

Stuart's, LLC v Edelman
2013 NY Slip Op 34204(U)
January 11, 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:

October 24, 2012

-against-

MOTION SEQUENCE: 02

INDEX NO.:012560-09

STUART EDELMAN, LEVEL 8 APPAREL, LLC,
WORLD CROSS CULTURE, INC., WORLDWIDE
SOURCING GROUP, LLC, KUK JA 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:

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Affirmation in Opposition	2
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The Plaintiffs move for an order pursuant to CPLR 3025(b) for leave to amend their complaint.

For the reasons that follow, the motion is granted in part and denied in part.

Factual and Procedural Background

In June 2009, Stuart's, LLC ("Stuarts") and Wayne Galvin (collectively referred to as "Plaintiffs") commenced the instant action against Defendants Stuart Edelman, Level 8 Apparel, LLC ("Level 8"), World Cross Culture, Inc. ("WCC"), Worldwide Sourcing Group, LLC ("WSG"), Kuk Ja Kim a/k/a Sam Kim, Peter Lister, Michael Hong and Mary-Lee Edelman (Ex. "A" to Motion). In December 2011, Defendants Lister and WSG ("Lister Defendants") amended their answer to assert additional cross claims and counterclaims.¹

In May 2012, the parties engaged in a failed attempt at mediation. Party depositions were scheduled for July and August 2012. On July 19, 2012, just prior to the first scheduled party deposition, Plaintiffs emailed the Defendants a proposed Supplemental and Amended Complaint ("amended complaint").² Thereafter, on August 3, 2012, Plaintiffs brought the instant motion for an order pursuant to CPLR 3025(b) granting them leave to file an amended complaint. In the amended complaint, the Plaintiffs seek, *inter alia*, to add as Defendants Sam Kim, Missy Moon, and Robert Spiegel and to assert additional causes of action against the original and proposed Defendants.³ At the time of the making of the motion, the depositions of the Defendants had not been conducted.

For the reasons that follow, the Plaintiffs' motion is granted in part and denied in part.

The Court's Determination

Pursuant to CPLR 3025, a party may amend his pleading 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 and in the absence of prejudice or surprise to the opposing party "resulting directly from the delay" (*McCaskey, Davies and Assocs., Inc. v New York City Health & Hospitals Corp.*, 59 NY2d 755,

¹ Lister is a member of WSG. The amended answer by the Lister Defendants contained counterclaims against both Plaintiffs for breach of contract and unsecured loans, a counterclaim against Plaintiff Galvin for fraud in the inducement, and a counterclaim against Plaintiff Stuart's based upon a promissory note. The Lister Defendants' amended answer also contained crossclaims against Defendant Stuart Edelman for breach of contract, fraud in the inducement and unsecured loans as well as a crossclaim for breach of contract and successor liability against co-Defendants Sam Kim and Level 8.

² Plaintiffs' counsel emailed the amended complaint so that defense counsel could ask Galvin at his deposition questions related to the amended complaint (Affirmation in Support at ¶ 22). While Plaintiff Galvin was deposed as scheduled, none of the Defendants have yet been deposed.

³ The original caption lists "Kuk Ja Kim a/k/a Sam Kim". Plaintiffs seek to amend the complaint to read "Kuk Ja Kim a/k/a Mrs. Kim" and add "Sam Kim" as a Defendant.

757 [1983]; *Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008]). The Second Department recently revisited the 'leave should be freely granted' policy applicable to motions for leave to amend pleadings and stated, in relevant part:

'[T]he legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt' These cases make clear that a plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance

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. Where the proposed amended pleading is palpably insufficient or patently devoid of merit, or whether the delay in seeking the amendment would cause prejudice or surprise, the motion for leave to amend should be denied. 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 (*Lucido v Mancuso*, 49 AD3d at 227, 229, *supra*).

As noted, when evaluating a motion for leave to amend a complaint to add a new cause of action, leave will be denied, in the absence of prejudice or surprise, only if the new causes of action would not withstand a motion to dismiss under CPLR 3211(a)(7) (*Id.* at 225).

Defendants oppose the motion on the ground that most, if not all, of the factual predicate underlying the amendments was known to the Plaintiffs at the time the original complaint was filed. However, mere lateness is not a basis for denying an amendment unless the lateness is coupled with significant prejudice to the other side (*Public Administrator of Kings County v Hossain Construction Corp.*, 27 AD3d 714 [2d Dept 2006]). Prejudice requires that the defendants have been hindered in the preparation of their case or have been prevented from taking some measure in support of their position, neither of which has been established in the action at bar (*see RCLA, LLC v 50-90 Realty, LLC*, 48 AD3d 538 [2d Dept 2008]).⁴

⁴ The prejudice, according to Defendant Hong, is that Hong has "already incurred substantial expense in legal fees preparing and implementing his defense to the complaint, spent enormous time and resources researching and reviewing documents, preparing for the taking and defending depositions and developing settlement positions during the course of voluntary mediation", all of which was done in the "context of having one cause of action against him. To allow Plaintiff to assert new allegations at this time which could have been asserted three years ago, will force Hong to relitigate and defend this case through a new lens" (Hong Memorandum of Law in Opposition at pp 8-9).

The Level 8, WCC and Sam Kim Defendants also argue prejudice to the extent the proposed amendment will further delay the proceedings and burden Defendants with costs and expenses associated with having to supplement and continue discovery even further (Level 8 Memorandum of Law in Opposition at pp 15-16).

Although the initial complaint was filed in 2009, the Defendants have not demonstrated surprise or prejudice in view of the fact that the amended complaint was e-mailed to defense counsel prior to the completion of Plaintiff's deposition and prior to the taking of any of Defendants' depositions (*see Giuffre v DiLeo*, 90 AD3d 602 [2d Dept 2011]) and, more importantly, the proposed amendments arise out of the same facts as those underlying the original complaint (*Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558 [2d Dept 2007]; *Tinajero v Board of Education of City of New York*, 294 AD2d 564 [2d Dept 2002]). Under these circumstances, the Defendants have failed to demonstrate prejudice or surprise (*Degregorio v American Manufacturers Mutual Insurance Co.*, 90 AD3d 694 [2d Dept 2011]).⁵

⁵ Given the absence of prejudice or surprise, the court grants branches "a", "j", "k" and "l" of the Plaintiffs' motion to the extent those branches seek to clarify and expand causes of action previously asserted in the original complaint and only insofar as asserted against Defendants named in the original complaint.

In branch "a" of the Plaintiffs' motion, Plaintiffs seek to "change the designation of the previously named defendant, "Kuk Ja Kim a/k/a Sam Kim", who has appeared by counsel in this action, so that the name correctly reads "Kuk ja Kim a/k/a Mrs. Kim". Notably, Plaintiffs seek to add Sam Kim as a Defendant in branch "b" of their motion.

Branch "j" of the Plaintiffs' motion seeks to clarify and expand upon a prior cause of action that sought declaratory judgment stating that Level 8 is the successor in interests to Stuart's and therefore holding that Level 8 is liable for, and must satisfy, the debts and obligations of Stuart's.

In branch "k", the Plaintiffs seek leave to amend the complaint to separate one cause of action into two separate causes of action. Specifically, the third cause of action in the original complaint asserted that Defendants Level 8, WCC, WSG, Kuk Ja Kim/Sam Kim, and Lister intentionally aided Stuart Edelman's breach of the Stuart's Operating Agreement and conspired with Edelman to transfer the assets of Stuart's, including the Tumi Licensing Agreement, to Level 8 (Ex. "A" to Motion at ¶ 60). Plaintiffs seek to add a claim that Defendants Level 8, WCC, Kuk Ja Kim/Mrs. Kim, Sam Kim, Hong, Moon, Spiegel, WSG and Lister, tortuously interfered with Stuart Edelman's contractual relationship with Stuarts (the Stuart's Operating Agreement) and tortuously interfered with Stuart's contractual relationship with Tumi (the Tumi Licensing Agreement).

In branch "l" of the Plaintiffs' motion, Plaintiffs seek to amend the complaint and separate the fourth cause of action asserted in the original complaint into two separate causes of action. The fourth cause of action alleged that the Defendants Stuart Edelman, Level 8, WCC, WSG, Kuk Ja Kim/Sam Kim, and Lister, tortuously interfered with Plaintiffs' advantageous business relationship with Tumi and Aeropostale. Plaintiffs seek to break up that claim with one cause of action based upon the purported tortuous interference with Plaintiffs' advantageous business relationship with Tumi and the other cause of action based upon the purported tortuous interference with Plaintiffs' advantageous business relations with Aeropostale. The Defendants named in the proposed 16th and 17th causes of action are: Stuart Edelman, Level 8, WCC, Kuk Ja Kim/Ms. Kim, Sam Kim, Hong, Moon, Spiegel, WSG and Lister.

Notwithstanding the absence of prejudice, in order to conserve judicial resources, an examination of the underlying merits of the proposed amendments is warranted (*Eighth Avenue Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]).

Proposed Cause of Action for Aiding and Abetting Breach of Fiduciary Duty against All Defendants (Third Cause of Action in Amended Complaint)

The branch of the Plaintiffs' motion to add a third cause of action for inducing and aiding/abetting Stuart Edelman to breach his fiduciary duty owed to Plaintiffs is denied as being palpably insufficient and devoid of merit as it does not state in detail the circumstances constituting the wrong as required by CPLR 3016[b] (*Wall Street Transcript Corp. v Ziff Communications Co.*, 225 AD2d 322 [1st Dept 1996]).

Proposed Cause of Action for Unfair Competition against All Defendants (Fifth Cause of Action in Amended Complaint)

The proposed fifth cause of action asserted against all of the original and proposed Defendants is a claim for unfair competition. In order to substantiate a claim for unfair competition, a plaintiff must demonstrate that the defendant misappropriated the plaintiff's labors, skills, expenditures, or good will and displayed some element of bad faith in doing so (*Abe's Rooms, Inc. v Space Hunters, Inc.*, 38 AD3d 690 [2d Dept 2007]). Here, the Plaintiffs have sufficiently alleged that the Defendants misappropriated and exploited proprietary information and trade secrets belonging to Plaintiffs (*Out of the Box Productions, LLC v Koschitzki*, 55 AD3d 575 [2d Dept 2008]). However, the Plaintiffs claim for unfair competition is time-barred as not having been brought within the applicable three-year limitations period (CPLR 214[4]).

The Plaintiffs' argument that the relation-back doctrine renders the proposed claim timely is without merit. According to the Plaintiffs, all new causes of action asserted against the original Defendants (Stuart Edelman, Level 8, WCC, WSG, Kuk Ja Kim/Sam Kim, Lister and Hong) "should be deemed to have been timely interposed against them because they arise out of the same facts and circumstances as set forth in the original complaint and they knew or should have known that these claims could be asserted against them. Therefore, they cannot claim surprise." Similarly, with respect to the claims asserted against Sam Kim, Moon, and Spiegel (the Defendants sought to be added), Plaintiffs argue that the proposed claims arise out of the same conduct, transactions and occurrences as set forth in the original complaint; that Kim, Moon and Spiegel are each united in interest with the original Defendants and that by reason of their unity in interest, they can be charged with notice of the action when it was initially commenced (Plaintiffs' Memorandum of Law in Support at pp 19-21).

Pursuant to CPLR 203(f), the “relation-back” statute:

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.

Under the relation-back doctrine, a plaintiff may interpose a cause of action against a person or entity after the statute of limitations has expired, provided that the plaintiff had timely commenced the action against another defendant, served process upon that other defendant within the applicable statutory period, and established that the defendant previously named and served was “united in interest” with the person or entity sought to be added as a defendant (CPLR 203[b]). More specifically, in order to determine whether defendants are united in interest such that a plaintiff may invoke the relation-back doctrine, the following must be shown:

(1) both claims arose out of [the] same conduct, transaction, or occurrence, (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he will not be prejudiced in maintaining his defense on the merits, and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well (*Arsell v Mass One LLC*, 73 AD3d 668, 669 [2d Dept 2010]).

At bar, the Plaintiffs have failed to satisfy their burden that the relation-back doctrine applies to the unfair competition cause of action asserted in the amended complaint as the Plaintiffs had knowledge of the facts underlying the claim before the limitations period had expired and Plaintiffs failed to establish that, but for a mistake, they would have asserted an unfair competition claim against the Defendants (*see id.* at 670). Therefore, the fifth cause of action alleging unfair competition is time-barred as against all original and proposed Defendants.⁶

Proposed Cause of Action for Conversion against All of the Defendants (Seventh Cause of Action in Amended Complaint)

⁶ Notably, any suggestion by Plaintiffs that they were mistaken as to Hong and Lister’s involvement is belied by Galvin’s deposition wherein he testified that as early as February 2009, Lister and Hong colluded with each other to take over the company (Ex. “12” to Level 8’s Opposition at pp 1020-1022).

The Plaintiffs' proposed claim for conversion is premised upon the misappropriation of assets and property owned by the Plaintiffs, which occurred on or about March 2009. As such, the Plaintiffs' claim for conversion in the seventh cause of action in the amended complaint is time-barred (CPLR 214[3] [three-year statute of limitations applies to claims for conversion]). Plaintiffs have failed to establish that, but for a mistake, they would have asserted a conversion claim against the Defendants and, therefore, Plaintiffs have not satisfied their burden that the relation-back doctrine is applicable to the conversion cause of action asserted (*see id.*).

Proposed Causes of Action Seeking a Judgment Declaring that the Defendants Violated New York's Debtor and Creditor Law §§ 273 and 276 and for Attorneys Fees Pursuant to 276-a (Eighth and Ninth Causes of Action in Amended Complaint)

Plaintiffs seek to amend the complaint with a cause of action seeking a declaratory judgment that sets aside the transfer of Stuart's assets to Level 8 as a fraudulent transfer in violation of New York Debtor and Creditor Law §§ 273 and 276.

The proposed eighth cause of action for fraudulent conveyance alleges that the Defendants transferred the assets and property of Stuart's to Level 8 without fair consideration and that Stuart's was rendered insolvent as a result of the transfer and that the Defendants transferred the assets with actual intent to hinder, delay and/or defraud Galvin and other creditors (Ex. "G" to Motion at ¶¶ 99-101).

The court finds that these allegations are not sufficiently particular to withstand dismissal pursuant to CPLR 3016(b) (*see High Tides, LLC v DeMichele*, 88 AD3d 954 [2d Dept 2011]). A fraudulent transfer cause of action must identify the alleged transfers at issue and cannot simply allude generally to alleged transfers. In this regard, the court notes that Plaintiffs have not identified any particular transaction that they seek to void (*Syllman v Calleo Development Corp.*, 290 AD2d 209 [1st Dept 2002]). In addition, with respect to Debtor and Creditor Law § 276, the Plaintiffs' allegations are insufficient to demonstrate actual intent and, therefore, have not stated a claim under Debtor and Creditor Law § 276. Accordingly, the branches of the motion to amend the complaint by adding the eighth and ninth causes of action set forth in the proposed amended complaint are denied.

Proposed Cause of Action for Tortious Interference with Hong's Contractual Relationship with Stuart's Asserted against Defendants (except the Edelman Defendants) (Eighteenth Cause of Action in Amended Complaint)

With respect to the proposed eighteenth cause of action asserting that the Defendants (except the Edelman Defendants) tortiously interfered with Hong's contractual relationship with Stuart's contained in the non-disclosure argument, that claim is time-barred as not having been

brought within the applicable three-years limitations period. The Plaintiffs failed to establish applicability of the relation-back doctrine to the eighteenth cause of action and therefore branch "m" of Plaintiffs' motion seeking leave to add the eighteenth cause of action is denied. While Plaintiffs' claims in the amended complaint may arise out of the same transactions or occurrences, the Plaintiffs have not demonstrated that the proposed Defendants are united in interest (*see Connell v Hayden*, 83 AD2d30, 45 [2d Dept 1981] [joint tortfeasors generally not united in interest since they frequently have different defenses]; *see also Regina v Broadway - Bronx Motel Comp*, 23 AD3d 255 [1st Dept 2005] [defendants are united in interest when a relationship between the parties gives rise to various liability of one for the conduct of the other]) or that Plaintiffs' failure to assert this claim against the Defendants was due to mistake (*see Arsell v Mass One LLC*, 73 AD3d at 670, *supra*).⁷

Proposed Cause of Action for Violation of New York Limited Liability Company Law § 402(d)(2) against Defendant Stuart Edelman Only (Sixth Cause of Action in Amended Complaint)

The sixth cause of action asserted in the amended complaint asserts the following:

STUART EDELMAN unlawfully approved the transfer of all or substantially all of the assets of STUART'S, a limited liability company, to LEVEL 8 without a vote first having been taken by at least a majority in interest of the members of STUART'S entitled to vote on the transfer.

As a result of the foregoing, STUART EDELMAN violated § 402 (d)(2) of New York's Limited Liability Corporation Law.

By reason of the aforesaid, GALVIN and STUART'S have been damaged in an amount to be determined at trial, but believed to be no less than \$2,500,000.

The factual basis underlying the purported statutory violation asserted in the amended complaint is very similar to the factual underpinnings asserted in the first, second, and sixth causes of action of the original complaint and, therefore, the branch of the Plaintiffs' motion to add a cause of action Stuart Edelman for his purported violation of section 402(d)(2) of New

⁷ For the same reasons, the branches of the motion seeking to add as Defendants Sam Kim, Moon, and Spiegel to the fourteenth through seventeenth causes of action asserted in the amended complaint must be denied inasmuch as they present claims which are time-barred (*see Lawyers' Fund for Client Protection of the State of New York v JP Morgan Chase Bank, N.A.*, 80 AD3d 1129 [3d Dept 2011] [amendments permitted where new allegations in the amended complaint were based on facts in original complaint and merely amplified and added detail without adding new claimants or causes of action]).

York's Limited Liability Company Law is granted.

Demand for Punitive Damages Against Edelman on the Breach of Fiduciary Duty Claim

The branches of the Plaintiffs' motion seeking to add a claim for punitive damages in the previously asserted causes of action for breach of fiduciary duty asserted against Stuart Edelman (the second cause of action in the original complaint) and against the other Defendants for inducing Edelman to breach his fiduciary duty (third cause of action in the original complaint) are denied as the proposed amendments do not allege conduct of such an egregious nature directed at the Plaintiffs nor a pattern of such conduct directed at the public in general (*Gladioli v Encompass Insurance Co.*, 40 AD3d 696 [2d Dept 2007]; *see also Aronis v TLC Vision Centers, Inc.*, 49 AD3d 576, 578 [2d Dept 2008]). Moreover, the proposed amendments fail to demonstrate that Stuart Edelman exhibited a high degree of moral culpability. As such, the proposed claims are palpably insufficient to show such conduct (*see Stein v McDowell*, 74 AD3d 1323 [2d Dept 2010]; *Rosenblum v Frankl*, 57 AD3d 960 [2d Dept 2008]).

To Assert All Causes of Action against Hong (Who was Recently Discovered to be a 7% Shareholder of Level 8)

With respect to branch "n" of the Plaintiffs' motion to "assert all causes of action against Hong, who recently was discovered to be a 7% shareholder of Level 8" the court notes that the initial complaint which was filed on or about June 2009 asserted only one cause of action against Hong, breach of the non-disclosure agreement, yet Plaintiffs were aware as early as February 2009 that "Mr Hong colluded with others to take over Stuarts, LLC" (Ex. "12" to Level 8's Opposition at p 1022).⁸ Accordingly, branch "n" of Plaintiffs' motion is denied as Plaintiffs cannot claim mistake for their failure to assert additional causes of action against Hong and, thus, the relation-back doctrine does not apply.

Based on the foregoing, it is hereby

Ordered that branches "a" and "f" of the motion are granted; and it is further

Ordered that branches "j", "k", and "l" of the motion are granted to the extent those

⁸ Given this admission, Plaintiffs knew of Hong's potential liability yet did not assert additional claims against him. Under the circumstances, there was no "mistake" in failing to assert the additional causes of action against Hong and thus, no relation-back (*see Buron v Coupal*, 87 NY2d 173 [1995]). The court also notes that although Plaintiffs seek to assert "all causes of action against Hong", the proposed complaint only asserts the third, fourth, fifth, seventh, ninth and fourteenth through seventeenth causes of action against Hong.

branches seek permission to serve pleadings which clarify and expand on causes of action previously asserted in the original complaint, only insofar as asserted against those Defendants named in the original complaint; and in all other respects, branches "j", "k", and "l" of the motion are denied; and it is further

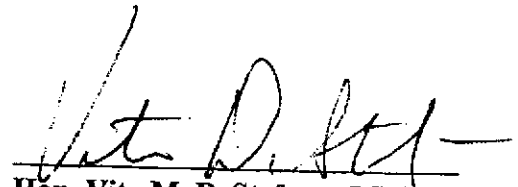
Ordered that branches "b", "c", "d", "e", "g", "h", "i", "m", and "n" are denied; and it is further

Ordered that the amended complaint in the proposed form annexed as exhibit "G" to the motion (as limited by this decision) shall be deemed served upon service of a copy of this decision and order with notice of entry thereof; 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 this decision and order.

This constitutes the decision and order of the court.

Dated: January 11, 2013


Hón. Vito M. DeStefano, J.S.C.

ENTERED

JAN 16 2013

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**