

SW Prods., Inc. v CBGB Festival, LLC

2019 NY Slip Op 31054(U)

April 4, 2019

Supreme Court, New York County

Docket Number: 652990/2014

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

SW PRODUCTIONS, INC.,

X

Plaintiff,

-against-

Index No.: 652990/2014

CBGB FESTIVAL, LLC, CBGB HOLDINGS, LLC,
CBGB, LLC, 315 BOWERY HOLDINGS, LLC,
PRODUCTIONS NEW YORK CITY, LLC,
315 BOWERY HOLDINGS, LLC,
NUMBERS AND FIGURES, INC.,
IDEKO PRODUCTIONS and
JENNIFER DOUGLAS,

Mot. Seq. No. 008

Decision and Order

Defendants.

CBGB FESTIVAL, LLC and 315 BOWERY
HOLDINGS, LLC,

X

Counterclaimants,

-against-

SW PRODUCTIONS, INC.,

Counterclaim Defendant.

X

CBGB FESTIVAL, LLC and 315 BOWERY
HOLDINGS, LLC,

Cross-Claim and Third-Party Plaintiffs,

-against-

PRODUCTIONS NEW YORK CITY, LLC,

Cross-Claim Defendant,

and

TIMOTHY HAYES, STUART WEISSMAN,
JENNIFER DOUGLAS and SPECTRUM WIDE
PRODUCTIONS, LLC,

Third-Party Defendants.

X

Masley, J:

Third-party defendant Jennifer Douglas moves (i) pursuant to CPLR 3211 to dismiss plaintiff/counterclaim defendant SW Productions, Inc. (SWP) and third-party defendants Stuart Weissman and Spectrum Wide Productions, LLC's (Spectrum) cross claim against her and (ii) pursuant to 22 NYCRR 130-1.1-a for costs and sanctions against SWP, Weissman, and Spectrum (collectively, the Weissman Parties) and their counsel for frivolous litigation. The Weissman Parties cross-move, pursuant to CPLR 3025 (b), for leave to amend their answer to CBGB Festival, LLC (CBGB) and 315 Bowery Holdings, LLC's (collectively, the CBGB Parties) third amended answer to include cross claims for contribution against Douglas, a former SWP employee, and Timothy Hayes, the CBGB Parties' alleged former president, in its ad damnum clause.

This action arises out of an agreement between CBGB and SWP to partner in the production of a New York City music festival, commencing in 2012 and to be held annually thereafter (Times Square Festival). CBGB engaged third-party defendant Timothy Hayes to promote the CBGB brand (NYSCEF Doc. No. [Doc.] 379, ¶ 158). Hayes arranged for CBGB to hire Weissman through his company, SWP, to produce the Times Square Festival (*id.* at ¶ 159).

Douglas began her employment with SWP in 2011. The Weissman Parties allege that Douglas was SWP's former business manager and CFO. (Doc. 381, ¶ 290). Douglas left SWP and founded defendant Numbers and Figures, Inc. (Doc. 379, ¶ 38).

In June 2014, CBGB allegedly pushed SWP out of the Times Square Festival. In response, SWP commenced this action on October 1, 2014 and filed an amended summons and complaint on November 3, 2014, alleging claims against Douglas for

tortious interference with contract and unfair competition (NYSCEF Doc. No. 46).¹ On September 18, 2015, this court (Oing, J.) dismissed those claims, among others against the other defendants (Docs. 112 & 113). On October 16, 2015, the CBGB Parties filed their answer with counterclaims against SWP for breach of contract and tortious interference with prospective business opportunity (Doc. 117). On November 5, 2015, the CBGB Parties filed an amended answer with counterclaims, cross complaint against defendant Productions New York City LLC (Productions), a company formed by Hayes, and third-party complaint against Hayes (Doc. 128). On May 3, 2016, the CBGB Parties filed its second amended answer, second amended counterclaims against SWP, amended cross complaint against Productions, and amended third-party complaint against Weissman, Hayes, and Douglas (Doc. 155).

On November 20, 2017, this court granted the CBGB Parties' motion for leave to file a third amended answer, counterclaims, cross claims, and third-party complaint to add third-party defendant Spectrum, a new entity formed by Weissman to which he allegedly transferred SWP's assets (CBGB Third Amended Answer and Amended Third-Party Complaint) (Doc. 344). This court directed the Weissman Parties to answer within 20 days of service (*id.*). On November 29, 2017, this court struck SWP's amended complaint (Doc. 345). On December 26, 2017, the Weissman Parties filed an amended answer to the amended counterclaims and third-party complaint and amended cross complaint against Hayes and Douglas (Doc. 359) (Weissman Amended Answer and Cross Complaint). The Weissman Amended Answer and Cross Complaint added a claim for contribution against Douglas if the CBGB Parties are successful on their claims

¹ For the purposes of this motion, the court will focus on the claims against Douglas.

against the Weissman Parties (*id.*, ¶¶ 290-291). On March 13, 2018, counsel for the CBGB Parties filed a notice of voluntary discontinuance of their third-party claims against Douglas (Voluntary Discontinuance) (Doc. 361).

Douglas now moves to dismiss the Weissman Parties' claim for contribution and for sanctions. The Weissman Parties cross-move for leave to amend their answer to the CBGB Parties' third amended answer to include cross-claims for contribution against Douglas and Hayes in its *ad damnum* clause.

Discussion

Douglas' Motion to Dismiss and Sanctions

As a preliminary matter, Douglas asserts that the Weissman Parties lack standing to bring their claim for contribution. In regard to Weissman and Spectrum, Douglas argues that they lack standing because Douglas was never their employee.

CPLR 1401, in relevant part, provides that,

"two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought."

"The section applies not only to joint tortfeasors, but also to concurrent, successive, independent, alternative, and even intentional tortfeasors" (*Schauer v Joyce*, 54 NY2d 1, 5 [1981] [internal quotation marks and citations omitted]). "The relevant question under CPLR 1401 and *Dole [v Dow Chemical Co.]*, 30 NY2d 143 (1972) is not whether [tortfeasor one] owed a duty to [tortfeasor two], but whether [both tortfeasors] each owed a duty to [plaintiff], and by breaching their respective duties contributed to [plaintiff's] ultimate injuries. There is no need to search for the existence of an elusive legal relationship between the wrongdoers" (*id.* [internal quotation marks and citations

omitted]). “A claim for contribution exists only when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owed to the injured person” (*Smith v Sapienza*, 52 NY2d 82, 87 [1981] [citations omitted]) unless “an independent obligation can be found on the part of a concurrent wrongdoer to prevent foreseeable harm, [then] he [or she] should be held responsible for the portion of the damage attributable to his negligence, despite the fact that the duty violated was not one owing directly to the injured person” (*Garrett v Holiday Inns, Inc.*, 58 NY2d 253, 261 [1983]). Douglas’ counsel only states that she was not employee of Sprectrum or Weissman and concludes, without any further explanation, that Weissman and Sprectrum lack standing. Douglas’ counsel fails to argue that Douglas does not have a duty to the CBGB Parties or any other independent obligation she had to prevent the wrongdoing alleged. Thus, at this time, the court will not dismiss a claim for contribution brought by Sprectrum and Weissman for a lack of standing.

In regard to SWP, Douglas argues that it lacks standing because SWP was dissolved. On June 29, 2016, SWP was dissolved by proclamation or annulment of authority. New York Business Corporations Law (BCL) § 1006 (a) provides, in relevant part, that “[a] dissolved corporation, its directors, officers and shareholders may continue to function for the purpose of winding up the affairs of the corporation.” Pursuant to BCL § 1005, “upon dissolution[,] the corporation continues to exist for the purpose of ‘winding up its affairs’, which includes [collecting its assets,] ‘paying or adequately providing for the payment of its liabilities’” (*Rodgers v Logan*, 121 AD2d 250, 253 [1st Dept 1986], quoting BCL § 1005 [a] [1], [3]). Further, BCL § 1006 (b) provides that “the dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred

before such dissolution.” “A corporation therefore continues to exist after dissolution for the winding up of its affairs, and a dissolved corporation may sue or be sued on its obligations, including contractual obligations and contingent claims, until its affairs are fully adjusted” (*MMI Trading, Inc. v Nathan H. Kelman, Inc.*, 120 AD3d 478, 479-80 [2d Dept 2014] [internal quotation marks and citations omitted]). Here, although SWP is dissolved, it still has standing to bring a claim against Douglas for contribution.

Douglas also argues that the claim for contribution should be dismissed because it is barred by the doctrine of res judicata. Douglas asserts that the Weissman Parties' claims against her were previously dismissed, providing not further analysis or reasoning. The doctrine of res judicata “applies only when a claim *between* the parties has been previously brought to a final conclusion” (*City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 127 [2007] [internal quotation marks and citations omitted]). The Weissman Parties previously brought claims against Douglas for tortious interference of a contract between the Weissman and CBGB Parties and for unfair competition. On September 18, 2015, Justice Oing dismissed those claims holding that there was no contract to interfere with and that there was no contract preventing Douglas from using the information she obtained from the Weissman Parties when she left their employ nor was the information a trade secret (Doc. 113). The Weissman Parties' new claim for contribution was not previously asserted or adjudicated. It is not based on the same facts as the previous claims that Douglas allegedly interfered with a contract between SWP and CBGB and that she engage in unfair competition with SWP. Res judicata is not applicable.

Douglas further argues that the Weissman Parties failed to seek leave to amend when they filed the Weissman Amended Answer and Cross Complaint and added claims against Hayes and Douglas.

On November 20, 2017, this court granted the CBGB Parties' motion for leave to amend their pleadings by filing the CBGB Third Amended Answer and Third-Party Complaint (Doc. 344). The court directed the Weissman Parties to answer within 20 days of service (*id.*). When the Weissman Parties answered, they included claims against Douglas and Hayes alleging,

"The Weissman Parties allege that if the CBGB Parties were injured or damages in the manner set forth in the complaint, that Jennifer Douglas alone or in a scheme only between Timothy Hayes and Jennifer Douglas and not the Weissman Parties engaged in culpable conduct, whether negligent, reckless, intentional or otherwise, in and about said matters; that said conduct proximately caused and contributed to the incident, and the CBGB Parties' Parties claimed damages; and that the CBGB Parties should be barred from recovering those damages from the Weissman Parties that are attributable to Timothy Hayes and/or Jennifer Douglas"

(Doc. 359, ¶¶ 290-291). These claims were not previously alleged, and since it is not responsive to any new allegations in the CBGB Third Amended Answer and Third-Party Complaint, the Weissman Parties should have moved for leave to amend to add these claims against Douglas and Hayes (*see* CPLR 3025 [d]; *Pagan v Quinn*, 51 AD3d 1299, 1300 [3d 2008]). These claims are dismissed without prejudice to permit the Weissman Parties the opportunity to comply with the requirements of the CPLR, if they so elect. Although the Weissman Parties now cross-move for leave to amend, they only seek to amend the ad damnum clause to add the relief they seek against Douglas and Hayes. Nevertheless, even if the court considers this a request for leave to amend to add these claims, the conclusory allegations contained paragraphs 290 and 291 of the Weissman Amended Answer and Cross Complaint, are not sufficiently supported by facts with

respect to their claim for contribution (*see 325 E. 118th St., LLC v Roach Bernard, PLLC*, 2017 NY Slip Op 31697 [U] [Sup Ct, New York County 2017]). Douglas' argument pursuant to CPLR 3017(a) that the Weissman Parties failed to request any relief in their demand for relief need not be considered at this time in light of the foregoing. Finally, the portion of Douglas' motion seeking sanctions is denied as an improper and unsupported request. Restating the elements of Rule 130 does not make it so. Castro's affirmation would violate 22 NYCRR 202.8(c) if it stated any law. A brief in any format which fails to state the law and apply the facts is completely useless.

Weissman Parties' Motion for Leave to Amend

The Weissman Parties' cross motion is denied. The Weissman Parties argue that the Voluntary Discontinuance was untimely and if accepted they would be greatly prejudiced.

Pursuant to CPLR 3217 (a) (1), a plaintiff may voluntarily discontinue an action without a court order by serving the parties with a notice of discontinuance "at any time before a responsive pleading is served or, if no responsive pleading is required, within 20 days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court." The claim is timely because Douglas has not served an answer to the Second Amended Answer and Third-Party Complaint, which asserts the claims against her. Further, the Weissman Parties are not prejudiced by dismissing CBGB's claims against Douglas, because this court has dismissed the Weissman Parties' claims for contribution without prejudice. If they elect, they may now properly move for leave to amend. Further, the portion of the Weissman Parties' motion seeking leave to amend is denied for the reasons stated above.

Finally, if a motion for leave to amend is brought, and opposition filed, the parties must submit briefs containing legal support and a complete analysis, as both were lacking in the briefs submitted on this motion.

Accordingly, it is

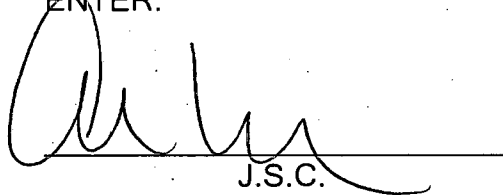
ORDERED that Jennifer Douglas' motion to dismiss is granted and the Weissman Parties' cross claim against her for contribution is dismissed without prejudice; and it is further

ORDER that Jennifer Douglas' motion for sanctions against SW Productions, Inc., Stuart Weissman and Spectrum Wide Productions, LLC is denied; and it is further

ORDERED that SW Productions, Inc., Stuart Weissman and Spectrum Wide Productions, LLC's cross motion for leave to amend their ad damnum clause is denied.

Dated: April 4, 2019

ENTER:



J.S.C.