges a violation of Debtor and Creditor Law § 273,<sup>3</sup> which does not require proof of an actual intent to defraud, it was not necessary for Plaintiffs to plead a purported violation of section 273 with the heightened particularity required by CPLR 3016(b). However, to the extent the proposed eighth cause of action alleges a violation of Debtor and Creditor Law § 276,<sup>4</sup> which alleges an actual intent to defraud, that branch of the proposed amendment was properly denied for failure to comply with CPLR 3016(b) (*see Gateway I Group, Inc. v Park Avenue Physicians, P.C.*, 62 AD3d 141 [2d Dept 2009]; *Menaker v Alstaedter*, 134 AD2d 412 [2d Dept 1987]).<sup>5</sup>

Accordingly, the branch of Plaintiffs' underlying motion seeking to add a cause of action for a declaratory judgment to set aside the transfer of Stuart's assets to Level 8 as a fraudulent transfer is granted only to the extent the transfer is a purported violation of Debtor and Creditor

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<sup>3</sup> Section 273 of the Debtor and Creditor Law provides: "Every conveyance made and every obligation incurred by a person who is or will be rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without fair consideration."

<sup>4</sup> Section 276 of the Debtor and Creditor Law provides: "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

<sup>5</sup> The Plaintiffs contend that their cause of action for violation of Debtor and Creditor Law was sufficiently pled pursuant to CPLR 3016(b) because their complaint alleges that: Galvin is a creditor of Stuart's (Stuart's purportedly owes Galvin almost \$300k); Defendants "transferred the assets and good will of Stuart's to Level 8 in violation of the Operating Agreement, including, but not limited to, the Tumi Licensing Agreement", "Stuart's business relationship with Aeropostale", and "Stuart's computers, files, and clothing designs"; and that the Defendants "unlawfully transferred the assets of Stuart's to Level 8 with actual intent to hinder, delay, and/or defraud Galvin and other creditors so as to make it impossible for them to get paid by Stuart's on the debts that Stuart's owed them" (Proposed Amended Complaint at ¶¶ 58-59, 93, 98-104).

Law § 273.<sup>6</sup>

*Amendment to Add Existing Defendant Hong as a Defendant on Additional Causes of Action*

To the extent the underlying motion sought to amend the complaint and assert additional causes of action against existing Defendant Michael Hong, that branch of the motion is granted and the following causes of action are also asserted against Defendant Hong: unfair competition, conversion, violation of Debtor and Creditor Law § 273 and tortious interference with Stuart Edelman's contractual relationship with Stuart, tortious interference with Stuart Edelman's contractual relationship with Tumi, tortious interference with Stuart's advantageous business relations with Tumi and tortious interference with Stuart's advantageous business relations with Aereopastale.

**Conclusion**

Based on the foregoing, it is hereby

Ordered that the Plaintiffs' motion to reargue is granted and, upon reargument, Plaintiffs' underlying motion, insofar as it sought leave to amend the complaint, is granted with respect to branches "e", "g", "h", "m", and "n", as limited by this decision and order; and it is further

Ordered that Plaintiffs are directed to serve an amended complaint in accordance with this decision and order within 30 days of the date hereof; and it is further

Ordered that the Defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days of the date of service of the amended complaint; and it is further

Ordered that the instant motion is in all other respects denied.

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<sup>6</sup> The attorneys' fees provision set forth in Debtor and Creditor Law § 276-a is not applicable in the instant matter in view of the this court's denial of the addition of a cause of action pursuant to Debtor and Creditor Law § 276, which requires particularized pleading as to a defendant's actual intent to defraud creditors (*see Farm Stores v School Feeding Corp.*, 102 AD2d 249 [2d Dept 1984] ["attorney's fees provision of section 276-a is inapplicable where the subject conveyance is invalid under the constructive fraud provisions of the Debtor and Creditor Law as opposed to the actual fraud provision thereof"]; *Marine Midland Bank v Murkoff*, 120 AD2d 122 [2d Dept 1986]).

This constitutes the decision and order of the court.

Dated: June 19, 2013

  
Hon. Vito M. DeStefano, J.S.C.

**ENTERED**  
JUN 24 2013  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE