

Beach v Touradji Capital Mgt., LP

2014 NY Slip Op 31029(U)

April 16, 2014

Sup Ct, New York County

Docket Number: 603611/08

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

A. Vollero (Mr. Vollero), argue that Touradji's Motion to Amend should be denied as prejudicial and meritless. For the reasons stated below, Touradji's motion is granted with respect to each proposed amendment except that Count Five (Defamation Against Gentry Beach, Robert Vollero and the Vollero Beach Funds) is denied, and Count Eleven (Aiding and Abetting Fraud Against Gentry Beach and Robert Vollero) is denied with respect to the claim against Mr. Vollero.

Background

Mr. Beach commenced this action on December 9, 2008 and amended the complaint to include Mr. Vollero as a plaintiff on January 22, 2009. Touradji filed its Counterclaims and Answer on November 4, 2009. Touradji made its first motion to amend on April 27, 2010. On June 15, 2010, the court denied this motion and instructed the parties to make any motions to amend after the completion of discovery. Mr. Beach filed Notice of Issue after the completion of discovery on July 31, 2013 and Touradji filed Notice of Issue on August 19, 2013. Touradji filed the current Motion to Amend on September 27, 2013 and Mr. Beach filed a Motion for Summary Judgment on September 30, 2013. On November 14, 2013, Touradji filed a copy of the proposed Amended and Supplemental Counterclaims and Answer to the First Amended Complaint, marked to show changes from the Original Counterclaims and Answer.

Touradji's proposed changes to the Original Counterclaims and Answer are as follows:

1. With respect to its breach of fiduciary duty cause of action, Touradji alleges that Mr. Vollero spoke to Mr. Beach's counsel without informing Touradji, that Mr. Beach and Mr. Vollero violated SEC trading laws and regulations while employed at Touradji, and that Mr. Beach and Mr. Vollero destroyed documents reflecting their efforts to fabricate their compensation claims.

On January 24, 2011, Referee Lowenstein ruled that Touradji has only the right to know that the conversation between Mr. Vollero and counsel took place, but everything in the notes taken of the conversation are privileged. On September 27, 2011, the court denied Touradji's motion for review of this ruling.

On December 9, 2011, the SEC issued a ruling finding that two former employees of Touradji whose employment ended in late 2008 violated Regulation M. Specifically, Touradji alleges that Mr. Beach and Mr. Vollero violated Regulation M in pursuit of their Haynesville Shale trading strategy.

In its original counterclaims, Touradji alleged that Mr. Vollero created false notes of his conversations with Touradji. It now alleges that these notes were destroyed.

2. Touradji has asserted a new cause of action for spoliation against Mr. Beach and Mr. Vollero and has requested sanctions. Touradji had previously made a motion for sanctions pursuant to CPLR 3126. On October 24, 2011, Referee Lowenstein issued a recommendation that no basis existed for issuing sanctions. The court ruled on March 29, 2012 that the issue of whether lesser sanctions should be imposed outside of the scope of CPLR 3126 was not considered by the referee and that future efforts by Touradji to seek lesser sanctions for spoliation will not be prejudiced by the referee's ruling.

3. Touradji has asserted a new cause of action for tortious interference with contract, alleging that Mr. Beach and Mr. Vollero knowingly induced Benjamin Bram (Mr. Bram), a previous equities trader at Touradji, to breach his confidentiality and non-disparagement agreement with Touradji by assisting Mr. Bram in disclosing false statements about Touradji's dealings with a firm called Amaranth Advisors. In its original counterclaims, Touradji alleged that Mr. Beach and Mr. Vollero intentionally disparaged Touradji in connection with the firm's

acquisition of the metals trading book of Amaranth. On April 29, 2011, Touradji deposed Mr. Bram on the issue of the Amaranth transaction and the confidentiality agreement between Touradji and Mr. Bram.

4. Touradji has asserted a new cause of action for aiding and abetting fraud against Mr. Beach and Mr. Vollero. Touradji alleges that Mr. Beach's father, Gary Beach, defrauded Touradji by misrepresenting his experience and successes, as well as the nature and value of oil and gas properties he contributed to Playa Oil & Gas LP. Touradji also alleges that Mr. Beach was involved with discussions with Gary Beach and assisted his fraud by encouraging Touradji to enter into the transaction with Gary Beach and invest capital, and by misrepresenting the value of Playa.

Discussion

I. Prejudice

CPLR 3025 (b) governs amendments and supplemental pleadings by leave. It states, "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, 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 including the granting of costs and continuances." However, "Lateness, coupled with significant prejudice to the other side" will bar the amendment of a pleading. *Heller v Louis Provenzano*, 303 AD2d 20, 22 (1st Dept 2003). Importantly, "Mere lateness is not a barrier to the amendment." *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 (N.Y. 1983). There is prejudice when the omission from the original pleading results in "some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided" Siegel, New York Practice, § 237.

Mr. Beach and Mr. Vollero have not shown that they will be prejudiced by Touradji's delay in filing its Motion to Amend. The parties were instructed to make motions to amend at the completion of discovery. When discovery was completed, Mr. Beach and Mr. Vollero filed Notice of Issue on July 31, 2013. Touradji filed its Motion to Amend two months after that, and before Mr. Beach and Mr. Vollero filed their Motion for Summary Judgment. Mr. Beach and Mr. Vollero cite cases in which motions to amend were denied due to lateness, but those cases are distinguishable from the case at hand. In *Hynes v Start Elevator*, 2 AD3d 178 (1st Dept 2003), the motion for leave to amend was denied because there was no merit in the proposed indemnification claim and there was a twenty-one month delay before the motion to amend was filed. In *Reilly v Newireen Associates*, 303 AD2d 214 (1st Dept 2003), the movants persistently neglected their obligation to identify violations of specific Code provisions in order to support their claim and filed their motion to amend almost a year after the Note of Issue had been filed – six months after the time to amend as set by the court had expired.

The longer that a party delays before filing a motion to amend, the more likely the other party will have lost a special right in the interim or incurred significant expense that could have been avoided. A two- to three-month delay alone is insufficient to establish prejudice unless Mr. Beach and Mr. Vollero can show that the consequence of Touradji's Motion to Amend is prejudicial. To this end, Mr. Beach and Mr. Vollero argue that if the court grants Touradji's Motion to Amend, their pending Motion for Summary Judgment would be premature, creating potential procedural problems that can be prejudicial. However, in this case there would be no procedural problem that the court could not resolve if Touradji's Motion to Amend were granted. To the extent that Touradji's Amended Counterclaims and Answer assert new facts that independently support new causes of action, those will be addressed later on as new claims. To

the extent that Touradji seeks to amend its existing claims with new facts, it has done so in a timely fashion.

Mr. Beach and Mr. Vollero also argue that if the Motion to Amend were granted, they would be prejudiced by the fact that they would need to conduct significant additional discovery and investigation to establish new defenses. Mr. Beach and Mr. Vollero cite several cases that resulted in the denial of a motion to amend. Each case, however, involved a moving party that was either previously aware of the facts of its proposed amendment or inexcusably delayed its motion to amend, causing unnecessary burden. See *B.B.C.F.D., S.A. v Bank Julius Baer & Co. Ltd.*, 62 AD3d 425, 425 (1st Dept 2009) (“The facts underlying Ivcher’s proposed cross claims have been known to him since no later than 2004, if not as long ago as late 2001. His delay until August 2007 in requesting leave to amend his answer is inexcusable.”); *Heller*, 303 AD2d at 24-25 (“[T]his application to amend was made without explanation as to the delay, over ten years after the accident, over six years after the commencement of the action, long after the completion of discovery and filing of the note of issue, over four years after the first trial of this action and over one and one-half years after the decision on the prior appeal.”); *Murdock v Avis Rent A Car System*, 196 AD2d 859, 860 (1st Dept 1993) (“The defendant did not offer a reasonable excuse for its lengthy delay in making the motion and was previously aware of the facts of its proposed counterclaim.”).

As stated earlier, the court instructed the parties to make any motion to amend after the completion of discovery. It is normal that additional work is required to establish defenses to new allegations and causes of action. Discovery produced new facts that were not known beforehand. For example, judgment was entered against Gary Beach in Texas in the Playa litigation, the SEC issued its resolution of the Regulation M investigation, and Touradji deposed

Mr. Bram about his role in the Amaranth transaction. All of this occurred in 2011. Touradji did not intentionally withhold known facts from its Original Counterclaims, such that its Motion to Amend would be prejudicial if granted. The additional work required to establish new defenses is a result of new facts that arose during discovery and the court's instructions to file motions after discovery. There is no showing of prejudice.

II. Merits

While motions to amend should be freely granted, leave to amend should be denied when the proposed amendments are without merit. *Heller*, 303 AD2d at 24. Mr. Beach and Mr. Vollero assert that many of the new allegations and causes of action that Touradji proposes are without merit.

A. Spoliation

Mr. Beach and Mr. Vollero point out that Touradji's new cause of action under spoliation is without merit. There is no cause of action for spoliation under New York law. *Landis v Remington Arms Co. Inc.*, 2012 WL 6098269 at *4 (NDNY 2012). The court previously denied Touradji's motion for sanctions under CPLR 3126 at the recommendation of Referee Lowenstein, but the possibility of lesser sanctions outside of the scope of CPLR 3126 had not been considered. For the sake of judicial economy, the court will allow Touradji to leave in Count Nine (Spoliation against Vollero and Beach) in the Amended Counterclaims. The court will treat it as a separate motion for sanctions.

B. Tortious Interference with Contract

Mr. Beach and Mr. Vollero assert that Touradji's new cause of action for Tortious Interference with Contract, which contains allegations that Mr. Beach and Mr. Vollero induced Mr. Bram to breach a confidentiality and non-disparagement agreement with Touradji in relation

to Touradji's dealings with Amaranth Advisors, is without merit because it is outside of the three-year statute of limitations for such claims. (CPLR 214). Mr. Beach and Mr. Vollero further assert that the new allegations do not relate back to the date of the original filing. "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." CPLR 203 (f). "[T]he salient inquiry [of the relation-back doctrine] is not whether the defendant had notice of the claim, but whether, as the statute provides, the original pleading gives 'notice of the transactions, occurrences ... to be proved pursuant to the amended pleading.'" *Giambrone v Kings Harbor Multicare Centre*, 104 AD3d 546, 548 (1st Dept 2013).

In its Original Counterclaims, Touradji alleged that Mr. Beach and Mr. Vollero intentionally disparaged Touradji in connection with the firm's acquisition of the Amaranth metals trading book. Touradji also examined Mr. Bram, a former equities trader of Touradji, to establish that he was subject to a confidentiality agreement. Although Touradji's Original Counterclaims did not include a claim for tortious interference with contract, it gave Mr. Beach and Mr. Vollero notice of the occurrence in which the alleged conduct took place, namely, the alleged disparagement in connection with the Amaranth transaction. That is enough to satisfy the relation-back doctrine. *See Jennings-Purnell v Jennings*, 107 AD3d 513, 514 (1st Dept 2013). Therefore, Count Ten of Touradji's Amended Counterclaims (Tortious Interference With Contact Against Gentry Beach and Robert Vollero) is not time-barred.

C. Breach of Fiduciary Duty

Mr. Beach and Mr. Vollero assert that Touradji's proposed modification to the Breach of Fiduciary Duty claim, to include allegations that Mr. Vollero improperly communicated with

Mr. Beach's counsel, is without merit. Referee Lowenstein ruled that Touradji has only the right to know that the conversation between Mr. Vollero and his counsel took place. The contents of the conversation are privileged. The court denied Touradji's motion to review this ruling, but since Touradji has the right to know that the conversation took place, the court will allow Touradji's proposed modification to include allegations that Mr. Vollero spoke to Mr. Beach's counsel.

Mr. Beach and Mr. Vollero also argue that the new allegations under Touradji's Breach of Fiduciary Duty claim are time-barred. Touradji alleges that Mr. Beach and Mr. Vollero violated SEC Regulation M, destroyed documents to fabricate compensation claims, and that Mr. Vollero spoke to counsel for Mr. Beach without informing Touradji. These acts occurred before 2009. However, all of these allegations relate back to transactions or occurrences of which Mr. Beach and Mr. Vollero were on notice.

Touradji alleges in its proposed amendments that Mr. Beach and Mr. Vollero violated Regulation M in pursuit of their Haynesville Shale trading strategy in 2008. In their Amended Complaint, Mr. Beach and Mr. Vollero claimed that "Early in 2008, Beach generated an investment strategy that positioned the OG, OGD, and DeepRock portfolios to take advantage of a newly discovered natural gas shale known as the Haynesville Shale." The Regulation M allegation is not time-barred because it relates back to the trading activities on which Mr. Beach and Mr. Vollero's own claims rely in their Amended Complaint.

Touradji alleges in its proposed amendments that Mr. Beach and Mr. Vollero destroyed documents that reflected their efforts to fabricate their compensation claims and that Mr. Vollero spoke to counsel for Mr. Beach without informing Touradji. In its Original Counterclaims, Touradji alleged that Mr. Vollero created false notes to support Mr. Beach and Mr. Vollero's

compensation claims. Touradji now alleges that these notes were destroyed. In its Original Counterclaims, Touradji also alleged that Mr. Vollero had falsely represented that he had ended any association with Mr. Beach and remained at Touradji after Mr. Beach left to manufacture claims for Mr. Beach and Mr. Vollero's lawsuit. Therefore, the allegations that Mr. Beach and Mr. Vollero destroyed these documents and that Mr. Vollero spoke to counsel for Mr. Beach are not time-barred because they relate to transactions and occurrences that were included in Touradji's Original Counterclaims.

Mr. Beach and Mr. Vollero argue in the alternative that the new allegations under Touradji's Breach of Fiduciary Counterclaim do not state a claim. A claim for breach of fiduciary duty against an employee is available "only where the employee has acted directly against the employer's interests – as in embezzlement, improperly competing with the current employer, or usurping business opportunities." *Veritas Capital Management, L.L.C. v Campbell*, 82 AD3d 529, 530 (1st Dept 2011). Touradji's new allegations do establish such a claim. With respect to Regulation M, Touradji alleges that Mr. Beach and Mr. Vollero repeatedly and knowingly engaged in the violations to generate profits which Mr. Beach and Mr. Vollero are seeking to recover in this action. The allegations of the destruction of documents reflecting Mr. Beach and Mr. Vollero's efforts to fabricate compensation claims and Mr. Vollero's undisclosed discussion's with Mr. Beach's counsel also establish a claim that Mr. Beach and Mr. Vollero had acted directly against Touradji. In light of the rule that leave to amend should be freely given, the court will allow Touradji to amend Count One (Breach of Fiduciary Duty against Gentry Beach and Robert Vollero) to reflect the new allegations.

D. Defamation

Mr. Beach and Mr. Vollero argue that Touradji's proposed amendment to its defamation claim is without merit. In an action for defamation, "the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally."

CPLR 3016 (a). "The complaint also must allege the time, place and manner of the false statement and to specify to whom it was made." *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999). Touradji's new allegations – that Mr. Beach caused a sham report to be provided to Amaranth and that Mr. Beach and Mr. Vollero stated that neither of them were ever involved with a private equity investment – fail to state a claim for defamation. Touradji has not alleged the place where any of the alleged statements were made and the alleged sham report is not even a statement by Mr. Beach or Mr. Vollero. Touradji had failed to make a proper defamation claim from the outset and has failed to properly amend its defamation claim. Therefore, Count Five of Touradji's proposed amendments (Defamation Against Gentry Beach, Robert Vollero and the Vollero Beach Funds) is denied.

E. Aiding and Abetting Fraud

A claim for aiding and abetting fraud must allege "(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud." *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 (1st Dept 2009). Mr. Beach and Mr. Vollero allege that Touradji has failed to plead two of the required elements in its aiding and abetting fraud cause of action: knowledge and substantial assistance.

Touradji alleges that Mr. Beach was aware that the oil and gas properties that Gary Mr. Beach contributed to Playa had no value. Touradji further alleges that Mr. Beach assisted

this fraud by encouraging Touradji to enter into the transaction with Gary Beach and invest capital, and by misrepresenting the value of Playa. Therefore, with respect to Mr. Beach, Touradji has alleged the elements of knowledge and substantial assistance.

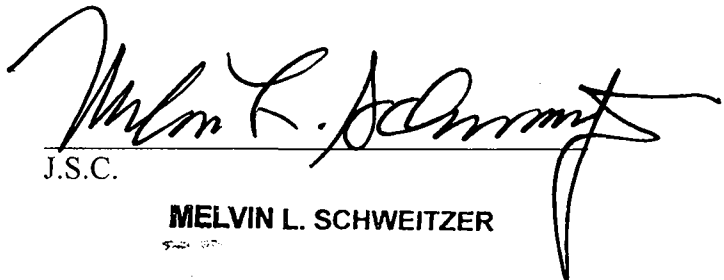
With respect to Mr. Vollero, Mr. Beach and Mr. Vollero are correct. Touradji only alleges that Mr. Beach acted in concert with Mr. Vollero, but mentions nothing as to Mr. Vollero's knowledge or assistance. Therefore, Touradji fails to state a claim for aiding and abetting fraud against Mr. Vollero. Count Eleven (Aiding and Abetting Fraud Against Gentry Beach and Robert Vollero) is denied with respect to the claim against Mr. Vollero.

Accordingly, it is

ORDERED that defendants' motion for leave to file its amended and supplemental counterclaims and answer is granted except that its motion to amend count five and count eleven, with respect to Robert Vollero is denied.

Dated: April 16, 2014

ENTER:


J.S.C.
MELVIN L. SCHWEITZER