

AQ Asset Mgt. LLC v Levine

2014 NY Slip Op 32935(U)

November 12, 2014

Supreme Court, New York County

Docket Number: 652367/2010

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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AQ ASSET MANAGEMENT LLC (as Successor to Artist
House Holdings Inc.), ANTIQUORUM, S.A., ANTIQUORUM
USA, INC. and EVAN ZIMMERMANN,

Plaintiffs,

Index No. 652367/2010

-against-

DECISION & ORDER

MICHAEL LEVINE, HABSBERG HOLDINGS LTD.
and OSVALDO PATRIZZI,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

Defendants Habsburg Holdings (Habsburg) and Osvaldo Patrizzi (Patrizzi, collectively with Habsburg, Sellers) move (Motion Sequence 041), pursuant to CPLR 3025(b), to serve a second amended answer with new counterclaims and cross-claims. Plaintiffs AQ Asset Management, LLC (AQ), Antiquorum, S.A., (ASA), Antiquorum USA, Inc. (AUSA) and Evan Zimmerman (Zimmerman, collectively with AQ, ASA, and AUSA, plaintiffs) and defendant Michael Levine (Levine) oppose.

Background

This action arises out of the sale by the Sellers of 50% of the capital stock of four companies comprising an auction house for valuable watches known as Antiquorum. The buyer in the transaction was Artist House Holdings, Inc. (AH), predecessor in interest to plaintiff AQ Asset Management LLC (AQ). This case, which has generated 45 motions, has been twice to the Appellate Division.¹ The facts will not be repeated in detail here.

In support of the motion to amend, the Sellers submit a proposed second amended answer (Doc 1712, Proposed Pleading). The motion was made after the 2014 AD Dec, which reinstated the following causes of action:

¹ The reader's familiarity with this court's decisions filed April 1, 2013 (Doc 533, 2013 Dec), January 17, 2014 (Doc 1241, Jan 2014 Dec), and August 28, 2014 (Doc 1690, Aug 2014 Dec) as well as the Appellate Division's decisions, dated July 10, 2014 (2014 AD Dec) and October 13, 2013 (2013 AD Dec) is assumed. The 2013 and 2014 AD Decs are reported at 111 AD3d 245 and 119 AD3d 457, respectively.

- 1) 13th counterclaim (CC) (contained in Doc 48) seeking a constructive trust against Zimmerman and ASA, repled as the 18th CC (Proposed Pleading ¶¶ 197-210);
- 2) the first 3rd CC (there were two 3rd CCs) against co-defendant Levine alleging breach of fiduciary duty contained in the Seller's answer to Levine's interpleader complaint (Doc 49), now repled as the 13th Cross Claim (CrC) against Levine (Proposed Pleading, ¶¶323-339); and
- 3) the 1st through 5th causes of action for breach of fiduciary duty in the Sellers' 4th party complaint against Levine (Doc 47), now repled as the 14th through 18th CrCs against Levine (Proposed Pleading, ¶¶ 34-382).

The Sellers had appealed this court's order dismissing these claims on April 18, 2013. Doc 548. On May 6, 2013, while the appeal was pending, the Sellers filed an amended answer (Amended Answer, Doc 605). In a footnote, relating to the 13th CC (item 1 in the above list), the 2014 AD Dec noted that Zimmerman and ASA did not "contend on appeal that the elements necessary for imposition of a constructive trust are not satisfied."

In a May 14, 2014 stipulation, signed by the attorneys for all parties to the action, the Sellers discontinued with prejudice the 3rd CC in their Amended Answer against AQ, which asserted a claim for indemnification. Amended Answer, ¶¶ 72-78. The same claim is asserted in the Proposed Pleading. Proposed Pleading, 3d CC ¶¶ 72-78.

Discussion

In opposition to the motion to amend, plaintiffs argue that: 1) the reinstated claims are inconsistent with claims asserted in the Amended Answer; 2) the Sellers have not stated a claim for constructive trust against ASA and Zimmerman; and 3) the claim discontinued by stipulation cannot be maintained

A. Inconsistent Theories

Amendments may be granted freely, at any time, so long as there is no prejudice. CPLR 3025; *Murray v City of New York*, 43 NY2d 400 (1977)(motion to amend may be granted at any time, even on appeal from final judgment, in absence of prejudice). Moreover, fraud and breach of contract may be

pleaded inconsistently. *Merrill Lynch v Chipetine*, 221 AD2d 284 (1st Dept 1995); *see also, Farash v Sykes Datatronics, Inc.*, 59 NY2d 500, 503-504 (1983)(alternative theories may be pled). However, an amendment should be denied where it is palpably insufficient or clearly devoid of merit. *Perotti v Becker, Glynn, Melamed & Muffy, LLP*, 82 AD3d 495, 498 (1st Dept 2011).

Plaintiffs misconstrue the cases they cite on page three, first paragraph, of their opposing brief, in which they argue that theories inconsistent with an original pleading cannot be asserted in an amended pleading. The cited authorities stand for the proposition that it is *too late* to request an amendment to assert a new theory in the face of a motion for summary judgment. *Brunetti v Musallam*, 59 AD3d 220, 223 (1st Dept 2009)(on summary judgment motion, plaintiff denied amendment to raise new, inconsistent theory of liability); *Ehrenspeck v Spear, Leeds & Kellogg, L.P.*, 51 AD3d 409 (1st Dept 2008)(same holding); *Peso v American Leisure Facilities Mgmt. Corp.*, 277 AD2d 48 (1st Dept 2000)(same holding). This is because it is prejudicial to bring in new theories when discovery is complete and summary judgment motions have been made.

Here, the alleged new theories were in defendants' original pleadings.² Discovery is not complete and summary judgment motions have not been made. Thus, the reinstated claims are not new, surprising or prejudicial. Moreover, the Appellate Division found the claims meritorious when they ruled that they should be reinstated, except, perhaps, for the suggestion that plaintiffs had not raised on appeal the lack of essential elements necessary to sustain the 13th CC for constructive trust against Zimmerman and ASA.

B. Constructive Trust against ASA & Zimmerman – Proposed 18th CC

The court will consider the merit of the constructive trust claim (now the proposed 18th CC), which has been raised on this motion, based upon the Appellate Division's suggestion that it may be infirm. The

² The only substantive difference is in ¶330 of the 13th CrC against Levine, which alleges that sales of the *Sellers'* inventory in excess of CHF 16,000,000 were to be paid to the Sellers. Proposed Pleading, ¶330. In the prior pleading, the allegation was that the Sellers were to receive this money from the sale of *ASA's* inventory. Doc 49, ¶ 139. Thus, the second amended answer must refer to ASA's inventory, as that is the claim that was reinstated by the Appellate Division and the Seller's motion is posited on leave granted by the Appellate Division. The Sellers do not explain why they made this substantive change. Moreover, pursuant to the parties' agreement, the inventory to be sold belonged to Antiquorum, not the Sellers, who were stockholders of the Antiquorum entities.

2014 AD Dec said that the claim should be reinstated because it was dismissed based upon an incorrect theory, i.e., that it required the court to enforce an illegal contract.

As previously mentioned, the Sellers sold 50% of the stock of the four Antiquorum companies to AH, predecessor to plaintiff AQ. In addition to the \$30 million purchase price, ASA was to pay for plaintiff Antiquorum's inventory on hand with a promissory note in the amount of 16 million Swiss Francs (CHF) payable to an undetermined party within 6 months, or Patrizzi was to pay that amount "to any stockholder which is entitled thereto." According to the Sellers, 16 million CHF from the sale of inventory was to be paid to Habsburg, and Patrizzi would receive any funds from the sale of inventory above that amount. ASA never signed the 16 million CHF note, and the Sellers claim they received nothing for the inventory. Pursuant to a separate consulting agreement, Patrizzi was to continue on as CEO for AH for up to three years, at AH's discretion, and to receive half of its stock if he complied with his consulting agreement.

Also relevant here is that Zimmerman and Patrizzi had an agreement, dated January 23, 2006, drafted by Levine (Distribution Agreement), to split Patrizzi's portion of the inventory proceeds with Zimmerman. In addition, the Distribution Agreement gave Zimmerman stock in Antiquorum. Patrizzi now claims that the terms of the Distribution Agreement were misrepresented to him by Zimmerman and Levine, both attorneys who had represented the Sellers, and that it was explained to him by them because he cannot read English well. Further, the Sellers claim that they were unaware that Zimmerman and Levine made a side agreement to share Zimmerman's portion of the inventory proceeds.

In August 2007, Zimmerman voted shares of the Antiquorum companies held in escrow by Levine, in concert with ASA, to remove Patrizzi and Habsburg from AH's board of directors and to remove Patrizzi as CEO of AH. Zimmerman then became CEO in Patrizzi's stead.

With this background in mind, the factual basis for the constructive trust claim against Zimmerman and ASA is that in the Fall of 2010, Levine transferred \$2 million from the escrow account to ASA and/or Zimmerman (Transfer). The Transfer was the return of \$2 million that had been transferred by ASA to Levine, as escrowee, in December 2006. The initial payment to Levine was made by Leo Verhoven, then comptroller and a principal of Habsburg, at a time when Patrizzi was CEO of AH. In 2007, Verhoven asked

Levine to send the \$2 million back, stating that it was for SPA expenses, not inventory proceeds. In 2008, Levine asked the Sellers, ASA and Zimmerman whether the \$2 million could be returned to ASA. ASA and Zimmerman consented; the Sellers objected. Levine made the Transfer to ASA and/or Zimmerman in October 2010, over the Sellers' objections. The Sellers claim that the Transfer was wrongful because the \$2 million was proceeds from the sale of inventory, to which they are entitled.

Plaintiffs urge that the claim for constructive trust against ASA and Zimmerman should not be permitted because it lacks merit as a matter of law. They raise the following grounds: 1) ASA and Zimmerman did not have a fiduciary relationship with the Sellers at the time of the Transfer in 2010; 2) Levine made the Transfer, not ASA or Zimmerman; 3) the Transfer was not made in reliance upon any promise to the Sellers by ASA and Zimmerman; 4) ASA and Zimmerman were not unjustly enriched because the Transfer was the return of ASA's own money; 5) the Appellate Division held that Levine did not engage in fraud when he received the \$2 million initially, in 2006, although the plaintiffs admit that the Appellate Division held that plaintiffs have a claim against Levine for breach of his fiduciary duty in making the Transfer in 2010; and 6) unjust enrichment does not lie because the Sellers' right to inventory proceeds is subject to a contract for which there is an adequate remedy at law.

The elements necessary for the imposition of a constructive trust are a confidential or fiduciary relationship, a promise (express or implied), a transfer in reliance thereon, and unjust enrichment. *Bankers Sec. Life Ins. Soc'y v Shakerdge*, 49 NY2d 939 (1980); *Abacus Fed. Sav Bank v Lim*, 75 AD3d 472, 473 (1st Dept 2010). However, the elements are not rigidly applied and a constructive trust can be imposed to satisfy the demands of justice even in the absence of a promise or a transfer in reliance upon it. *Kaufman v Cohen*, 307 AD2d 113, 127 (1st Dept 2003). "Unjust enrichment ... does not require the performance of any wrongful act by the one enriched." *Simonds v Simonds*, 45 NY2d 233, 242 (1978). An innocent party may be a constructive trustee. *Id.* What is required is that the circumstances are such that, in equity and good conscience, the party should not retain it. *Id.*

Applying these principles here, the 18th Proposed CC does not state a cause of action and the court denies leave to include it in the Sellers' second amended answer. The sense of the claim is that Zimmerman

and ASA knew that the Transfer was inventory proceeds, Levine should not have given it to them, and it would be unjust for them to retain the money.³ However, the 2014 AD Dec held that Levine could not be held liable for breach of contract for making the Transfer because the SPA did not require Levine to hold inventory sale proceeds in escrow, which were to be paid for by a note from ASA or by Patrizzi. Hence, it cannot be said that it would be unjust for Zimmerman or ASA to receive inventory proceeds from Levine that should never have been placed in escrow in the first place. Zimmerman and ASA did not have a fiduciary relationship with the Sellers when the Transfer was made. At the time, the Sellers had been ousted from management by Zimmerman and ASA, so that no relationship of trust and confidence existed. Nor can it be said that the Sellers are without a remedy absent imposition of a constructive trust. Their voluminous proposed pleading includes claims that Zimmerman and ASA aided and abetted Levine's breach of fiduciary duty; that ASA holds inventory proceeds, as opposed to just the \$2 million thereof, as constructive trustee for the Sellers; and that ASA and Zimmerman must account for monies they received that allegedly belong to the Sellers. In particular, the claim for aiding and abetting breach of fiduciary duty would afford the Sellers a full remedy. An aider and abettor can be held liable for the breach by the fiduciary. *Caprer v Nussbaum*, 36 AD3d 176, 193 (2d Dept 2006). Hence, ASA and Zimmerman could be held liable for aiding or abetting Levine's alleged breach of fiduciary duty in returning the \$2 million. In sum, as pleaded, the 18th CC does not include the elements of a claim for constructive trust against ASA or Zimmerman based on their receipt of the \$2 million Transfer from Levine's escrow account; the motion to amend is denied with respect to the proposed 18th CC.

C. Discontinued 3rd CC against AQ

Lastly, the Sellers may not assert the 3rd CC against AQ that they discontinued voluntarily with prejudice. CPLR 3217(a)(2) provides that a party asserting a claim may discontinue it "by filing with the

³ The Sellers argue that it was not the Transfer of \$2 million, but the transfer of the shares of stock to Levine that is the basis of this claim. Reply Affirmation of Kerry Gottlib, Doc 1741, ¶¶9). However, the Proposed Pleading reads: "Zimmerman and/or A-SA hold a portion [sic] the funds from the \$2 Million Transfer" and prays for "a constructive trust, on the funds from the \$2Million Transfer and upon any property purchased with such funds." Proposed Pleading, ¶¶ 209-210.

clerk of the court before the case has been submitted to the court or jury a stipulation in writing signed by the attorneys of record for all parties....” The discontinuance is without prejudice, “unless otherwise stated in the ... stipulation ... of discontinuance” CPLR 3217(c). Stipulations of settlement are favored by the courts and should not be overturned absent fraud, collusion, mistake or accident. *Hallock v State*, 64 NY2d 224, 230 (1984).

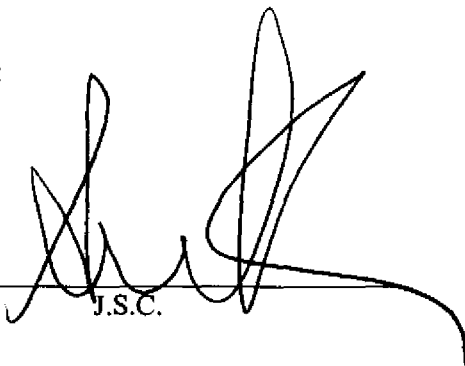
Here, the Sellers e-filed a voluntary discontinuance *with prejudice* of its 3rd CC against AQ. Doc 1563. It was signed by the attorneys for all parties. There is no showing of fraud, collusion, mistake or accident. The court will enforce the agreement and the second amended answer shall not contain the 3rd CC against AQ for indemnification. Accordingly, it is

ORDERED that the motion by defendants HABSBERG HOLDINGS LTD. and OSVALDO PATRIZZI to serve a second amended answer is granted to the extent set forth above and is otherwise denied; and it is further

ORDERED that said defendants shall serve the proposed second amended answer with counterclaims and cross-claims, modified as set forth in this decision, three (3) days from the e-filing of this decision and order, and the other parties shall answer the counterclaims and cross-claims within the time limited by the CPLR, and said defendants shall not grant extensions of time to answer or move with respect to the second amended answer without leave of court.

Dated: November 12, 2014

ENTER:



J.S.C.