

Reich v Nole

2015 NY Slip Op 30594(U)

April 17, 2015

Sup Ct, New York County

Docket Number: 650002/2013

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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ALEXANDER REICH

Plaintiff,

DECISION and ORDER

- against -

Index No. 650002/2013
Motion Seq. No. 002

SAM NOLE, MUSIC MEDIA, LLC and MYSTERY
RECORDS, LLC,

Defendant.

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SALIANN SCARPULLA, J.:

In this action to recover a debt, plaintiff Alexander Reich (“Reich”) moves to amend his complaint by an order to show cause, and defendants Sam Nole and Mystery Records, LLC oppose plaintiff’s motion (collectively, the “defendants”).¹

On December 31, 2012, Reich commenced this action by filing a summons and complaint (“original complaint”). In the original complaint, Reich alleged that defendants received a loan in 2004 from third-party Rocky Horsford (“Horsford”) for \$300,000 and assented, jointly and severally, to repay the loan by June 30, 2006 and to acquire a life insurance policy for \$300,000 to benefit Horsford (“the agreement”). Reich alleged that defendants defaulted on the agreement when they did not pay back the loan and did not

¹ Defendant Music Media, LLC has neither appeared in this matter nor answered the summons and complaint.

acquire a life insurance policy to benefit Horsford and that on January 12, 2007 the defendants executed a Confession of Judgment in favor of Horsford.

Reich further alleged that he and Horsford entered into an agreement in October 2010 where Horsford agreed to pay Reich \$300,000, and to secure such a debt, Horsford assigned to Reich the debt that defendants owed him and the Confession of Judgment. He also claimed that defendants were made aware of this assignment on or around September 22, 2011, and at that time, Reich demanded payment from the defendants of the debt to Horsford. Reich maintained that defendants have not repaid the debt and have refused to pay the debt, and he sought judgment against the defendants.

Reich now moves to amend the original complaint “to correct errors therein.” The errors that Reich seeks to correct are as follows: (1) Paragraph 5 of the original complaint provides that in October 2010 Horsford agreed to pay Reich \$300,000. Reich claims that the original agreement was actually entered into on July 30, 2010, and the parties subsequently entered into another agreement bearing the date October 28, 2010; (2) Reich also seeks to amend the amount listed in Paragraph 5 of the complaint to \$343,900, which was allegedly agreed to between Reich and Horsford in the October 28, 2010 agreement; and Paragraph 7 of the original complaint alleges, “Defendants were advised of the assignment on or about September 22, 2011.” Reich seeks to amend this date to September 26, 2011 and to note that the defendants were advised of the assignment by the Reich’s attorney.

The defendants oppose Reich's motion to amend "on both procedural and substantive grounds." First, defendants claim that Reich's moving papers are deficient on a number of grounds related to not having an affidavit of merit and to having an improper verification. Second, defendants argue that Reich's motion is deficient because "it fails to set out the documents it 'refers' to." This argument relates to the fact that Reich's attorney described this as "an action seeking to recover on a note," when defendants claim that "there is no note and no note has ever been produced by the plaintiff."² Defendants also argue that "the moving papers are devoid of any copy of any properly prepared and executed assignment," and that the amendment of the complaint is improper because the October 2011 agreement is not signed by Reich. Finally, defendants argue that allowing Reich to amend the complaint at this date will prejudice them.

Discussion

"Leave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay." *See Fahey v. Cnty. of Ontario*, 44 N.Y.2d 934, 935 (1978) (citing CPLR § 3025[b]; *Sindle v. New York City Transit Auth.*, 33 N.Y.2d 293, 296-97 [1973]). In making such a motion, "plaintiff need not establish the merit of its

² In Paragraph two of the Affirmation in Support of Motion, Reich states that the action "is evidenced by a Confession of Judgment executed by defendant SAM NOLE on his own behalf and on behalf of the two corporate defendants (Exhibit 'A')." However, as defendants correctly note, Exhibit A is a copy of the original complaint and not a Confession of Judgment.

proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.” *MBIA Ins. Corp. v. Grestone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dep’t 2010) (citation omitted).

Here, Reich seeks to amend his complaint to add an additional agreement between third-party Horsford and Reich, as well as an additional amount contained in the subsequent agreement. Reich also seeks leave to amend the date on which the defendants became aware of the assignment and to note that defendants became aware of the assignment through Reich’s counsel. The proposed amendments are straightforward and should normally be granted as a matter of course.

However, although Reich alleges that the subsequent agreement he seeks to reference in the amended complaint states that Horsford agreed to pay Reich \$343,900 in accordance with the October 28, 2010 agreement, the Court notes that this document does not state the foregoing. *See* Affirmation in Support of Motion, Ex. F ¶ 4 (“Horsford will pay to Reich the sum of \$246,700.00, representing return of his capital investment, profit of \$50,000.00, \$25,000.00 to be paid on a separate debt and \$21,700.00 representing interest due on a separate debt.”). Thus, Reich has failed to submit adequate support for the proposed amendment, and I therefore deny Reich’s motion to amend with leave to renew in accordance with the foregoing.

I note that defendants’ oppose Reich’ motion for leave to amend, in part, on grounds that are more appropriate for a motion to dismiss rather than an opposition to a

motion for leave to amend, including raising issues with portions of the complaint that Reich is not seeking to amend. To the extent defendants argue procedural deficiencies in Reich's moving papers, those may be cured in the renewed motion.³

In accordance with the foregoing, it is

³ Defendants also argue that they will be prejudicial because the motion to amend is being made deep into discovery. "Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment." *Valdes v. Marbrose Realty*, 289 A.D.2d 28, 29 (1st Dep't 2001). However, lateness alone will not justify a denial for leave to amend; instead, denial would be warranted if the delay in making the amendment was accompanied by serious prejudice to the side opposing the amendment. *See Jacobson v. Croman*, 107 A.D.3d 644, 645 (1st Dep't 2013) (quoting *Edenwald Contr. Co. v. City of New York*, 60 N.Y.2d 957, 959 [1983]). Defendants have failed to state what prejudice—beyond the fact that the proposed amendment is occurring later than when they would have hoped—they would face should leave to amend be granted. Moreover, it is difficult to imagine what prejudice defendants would face considering that Reich seeks only to change the date and amount of a third-party agreement executed in connection with the confession of judgment, the date on which the defendants allegedly became aware of the assignment of the confession of judgment to Reich, and to note that the defendants allegedly became aware of the assignment from Reich's counsel.

ORDERED that the plaintiff's motion for leave to amend the complaint herein is denied without prejudice to renew.

This constitutes the decision and order of this Court.

Date: New York, New York
April 17, 2015

ENTER:

A handwritten signature in black ink, appearing to be 'S', is written over a horizontal line. The signature is enclosed within a hand-drawn oval.

Saliann Scarpulla, J.S.C.