

Dart Direct, Inc. v Urban Express/NJ LLC
2015 NY Slip Op 30879(U)
February 24, 2015
Sup Ct, New York County
Docket Number: 652838/11
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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DART DIRECT, INC., and JO JO W INC.,

Plaintiffs,

DECISION AND
ORDER

-against-

Index No.
652838/11

URBAN EXPRESS/NJ LLC, EARLYBIRD
DELIVERY SYSTEMS, LLC and URBAN
EXPRESS ASSEMBLY LLC,

Defendants.

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URBAN EXPRESS/NJ LLC, EARLYBIRD
DELIVERY SYSTEMS, LLC, and URBAN
EXPRESS ASSEMBLY LLC,

Third-Party
Index No.
590945/11

Third- Party Plaintiffs,

-against-

TODD WEISS and GREGG WEISS,

Third-Party Defendants.

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HON. ANIL C. SINGH, J.:

Motion sequence 006 and 007 are consolidated for disposition.

In motion sequence 006, defendants/third-party plaintiffs move for an order:

- a) dismissing any and all contractual claims asserted by plaintiff Dart Direct, Inc., based upon its alleged lack of standing; b) dismissing any and all contractual

claims asserted against defendants Earlybird Delivery Systems, LLC and Urban Express Assembly LLC because they are not parties to the contracts at issue; c) amending the caption to correct the spelling of third-party defendant Greg Weiss' name; d) for leave to amend defendant/third-party plaintiffs' answer and counterclaims pursuant to CPLR 3025(b); and e) for sanctions against plaintiffs. Plaintiffs and the third-party defendants oppose the motion.

In motion sequence 007, plaintiffs and the third-party defendants move for an order pursuant to CPLR 2004(a) extending the filing date of the Note of Issue to May 20, 2015; and b) for attorneys' fees and costs as a sanction. Defendants oppose the motion.

Plaintiffs Dart Direct, Inc. ("Dart" or "Dart Direct") and Jo Jo W, Inc. ("Jo Jo") commenced the instant action by filing a summons and complaint against defendants Urban Express/NJ LLC ("Urban Express"), Earlybird Delivery Systems, LLC ("Earlybird"), and Urban Express Assembly LLC ("Assembly") on October 17, 2011. The complaint alleged the following facts.

Plaintiffs and defendants are in the same line of business – namely, providing delivery and assembly services for sports equipment. On November 24, 2008, Dart and Urban Express entered into a written purchase agreement. Pursuant to the purchase agreement, Dart conveyed, sold and assigned to Urban

Express certain accounts identified on a schedule to the purchase agreement. The agreement also contained a provision permitting Urban Express to use certain proprietary source code, as well as a provision not to compete. In January 2010, Dart assigned to Jo Jo its right to receive payments pursuant to the purchase agreement and advised defendants that all payments due to Dart pursuant thereto should be made to Jo Jo.

The complaint alleged that defendants failed and refused to pay plaintiffs their full contractual ten percent share of monies invoiced to and collected from the accounts.

The complaint alleged one cause of action for a declaration that defendants were required to pay plaintiffs ten percent of the monies invoiced to and collected from all of the accounts listed in the schedule to the purchase agreement, and four causes of action for breach of contract.

On November 16, 2011, defendants filed an answer, counterclaims, and a third-party complaint. The first counterclaim alleged breach of contract. The second counterclaim against plaintiffs and third-party defendants Todd Weiss and Greg Weiss was for fraud in the inducement. The third counterclaim sought a declaratory judgment regarding the rights of the parties under the purchase agreement and the commission agreement.

Plaintiff filed a first amended complaint on April 9, 2013. The amended complaint alleged the following facts.

Dart Direct began doing business in 1953 as a messenger and courier company founded and formed by Abraham Weiss. For 55 years, the company was family owned and operated, first by Abraham, then by his sons, Joel Weiss and Symore Weiss, and then by his grandsons Greg Weiss, Todd Weiss and Steven Weiss.

In 2002, Dart began to also provide delivery and assembly services. These services were in high demand, sales and revenues exceeded expectations and the business flourished. In 2007, Dart sold the messenger business, and the company focused all its sales, production and performance efforts on delivery and assembly services.

The company was sold to Urban Express shortly thereafter. Urban Express acquired Dart on November 24, 2008, purchasing the entire company, its operations, accounts, assets, customers, and proprietary computer software and business.

The amended complaint alleges that it was to the mutual benefit of the parties not to structure the sale with the traditional fixed purchase price, large “lump-sum” downpayment, and scheduled payments made on the remaining

balance. Instead, they structured the transaction as a 100% earn-out deal, with Dart being compensated based on revenues derived from business done by Urban Express from the date of the purchase. The parties agreed that Urban Express would pay Dart, as a commission, 10% of whatever the amount was that Urban Express received each month from the business it did with each of the companies specifically identified in the written contact as an account. For two-and-a-half years, Dart was paid per the agreement. When defendants allegedly failed to pay the correct amount of commission, plaintiffs commenced the instant action.

Defendants filed a first amended answer, counterclaims, and third-party complaint on May 8, 2013.

Discussion

We begin by addressing the branch of defendants' motion for leave to amend the answer, counterclaims, and third-party complaint. Specifically, defendants are seeking to raise certain affirmative defenses; to allege in detail claims against Jo Jo, as well as the third-party defendants, for breach of the purchase agreement and commission agreement; and to add a claim for a declaratory judgment in connection with certain terms of the contracts that are alleged to be ambiguous.

Defendants contend that plaintiffs will sustain no prejudice or surprise if the

Court grants leave to amend, for the facts and circumstances surrounding defendants' revised claims and affirmative defenses stem from documents exchanged and depositions conducted and all arise out of the same underlying issue at dispute in the complaint. Defendants assert that discovery is not complete, so the proposed amendments would not prejudicially hinder any parties in the preparation of their cases.

In response, Dart, Jo Jo, and the third-party defendants assert that there is absolutely no newly-discovered evidence that warrants any amendment. On the contrary, plaintiffs point out that the agreements and facts purportedly giving rise to the proposed new claims have been in the possessions of the defendants as early as 2008, and no later than 2011, and appear on the face of those documents. For example, plaintiffs note that the assignments, made in January 2010, were alleged in paragraph 26 of the 2011 complaint and paragraph 19 of the first amended complaint. Plaintiffs contend that whatever defenses and claims the defendants had – and who they could bring them against – was well-known to them, and could and should have been asserted when defendants filed their initial pleading in November 2011, or their first amended pleading in 2013. Further, plaintiffs assert that discovery is now complete.

While leave to serve an amended pleading shall be freely granted, such a

motion is committed to the sound discretion of the trial court, and the resulting determination will not be lightly set aside (see CPLR 3025(b)).

Where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay (Oil Heat Institute of Long Island Insurance Trust v. RMTS Associates, LLC, 4 A.D.3d 290, 293 [1st Dept., 2004]; see also Napoli v. Canada Dry Bottling Co. of New York, Inc., 166 A.D.2d 696, 697 [2d Dept., 1990] (plaintiffs permitted almost four years to elapse, during which discovery proceeded on the original legal theories, before they sought leave to serve a second amended complaint); Lind v. Greenspan, 78 A.D.3d 555 [1st Dept., 2010] (undue prejudice to respondent caused by petitioners' long delay in moving to amend, for which petitioners offered no excuse); Brunetti v. Musallam, 59 A.D.3d 220 [1st Dept., 2009] (denying plaintiff's motion to amend to add new damages claims where plaintiff provided no valid reason for waiting until the eve of trial to propose the amendments); Wassfam L.L.C. v. Palacios, 107 A.D.3d 493 [1st Dept., 2013] ("No excuse, much less a reasonable one, was provided for the extended delay in moving to amend one year after the filing of the answer and after the note of issue had been filed"); Van Damme v. Gelber, 111 A.D.3d 408 [1st Dept., 2013] (party did not move to amend his pleadings to assert a new theory until 3 ½ years after he filed his original pleadings, after discovery

had concluded, and the note of issue filed); Excelsior Insurance Company v. Antretter Contracting Corp., 262 A.D.2d 124 [1st Dept., 1999] (“Where the amending party should have been aware of the affirmative defense when it served its answer, but gave no reasonable excuse for waiting until the eve of trial, amendment should have been denied”); and James-Smith v. Rottenberg, 32 A.D.2d 792 [2d Dept., 1962] (“all the facts which might form the basis of the affirmative defenses occurred prior to the making of the contract and were or should have been known to respondent at least by the time the complaint was served”)).

After careful consideration, the Court finds that defendants have offered no valid reason for the lengthy delay in moving to amend the pleading. We will not countenance time and effort wasted in preparing a case against a pleading from which significant material has been needlessly withheld. The contracts that are at the epicenter of this litigation were entered into by the parties more than six years ago. It is hard to fathom why the defendants waited until this late stage of the litigation to seek leave to amend their pleading.

Under such circumstances, the Court in its discretion will deny the application for leave to amend.

Defendants’ next contention is that all claims asserted by Dart should be

dismissed on the grounds that Dart does not have standing. Defendants assert that Dart assigned all of its rights and obligations under the purchase agreement and commission agreement to Jo Jo, so Dart no longer has standing to sue under those agreements.

“The Court of Appeals and lower appellate courts of this state have consistently held that pursuant to CPLR 3211(e), the failure to raise the defense of lack of standing in a motion to dismiss or answer results in the waiver of such defense” (Security Pacific National Bank v. Evans, 31 A.D.3d 278, 280-281 [1st Dept., 2006]). Based on this authority, we find that defendants’ failure to raise the issue of plaintiff’s lack of standing until two years after the first amended complaint was filed constitutes a waiver of that defense.

Defendants’ next contention is that plaintiffs’ claims for breach of the purchase and commission agreements asserted against Earlybird Delivery Systems, LLC and Urban Express Assembly LLC should be dismissed because those defendants are not parties to the agreements. Counsel argues that defendants who are not in privity of contract with the plaintiff cannot be sued for breach of contract. Only one of the defendant in this case – namely, Urban Express/NJ LLC – is a party to these agreements.

In opposition, plaintiffs contend that Earlybird does business as Urban

Express, and these entities admittedly assumed Urban Express' obligations to pay the commissions due under the purchase and commission agreements.

Plaintiffs point out that paragraph 24 of the first amended complaint specifically alleges that "Urban [Express] delegated to Earlybird and/or [Urban] Assembly its contractual obligations under the purchase agreement and commissions agreement to make the required payments to Dart" (Sash Aff., exhibit A). In paragraph 24 of the first amended answer, the Urban parties state: "Admit the allegations contained in paragraph 24 of the complaint" (Sash Aff., exhibit B). Plaintiffs contend that this admission, without more, establishes that the affirmative defense based on lack of privity is improper.

In reply, defendants raise the argument that, under the Statute of Frauds, any agreement to assume the debt of another must be in writing, but there is no such writing, note, or memorandum wherein Earlybird or Urban Express Assembly agreed to assume the obligations of Urban Express/NJ LLC under the purchase agreement or commission agreement.

We cannot consider defendants' argument based on the Statute of Frauds, as it is raised for the first time in their reply affirmation in support of their motion (Mulligan v. City of New York, 120 A.D.3d 1155, 1156 [1st Dept., 2014]).

In short, the court finds that there is an issue of fact regarding whether

Earybird does business as Urban Express. The issue is reserved for trial, so the motion to dismiss for lack of privity must be denied.

The third branch of defendants' motion is to amend the caption to correct the spelling of third-party defendant Greg Weiss' name. Plaintiffs do not oppose such amendment.

The final branch of defendants' motion seeks sanctions against plaintiffs based on counsel's alleged frivolous line of questioning during the deposition of Steven Moelk.

In short, the Court finds that the conduct alleged does not rise to a level sufficient to justify an award of sanctions.

Having addresses all of the issues raised in defendants' motion, we turn next to plaintiffs' motion.

The branch of the motion seeking an extension of the filing date of the note of issue to May 20, 2015, is denied in light of our denial of defendants' motion for leave to amend the complaint.

Finally, the Court in its discretion declines to award sanctions based on the alleged frivolous refusal of the defendants to stipulate to an extension of time to file the note of issue.

Accordingly, it is

ORDERED that defendants' motion (mot. seq. 006) is granted only to the extent that the caption shall be amended to correct the spelling of third-party defendant Greg Weiss from "Gregg" to "Greg", and the action shall bear the following caption:

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DART DIRECT, INC., and JO JO W INC.,

Plaintiffs,

-against-

Index No.
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URBAN EXPRESS/NJ LLC, EARLYBIRD DELIVERY SYSTEMS, LLC and URBAN EXPRESS ASSEMBLY LLC,

Defendants.

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URBAN EXPRESS/NJ LLC, EARLYBIRD DELIVERY SYSTEMS, LLC, and URBAN EXPRESS ASSEMBLY LLC,

Third-Party
Index No.
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Third- Party Plaintiffs,

-against-

TODD WEISS and GREG WEISS,

Third-Party Defendants.

-----X

and it is further


ORDERED that movant is directed to serve a copy of this order with notice

of entry on the County Clerk (Room 141B) and on the Clerk of the Trial Support Office (Room 158), who are directed to mark their records to reflect the amended caption; and it is further

ORDERED that plaintiffs' motion (mot. seq. 007) is denied in its entirety.

The foregoing constitutes the decision and order of the court.

Date: 4/24/15
New York, New York



Anil C. Singh