E&B Giftware, LLC v Mauer
2016 NY Slip Op 31569(U)
August 17, 2016
Supreme Court, New York County
Docket Number: 651672/2015
Judge: O. Peter Sherwood

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

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E&B GIFTWARE, LLC EB BRANDS HOLDINGS, INC., and EBB HOLDING COMPANY LLC,

Plaintiffs,

-against-

DAVID MAUER, FRANK KIRBY and HARRIS METH,

Defendants.

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DECISION AND ORDER

Index No.: 651672/2015
Motion Sequence No.: 005

O. PETER SHERWOOD, J.

On March 8, 2016, this court signed an order granting a motion to dismiss the complaint in this action without prejudice to a motion to replead (NYSCEF Doc. No. 55). Now, plaintiffs move to amend their complaint against defendant David Mauer pursuant to CPLR 3025(b). Leave to amend a pleading pursuant to CPLR § 3025 "shall be freely given," in the absence of prejudice or surprise (*see e.g. Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354 [1st Dept 2005]). Prejudice in this context is shown where the nonmoving party is "hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Loomis v Civetta Corinno Const. Co.*, 54 NY2d 18, 23 [1981]).

In order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated (*Thompson, supra*, 24 AD3d at 205; *Zaid, supra*, 18 AD3d at 355). Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*see Aerolineas Galapagos, S.A. v Sundowner Alexandria*, 74 AD3d 652 [1st Dept 2010]; *Thompson, supra*, 24 AD3d at 205). Thus, a motion for leave to amend a pleading must be supported by an affidavit of merit or other evidentiary proof (*Delta Dallas Alpha Corp. v S. St. Seaport Ltd. Partnership*, 127 AD3d 419, 420 [1st Dept 2015]). As the party seeking the amendment, plaintiffs have the burden in the first instance to demonstrate their proposed claims' merits, but defendants, as the parties opposing the motion, "must overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged in the moving papers are obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 W. 40th St. LLC*, 42 AD3d 82, 86 [1st Dept 2007]).

CPLR 3025(b) requires a motion to amend "be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." Plaintiffs attach a copy of their Proposed Second Amended Complaint (PSAC, Berman aff, exhibit A, NYSCEF Doc. No. 60), but do not show the proposed changes in their moving papers. Plaintiffs attach a blackline to their reply papers (NYSCEF Doc. No. 67), but this does not cure the defect. While plaintiffs argue that this court allowed such a cure in *Scher v CMJ Holdings Corp.* (2015 N.Y. Slip Op. 31468[U], *3 [Sup Ct, New York County 2015]), Scher had submitted an affirmation explaining the proposed changes to the complaint, fulfilling the statutory requirement and eliminating prejudice to the defendants (*see, id.*). Such is not the case here. The affirmation provided by plaintiffs merely presented the PSAC without explanation. It speaks neither to the proposed changes nor to their merits.

Additionally, while the absence of an affidavit of merit is not, alone, fatal, the plaintiffs have not shown this amendment to have merit, so the court declines to use its discretion to allow it. The first cause of action, for breach of fiduciary duty, is barred by the release (Semel aff, exhibit A, NYSCEF Doc. No. 63) and the three year statute of limitations, as discussed in the decision on the prior motion to dismiss (NYSCEF Doc. No. 55, at 44). The allegations supporting the portion of the second cause of action, for fraud, are also lacking in merit.

"To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], lv. denied 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]). Such claims are required to be stated in detail (CPLR 3016[b]). For the portion of the fraud claim related to FunGoPlay, plaintiffs now allege Mauer "falsely portrayed FunGoPlay as is [sic] it were a Company with assets and ongoing operations," by representing FunGoPlay as "a Company he was acquainted with, that was interested in having EB Brands manufacture a six-figure shipment of electronic soccer balls and Frisbees" (PSAC, ¶¶ 58-59). These broad and vague allegations, where misleading at all (as plaintiff has conceded that Mauer was, in fact, acquainted with FunGoPlay, and as the PSAC supports the conclusion that FunGoPlay was actually interested in having EB Brands

manufacture soccer balls and frisbees [PSAC, ¶¶ 56, 62]), cannot support a claim for fraud. Nor has the plaintiff alleged the required justifiable reliance.

The PSAC fraud claim also contains allegations regarding Mauer's presentation of false financial information to the shareholders and board of directors. Plaintiffs claim the financial statements omitted information about returned merchandise (PSAC at ¶¶ 71-73, 79). However, the financial statements attached to the PSAC disclose the sales programs and that the amount of returns under these programs can range in the millions of dollars (EB Brands Holdings, Inc., Consolidated Financial Report, December 31, 2009, PSAC, exhibit A, at 10, 12; EB Brands Holdings, Inc., Consolidated Financial Report, December 31, 2010, PSAC, exhibit B, at 9, 12; EB Brands Holdings, Inc., Consolidated Financial Report, December 31, 2011, PSAC, exhibit C, at 10, 12). Instead of showing the merits of plaintiffs' allegations, the exhibits contradict them. Additionally, plaintiffs again fail to allege justifiable reliance.

Nor have plaintiffs shown the third claim, for fraudulent concealment, has merit. A cause of action for fraudulent concealment "must allege that the defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff; that the plaintiff reasonably relied on the misrepresentation; . . . that the plaintiff suffered damage as a result of its reliance on the defendant's misrepresentation [and] that the defendant had a duty to disclose material information and that it failed to do so" (P.T. Bank Cent. Asia v ABN AMRO Bank N.V., 301 AD2d 373, 376 [1st Dept 2003]). As far as this claim is predicated on the financial statements, the attached financial statements do not support plaintiffs' allegations of a misrepresentation, as discussed above. As far as this claim is based on defendants' alleged concealment of the credit request forms, which defendants allegedly failed to process properly, plaintiffs have not alleged any facts suggesting the board of directors relied on misrepresentations by the defendants about the existence of merchandise returns, or how the alleged concealment caused damage.

Finally, the fourth claim, for civil conspiracy, also fails, as "a cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort" (Romano v Romano, 2 AD3d 430, 432 [2003]). As discussed above, plaintiffs' other claims have failed. Therefore, the claim for civil conspiracy also fails.

Accordingly, this motion for leave to amend the complaint is DENIED.

This constitutes the decision and order of the court.

DATED: August 17, 2016

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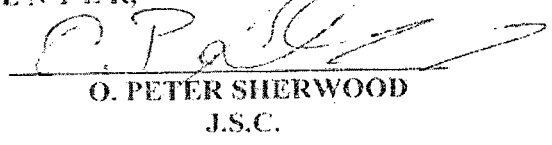

O. PETER SHERWOOD
J.S.C.