Kahn v Leo Schachter Diamonds, LLC
2016 NY Slip Op 31271(U)
July 5, 2016
Supreme Court, New York County
Docket Number: 654542/2012
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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RICHARD KAHN,

Plaintiff,

-against-

DECISION AND ORDER

LEO SCHACHTER DIAMONDS, LLC
LEO SCHACHTER DIAMONDS LTD.,

Index No. 654542/2012

Defendants.

Mot. Seq. 007

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HON. ANIL C. SINGH, J.:

This action was filed on December 27, 2012 by plaintiff Richard Kahn ("Kahn" or "plaintiff") to recover compensation for his alleged work in introducing and selling defendants' diamond products in Brazil and other South American and Central American countries. Leo Schachter Diamonds, LLC ("LSD NY") and Leo Schachter Diamonds, Ltd ("LSD Israel," with LSD NY, "defendants") moved for summary judgment in August, 2015. In December, 2015, plaintiff moves for an order pursuant to CPLR 3025(b) for leave to file an amended claim. Defendants oppose the motion. This Court is holding defendant's summary judgment motion in abeyance until it decides this motion.

BACKGROUND

It is alleged by plaintiff that he met with Elliot Tannenbaum ("Tannenbaum"), the "managing member of defendants" in March 2011 about doing business together

(Compl. ¶ 14). Plaintiff allegedly began consulting for defendants in April 2011, and devoted substantial time and effort on defendants' behalf through May 2012. He made several trips to Brazil and introduced defendants' representatives to his contacts. In May 2012, defendants terminated their relationship with plaintiff. Plaintiff claims that he is not fully compensated by defendants. See id. ¶ 21-32.

The original complaint asserts the following seven cause of action against the defendants: (i) failure to pay sales commissions in violation of New York Labor Law § 191-c (Count 1); (ii) breach of contract for failure to pay, pre-termination, "2% gross on all sales in Brazil, Argentina, and other Central and South American territories for which plaintiff introduced clients for defendants" ("the 2% Commission") (Compl. ¶ 47) (Count 2); (iii) breach of contract for failure to pay the 2% Commission post-termination (Count 3); (iv) declaratory judgment that defendants own plaintiff the 2% Commission for five years following his termination (Count 4); (v) unjust enrichment (Count 5); (vi) an accounting (Count 6); and (vii) fraud (Count 7). Counts 1 (Labor Law) and Count 7 (fraud) were subsequently dismissed by this Court.

Plaintiff alleges that the parties agreed that plaintiff would be "a partner in the Brazil Partnership" (Compl. ¶ 17), and that plaintiff would own a "15% interest" in any partnership or joint venture that defendants developed in South and Central America (Compl. ¶ 18). The additional allegations were not made under Count 2 and 3 (breach of contract), nor were they requested at the end of the complaint, rather,

they appeared as a general background, and were briefly mentioned under Count 7 (fraud) ("[p]laintiff would receive a partnership interest and commissions . . . .").

Plaintiff seeks to amend its complaint to clarify, among other things, that the agreement between the parties included the structure of both long term and short term compensation (Ex. E, ¶ 14); the reason for the short term upside was to cover Plaintiff's expenses while Plaintiff was building up LSD's presence in Brazil (Id., ¶ 17); the long term upside (15% interest in the profits) . . . was a result of plaintiff's partnership with LSD in Brazil and his setting up a platform for LSD to import diamonds into Brazil without having to pay prohibitive tariffs (Id., ¶ 18).

Plaintiff asserts that the theory of the case is not changing and the defendants will not be prejudiced, since plaintiff seeks recovery under the same agreement he alleges throughout the original complaint.

Defendants oppose the amendment on the grounds that the proposed amended claims are patently lacking in merit. Defendants further argue that they will be prejudiced by the amendment, because it will add a new theory of liability after the close of discovery. Finally, defendants maintain that the proposed amendments are based on purported facts known to plaintiff since the inception of this action. There is no reasonable excuse in the three-year delay since the filing of the original complaint.

Plaintiff claims that the delay is caused by the reasonable belief that defendants understood plaintiff's claims to include entitlement to the 15% interest.

DISCUSSION

Under CPLR 3025, "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom." MBIA Ins. Corp. v Greystone & Co., Inc., 74 A.D.3d 499, 500 (1st Dept 2010). 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. Heller v. Louis Provenzano, Inc., 303 A.D.2d 20, 24 (1st Dept 2003) (internal quotation marks omitted).

The moving party is not required to establish an evidentiary basis for its amendments and must only show that they are not "palpably insufficient or patently devoid of merit." MBIA Ins. Corp. v Greystone & Co., Inc., 74 A.D.3d 499, 500 (1st Dept 2010). However, "to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted." Megaris Furs, Inc. v. Gimbel Bros., Inc., 172 A.D.2d 209, 209 (1st Dept 1991). The court should examine the sufficiency of the merits of the proposed amendment. Heller, 303 A.D.2d at 25.

Courts generally define amendments brought after an "extended delay" as those filed significantly after the note of issue and certificate of readiness for trial. IDT Corp. v. Morgan Stanley Dean Witter & Co., 26 Misc. 3d 1231(A) (Sup. Ct. 2010) (citing Beuschel v. Malm, 114 A.D.2d 569, 569 (3d Dept 1985) (affirming

trial court's decision denying leave where motion was filed seven months following note of issue)).

Here, the proposed amendments are made three years after the action was commenced, and ten months after the note of issue and certificate of readiness were filed. Plaintiff offered a reasonable excuse for the delay, noting that it was caused by the belief that defendants understood plaintiff's claims to include entitlement to the 15% interest. It was only upon reviewing defendant's motion for summary judgment that the plaintiff felt the need to clarify its allegations. See Jacobson v. McNeil Consumer & Specialty Pharm., 68 A.D.3d 652 (1st Dept 2009) (holding that an oversight of a previous attorney is a reasonable excuse for the delay).

While plaintiff was or should have been aware of the facts and theories asserted in the amended complaint long before amendment was actually sought, delay alone is not a sufficient ground for denying leave to amend." Greenburgh Eleven Union Free Sch. Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 298 A.D.2d 180, 181 (1st Dept 2002). In the absence of prejudice, plaintiffs' delay in seeking to amend . . . is not a sufficient reason to deny the amendment. Sheppard v. Blitman/Atlas Bldg. Corp., 288 A.D.2d 33, 34 (1st Dept 2001).

Prejudice occurs when the party opposing amendment "has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." Jacobson, 68 A.D.3d at 654-55.

Defendants cannot establish that they will be prejudiced by the amended complaint, since they were placed on notice of such theory by the allegations in the initial complaint; in that case, [l]eave to amend a complaint to add an additional theory of liability is generally granted. See Panto v. J & M Salvage Co., 157 A.D.2d 582 (1st Dept 1990).

Consequently, the only question left is whether the proposed amendment has any merit. While it is true that motions for leave to amend pleadings are to be liberally granted in the absence of prejudice or surprise, it is equally true that the court should examine the sufficiency of the merits of the proposed amendment when considering such motions. Heller v. Louis Provenzano, Inc., 303 A.D.2d 20, 25 (1st Dept 2003) (internal citations omitted). The court is *not* required to accept a party's allegations as true on a motion to amend; instead, the motion must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment. Boaz Bag Bag v. Alcobi, 129 A.D.3d 649, 649 (1st Dept 2015).

Here, there is no evidentiary proof that could support plaintiff's proposed amendments. It is clear from the evidence that there was no agreement between plaintiff and defendants with respect to the 15% long term interest. Plaintiff's own email acknowledges that the relevance of the 15% interest is at least one year away, and that both parties agreed to table the issue until a later date (Ex. 19, Email Correspondence, at LSD00001046-47). Plaintiff also wrote that "I've already

offered powerful compromises from my Side [sic] (forgetting about 15% partnership and security of long term contract)" (Ex. 20, Email Correspondence, at LSD00002012).

The evidence at best shows that the parties had conversations about the "long term upside," though the specific terms were still under negotiation. Plaintiff has failed to raise a triable issue of fact as to whether there was an agreement between the parties regarding the 15% interest.

Therefore, plaintiff's motion to amend is denied because he failed to provide evidentiary proof that could be considered upon a motion for summary judgment.

Accordingly it is,

ORDERED that defendants motion to amend is denied.

Date: July 5, 2016
New York, New York

Anil C. Singh