

**Simiele v Simiele**

2016 NY Slip Op 30797(U)

May 2, 2016

Supreme Court, Schuyler County

Docket Number: 2013-66

Judge: Eugene D. Faughnan

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At a Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Schuyler County Courthouse, Watkins Glen, New York, on the 2<sup>nd</sup> day of May, 2016.

PRESENT: HON. EUGENE D. FAUGHNAN  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF SCHUYLER

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GINA SIMIELE

Plaintiff,

-vs-

DECISION

Index No. 2013-66  
RJI No. 2013-0108

MARK SIMIELE and  
WINE AND GLASS TOUR, INC.

Defendants.

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APPEARANCES:

COUNSEL FOR PLAINTIFF:

THE CROSSMORE LAW OFFICE  
By: Edward Y. Crossmore, Esq.  
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Ithaca, NY 14850

COUNSEL FOR DEFENDANTS:

LECLAIR KORONA GIORDANO COLE LLP  
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Rochester, NY 14614

**EUGENE D. FAUGHNAN, J.S.C.,**

This matter comes before the Court this time on the Motion of Gina Simiele (“Plaintiff”) dated April 14, 2016 for leave to amend her Complaint pursuant to CPLR Rule 3025. In support of her request, Plaintiff has submitted a Notice of Motion, Affidavit of Edward Y. Crossmore, Esq. dated April 14, 2016 (with Exhibits A-G), and Memorandum of Law in Support. The Motion is opposed by Defendants, Mark Simiele and Wine and Glass Tour, Inc. (“W&GT”) who submitted an Attorney Affirmation of Steven E. Cole dated April 21, 2016 (with Exhibits A-E) and a Memorandum of Law in Opposition. The Court has deemed the Motion submitted, and ready for a Decision.

**Factual and Procedural Background**

Plaintiff and Defendant Mark Simiele are brother and sister, and the only shareholders in W&GT. The siblings own equal amounts of the non-voting stock, and Defendant Mark Simiele owns all of the voting stock. Since 2010, when Plaintiff left the business, Defendant Mark Simiele has been the sole director and President of W&GT, and runs the day to day operations.

Plaintiff commenced this action on March 20, 2013, as a derivative action on behalf of WG&T pursuant to Business Corporation Law §626(a). The complaint alleges that Defendant Mark Simiele breached his fiduciary duty to W&GT and that he misappropriated funds and corporate resources to his own personal use and benefit.

It appears that discovery commenced in approximately June, 2013. In early 2014, Defendants moved for a protective order seeking a confidentiality stipulation, and also seeking a discovery deadline of March 31, 2014. Plaintiff opposed the motion for the confidentiality agreement, and also cross moved for a conditional order of preclusion due to Defendants’ failure to respond to Plaintiff’s First Notice to Produce. Defendants had declined to provide responses without the confidentiality agreement being signed first. In a Decision and Order dated February 28, 2014, the Court denied Defendants’ application for a protective order and granted Plaintiff’s

cross-motion, and directed Defendants to respond to the First Notice to Produce within 30 days of that Decision and Order. The Court declined to set a discovery deadline for March 31, 2014.

The Court then held a Preliminary Conference on April 16, 2014, and following that conference directed that discovery was to be completed by July 1, 2014, and any motions would be returnable on September 26, 2014. Discovery continued, including several depositions, in the first half of 2014. The parties scheduled the depositions of Defendant Mark Simiele and Michelle Simiele, his wife, who apparently also acted as a bookkeeper for the company, to be conducted in early July, 2014. Although this was after the discovery deadline set by the Court, Defendant Mark Simiele was willing to go forward with the depositions, if Plaintiff supplemented her responses to interrogatories prior to the depositions. Plaintiff contended that she should not have to supplement her discovery responses as a condition to the depositions. The parties were unable to resolve those issues, and eventually, Plaintiff made a motion for an order directing the depositions of Mark Simiele and Michelle Simiele, without the condition of having to supplement Plaintiff's response to interrogatories. Defendant cross moved for dismissal of Plaintiff's allegations of a breach of fiduciary duty. By Decision and Order dated December 23, 2014, the Court granted Plaintiff's motion and denied Defendant's motion. The Court then extended the discovery deadline again, and ordered that depositions be completed by March 20, 2015. Plaintiff served her supplemental response to interrogatories on or about May 11, 2015.

After additional discovery, Plaintiff filed a motion on June 2, 2015 for an interlocutory order directing Defendant Mark Simiele to file an accounting regarding WG&T covering 2007-2013. Defendants opposed the motion and filed a cross motion for partial summary judgment, seeking to dismiss the claim for misappropriation of cash receipts. The motions were returnable on July 31, 2015. In the meantime, Defendant Mark Simiele filed a trial note of issue on July 13, 2015.

The Court rendered its Decision and Order on September 25, 2015 denying Plaintiff's motion for an interlocutory order for an accounting, and granted Defendants' motion for summary judgment dismissing the claim that Defendant Mark Simiele systematically removes

cash from WG&T operations. Plaintiff filed a motion to re-argue pursuant to CPLR Rule 2221(d). That motion was denied by the Court in a Decision and Order dated February 11, 2016. In the meantime, the Court also held another preliminary conference with the parties on November 23, 2015, and the matter was set down for trial for May 9, 2016. Upon re-assignment of this matter to the undersigned Justice, the case was scheduled for another conference on April 5, 2016, and at that point, Plaintiff's counsel informed the Court of Plaintiff's intention to file a motion to amend her complaint. A scheduling order was issued for deadlines for any such motion and Defendant's response.

Plaintiff filed the current motion seeking leave of Court to file an amended complaint. Plaintiff's motion includes the proposed Amended Complaint, in which Plaintiff seeks to add allegations set forth at paragraphs 22a through 22q. In this motion, Plaintiff submitted the affidavit of Mr. Crossmore, with attached Exhibits.

Plaintiff contends that the "bulk of the allegations plaintiff seeks to add to her Amended Complaint were raised with particularity on plaintiff's motion of June 2, 2015 for an interlocutory order directing Mark Simiele to account." (Crossmore 4/14/16 Affidavit ¶ 7) Further, the affidavit avers that "none of the allegations contained in the proposed Amended Complaint are new. The defendant Mark Simiele has been aware that the plaintiff was asserting these allegations since at least July 17, 2015.... The defendant Mark Simiele would not be prejudiced or surprised by the grant of leave to amend the complaint." (Crossmore 4/14/16 Affidavit ¶13)

Defendant opposes the motion, stating that Plaintiff has proffered no explanation for the delay in seeking to amend, and that the allegations she seeks to add now are the same allegations she unsuccessfully raised in her prior motion for an interlocutory order for an accounting. Defendant argues that the allegations Plaintiff seeks to add about the company's declining cash receipts would be part of the claim that Mr. Simiele misappropriated cash from the company, and that claim has already been dismissed by the Court.

## Discussion

Under CPLR Rule 3025(b) a party may amend their pleading with leave of court, which shall be freely given upon such terms as may be just, and any motion to amend shall be accompanied by the proposed amended pleading. “While leave to amend a complaint or supplement a bill of particulars ordinarily should be freely granted (*see Berger v Water Commrs. of Town of Waterford*, 296 A.D.2d 649, 649, 744 N.Y.S.2d 562 [2002]; *Gile v. General Elec. Co.*, 272 A.D.2d 833, 835, 708 N.Y.S.2d 188 [2000]), ‘[l]ateness in making a motion to amend, coupled with the absence of a satisfactory excuse for the delay and prejudice to the opposing party, justifies denial of such a motion’ (*Thibeault v. Palma*, 266 A.D.2d 616, 617, 697 N.Y.S.2d 404 [1999]).” *Sadler v. Town of Hurley*, 304 AD2d 930, 931 (3<sup>rd</sup> Dept. 2003); *see Harris v. Jim’s Proclean Serv, Inc.* 34 AD3d 1009 (3<sup>rd</sup> Dept. 2006). A court's discretion to grant leave to amend should be exercised with caution where the case has been certified as ready for trial. *See Jablonski v. County of Erie*, 286 A.D.2d 927, 928, 730 N.Y.S.2d 626 (4<sup>th</sup> Dept. 2001); *Sadler, supra*. When the motion to amend is made on the eve of trial, “there is a heavy burden on plaintiff to show extraordinary circumstances to justify amendment by submitting affidavits which set forth the recent change of circumstances justifying the amendment and otherwise giving an adequate explanation for the delay” *Jablonski at 928, quoting Hemmerick v. City of Rochester*, 63 AD2d 816 (4<sup>th</sup> Dept. 1978); *see Schwab v. Russell*, 231 AD2d 820, 821 (3<sup>rd</sup> Dept. 1996). “Lateness in making a motion to amend, coupled with the absence of a satisfactory excuse for the delay and prejudice to the opposing party, justifies denial of such a motion.” *Thibeault*, 266 AD2d 616, 617 (3<sup>rd</sup> Dept. 1999)(citation omitted). A court may examine proposed amendments to determine whether they are meritorious. *See Jackson v Dow Chem. Co.*, 295 A.D.2d 855 (3<sup>rd</sup> Dept.2002); *Sadler, supra*.

### ***1. Reasonable Excuse for the delay***

In this case, the Plaintiff has not advanced any explanation for the delay. In fact, the

affidavit in support does not make any mention of delay, and rather simply references the earlier motion for an interlocutory order, and the facts and arguments raised then. The current motion argues that Defendants were aware that the Plaintiff was making these assertions since at least July 17, 2015, and would not be surprised or prejudiced. However, Plaintiff was also aware of those same allegations since at least that date, and did not make any motion to amend until April 14, 2016, less than 30 days before the trial. Plaintiff has not shown a recent change of circumstances to justify the amendment, and also has not offered a reasonable excuse for the delay.

This case was commenced over 3 years ago, and the trial note of issue and certificate of readiness were filed in July, 2015, some 10 months ago. On November 23, 2015, this case was set for a trial beginning on May 9, 2016. The Plaintiff is not claiming discovery of new facts, but rather, facts that she has known about for many months. Yet, she did not move to amend the complaint until just before the trial. “While delay alone will not be sufficient cause to deny a party's motion for leave to amend, where, as here, an action has long been certified as ready for trial and the moving party had full knowledge of the amendment sought, in the absence of good cause for the failure to move for leave to amend at an earlier date, the motion to amend should be denied on the ground of gross laches alone” *Smith v. Hercules Constr. Corp.*, 274 AD2d 467, 468 (2<sup>nd</sup> Dept. 2000) (citations omitted). The Court concludes that Plaintiff has not given a reasonable excuse for the delay in seeking leave to amend her complaint. *See e.g. Schwab, supra; Yablonski, supra; Simpson v. Browning-Ferris Indus. Chemical Services, Inc.*, 146 AD2d 769 (2<sup>nd</sup> Dept. 1989) (“plaintiff made no effort to explain the delay ... on the eve of trial some 6 ½ years after the date of accident, 3 ½ years [after the pleading] was served and 2 ½ years after the completion of examinations before trial”).

## ***2. Prejudice and merits of the proposed amendment***

“While a delay in seeking to amend a pleading may be considered by the trial court, it does not bar that court from exercising its discretion in favor of permitting the amendment where there is no prejudice.” *Kimso Apts., LLC v. Gandhi*, 24 NY3d 403, 413 (2014) (citing *Dittmar*

*Explosives, Inc. v. A.E. Ottaviano*, 20 NY2d, 498, 503 [1967]). Even if there is no prejudice to the non-moving party, leave to amend may be denied if the amendment is plainly lacking in merit. See *Davis v. Wyeth Pharms., Inc.*, 86 AD3d 907 (3<sup>rd</sup> Dept. 2011); see also *Sutch v. Sutch-Lenz*, 129 AD3d 1137 (3<sup>rd</sup> Dept. 2015); *Berger v. Water Commissioners, supra*. In this case, Plaintiff argues that Defendant was aware of the allegations at least as of July, 2015 and is not prejudiced or surprised; Defendant argues that the allegations have been rejected by this Court's prior Decision and Order on the motion to direct an interlocutory accounting.

Plaintiff's motion states that none of the allegations in the proposed Amended Complaint are new (Crossmore 4/14/16 Affidavit at ¶13). They consist of 17 paragraphs, 22a-22q. All of the 17 paragraphs have previously been advanced in June and July of 2015 through either the affidavit of the Plaintiff or her attorney. (See Plaintiff's 4/14/06 Memo of Law at pp.4-7).

The Court has considered many of these issues in its Decision and Order from September 25, 2015. The Court stated:

Ms. Simiele's attorney also submits an affidavit and reply affidavit setting forth examples of what he contends to be misappropriation of cash on the part of Mark Simiele. For example, he argues that the differences between W&GT Quickbook Reports and W&GT's tax return are indicative of wrongdoing. Additionally, he contends that payments made by W &GT related to a speed boat owned by Mark Simiele, and life and health insurance for Mr. Simiele are improper. The court has reviewed all the conclusions by plaintiff's counsel contained in his affidavits and finds them to be speculative in nature, as he is without knowledge of the underlying facts.

9/25/15 Decision and Order pp.7-8.

As the Court noted in its Decision and Order, allegations of wrongdoing must be factual and specific (*Eklund v. Pinkey*, 27 AD3d 878 [3<sup>rd</sup> Dept. 2006]), and a complaint must set forth with particularity the offending incidents, which is even more important in a derivative action by a shareholder. *DiPace v. Figueroa*, 128 AD2d 942, 943 (3<sup>rd</sup> Dept. 1987) (citation omitted). This Court's prior Decision noted that conclusions reached by counsel in his affidavits did not provide any further support for the claim, and the Court then determined to dismiss the claim the

Defendant systematically removes cash from the company.

Upon review of the proposed Amended Complaint, the Court again determines that the allegations are vague and conclusory, and, in some instances, have already been rejected by the Court. For example, paragraphs d and e of the proposed Amended Complaint refer to: 1) the differences in the company Quickbook Reports compared to the company tax returns; and 2) payments made by the company for a speed boat owned by Mark Simiele and health and life insurance payments made for his benefit. These allegations were contained in the 6/2/15 affidavit from Mr. Crossmore, and the Court found counsel's conclusions to be speculative and of no probative value.

The proposed Amended Complaint contains paragraphs that are either vague and conclusory; do not specify misconduct by Mark Simiele; are based on conclusions reached by Plaintiff's counsel; have already been stated in the original Complaint, or pertain to claims or arguments already rejected by this Court.


### **Conclusion**

Based upon the foregoing, the Plaintiff's motion for leave to amend her Complaint is **DENIED**.

THIS CONSTITUTES THE DECISION OF THIS COURT.

ENTER:

DATED: May 2, 2016  
Watkins Glen, NY

  
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HON. EUGENE D. FAUGHNAN  
SUPREME COURT JUSTICE