SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ROBERT LERCH and ELIZABETH TAPPER,

Plaintiffs,

-against-

ARK RESTORATION & DESIGN LTD., ANATOLY KRISHTUL, RENA KRISHTUL, and DAVID KRISHTUL,

Defendants.

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Index No.: 653221/2012

Motion Seq. No. 002

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for breach of contract and breach of implied good-faith and fair dealing, plaintiffs Robert Lerch and Elizabeth Tapper ("plaintiffs") move pursuant to CPLR 3025(b) for leave to file and serve a second amended complaint adding a fourth cause of action under New York General Business Law § 349 ("GBL 349").

Defendants oppose plaintiff's motion, and cross-move to compel discovery responses and for costs and attorneys' fees incurred in the instant motion practice.

Factual Background[1]

The underlying dispute among the parties arises from alleged agreements to create two pieces of jewelry (the "jewelry suite") and to share profits from an art show. The dispute was the subject of an action commenced in February 2012 (Index No. 650350/2012), which was dismissed for failure to comply with Judiciary Law § 470 (failure to maintain New York office), with leave to replead (see order dated July 23, 2012).

When plaintiffs commenced the instant action (by new counsel, William Rand, Esq.),

[1] For a complete recitation of the factual background of this matter, the parties are directed to the court's decision and order dated April 11, 2013.

defendants successfully moved to dismiss all of plaintiffs' non-contractually based claims asserted in that complaint.[2] As part of the court's decision, plaintiffs were ordered to serve an amended complaint conforming to the decision.

Plaintiffs amended the complaint in May 14, 2013, and on or about May 31, 2013, defendants served their answer along with comprehensive discovery demands. To date, plaintiffs have not responded to the demands.[3]

On July 11, 2013, plaintiffs filed a purported "substitution" of attorneys, stating their intention to proceed *pro se*. Thereafter, on October 9, 2013, Richard P. Savitt, Esq. filed a notice of appearance on behalf of plaintiffs, and the instant motion to add GBL 349 claim ensued.

In support of the motion, Savitt attaches a proposed second amended complaint to the moving papers and argues that the court should grant leave to amend pursuant to CPLR 3025(b), because leave to amend is freely granted in the absence of prejudice or surprise resulting directly from the delay in seeking leave. Moreover, a court should not examine the merits or legal sufficiency of the proposed amendment unless it is palpably insufficient or patently devoid of merit on its face; neither of which is present here. No prejudice or surprise will result, and there are no new alleged facts in the proposed second amended complaint.

In opposition, defendants argue that the proposed new cause of action based on GBL 349 substantively duplicates plaintiffs' fraud claims, which were dismissed. Moreover, the new

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[2] This court dismissed plaintiffs' claims for money had and received; conversion; fraud; unjust enrichment; and breach of fiduciary duty. Plaintiffs' claim for breach of the implied covenant of good-faith and fair dealing was dismissed to the extent that it was premised on allegations which duplicated the breach of contract claim, *i.e.*, defendants failed to complete the jewelry suite and to share profits from an art show. This court further merged plaintiffs' first and second causes of action into one cause of action for breach of contract.

[3] The record indicates that on or about July 2, 2013, plaintiffs (by counsel Rand) served discovery demands upon defendants (Plaintiff's Opposition to Defendant's Cross-Motion, Exh. E).

claim lacks the particularity required by CPLR 3016(b), which provided the basis for the prior dismissal of plaintiffs' non-contractual claims. In any event, the new claim is a tort claim which is duplicative of the contract claim, and thus the court should not permit plaintiffs to amend their complaint again.

The court consolidated plaintiffs' claims to eliminate duplicative and unnecessary causes of action in the prior order, and thus, plaintiffs' motion is abusive, untimely, and they should not be afforded an opportunity to replead dismissed causes of action. Plaintiffs already served an amended complaint and should not now be permitted to reopen the question of the form of pleadings herein. The "new" claim is a transparent attempt to evade the effect of the court's dismissal of the fraud claims and should not be permitted.

The motion is also fatally defective in form. Although the notice of motion recites that the motion is based on the affirmation of plaintiffs' counsel Savitt, the affirmation has a signature line and purported signature for Savitt but is affirmed at the beginning by "Brian Cohen... the Plaintiff in this action," who bears no relation to the case.[4] Thus, the motion lacks proper support under the Rules.

In support of their cross-motion, defendants argue that plaintiffs have failed to respond to their discovery demands, which were served in May 2013. Due to plaintiffs' longstanding failure to respond, and inappropriate and improper direction that defendants obtain previously demanded discovery from plaintiffs' "prior" counsel, defendants' seek sanctions and attorneys' fees in cross-moving for this relief.

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[4] Defendants' counsel advised Savitt of this defect (as well as the issue of the GBL 349 claim being duplicative of the previously dismissed fraud claims) in an effort to resolve/obtain the withdrawal or adjournment of the motion; however, Savit refused to withdraw or adjourn the motion, thus necessitating defendants' opposition.

In plaintiffs' reply/opposition to the cross-motion, plaintiffs state that the cross-motion violates CPLR 3124, as defendants have not provided the court with an affidavit of good-faith indicating what efforts counsel made to resolve any outstanding discovery disputes. Moreover, defendants' counsel did not send to Savitt any discovery demands, or respond to Savitt's inquiry as to whether a preliminary conference order had been issued in the matter. Plaintiffs would have responded or discussed resolution of outstanding discovery disputes, but defendants' counsel never advised that he had served demands on prior counsel; never provided copies of prior demands; and never told Savitt there was a dispute with outstanding discovery. In any event, plaintiffs are in the process of responding to the discovery demands at this time.

Furthermore, the cross-motion violates CPLR 2214, as it was not served at least seven days before the return date of plaintiffs' motion.

Plaintiffs deny discussing the merits of the motion when defendants requested that it be withdrawn. Defendants also failed to disclose to the court that defendants failed to respond to plaintiffs' own discovery requests. Thus, a preliminary conference should be scheduled to resolve these discovery issues.

In reply, defendants point out that plaintiffs fail to address the substantive and procedural defects in their motion. The parties' email correspondence show that defendants' counsel explained the defects in plaintiffs' motion, the outstanding discovery, and the request for an extension or withdrawal of the motion to foster resolution of the outstanding issues. Defendants also attach correspondence with prior counsel Rand, which demonstrates that defendants' requests for responses had gone unheeded.

Discussion

Leave to amend a complaint should be granted where the proposed amendment is not palpably insufficient or clearly devoid of merit, and defendant cannot legitimately claim surprise or prejudice (internal citations omitted) (*Castor Petroleum, Ltd. v. Petroterminal de Panama, S.A.*, 90 AD3d 424, 933 NYS2d 662 [1st Dept 2011] citing CPLR 3025(b); *see also JPMorgan Chase Bank, N.A. v. Low Cost Bearings N.Y. Inc.*, 107 AD3d 643, 969 NYS2d 19 [1st Dept 2013]; *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 AD3d 499, 901 NYS2d 522 [1st Dept 2010]). Thus, leave to amend a pleading to add a duplicative cause of action should be denied (*see Spitzer v. Schussel*, 48 AD3d 233, 850 NYS2d 431 [1st Dept 2008] (proposed amendment to add declaratory judgment cause of action was duplicative of cause of action for accounting in original complaint, and was thus properly denied); *Hylan Elec. Contracting, Inc. v. MasTec North America Inc.*, 74 AD3d 1148, 903 NYS2d 528 [2d Dept 2010] (trial court improperly granted leave to amend to add causes of action to recover damages based on fraud and breach of fiduciary duty, when claims were based on breach of contract)).

A cause of action under GBL 349 must be predicated on a deceptive act or practice that is consumer oriented and directed toward the public at large (*see Gaidon v. Guardian Life Ins. Co. of America*, 94 NY2d 330 [1999]), as distinguished from merely a private contractual dispute (*see Merin v. Precinct Developers LLC*, 74 AD3d 688, 902 NYS2d 821 [1st Dept 2010]; *The 20 Pine Street Homeowners Association v. 20 Pine Street LLC*, 2012 WL 1965623 [Sup Ct New York Cty 2012]).

Plaintiffs' motion seeking leave to add a cause of action under GBL 349 is denied on the grounds that it is clearly devoid of merit. The cause of action is based entirely upon plaintiffs'

breach of contract allegations. The allegation that "defendants have a history of defrauding consumers and the public at large" is insufficiently specific to establish that any specific alleged wrongful acts on the part of defendants herein were directed toward the public at large.

Further, plaintiffs' motion, containing a facially defective claim, is nothing but a shoehorn to force a non-contractual claim into a breach of contract matter. As defendants note in opposition, the proposed claim is, for purposes of this motion, duplicative of the previously dismissed claims sounding in fraud. The court also notes that plaintiffs did not address defendants' contentions in this regard in reply.[5] Therefore, leave to amend the complaint is denied.

As to defendants' cross-motion, plaintiffs are ordered to respond to defendants' discovery demands within 30 days. Plaintiffs' argument that the motion is untimely is meritless, as plaintiffs were able to submit opposition, and were therefore not prejudiced (*see Edwards v. Devine*, 111 AD3d 1370, 975 NYS2d 277, 278 [4th Dept 2013] ("contrary to defendants' contention, the court did not abuse its discretion in considering the papers submitted by plaintiff in opposition to the motion even though they were not timely served...defendants were not prejudiced by the late service inasmuch as they were able to submit a reply affidavit"); *see also Einheber v. Miller*, 2006 WL 7126735 [Sup. Ct. New York Cty. 2006]).

Moreover, that defendants did not submit a good-faith affidavit with their motion is not fatal to the relief defendants seek under the circumstances. Plaintiffs do not dispute that defendants served discovery demands upon them in May 2013. Therefore, responses were

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[5] The court also finds that plaintiffs fail to address the inclusion of "Brian Cohen," a non-party, as the purported affimant. While the inclusion of this name appears to be a typographical error, there is no explanation given and thus, plaintiffs' motion could be denied on this ground alone.

required under the CPLR. Also, defendants submit in reply email correspondence indicating that they in fact attempted to resolve the discovery dispute prior to the instant motion practice (*Northern Leasing Systems, Inc. v. Estate of Turner*, 82 AD3d 490, 918 NYS2d 413 [1st Dept 2011] (rejecting the "argument that plaintiff's failure to include an affirmation of good faith pursuant . . . should be fatal to its cross motion for sanctions" as "unavailing" where the record indicates that plaintiff attempted . . . to reach an accommodation with defendants"); *cf. Fulton v. Allstate Ins. Co.*, 14 AD3d 380, 788 NYS2d 349 [1st Dept 2005] (cross-motion to compel discovery should have been denied where no "such affirmation was submitted, *nor is there any other indication that there were any such discussions between counsel at all*")). The absence of a separate, formal good-faith affirmation does not warrant denial of defendants' cross-motion when the undisputed facts indicate that defendants made an effort to resolve the dispute, and that plaintiffs were made aware of their discovery obligations.

However, defendants' requests for sanctions, costs and attorneys' fees are denied. Generally, attorneys' fees "are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Gotham Partners, L.P. v High River Ltd. Partnership*, 76 AD3d 203, 906 NYS2d 205 [1st Dept 2010]; *Braithwaite v 409 Edgecombe Ave. HDFC*, 294 AD2d 233, 742 NYS2d 280 [1st Dept 2002]). Moreover, although the court denied plaintiffs' motion, the court finds that it was not frivolous. Lastly, the court notes that defendants' also failed to produce discovery responses.

Given that outstanding discovery remains, the parties are directed to appear at a preliminary conference on April 1, 2014, at 2:15 p.m.

Conclusion

It is hereby

ORDERED that plaintiffs' motion for leave to amend the complaint is denied; and it is further

ORDERED that defendants' cross-motion is granted to the extent that plaintiffs shall respond to defendants' discovery demands within 30 days of the date of this order; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 35, Room 438 on April 1, 2014 at 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: February 25, 2014

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD