SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

X

SWIFT STRONG, LTD.,

Plaintiff,

-against-

MIACHART, LLC, JOSE PEREIRA, SR., JOSE PEREIRA, JR., ALFRED SILES, and ROBERTO ORTEGA,

Defendants.

Index No. 653482/11

DECISION & ORDER

Mot. Seq. No. 001

X

MIACHART, LLC, JOSE PEREIRA, SR., JOSE PEREIRA, JR., ALFRED SILES, ROBERTO ORTEGA, and REPINTER INTERNATIONAL COMPANY, S.A.,

Counterclaim Plaintiffs,

-against-

SWIFT STRONG, LTD. (Liberia), SWIFT STRONG LIMITED (Panama), GRACE LINE, LTD., GRACE LINE OF N.Y., JOHN GRACE, PETER METZ and V. SHIPS (USA) LLC,

Counterclaim Defendants.

X

OSTRAGER, J:

This is a case that was filed in 2011 arising out of a 2008 transaction. During the past five years, the parties have been intermittently litigating this case, and no request for judicial intervention was filed until 2016, shortly before the instant Order to Show Cause was filed this month. The papers are somewhat confusing; indeed, the Court is unable to confirm the correct caption, as the caption of the OSC differs from that in the latest pleadings, and the file does not include proof of service on all named parties. But it is clear that defendants are seeking leave to serve an Amended Answer to the Amended Complaint which was e-filed on *June 8, 2012*,

together with Second Amended Counterclaims (NYSCEF Doc. No. 46). Specifically, defendants/counterclaim plaintiffs seek leave to join John Grace and Peter Metz as counterclaim defendants and to serve upon them a Supplemental Summons and the Amended Answer with Second Amended Counterclaims.

The motion is denied for the following reasons.

CPLR 3025(b) allows a party to seek leave of court to amend pleadings "at any time", and CPLR 1003, cited by the movants here, allows a party to add additional parties by leave of court "at any stage of the action." Here, it is undisputed that Messrs. Grace and Metz were never served with process at any time and that, in all events, defendants executed a Stipulation of Discontinuance without Prejudice of this action against them in 2012 (NYSCEF Doc. No. 6). While counsel disagree as to the precise discussions that led to the discontinuance, it is undisputed that neither Grace nor Metz was served with a Summons and the Answer with Counterclaims before the Stipulation was signed or at any time thereafter.

The underlying facts are as follows. On or about January 4, 2008, plaintiff Swift Strong, Ltd., the owner of a cargo vessel named M/V Swift Strong, entered into a written charter agreement with Repinter International Shipping Company, S.A. Pursuant to that agreement, plaintiff chartered its vessel to Repinter for two years at an agreed upon rate. Repinter allegedly defaulted on the agreement by, among other things, failing to pay the plaintiff the monies due pursuant to the agreement. Believing Repinter to be defunct, plaintiff commenced this action against purported agents and/or alter egos of Repinter: Miachart, LLC, Jose Pereira, Sr., Jose Pereira, Jr., Alfredo Siles and Roberto Ortega. The three causes of action asserted were fraud in the inducement, aiding and abetting fraud, and negligent misrepresentation (NYSCEF Doc. No. 4). Defendants answered and asserted counterclaims on their own behalves, as well as on behalf

of Repinter, seeking rescission of the contract and damages. In addition to asserting the counterclaims against plaintiff Swift Strong and a similarly named entity, the defendants/counterclaim plaintiffs named Grace Line Limited/Ltd., Grace Line of N.Y., John Grace, Peter Metz and V. Ships (USA) LLC as counterclaim defendants, but the only service that appears to have been made was made upon counsel for plaintiff Swift Strong (NYSCEF Doc. No. 5).

In December of 2012, counsel for plaintiff and defendants entered into the above-referenced Stipulation of Discontinuance without Prejudice. In that Stipulation, the defendants/counterclaim plaintiffs agreed to discontinue without prejudice their counterclaims against John Grace and Peter Metz, which counterclaim pleadings, as previously indicated, had never been served upon Grace and Metz. Defendants concede that counsel for the plaintiff/counterclaim defendants expressly declined to accept service on behalf of Messrs. Grace and Metz. The Stipulation was followed by multiple amendments to the pleadings by both sides, modest discovery, and settlement negotiations, until court intervention was sought in 2016. The moving defendants/counterclaim plaintiffs now seek to add Grace and Metz into the action, claiming that facts learned during discovery in this action and via a federal action involving some of the same parties reveal a basis for counterclaims against Grace and Metz individually, as well as in their corporate capacities.

Recognizing that any claim asserted against Grace and Metz in 2016 based on a 2008 agreement would be time-barred on its face, the movants seek to rely on the "relation back" doctrine codified in CPLR 203(b). That doctrine allows for claims later asserted against co-defendants "united in interest" with the original defendants to "relate back" to when the original defendants were served to determine the timeliness of the claims against the newly joined co-

defendants. The criteria the movants must demonstrate to take advantage of the relation back doctrine, as applied here, are: (1) both the original counterclaims asserted against the entities and the counterclaims sought to be asserted against Grace and Metz individually arose out of the same conduct, transaction, or occurrence; (2) the proposed new parties Grace and Metz are united in interest with the original counterclaim defendant entities, and by reason of that relationship can be charged with notice of the institution of the action such that they will not be prejudiced by the delayed, otherwise stale, commencement of the action against them in maintaining a defense on the merits; and (3) the proposed new parties Grace and Metz knew or should have known that, but for a mistake by the counterclaim plaintiffs in failing to identify all proper parties, the action would have been maintained against them as well. *Mondello v New York Blood Ctr. – Greater N.Y. Blood Program*, 80 NY2d 219, 226 (1992); *see also Buran v Coupal,* 87 NY2d 173 (1995).

While the movants have pointed to evidence that might well satisfy the first two criteria, they cannot possibly satisfy the third criterion. Defendants named Grace and Metz as defendants in 2012 but not only failed to serve them with process, but executed a stipulation discontinuing the action against them without prejudice. Consequently, defendants were not mistaken "in failing to identify all proper parties." When the claims were asserted and discontinued against Metz and Grace without service of process, defendants had at least some knowledge of the potential involvement of Metz and Grace in the transaction at issue here. So, for example, plaintiff's Amended Complaint was verified by Peter Metz as the "Secretary/Director of Swift Strong, Ltd" on December 13, 2011, a year before the Stipulation of Discontinuance was signed on December 5, 2012 (NYSCEF Doc. No. 4). And, John Grace has apparently, at all relevant times, been significantly involved with the named Grace entities.

In the pleadings filed by the movants on October 15, 2012, about 2 months before the Stipulation of Discontinuance was signed, the movants confirmed their knowledge of the role of Metz in the transaction at issue, noting that on December 30, 2008 "Mr. Peter Metz (Director) executed a settlement agreement on behalf of Swift Strong Ltd." (NYSCEF Doc. No. 5, ¶ 209). Further, at paragraph 119, defendants allege that "John Grace was the, or one of the actual or beneficial shareholders who operated and/or controlled Grace Line of NY, Swift Strong Ltd. (Liberia), Grace Line Limited, and Swift Strong Limited (Panama)." With respect to Metz, the pleadings allege (at ¶ 120) that "Peter Metz was at all relevant times the Chief Financial Officer of Grace Line of New York and a director of Swift Strong Ltd. (Liberia) and Swift Strong Limited (Panama)." The movants go on to allege (at ¶ 128) that:

> As detailed below herein, John Grace, Peter Metz, and V. Ships fraudulently and/or negligently mispresented the condition of the Vessel at the time of delivery and at all times thereafter during the existence of the Charter Party. In doing so, these Counterclaim Defendants also breached the Charter Party warranties, as well as other terms and conditions therein.

Thus, any suggestion by the movants that they delayed in seeking to add Grace and Metz back into the action due to the alleged failure of plaintiff's counsel to timely respond to discovery demands is unpersuasive as the movants were undeniably in possession of information related to Grace and Metz in or prior to 2012. In short, defendants slept for many years on any rights they claim to have against Grace and Metz and it is simply unreasonable for this Court to allow the defendants to resurrect claims against Grace and Metz that could have been pursued a long time ago.

The movants have also failed to meet their burden of establishing that the proposed amendment, asserting an alter ego theory against Grace and Metz, has merit. The evidence relied on by the movants to claim that Grace owns over 90% of Swift Strong actually shows that an

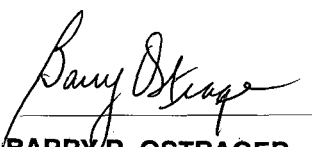
entity known as Granite International Holdings LLC ("Granite International") owns over 91% of Swift Strong. Granite International is owned by Sterling Grace International LLC and various other entities and trusts. Thus, while Grace apparently has an involvement in these entities, he is not an owner of Swift Strong in his individual capacity. And the fact that Metz signed certain documents as an officer of Swift Strong in no way demonstrates the domination and control needed to pierce the corporate veil.

Finally, the movants themselves establish that they obtained much of the relevant information in 2014 in response to discovery demands in this action, and additional information such as deposition testimony by Grace and Metz was quoted in a July 24, 2013 decision in a federal action involving another Swift vessel. *See Swift Spindrift, Ltd. v Alvada Ins.*, 09 Civ. 9342 (SDNY)(NYSCEF Doc. No. 27). Consequently, the opposition correctly asserts that the movants delayed unreasonably in seeking to add Grace and Metz into this action by Order to Show Cause in October 2016, and that those individuals will be prejudiced by the delay in that the pleadings are already in place and discovery presumably advanced. If discovery is not advanced in this 2011 case, that is not a reason to reward defendants' failure to pursue such claims as they might have against Grace and Metz, all of which seem dubious. The movants offer no satisfactory explanation for why Grace and Metz were not served with process at any point during the last five years that this case was pending. And regarding the "relation back" doctrine, the opposition correctly asserts that the movants have failed to establish a recent discovery of the requisite "unity of interest" sufficient to warrant the joinder of these individuals in this 2011 case at this late date.

Accordingly, it is hereby

ORDERED that the motion by defendants/counterclaim plaintiffs to serve a Supplemental Summons and the proposed Amended Answer to Amended Complaint and Defendants/Counterclaim Plaintiffs' Second Amended Counterclaims (NYSCEF Doc. No. 12) is in all respects denied. Discovery shall proceed pursuant to the schedule previously ordered by the Court.

Dated: October 13, 2016



BARRY R. OSTRAGER
JSC

J.S.C.