

**Tishman Speyer China Fund L.P. v RMJM  
Worldwide, Inc.**

2015 NY Slip Op 30141(U)

January 30, 2015

Supreme Court, New York County

Docket Number: 653807/2012

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

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TISHMAN SPEYER CHINA FUND L.P.,

Index No.: 653807/2012

Plaintiff,

**DECISION & ORDER**

-against-

RMJM WORLDWIDE, INC., RMJM, INC., RMJM GROUP, INC., RMJM U.S. HOLDINGS, INC., THE HILLIER GROUP ARCHITECTURE, NEW JERSEY INC., THE HILLIER GROUP ARCHITECTURE PENNSYLVANIA, INC., RMJM ARCHITECTURE LIMITED, RMJM LIMITED, RMJM (SCOTLAND) LIMITED, DECLAN THOMPSON, ALEXANDER PETER MORRISON, SIR FRASER MORRISON, and RICHARD BAILES,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff Tishman Speyer China Fund L.P. moves, pursuant to CPLR 3025, for leave to file a Second Amended Complaint (the SAC) to assert additional claims against defendant Declan Thompson and to add Alexander Peter Morrison, Sir Fraser Morrison, and Richard Bailes (collectively, the Executives) as additional defendants. Thompson opposes the motion.

Plaintiff's motion is granted for the reasons that follow.

*I. Procedural History & Factual Background*

The court assumes familiarity with its order dated July 14, 2014 (the Default Order), which sets forth the procedural history of this action. *See* Dkt. 95. The Default Order granted plaintiff's motion for a default judgment against the corporate defendants (collectively, RMJM), and judgment was entered against them on January 2, 2015.<sup>1</sup> *See* Dkt. 113. That judgment was severed, and the action continued against Thompson.

<sup>1</sup> As disused at oral argument [*see* Dkt. 112 (11/6/14 Tr. at 5-6)], the corporate defendants were improperly removed from the caption. As ordered below, plaintiff is directed to notify the

Based on documents recently produced by Thompson,<sup>2</sup> plaintiff now seeks to amend the allegations against Thompson and to assert new claims against Thompson and the Executives. As Thompson only opposes the amendment as to him, leave to amend to add the Executives is granted. The allegations in the SAC that are pertinent to this motion are set forth below.

Between 2008 and 2010, RMJM provided architectural services to a non-party affiliate of plaintiff (Infinity TJ). In early 2011, the parties began corresponding about RMJM's payment. On February 22, 2011, non-party Peter Schubert, an RMJM employee, emailed plaintiff, carbon copying Thompson, agreeing that RMJM would be paid \$820,481.89 for its services. It was further agreed that this amount would be paid to RMJM in a "roundtrip payment",<sup>3</sup> which meant that: (1) plaintiff would make a payment of \$820,481.89 to RMJM; (2) Infinity TJ would then make a second payment of \$820,481.89 to RMJM; and (3) RMJM would repay \$820,481.89 to plaintiff. The first two steps occurred. The third did not.

Up to this point, this case concerned plaintiff's efforts to recoup its payment of \$820,481.89 from RMJM and to hold Thompson personally liable on a theory of fraudulent inducement. As noted earlier, plaintiff already has a judgment against RMJM, and the action has been proceeding against Thompson. However, based on documents produced by Thompson, plaintiff seeks to add new theories of recovery against Thompson and to add three other RMJM executive involved in the roundtrip payment. Plaintiff learned of those executives' identities

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requisite court offices that this action shall now bear the caption appearing at the top of this decision.

<sup>2</sup> The documents produced were originally demanded in the summer of 2013, but were unjustifiably not produced at that time. The delay was further exacerbated by numerous substitutions of counsel, discussed in detail in the Default Order. Consequently, defendants' argument that the motion should not be granted due to delay or prejudice is devoid of merit.

<sup>3</sup> The reasons for the roundtrip payment are unclear.

from the delayed discovery. Additionally, the discovery informed plaintiff of the context of RMJM's failure to remit plaintiffs' money – namely, that RMJM allegedly was a serial tax delinquent and, at the time of the roundtrip payment, had hundreds of thousands of dollars of tax liabilities. RMJM's situation was so dire, plaintiff alleges, that it only had funds to pay its taxes or its employees, but not both. Plaintiff claims that RMJM sought to procure and use the roundtrip payments from plaintiff and Infinity TJ to pay off its tax bills. Moreover, based on communications between RMJM and the tax and regulatory authorities (including the IRS, the New York State Department of Labor, and the New Jersey Division of Taxation), plaintiff alleges that Thompson and the Executives may be personally liable for some or all of RMJM's tax bill. Plaintiff, therefore, avers that RMJM's use of plaintiff's payment to pay its tax bill constitutes unjust enrichment as against Thompson and the Executives because they personally benefited from the conversion of plaintiffs' funds since by doing so, they eliminated a threat of personal tax liability. Plaintiff, therefore, seeks to hold Thompson and the Executives personally liable through four proposed causes of action: (1) fraud against Thompson; (2) fraud against the Executives; (3) unjust enrichment against Thompson and the Executives; and (4) tortious interference with contract against Thompson and the Executives.

## *II. Discussion*

“Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law. A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]. Prejudice to warrant denial of leave to amend requires some indication that the defendant has been hindered

in the preparation of [their] case or has been prevented from taking some measure in support of [their] position.” *McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012) (citations and quotation marks omitted). As noted earlier, the proposed amendment does not prejudice Thompson. Thus, the proposed amendment may only be denied if it is clearly devoid of merit. *See MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 500 (1st Dept 2010). It is not.

First, it should be noted that Thompson does not oppose the proposed fraud claims against the Executives. Fraud was originally alleged against Thompson, and Thompson has indicated he intends to challenge the merits of the fraud claims on a forthcoming motion to dismiss. *See* Dkt. 109 at 11 n.3. For the purposes of the instant motion, Thompson only opposes the new, proposed causes of action for unjust enrichment and tortious interference with contract.

“The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.” *Paramount Film Distributing Corp. v State*, 30 NY2d 415, 421 (1972). “[I]n order to adequately plead such a claim, the plaintiff must allege ‘that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.’” *Georgia Malone & Co. v Rieder*, 19 NY3d 511, 516 (2012), quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 (2011).

Thompson argues that the proposed unjust enrichment claim is clearly devoid of merit because the SAC does not allege that Thompson personally benefited from the roundtrip payment. Thompson is wrong. The SAC clearly alleges that Thompson used plaintiff’s extra payment to pay off RMJM tax’s liabilities, which, in turn, allegedly reduced Thompson’s personal tax liability. Though Thompson disputes his potential personal tax liability, this is a

question of fact requiring fact and expert discovery to resolve. Ergo, it is a question unsuitable for resolution on a motion to amend (and, perhaps, may not be possible to resolve on a motion to dismiss). Consequently, Thompson has not demonstrated that the proposed unjust enrichment claim against him is meritless.

As for the proposed claim for tortious interference, the elements of such a claim are “the existence of a valid contract between the plaintiff and a third party, defendant’s knowledge of that contract, defendant’s intentional procurement of the third-party’s breach of the contract without justification, actual breach of the contract, and damages resulting therefrom.” *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 (1996). The SAC alleges these elements.

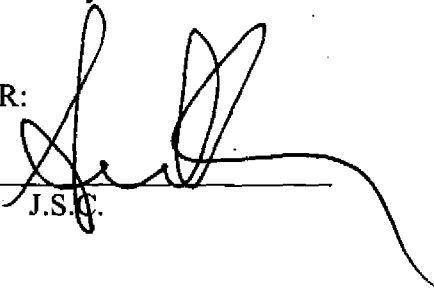
Thompson’s argument that he cannot possibly have personal liability for RMJM’s alleged breach of contract is without merit. Where, as here, a personal benefit was allegedly gained, separate and apart from the defendants’ duties as an employee, the employee may be personally liable. *See Petkanas v Kooyman*, 303 AD2d 303, 305 (1st Dept 2003). Thompson’s alleged personal tax liability meets that standard. An economic interest defense does not preclude the claim, as Thompson, again, allegedly acted out of his own personal financial interest, not solely to protect his interest in RMJM. *See White Plains Coat & Apron Co., v Cintas Corp.*, 8 NY3d 422, 426 (2007). Nonetheless, Thompson may indeed be able to defeat this claim by showing that he was not the reason the alleged roundtrip payment scheme was orchestrated or that there simply was no valid contract governing the roundtrip payment (a predicate to a tortious interference claim). However, the potential viability of this defense is not grounds to deny the proposed amendment since it is not patently devoid of merit. Accordingly, it is

ORDERED that the motion of plaintiff Tishman Speyer China Fund L.P. to file a proposed Second Amended Complaint is granted and such complaint must be filed within 3 days of entry of this order in the NYSCEF system; and it is further

ORDERED that the Second Amended Complaint must bear the caption appearing at the top of this decision and plaintiff's counsel must promptly inform the court's relevant offices of the change in the caption; and it is further

ORDERED that Alexander Peter Morrison, Sir Fraser Morrison, and Richard Bailes must be served within 30 days of entry of this order and once they have answered the complaint, the parties shall promptly call the court to schedule a discovery conference.

Dated: January 30, 2015

ENTER:   
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J.S.C.