

Hunzinger v Costello
2019 NY Slip Op 30967(U)
April 5, 2019
Supreme Court, New York County
Docket Number: 653086/2012
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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VERONICA HUNZINGER,

Plaintiff,

- v -

CAROL COSTELLO,

Defendant.

INDEX NO. 653086/2012

MOTION DATE 05/03/2018,
07/18/2018

MOTION SEQ. NO. 011, 012

DECISION AND ORDER

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MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 239, 240, 241, 242, 244, 245, 246, 247, 248, 249, 250, 251

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL

The following e-filed documents, listed by NYSCEF document number (Motion 012) 253, 254, 255, 256, 257, 258, 259, 261, 262, 263, 264, 265, 266, 267, 268, 269

were read on this motion to/for AMEND CAPTION/PLEADINGS

In motion sequence number (Motion) 011, plaintiff Veronica Hunzinger, minority shareholder and former employee/director of Plaid, Inc. (Plaid), moves, pursuant to CPLR 602 (a), to consolidate for joint trial this derivative action with the parallel dissolution action, *Matter of Plaid, Inc.* (Index No.: 652578/2012) (Dissolution Action). In the Dissolution Action, plaintiff seeks, by petition, judicial dissolution of Plaid, a corporation closely held by only plaintiff (45% shareholder) and defendant Carol Costello (55% shareholder).

In Motion 012, plaintiff moves, pursuant to CPLR 3025 (b), for leave to file a second amended and supplemental second amended complaint (SAC) to supersede the operative first amended complaint (FAC), dated 12/10/12 (NYSCEF Doc. No. [Doc]

255). More than six years after the FAC was filed, and more than a year after summary judgment motions in both actions were decided, plaintiff seeks to supplement and amend her pleading in this derivative action to include new factual allegations, modify portions of her existing claims, and assert five new causes of action against defendant as well as two proposed new defendants, non-party Paul Worthington (defendant's husband) and, curiously, Plaid itself.¹

The factual and procedural background for this derivative action and the Dissolution Action is set forth in detail in the court's January 12, 2018 decision and order by which the parties' four summary judgment motions across both actions were resolved (SJ Decision) (Doc 231). The SJ Decision is incorporated into this decision and order and the court presumes familiarity with these actions. Oral argument for Motions 011 and 012 was held jointly and the transcript of that proceeding is also incorporated in this decision and order. Below, Motion 012 is first discussed as the outcome impacts any analysis of Motion 011.

In support of Motion 012, plaintiff has submitted a red-lined proposed second amended complaint (PSAC) (Doc 258). As outlined in the PSAC, plaintiff seeks to supplement and amend the December 10, 2012 FAC with allegations of defendant's past and continuing misconduct as Plaid's sole officer/director and its majority shareholder. Apart from new factual allegations, plaintiff seeks to reinsert two claims in the FAC that were dismissed in the SJ Decision and to raise five new claims against defendant, Worthington, and Plaid itself. The proposed claims in the PSAC include:

¹ Plaid is the subject of plaintiff's parallel Dissolution Action. In this derivative action, plaintiff alleges all claims in the FAC on Plaid's behalf and seeks relief on the basis that Plaid was allegedly injured.

- Proposed second cause of action: a derivative claim of common law breach of fiduciary duty against defendant for usurping Plaid's business opportunities involving nonparty "Lola Travel" (Lola), a former Plaid customer that hired defendant as part of defendant's scheme to misdirect Plaid's opportunities to only herself; the court granted this prong of plaintiff's motion for leave to amend at oral argument (*see* Doc 271 [transcript]);
- Proposed fourth and fifth causes of action: the direct breach of contract claim and derivative accounting claim (reinserted from FAC) dismissed in the SJ Decision;
- Proposed seventh cause of action: a derivative claim for common law fraud against defendant and Worthington alleging they defrauded Plaid by improperly compensating Worthington for inferior or valueless consulting services;
- Proposed eighth cause of action: a derivative claim for conversion of Plaid funds and assets against defendant and Worthington, also based on the compensation Worthington received from Plaid from 2011 to 2015;
- Proposed ninth cause of action: a derivative claim for aiding and abetting breach of fiduciary duty against Worthington for his alleged assistance with defendant's breach, again relating to Worthington's compensation; and
- Proposed tenth cause of action: a derivative claim for unjust enrichment against defendant, Worthington, and Plaid.

Motion 012:

Plaintiff's motion for leave to serve a second amended and supplemental complaint

1. Applicable standard for CPLR 3205 (b) motions for leave to amend

Whether to grant or deny a party's motion under CPLR 3025 (b) is left to the sound discretion of the court (*e.g. Corsello v Verizon New York Inc.*, 25 Misc 3d 1221(A) [Sup Ct, Kings County 2009], *affd in part, appeal dismissed in part* 76 AD3d 941 [2d Dept 2010], *affd* 18 NY3d 777 [2012]). Leave to amend under CPLR 3025 (b) is, generally, to be freely granted and, unlike amendment as a right under CPLR 3205 (a), there is no time restriction as to when a party may seek leave to amend by permission

(CPLR 3205; *e.g. Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014]

["(A)bsent prejudice, courts are free to permit amendment even after trial."]).

CPLR 3025 (b) motions are properly denied where the proposed amendment would unduly prejudice or surprise the opposing party or where the proposed amendment is palpably insufficient. "Prejudice is more than the mere exposure of the [party] to greater liability" (*id.* [internal quotation marks omitted] [alteration in original]). Moreover, "mere lateness is not a barrier to the amendment, but lateness coupled with significant prejudice is" (Siegel, NY Prac. § 237). The court may consider a movant's "extended delay in moving for leave to serve an amended complaint" and deny leave to amend where a lengthy delay is not explained by "a reasonable excuse" (*Sewkarran v DeBellis*, 11 AD3d 445, 445 [2d Dept 2004]). Further, introducing entirely new theories of liability after a long delay can warrant denying the motion if it causes undue prejudice and surprise (*e.g. 39 Coll. Point Corp. v Transpac Capital Corp.*, 27 AD3d 454, 455 [2d Dept 2006]).

To establish it is entitled to leave to amend under CPLR 3025 (b), a movant "need not establish the merit of its proposed new allegations . . . but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] [citation omitted]). "[T]he court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face. Once a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion," such as that seeking summary judgment (*Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [1st Dept 2007]).

Here, defendant argues preliminarily that Motion 012 must be denied on the basis that plaintiff submits no requisite affidavit of merit or evidentiary material to support the proposed amendments.² The court disagrees.

While some New York courts have continued to apply an old rule that a motion for leave to amend pursuant to CPLR 3025 (b) must be accompanied by an affidavit of merit or other evidentiary proof supporting the proposed amendments, many New York courts have abandoned that requirement (*see Hickey v Kaufman*, 156 AD3d 436, 436 [1st Dept 2017], *lv denied* 32 NY3d 905 [2018] ["Given the Legislature's 2005 amendment of CPLR 3211 (e) . . . plaintiff was not required to support his motion to amend the complaint with an affidavit of merit (citation omitted)]; *see also Petrisko v Animal Med. Ctr.*, [Sup Ct, NY County 2019]). Particularly, the First Department does not uniformly require any additional submissions, such as an affidavit of merit, in support of CPLR 3025 (b) motions, and most recent cases reviewed by the court indicate that there is no unwavering requirement (*e.g. Boliak v Reilly*, 161 AD3d 625, 625 [1st Dept 2018] [evidentiary showing or affidavit of merit not required]; *Hickey*, 156 AD4d at 436).

Accordingly, plaintiff's failure to submit an affidavit of merit or evidentiary support for Motion 012 does not mandate or warrant dismissal of the motion. None of the cases on which defendant relies demonstrate otherwise.

2. The proposed breach of contract and accounting claims (previously dismissed)

Plaintiff's motion for leave to amend seeks to reassert her individual claim of breach of contract against defendant, which the court dismissed from the FAC in the SJ

² A proposed amendment is any change to the operative pleading without regard to whether the relevant facts supporting that claim existed at the time the operative pleading was filed; a proposed supplement is an amendment that relates to only facts discovered after the operative pleading was filed (Siegel, NY Prac. § 237 [6th ed.]).

Decision (Doc 231, at 12-19). As the proposed amended breach of contract claim is based on essentially identical factual allegations as those that formed the dismissed claim, leave to amend is denied.

“Although leave to amend is freely given and may be granted even where the effect of the amendment is merely to supplement existing claims with additional factual allegations . . . a pleading which circumvents prior dismissal orders should not be permitted” (*Societe National D'Exploitation Industrielle Des Tabacs et Allumettes v Salomon Bros. Intl. Ltd.*, 2000 NY Slip Op. 00532 [Sup Ct, NY County 1998], *affd* 268 AD2d 373, 374 [1st Dept 2000], *lv denied* 95 NY2d 762 [2000]). In any event, plaintiff concedes, in her reply memorandum in support of Motion 012, that she “has no issue[] . . . removing the dismissed” contract claim from the PSAC (Doc 268 at 4). Accordingly, the proposed contract claim is deemed abandoned and Motion 012 is denied with respect to that claim.

Plaintiff’s proposed accounting claim is alleged with identical facts as the dismissed accounting claim. Nevertheless, dismissal of the prior accounting claim does not mandate denial of the proposed claim in the PSAC. The FAC’s accounting claim was dismissed in the SJ Decision, but there was no ruling on the merits: the accounting claim was dismissed as moot because the record then before the court established that plaintiff had received all requested access to Plaid’s books and records in discovery. Here, the PSAC addresses continuing misconduct extending, in terms of years, beyond the time at issue in the FAC, and there is nothing in the record now before the court indicating that plaintiff has had continuous access to Plaid’s books and records. The proposed accounting claim, therefore, is not palpably insufficient or devoid of all merit, at

least with regard to the period following the parties' summary judgment motions.

Accordingly, leave to amend is granted with respect to the proposed accounting claim.

3. The proposed common law fraud claim against defendant and Worthington

Defendant argues that leave to interpose a common law fraud claim against defendant and Worthington should be denied as legally insufficient and time-barred. Specifically, defendant claims the proposed amendment lacks the particularity under CPLR 3016 (b) required to adequately state a fraud claim against either defendant or Worthington in that plaintiff does not propose factual allegations setting forth: (i) any necessary details regarding the contents or falsity of a purported misrepresentation, when, where, or who made the statement; (ii) a basis on which to infer that either defendant or Worthington knew the representation was false; (iii) an intent to induce any person or entity to rely on the representation; or (iv) that there was any reliance whatsoever, let alone justifiable reliance, on the representation.

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). A fraud claim must be alleged with particular facts under CPLR 3016 (b). If the particular claims are uniquely not within the knowledge of the claimant, she must allege, at a minimum, particularized "facts suffice to permit a reasonable inference of the alleged misconduct" (*id.* [internal quotation marks and citation omitted]).

The proposed fraud claim is defective on its face and unsupported by particular facts. The allegations establish that defendant ousted plaintiff from Plaid in 2009, doubled her own salary and ceased making distributions in 2010, and continued taking that salary without distributions through 2016 (Doc 258, ¶¶ 21-35). In connection with

Worthington's services for Plaid, the PSAC contains the following allegations: defendant hired him as a "consultant" and paid him approximately \$150,000 in 2011 and again in 2012, then \$20,000 in 2013, \$26,000 in 2014, and \$8,400 in 2015 (*id.* ¶¶ 35-37).

Plaintiff terms those payments "self-interested and fraudulent payments" because Worthington "added no value to [Plaid] and performed no real services," his efforts "only added one client to [Plaid]," and that one client did not significantly increase Plaid's revenue (*id.* ¶¶ 35, 37-39 [Worthington "effectively did nothing" for Plaid]).

Plaintiff concludes that defendant and Worthington "materially misrepresented to the shareholders of Plaid that . . . Worthington was performing necessary services for Plaid" but, "[i]n reality, Worthington was either providing no services at all or provided services that were of no value" (*id.* ¶¶ 90-93).

The proposed fraud claim is patently insufficient to state a legally cognizable cause of action against either defendant or Worthington as they do not establish with specificity the necessary elements of a fraud claim. There are no factual allegations, apart from purely conclusory and/or speculative statements, from which to infer that defendant or Worthington made a false representation to Plaid with intent to induce Plaid's reliance, or that Plaid did justifiably rely on any misrepresentation. The motion is accordingly denied with respect to the seventh cause of action in the PSAC.

While the proposed amendments are plainly insufficient to support a fraud claim, the allegations pertaining to Worthington's compensation for services rendered may be asserted in the SAC as they support plaintiff's existing derivative breach of fiduciary claims (*id.* ¶¶ 34-39); however, the heading preceding those paragraphs in the PSAC are struck as it states only bare legal conclusions (*see id.*).

4. The proposed conversion claim against defendant and Worthington

Plaintiff's proposed derivative conversion claim asserts that defendant and Worthington: "exercised unauthorized dominion and control over Plaid funds and assets"; "used Plaid money and assets for their own benefit and to the detriment of Plaid"; and "diverted funds rightfully belonging to Plaid to their own personal accounts" (Doc 258, ¶¶ 96-99). The proposed eighth cause of action is also palpably insufficient and leave is denied as to this claim.

Non-chattel property, such as the fungible money in a corporation's bank account, is not an appropriate subject for a conversion claim (*see C & B Enters. USA, LLC v Koegel*, 136 AD3d 957, 958[2d Dept 2016]; *9310 Third Ave. Assocs. v Schaffer Food Serv. Co.*, 210 AD2d 207, 208 [2d Dept 1994]). Conversion requires an unauthorized exercise of dominion and control over personal property that interferes with another's superior right to possess that property. The Plaid funds that were paid to Worthington for services are not chattel that can be converted. The claim is also legally insufficient on its face as it does not state that there was an unauthorized transfer: defendant was the sole director and officer of Plaid and its majority shareholder when the transactions occurred.

5. The proposed claim for Worthington's aiding and abetting breach of fiduciary duty

Plaintiff's proposed aiding and abetting defendant's breach of fiduciary duty claim asserts that Worthington "understood that his wife [defendant] is a shareholder, director and officer of Plaid and thus owed fiduciary duties to [Plaid] and its shareholders," and "[d]espite this knowledge, . . . aided and abetted [defendant's] breach . . . by participating in scheme [sic] whereby Plaid monies were paid to him for work he either did not perform or was unnecessary for him to perform" (Doc 258, ¶¶ 102-103).

Even if those proposed allegations were not palpably insufficient, the court would exercise its discretion to deny this prong of the motion. If the proposed amendment adding Worthington as a new defendant and alleging that he aided and abetted defendant's breach of fiduciary duty, Worthington would sustain undue prejudice and surprise at this late juncture. The proposed amendment seeks to add Worthington as a defendant suddenly despite six years of litigation. Further, the proposed claim would raise, if permitted, a brand-new theory that Worthington was an active participant in defendant's multi-faceted scheme to breach her fiduciary duties to Plaid; for the entirety of this litigation under the FAC, Worthington was a nonparty from whom discovery was taken in connection with plaintiff's original theory that Worthington was an unsuccessful but overcompensated consultant for Plaid, supporting plaintiff's fiduciary claims alleging that defendant engaged in corporate waste as the sole director/officer of Plaid.

If granted, Worthington would necessarily be required to drastically change his position and respond to a supplemental summons and new complaint after six years of litigation which included extensive discovery and dispositive motions. Moreover, plaintiff was aware of the facts surrounding this new theory, and explored those facts at length. Plaintiff provides no excuse for this delay, and there are no newly-discovered facts that support this proposed theory; the facts underlying this theory have been in plaintiff's possession since before she moved for summary judgment—which was, itself, decided by the court more than a year ago. Thus, the court declines to exercise its discretion to grant leave to amend to interpose this claim as it would cause inexplicable surprise and prejudice to Worthington at this late hour.

Practically speaking, the amendment would also necessitate significant additional fact discovery—which the court directed to be completed no later than June 25, 2018

after already being revisited, following the SJ Decision, on the limited basis of defendant's and Plaid's Lola-related business transactions (Doc 243 [5/15/18 order]). Notably, prior to making their summary judgment motions, the court's orders indicate that fact discovery was, years ago, effectively closed and the only discovery that would remain, should either action survive the parties' four summary judgment motions, would concern experts. Plaintiff plainly could have sought to add Worthington as a defendant and allege this proposed claim many years ago but, instead, pursued alternative theories of liability.

Accordingly, this prong of Motion 012 is denied:

6. The proposed unjust enrichment claim against defendant, Worthington, and Plaid

The motion is further denied as to the proposed unjust enrichment claim against Plaid. Plaid is, in this action, the entity on behalf of which plaintiff's claims (in fact, the entire derivative action) are based. Plaid cannot simultaneously be the injured claimant-entity and the defendant entity that was unjustly enriched by the alleged misconduct. At most, Plaid is a nominal defendant against which an unjust enrichment claim does not lie; Plaid cannot recover from itself sums of money that it unjustly and inequitably obtained and retained from itself.

The proposed amendment is also denied as to Worthington because the bare conclusions and speculative allegations that he has been unjustly enriched by inequitably obtained funds are legally insufficient. The PSAC proposed allegations state that the only Plaid monies Worthington obtained are those that Plaid paid to him as compensation for services performed, whether or not that money was well spent.

The motion is granted with respect to the proposed unjust enrichment claim against defendant. While many of plaintiff's proposed amendments in the PSAC

regarding defendant's alleged breaches of fiduciary duty do not assert, on their face, that defendant inequitably benefited to the detriment of Plaid, the amendment to raise a theory of unjust enrichment against defendant is not palpably insufficient, clearly devoid of any merit, or likely to cause undue prejudice or surprise. Defendant has been actively defending the same and similar allegations in this action and the Dissolution Action for more than six years. The addition of this proposed claim would not require defendant to change her position in this action as she has had ample notice of, and vigorously litigated, the factual allegations that support the proposed unjust enrichment claim.

While the merits of this claim may later be tested by defendant if an SAC is filed in accordance with this decision, the court is not, on this motion, tasked with evaluating the merits where plaintiff has established prima facie entitlement to leave to amend her pleading.

The court has considered all of the parties' remaining contentions and finds that they are unavailing or do not necessitate any alternate result.

**Motion 011:
Plaintiff's motion to consolidate this action and the Dissolution Action for trial**

In light of the court's decision granting in part Motion 012, detailed above, plaintiff's Motion 011 to consolidate this action and the Dissolution Action for the purpose of a joint trial is denied without prejudice to a new motion when the SAC contemplated in this decision has been filed and an answer or other response to that forthcoming pleading has been interposed.

Accordingly, it is

ORDERED that Motion Sequence Number 011, Plaintiff Veronica Hunzinger's motion to consolidate this action with the related action, is denied without prejudice to a new motion as outlined in the decision above; and it is further

ORDERED that Motion Sequence Number 012, Plaintiff's motion for leave to amend the first amended complaint, is granted in part; and it is further

ORDERED that Plaintiff may file a second supplemental and amended complaint in accordance with this decision within 10 days of entry of this decision and order on NYSCEF; and it is further

ORDERED that Defendant Carol Costello shall answer Plaintiff's new pleading within 30 days of entry of this decision and order on NYSCEF; and it is further

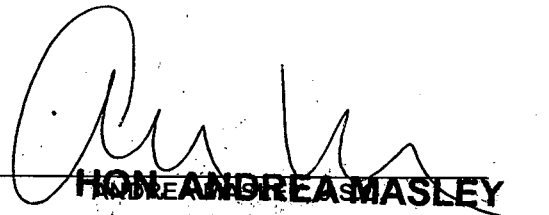
ORDERED that the parties will appear for a compliance conference in Room 242 at 60 Centre Street on May 28, 2019 at 12 am/pm.

MOTION 011:

4/5/2019
DATE

CHECK ONE: CASE DISPOSED
 GRANTED DENIED
APPLICATION: SETTLE ORDER
CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE



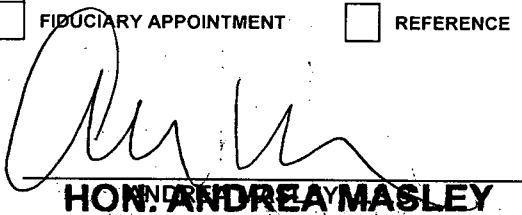
HON. ANDREA MASLEY

MOTION 012:

4/5/2019
DATE

CHECK ONE: CASE DISPOSED
 GRANTED DENIED
APPLICATION: SETTLE ORDER
CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER
 SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE



HON. ANDREA MASLEY