

<b>Davis v Scottish Re Group Ltd.</b>
2019 NY Slip Op 31008(U)
April 10, 2019
Supreme Court, New York County
Docket Number: 654027/2013
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

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INDEX NO. 654027/2013
MOTION DATE 12/07/2018
MOTION SEQ. NO. 010

DAVIS, PAUL

Plaintiff,

- v -

SCOTTISH RE GROUP LIMITED, ET AL.

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 496, 499, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 531

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

The underlying facts and allegations have been discussed at length in prior decisions of this court, as well as of the Appellate Division. Summarized, this action arises out of various corporate transactions. Through one transaction, Cerberus Capital, LLC, ("Cerberus") and Massachusetts Mutual Life Insurance Company acquired Scottish Re Group, Ltd. ("Scottish Re"). In another transaction, plaintiff alleges that Cerberus improperly purchased and resold certain debt securities from a subsidiary of Scottish Re (US), Inc. (the "Orkney Transaction"). The effects of the Orkney Transaction were allegedly not fully disclosed to shareholders in the Information Statement describing the merger. Other transactions involved an allegedly "unfair" dividend strategy and "improper" redemptions on the part of Scottish Re (first amended complaint [NYSCEF Doc No. 240]).

As against Scottish Re, the first amended complaint presently contains one surviving claim for breach of contract (count 2) (NYSCEF Doc Nos. 320 [July 11, 2016 Decision on Motion to Dismiss]). As against Cerberus, the first amended complaint contained only one claim for unlawful conspiracy that was dismissed on the grounds that it was based in conclusory allegations (count 6) (NYSCEF Doc No. 384 [July 19, 2017 Decision on Motions to Dismiss] at 18). As against defendants Larry Port and Raymond Weschler (collectively, the "Director defendants"), as well as other previously named directors, the first amended complaint contained two direct claims for breach of fiduciary duty, one with respect to discriminatory dividends, and another with respect to the merger (counts 3 and 4); one derivative claim for waste (count 5); and two derivative claims for breach of fiduciary duty with respect to the Orkney Transaction (counts 7 and 8). The court sustained count 3, dismissed count 4 for failure to allege necessary facts to sustain a direct claim, and dismissed the derivative claims (counts 5, 7, 8) for lack of standing (NYSCEF Doc No. 384).

Under motion sequence 010, plaintiff moves to amend the complaint for a second time, pursuant to CPLR 3025 (b). Having since acquired an assignment of Scottish Re's claims (Brenner affirmation, exhibit 4 [Order]), plaintiff now seeks to add claims that were previously dismissed for lack of standing, on behalf of Scottish Re, against Cerberus and the Director defendants. As against Cerberus, the second amended complaint asserts five causes of action under Cayman Island law for unlawful conspiracy, knowing receipt, dishonest assistance, breach of confidence, and breach of fiduciary duty. As against the

directors, the second amended complaint asserts two causes of action under Cayman Island law for breach of the duty of sufficient information and breach of fiduciary duty. The proposed amendment would also add facts uncovered in discovery about the Orkney Transaction, and remove claims that plaintiff is no longer pursuing or that have been dismissed (mem at 5).

Plaintiff first argues that leave is warranted because there is no prejudice or surprise to defendants. The proposed amendments are “premised upon the same facts, transactions or occurrences alleged in the original complaint” (mem at 6, citing *Janssen v Inc. Vill. of Rockville Ctr.*, 59 AD3d 15, 27 [2d Dept 2008]). The Second Cause of Action in the proposed second amended complaint, against the Director defendants, was formerly the Seventh Cause of Action in the original complaint. The amendment reflects only facts that became available through discovery and plaintiff’s new status as assignee (mem at 7). Likewise, defendant Cerberus has been on notice for years of the newly added causes of action 3 – 7 in the proposed second amended complaint because they all arise out of the same alleged wrongdoing regarding the Orkney Transaction that was at issue in the original complaint (mem at 7-8). Second, the claims are not “palpably insufficient” or “patently devoid of merit”. Plaintiff, as assignee, has authority to bring these claims based on the assignment agreement and Judiciary Law § 489 (1). The claims themselves are bolstered by the new information that became available through discovery (mem at 10-11).

In opposition, the Director defendants contend that the Orkney claim is time-barred because it was not asserted by a party with standing within three years of the date that Scottish Re’s board of directors approved the Orkney transaction (Directors opp at 8, citing *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009] [“Where the remedy sought is purely monetary in nature, courts construe the suit as alleging ‘injury to property’ within the meaning of CPLR 214[4], which has a three-year limitations period.”]). Although the claim accrued under Cayman Island law, the Cayman statute of limitations is longer, and as such, New York’s statute of limitations applies (opp at 9 n 11, citing CPLR 202; *Glob. Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 526 [1999]; *Smith Barney, Harris Upham & Co. Inc. v Luckie*, 245 AD2d 17, 18 [1st Dept 1997]). Because a tort claim does not accrue until damages are sustained, plaintiff’s claim would have accrued on April 15, 2011, when the directors approved the transaction at issue and agreements were entered giving the transaction effect (opp at 9). The claim therefore expired on April 11, 2014.

The Director defendants further contend that assignment of the claims does not revitalize a stale claim (opp at 10, citing *Trans-Res, Inc. v Nausch Hogan & Murray*, 298 AD2d 27, 30 [1st Dept 2002] [“An assignee takes a cause of action subject to all the infirmities, equities and defenses that could have been asserted against the assignor at the time of the assignment.”]; *Craft EM CLO 2006-1, Ltd. v Deutsche Bank AG*, 56 Misc 3d 1216[A], at \*5 [Sup Ct NY County 2017]; *Roslyn Assocs. v Inc. Vill. of Mineola*, 84 AD2d 581, 581 [2d Dept 1981]). Nor is the relation back doctrine helpful to plaintiff, because he lacked capacity to bring the claim when the original complaint was filed (opp at 11-12, citing *Goldberg v Camp Mikan-Recro*, 42 NY2d 1029, 1030 [1977]; *S. Wine & Spirits of Am., Inc. v Impact Envtl. Eng’g, PLLC*, 80 AD3d 505, 505-06 [1st Dept 2011]; *Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2005-S4 v Nomura Credit and Capital, Inc.*, 39 Misc.3d 1226[A], at \*7 [Sup Ct NY County 2013]). Because plaintiff lacked standing until the assignment, there is not a valid pre-existing action for the claims to relate back to. Finally, the purpose of CPLR 203 is to enable a plaintiff to correct a pleading error, not to act as a tolling statute. To allow plaintiff to benefit from the relation back doctrine under these circumstances would create negative policy implications (opp at 13).

In a separate opposition, defendant Cerberus argues as the Director defendants do, that the applicable statute of limitations in this case is three years, and as such, plaintiff’s Second Amended Complaint is not timely. Cerberus also incorporates by reference the Director defendants’ facts and arguments with respect to the relation back doctrine.

In reply, plaintiff counters that defendants ignore New York's savings statute, CPLR 205(a), which "provide[s] a second opportunity to the claimant who has failed the first time around because of some error pertaining neither to the claimant's willingness to prosecute in a timely fashion nor to the merits of the underlying claims" (reply at 3, citing *George v Mt. Sinai Hospital*, 47 NY2d 170, 178-79 [1979]). Plaintiff has met all of the requirements to take advantage of the savings statute. First, the original complaint was filed on November 13, 2013, within the three-year statute of limitations (opp at 4). Second, the First Department's dismissal of the original Orkney Transaction claims was a procedural determination based on standing, not on the merits (opp at 4-5). Third, plaintiff filed the motion for leave to amend within six months of the aforementioned decision, as required by CPLR 205 (a). Finally, there is no issue as to whether plaintiff identifies as the "same plaintiff", also required by CPLR 205 (a) (opp at 5, citing *Reliance Ins. Co. v PolyVision Corp.*, 390 FSupp2d 269, 273 [ED NY 2005] ["[T]he plaintiff in the new lawsuit may appear in a different capacity, such as duly appointed administrator, but the identity of the individual on whose behalf redress is sought [must] remain the same."]).

Plaintiff also argues that the relation-back doctrine does apply, and that the caselaw cited by defendants is inapposite because, unlike here, in those cases the entire action had been dismissed due to plaintiff's lack of standing. Here, plaintiff's entire complaint was not dismissed, only some of the claims. Here, there exists a valid preexisting action to which plaintiff's new pleading relates, per CPLR 203(f) (opp at 8-9, citing *Hui v E. Broadway Mall, Inc.*, 4 NY3d 790, 791-92 [2005]; *Bellini v Gersalle Realty Corp.*, 120 AD2d 345 [1st Dept 1986]). Defendants have long been on notice of these claims.

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]). Mere lateness in seeking such relief is not in itself a barrier to obtaining judicial leave to amend (*see Ciarelli v Lynch*, 46 AD3d 1039 [3d Dept 2007]). Rather, when unexcused lateness is coupled with significant prejudice to the other side, denial of the motion for leave to amend is justified (*see Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 958 [1983]). 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*, 24 AD3d at 205; *Zaid*, 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*, 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, plaintiff has 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]). Where there has been extended delay in seeking leave to amend, the party seeking to amend a pleading must establish a reasonable excuse for the delay (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 [1st Dept 2003]).

With respect to the claims against both the Director defendants and defendant Cerberus, the parties do not dispute that the applicable statute of limitations is three years. Because the motion to amend was filed after the expiration of the statute of limitations, whether the complaint may be amended to add the claims at issue depends on whether they relate back to valid preexisting complaint (*S. Wine & Spirits*

*of Am., Inc. v. Impact Envtl. Eng'g, PLLC*, 80 AD3d 505, 505–06 [2011] “[Relation back applies to the amendment of claims and parties and is dependent upon the existence of a valid preexisting action.”]). CPLR 203 (f) provides:

“A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.”

The claim that plaintiff seeks to add with respect to the Director defendants was previously asserted and dismissed for lack of standing, so there is no question as to whether the defendants have been on notice of the transactions and occurrences at issue. Similarly, Cerberus itself states in its opposition that the amendment contains “the exact same substantive allegations” that plaintiff has previously asserted (Cerberus opp at 1). However, defendants contend that because plaintiff lacked standing with respect to the renewed claims when the FAC was filed, there is no valid preexisting complaint for the renewed claims to relate back to.

As plaintiff points out, the cases cited by defendants may be distinguished on the grounds that in those cases, unlike here, the complaint had been dismissed in its entirety and there was thus no valid preexisting action for new claims to relate back to (*see Goldberg v Camp Mikan-Recro*, 42 NY2d 1029, 1030 [1977]; *S. Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC*, 80 AD3d 505, 505-06 [1st Dept 2011]; *Truty v Fed. Bakers Supply Corp.*, 217 AD2d 951, 951 [4th Dept 1995]; *Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2005-S4 v Nomura Credit and Capital, Inc.*, 39 Misc.3d 1226[A], at \*7 [Sup Ct NY County 2013]).

Here, as the complaint has not been dismissed in its entirety, there exists a valid preexisting action that is not mooted by plaintiff’s initial lack of standing (*see Hui v E. Broadway Mall, Inc.*, 4 NY3d 790, 791-92 [2005]; *Bellini v. Gersalle Realty Corp.*, 120 AD2d 345, 347–48 [1st Dept 1986]). Rather, “[i]t is well-settled that amendment of a pleading to assert a new cause of action, even one which technically belongs to different persons, or to substitute new parties, related to the original parties, is not precluded because an independent, do [sic] novo action would be time barred” (*Bellini*, 120 AD2d at 347). Defendants have not and cannot assert surprise or prejudice as the claims asserted in the second amended complaint. Therefore, as in *Bellini*, “the subject amendment does not frustrate the principle underlying purpose of the Statute of Limitations, which is to compel the exercise of a right of action within a reasonable time so that a defendant has an opportunity to prepare an adequate defense” (120 AD2d at 348).

Finding that the claims asserted in the second amended complaint relate back to a timely prior pleading, the court need not reach the issue of whether CPLR 205 (a) applies in this case.

With regard to the underlying merits, the proposed claims are not “patently insufficient” (*see Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [1st Dept 2007]).

It is hereby

**ORDERED** that the plaintiff's motion for leave to amend the complaint is granted; and it is further

**ORDERED** that the defendant shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

**ORDERED** that counsel are directed to appear for a status conference in Room 252, 60 Centre Street, on May 13, 2019, at 10:30 AM.

4/10/2019  
DATE

  
O. PETER SHERWOOD, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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