

**Benjamin v Stonebridge Pharm., Inc.**

2017 NY Slip Op 30238(U)

February 2, 2017

Supreme Court, New York County

Docket Number: 151017/2014

Judge: Manuel J. Mendez

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.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ  
Justice

PART 13

LAUREN BENJAMIN,  
Plaintiff,

Index No. 151017/2014  
MOTION DATE 12/14/2016  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_

-against-

STONEBRIDGE PHARMACY, INC.,  
Defendant.

The following papers, numbered 1 to 12 were read on this motion to withdraw as counsel, and cross-motion to amend the complaint.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1 - 4; 5 - 9

10 - 12

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers, it is ordered that this motion by the Law Offices of James J. Cutro, PC, to withdraw as counsel for Defendant Stonebridge Pharmacy, Inc., is granted, and Plaintiff's cross-motion for leave to amend the Complaint is granted to the extent of adding Westcliff Medical Supply, Inc. as a Defendant.

Plaintiff commenced this action by Summons and Complaint asserting a cause of action for violation of New York Labor Law 201-C against the Defendant- her former employer. The Complaint alleges that the Defendant discriminated against, and wrongfully terminated, the Plaintiff when she became a foster mother by refusing to provide her with leave to care for her child. Issue was joined and the parties proceeded with discovery.

The Law Offices of James J. Cutro, PC represented the Defendant in this action and now seeks to withdraw as counsel, pursuant to CPLR 321(b)(2), due to the Defendants' failure to meet its financial obligations. Defendant and its counsel entered into an agreement on December 1, 2014 which provided that the firm would reduce its hourly rate for its representation because Defendant was winding down its business and lacked future revenue. This agreement also provided that in the event Defendant fell into arrears in paying its financial obligations to counsel, that counsel had the right to terminate its representation. Counsel states that Defendant is currently in arrears for \$5,702, and that it was informed by Defendant's former Chief Executive Officer and President, Rose Pereg, that she lacked the funds to pay for any further legal fees and expenses. Counsel informed Ms. Pereg that it would make an application to withdraw as counsel, and Ms. Pereg states that she does not oppose.

**Plaintiff opposes the motion, and cross-moves pursuant to CPLR §3025(b) for leave to amend her Complaint to add Defendant's new corporate entity, Westcliff Medical Supply, Inc., and Rose Pereg as defendants.**

**Plaintiff contends that she does not necessarily oppose the motion for Defense counsel to withdraw, but that the motion raises questions of Defendant's potential future financial status. That the motion's affirmations in support refer to the Defendant corporation being dissolved, and that no additional information as to financial status or solvency is provided. Therefore, Plaintiff requests that an Order be granted allowing Defendant a short time to appear with new counsel, and that in the event of a default, a judgment automatically be entered in favor of Plaintiff with the matter set down for an inquest to determine damages.**

**In support of its cross-motion to amend the Complaint, Plaintiff contends that Defendant is still listed as current and active on the New York State Division of Corporations Website, but that it is operating under a different entity name- Westcliff Medical Supply, Inc. That Westcliff has the same corporate address as Stonebridge, and lists the same Chief Executive Officer as Rose Pereg. (Cross-Mot. Exh. A).**

**Plaintiff asserts that she is concerned about her ability to collect a judgment if Stonebridge is insolvent and operating under the newly registered corporation Westcliff, and that Ms. Pereg has dictated the course of this action through the Defendant corporation, and her personal involvement in the corporation is obvious. That Defendant's policy and practice was to allow pregnant female employees to take time off after giving birth, but that Defendant's President, Rose Pereg, refused to apply the company policy to Plaintiff. That Ms. Pereg also accused Plaintiff of covering up her intentions to have a child when she was hired in April of 2011, and terminated Plaintiff immediately before she could qualify for FMLA. That Rose Pereg, as the Chief Executive Officer, was the corporate contact and Chief Executive Officer who engaged in the corporations day-to-day operations, including finances, and; was Plaintiff's former employer who personally hired, fired, and signed all company documents.**

**As a result, Plaintiff argues that she should be granted leave, in the interests of justice, to add to the caption, and amend the Complaint to include, both the newly named corporate entity, Westcliff, and Ms. Pereg as defendants. Plaintiff also argues that Defendant, Westcliff and Ms. Pereg are essentially united in interest, and that this action is still in the discovery phase, so that amending the Complaint would not be prejudicial. However, Plaintiff contends that she would be extremely prejudiced if she is not allowed to amend the Complaint because she may not be able to collect on a judgment if Defendant's remaining assets are liquidated, sold, or otherwise become the subject of bankruptcy.**

**Defendant opposes the cross-motion, except as to adding Westcliff as a defendant.**

**Leave to amend pleadings pursuant to CPLR 3025(b) should be freely given "absent prejudice or surprise resulting directly from the delay" (Anoun v. City of New**

York, 85 A.D.3d 694, 926 N.Y.S.2d 98, 99 [1<sup>st</sup> Dept., 2011] citing to, *Fahey v. County of Ontario*, 44 N.Y.2d 934, 935, 408 N.Y.S.2d 314, 380 N.E.2d 146 [1978]), “or if the proposed amendment is palpably improper or insufficient as a matter of law” (*McGhee v. Odell*, 96 A.D.3d 449, 450, 946 N.Y.S.2d 134, 135, [1<sup>st</sup> Dept., 2012] citing to, *Shepherd v. New York City Tr. Auth.*, 129 A.D.2d 574, 574, 514 N.Y.S.2d 72 [2<sup>nd</sup> Dept., 1987]). “Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment” (*Valdes v. Marbrose Realty, Inc.*, 289 A.D.2d 28, 29, 734 N.Y.S.2d 24 [1<sup>st</sup> Dept., 2001]). A motion to amend pursuant to CPLR 3025(b) is palpably insufficient to add claims that are time barred. (*Calamari v. Panos*, 131 A.D.3d 1088, 16 N.Y.S.3d 824 [2<sup>nd</sup> Dept. 2015]).

“A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]” (*McGhee v. Odell*, 96 A.D.3d 449, 450, 946 N.Y.S.2d 134, 135, [1<sup>st</sup> Dept., 2012] citing to, *Otis El. Co. v. 1166 Ave. of Ams. Condominium*, 166 A.D.2d 307, 307, 564 N.Y.S.2d 119 [1<sup>st</sup> Dept. 1990]). Defendants will not suffer any prejudice when an amended complaint adds a claim premised upon the very same subject matter alleged by the original complaint (*Brown v Blennerhasset Corp.*, 113 A.D.3d 454, 979 N.Y.S.2d 27 [1<sup>st</sup> Dept., 2014]).

The Proposed Amended Complaint does not allege new facts or occurrences, and therefore the initial pleading provided sufficient notice of the occurrences from which the claims arose. Allowing an amendment to the Complaint to add Westcliff as a Defendant is not palpably improper as it is potentially united in interest with Defendant Stonebridge. The entity information selected for Stonebridge on the New York State Division of Corporations website lists Westcliff as the current entity name, with the same address and the same Chief Executive Officer as Stonebridge. (Cross-Mot. Ex. D). (Id.). There is no proof of a distinction between the two corporate entities, and the Defendant does not provide any evidence to the contrary. Therefore, Plaintiff is granted leave to amend Westcliff as a Defendant, as the Defendant fails to show how it would be prejudiced, hindered, or how its position would change by allowing the amendment. “To be ‘united in interest’ it is not necessary...to have joint interest. If the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other, then they are ‘otherwise united in interest.’” (*Grossman v. New York City Health and Hospitals Corp.*, 178 A.D.2d 323, 578 N.Y.S.2d 135 [1<sup>st</sup> Dept. 1991], citing *Prudential Ins. Co. v. Stone*, 270 N.Y. 154, 200 N.E.679 [1936]).

However, Plaintiff has not stated a basis for leave to amend the Complaint to add Ms. Pereg as a defendant. The Proposed Amended Complaint contains only the cause of action under Labor Law 201-C. Plaintiff’s argument that Ms. Pereg did the hiring, firing, and performed actions as the Chief Executive Officer on behalf of the Defendant, does not provide a valid basis to pierce the corporate veil and subject Ms. Pereg to individual personal liability.

**“The general rule...is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability...the concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporations.” (East Hampton Union Free School Dist. v. Sandpebble Builders, Inc., 66 A.D.3d 122, 884 N.Y.S.2d 94 [2<sup>nd</sup> Dept. 2009]). “[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury.” (James v. Loran Realty V Corp., 85 A.D.3d 619, 925 N.Y.S.2d 492 [1<sup>st</sup> Dept. 2011, citing Matter of Morris v. New York State Dept. Of Taxation & Fin., 82 N.Y.2d 135, 603 N.Y.S.2d 807, 623 N.E.2d 1157 [1993]). “[A] party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice...” Franklin v. Daily Holdings, Inc., 135 A.D.3d 87, 21 N.Y.S.3d 6 [1<sup>st</sup> Dept. 2015]).**

**“Factors to be considered in determining whether the owner has ‘abused the privilege of doing business in the corporate form’ include whether there was a ‘failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use.’” (See East Hampton, Supra, citing Millennium Constr., LLC v. Loupolover, 44 A.D.3d 1016, 845 N.Y.S.2d 110 [2<sup>nd</sup> Dept. 2007]). “However, [a] cause of action for piercing the corporate veil to hold the individual defendant liable should [be] dismissed, [if] the sole allegation of ‘domination’ in the complaint is that the principals made the decisions for the corporation.” (Dabrowski v. Abax Inc., 64 A.D.3d 426, 882 N.Y.S.2d 119 [1<sup>st</sup> Dept. 2009]).**

**Plaintiff fails to allege any of the elements necessary for piercing the corporate veil to include Ms. Pereg as a Defendant. Even under the liberal “notice pleading”, a Complaint must still allege the material elements of a cause of action, including the material elements necessary in an action seeking to hold an owner personally liable for the actions of his or her corporation under the doctrine of piercing the corporate veil. Plaintiff does not assert or suggest that Ms. Pereg acted other than in her capacity as the Chief Executive Officer and President. (See East Hampton, Supra). Therefore, that portion of Plaintiff’s cross-motion seeking to add Ms. Pereg as a Defendant is denied.**

**Accordingly, it is ORDERED that this motion to withdraw as counsel is granted, and it is further,**

**ORDERED, that the Law Offices of James J. Cutro, PC is permitted to withdraw as counsel for the Defendant Stonebridge Pharmacy, Inc., and it is further,**

**ORDERED, that the Law Offices of James J. Cutro, PC serve a copy of this Order with Notice of Entry upon its former client, Defendant Stonebridge Pharmacy, Inc., by regular mail and certified mail return receipt requested at the address on file for Defendant, and on the attorneys for Plaintiff, and it is further,**



**ORDERED, that within 20 days from the date of entry of this Order a copy of this Order with Notice of Entry shall be served on the New York County Clerk's Office pursuant to e-filing protocol, and a separate copy of this Order with Notice of Entry shall be served pursuant to e-filing protocol on the Trial Support Clerk in the General Clerk's Office at genclerk-ords-non-mot@nycourts.gov, who shall amend their records accordingly, and it is further,**

**ORDERED, that the parties appear for a Status Conference at IAS Part 13, 71 Thomas Street, Room 210, New York, New York 10013, on May 10, 2017, at 9:30 a.m.**

ENTER:

Dated: February 2, 2017

  
\_\_\_\_\_  
MANUEL J. MENDEZ

**MANUEL J. MENDEZ**  
**J.S.C.**

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST                       REFERENCE