Scher v CMJ Holdings Corp.
2015 NY Slip Op 31468(U)
August 3, 2015
Supreme Court, New York County
Docket Number: 651858/2013
Judge: O. Peter Sherwood
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

---------- -X

JOHN SCHER and METROPOLITAN TALENT, INC.,

Plaintiffs,

-against-

CMJ HOLDINGS CORP., CMJ NETWORK, INC., RH ACQUISITION, INC., ROBERT K. HABER and JOANNE HABER,

Defendants.

---------- - -X

DECISION AND ORDER

Index No.: 651858/2013
Mot. Seq. No.: 003

O. PETER SHERWOOD, J.:

This case has been pending since May 2013. The plaintiffs were scheduled to file a note of issue on or before June 29, 2015. On May 15, 2015, plaintiffs filed the instant motion to amend their complaint for the second time and add Abaculi Media, Inc. ("Abaculi") as a party. Defendant CMJ Holdings Corp. ("Holdings") opposes the motion. The other defendants take no position.

The current complaint alleges plaintiffs Metropolitan Talent, Inc. ("Metropolitan") and its principal shareholder, John Scher, negotiated with defendants CMJ Network, Inc. ("Network"), a music publisher and promoter, and its principal, Robert Haber. The negotiations resulted in a letter of intent describing a plan in which Metropolitan would acquire certain of Network's assets and liabilities. That deal never came to fruition. During the period of the letter of intent, Metropolitan "extended financial accommodations" to Network, resulting in Network signing a variety of promissory notes payable to Scher (Amended Complaint [NYSCEF Doc. No. 34], ¶ 10). Network never paid off those notes. Plaintiffs also allege Network assigned various security interests to Metropolitan (*id.*, ¶ ¶ 15-16).

The Amended Complaint further alleges that, after Network's failure to pay on the notes, and after termination of the letter of intent with Metropolitan, the Habers negotiated an asset purchase

agreement between Network and Holdings. As part of that asset purchase agreement, Holdings assumed certain of Network's liabilities. Network's debts to the plaintiffs were not among them. Plaintiffs allege the price Holdings paid for Network's assets (in the form of cash and the assumption of liabilities) was not fair consideration, and therefore the transfer was fraudulent (Amended Complaint, ¶ 21-22).

Plaintiffs assert three causes of action in the Amended Complaint. The first is breach of contract based on Network's default under the notes. Plaintiffs also bring this claim against Holdings, alleging that the acquisition of Network's assets was a fraudulent transfer. Plaintiffs add that Holdings is a mere continuation of Network and thus is responsible for Network's debts to the plaintiffs (Amended Complaint, ¶ 30). In the second cause of action, plaintiffs allege fraud against all defendants based on the same fraudulent transfer. Finally, plaintiffs claim the transaction transferred assets which had been collaterally assigned to the plaintiffs, and so violated Article 9 of New York's Uniform Commercial Code (Amended Complaint, ¶ ¶ 37-39).

Plaintiffs now seek to amend their complaint again, to add allegations that on or about June 6, 2014, after this lawsuit was filed, Holdings transferred some of Network's assets to Abaculi Media, Inc. (Abaculi). Plaintiffs claim Holdings and Abaculi used the same employees, assets, and processes as Network (Second Amended Complaint, attached as Exhibit A to Pearl Aff, ¶ 29). Plaintiffs further allege that Network, and subsequently Holdings, were left as mere shell corporations, without significant assets (Second Amended Complaint, ¶ 30-31). Plaintiffs also seek to amend the second cause of action to allege that, as the transfer of assets from Network to Holdings was fraudulent, both that transfer and the subsequent transfer of the assets to Abaculi may be set aside pursuant to New York Debtor and Creditor Law section 278.

Motions for leave to amend pleadings should be freely granted unless prejudice or surprise would result, or if the proposed amendment is insufficient or patently devoid of merit (CPLR 3025[b]; see *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010] citing *Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 653 [1st Dept 2009]). Holdings claims it would be prejudiced, given the late date of the motion, as additional discovery would have to be performed, setting the case schedule back. Holdings also argues the proposed claims lack merit.

Prejudice to Holdings

Holdings claims the proposed amendments would prejudice the defendants because much of the already completed discovery would have to be repeated. Holdings also argues that additional discovery would have to be done regarding defendants' fraudulent intent, related to the plaintiffs' new allegations pursuant to New York Debtor and Creditor Law section 278. Holdings argues the plaintiffs were aware of the new facts alleged in the amended complaint as early as the summer of 2014, or, at the latest, by October of that year (approximately seven months before the filing of this motion). Holdings relies on *Oil Heat Institute of Long Island Insurance Trust v RMTS Associates, LLC, et al.,* for the premise that "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" (4 AD3d 290, 293 [1st Dept 2004][internal quotations omitted]).

Plaintiffs argue that the timing of this motion is reasonable, as they needed to take the deposition of Holdings' corporate representative to determine the status of Abaculi before moving to amend. While the deposition was originally noticed for September, 2014, it had been adjourned several times at Holdings' request to accommodate the designated representative's ill health. As of

April 22, 2015, the deposition had not been taken (*see* Amended Stipulated Status Conference Order filed April 22, 2015, NYSCEF Doc. No. 50). While plaintiffs concede additional discovery may be required if the motion is granted, plaintiffs contend it would still be more efficient to take the discovery in this matter than to initiate a separate suit against Abaculi. Plaintiffs also note the parties contemplated the potential addition of new parties as late as May 2015, as they had stipulated to a deadline for impleader concurrent with the end date for all disclosure (*id.*).

As to Holding's argument regarding discovery on the matter of defendants' fraudulent intent, plaintiffs already allege the transfer from Network to Holdings was fraudulent. Moreover, evidence of fraudulent intent is not necessary. Pursuant to New York Debtor and Creditor Law section 274, a conveyance may be fraudulent, "without regard to . . . actual intent."[1] If plaintiffs are successful in proving the transfer was fraudulent, Section 278 provides that:

> "Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser, (a) Have the conveyance set aside or obligation annulled . . . or (b) Disregard the conveyance and attach or levy execution upon the property conveyed."

Section 278(1) has no requirement of fraudulent intent on the subsequent purchaser's behalf. The only new issues raised in the proposed second amended complaint are whether Abaculi was a purchaser for fair consideration, and whether it had knowledge of the alleged fraudulent transfer

---

[1] 274 of the Debtor and Creditor law states:
"Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent."

from Network to Holdings. Plaintiffs allege that Abaculi was aware of the instant dispute and the existence of the fraud by Network and Holdings when it obtained the assets, and so may be reached pursuant to section 278.

While the requested amendment will require taking some additional discovery, the additional discovery is of limited scope, the delay was not undue, and the addition of new parties at this time was contemplated by the parties. Holdings is not significantly prejudiced by the amendment.

Procedural Issues

Holdings argues the motion is procedurally defective in that plaintiffs made the motion to amend pursuant to CPLR section 1003, and not 3025, the rule which governs motions to amend. Holdings relies on *Ospina v Vimm Corporation* to support its position (Opp at 7, citing 203 AD2d 440, 441 [2nd Dept 1994]). In that case, the Second Department held that "[t]he plaintiff's failure to seek leave pursuant to CPLR 3025(b) and CPLR 1003 to serve an amended summons and complaint purporting to join [another entity] as a party defendant is a jurisdictional defect" (*Ospina*, 203 AD2d at 441). However, in *Ospina*, the plaintiff had not moved to join the entity at all (*id.*). Here, while the plaintiffs do not explicitly say the motion is being made pursuant to CPLR 3025(b), plaintiffs do invoke that section, and the motion is presented as a motion to amend the complaint (Memo, ¶ 6). Holdings cites no case as support for a position that plaintiffs' failure to cite this particular provision is fatal to plaintiffs' motion.

Holdings also argues the motion should be denied because plaintiffs submitted a copy of their proposed second amended complaint with the moving papers, failing to provide a red-line version highlighting the proposed changes as required by CPLR 3025(b). It maintains that plaintiffs should not be allowed to cure this omission by attaching a red-line to their reply, which plaintiffs did

(Opp at 20). While "the function of a reply . . . is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion" (*Ritt by Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992]), the court has discretion to consider such an argument (*see Eujoy Realty Corp. v. Van Wagner Communications LLC,* 22 NY3d 413, 422 [2013] ["even if Eujoy had, in fact, presented a new legal argument about the lease to Supreme Court in a reply brief, neither that court nor the Appellate Division would have been prohibited from considering it"]). Similarly, the court may consider the red-line version submitted along with the reply, here. Holdings relies on *Karl's Plumbing & Heating Co., Inc. v Yevool, Inc.*, but that case is distinguishable, as the defendants there not only failed to provide a red-line, but also neglected to provide an affirmation or affidavit explaining the changes (NYLJ, 1202543284650, *2-3 [Sur Ct, Queens County 2012]). Those defendants also "unreasonably delayed" making the motion "for over two years" with no excuse (*id.* at *3). Here, while there was delay, it was not unreasonable, excessive, or prejudicial.

The Merits of the Proposed Amendments

Holdings argues the plaintiffs have not shown the amendments have merit.

A. Second Claim- Fraud

The second claim relies on allegations of a fraudulent transfer of assets from Network to Holdings. In the proposed second amended complaint, plaintiffs add that they are entitled to disregard the subsequent conveyance to Abaculi, pursuant to New York Debtor and Creditor Law section 278.

Holdings claims that amendment of the fraud claim should not be allowed because CPLR 3016(b) requires this claim be pled with particularity (Opp at 18). Holdings argues that plaintiffs

have failed to allege the specific assets acquired by Abaculi and the value of those assets, or to allege how Abaculi provided inadequate consideration for those assets (*id.*). However, plaintiffs are not alleging Abaculi failed the first prong of the test in Debtor and Creditor Law section 278. Plaintiffs do not allege Abaculi failed to provide fair consideration. Plaintiffs allege Abaculi failed the second prong of the test because Abaculi was aware of the allegations of fraud when it purchased those assets. Holdings does not claim that those allegations are insufficient.

B. First Claim- Breach of Contract

Holdings argues that while Abaculi is named in this claim as a "mere continuation" of Network and Holdings, it actually had a broader business than Network did (Opp at 12, Abaculi Website Printout, attached as Exhibit F to Pearl Affirmation). Holdings also contends that Holdings still exists, as Abast Holdings Corp. (Opp at 17, citing Pearl Aff [NYSCEF Doc. No. 52] at ¶ 7). Holdings argues, therefore, that Abaculi cannot be held liable as a "mere continuation" of Holdings. However, the first claim in the Second Amended Complaint does not allege Abaculi was a "mere continuation" of Network or Holdings (¶ 33). Plaintiffs allege Holdings was a "mere continuation" of Network, and that Abaculi "continues to operate the same business as that conducted by Network using the same assets" (*id.*). Plaintiffs do not argue that Abaculi has successor liability, but claim they may set aside the conveyance of the transferred assets to Abaculi, pursuant to New York Debtor and Creditor Law section 278, because Abaculi knew of the fraudulent transfer of Network's assets to Holdings when it purchased those assets (*id.*). That statute provides that a creditor may pursue fraudulently transferred assets to a subsequent purchaser unless that purchaser is "a purchaser for fair consideration without knowledge of the fraud at the time of the purchase" (Debtor & Creditor Law § 278).

C. Third Claim- Secured Interests in Certain Assets

The third claim asserts that Network, Holdings, and Abaculi violated the plaintiffs' collateral security interests pursuant to Article 9 of New York's Uniform Commercial Code. Plaintiffs allege they had a secured interest in "1) Sonic Bids renewal; 2) New Zealand government cultural affairs annual marketing deal; and 3) court-ordered distribution of Cable & Wireless bankruptcy distribution [, 4]) Canadian Heritage Trade and Investment Branch and Contract #45263698; and [5]) rVibe Purchase Order dated September 16th, 2009" (Second Amended Complaint, ¶ ¶ 15-16). Plaintiffs further allege that the asset transfer from Network to Holdings to Abaculi resulted in Abaculi "acquiring all of Network's assets" (*id.*, ¶ 28).

Holdings argues that the plaintiffs' third claim against Abaculi fails because: Abaculi was not a party to the transfer of assets from Network to Holdings; plaintiffs fail to allege how Abaculi violated plaintiffs' security interests; plaintiffs are estopped from bringing a claim based on the violation of a security interest, as the court previously held the agreement between Schor and Network was not a security agreement; and none of the assets transferred to Holdings and then Abaculi were assets in which plaintiffs claim a secured interest (Opp at 13-14). Holdings cites no authority for any of these arguments.

It appears Holdings is referring to an order in this case dated March 17, 2014, deciding defendants' motion to dismiss the original complaint in this action (NYSCEF Doc. No. 30). In that decision, Justice Schweitzer dismissed this cause of action as to the Habers and defendant RH Acquisition, but allowed the plaintiffs to amend it as against Network, to add allegations regarding the assignment of the security interest between the plaintiffs, and as against Holdings, "on a successor liability theory" (*id.* at 12). Plaintiffs seek to add Abaculi to this claim to pursue the

transferred assets (Second Amended Claim, ¶ 43). Plaintiffs have alleged that some of the transferred assets are the same assets in which they hold secured interests (*id.*, ¶¶ 42-44). The earlier decision does not prohibit this claim. While Holdings argues that no assets in which plaintiffs claim a secured interest were transferred to Abaculi, that is an issue of fact. Plaintiffs' allegations are sufficient at this juncture.

The Court has considered Holdings' remaining arguments and finds them to be without merit.

Accordingly, it is hereby

ORDERED that plaintiffs' motion to amend their complaint is GRANTED. Plaintiffs may file their Second Amended Complaint, and shall serve it upon Abaculi within ten days from the date of this order.

This constitutes the decision and order of the court.

DATED: August 3, 2015

E N T E R,

O. PETER SHERWOOD
J.S.C.