SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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CORTLANDT STREET RECOVERY

Plaintiff,

- V -

BONDERMAN, DAVID

Defendant.

INDEX NO. 653357/2011

MOTION DATE

MOTION SEQ. NO. 014

DECISION AND ORDER

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HON. MARCY S. FRIEDMAN:

Plaintiff Wilmington Trust Company (WTC) moves in Index Number 653357/2011 (Cortlandt II or the Plenary Action) for an order granting it leave to amend the complaint. The motion seeks to add proposed defendants Apax Partners LLP (Apax) and TPG Capital, L.P. (TPG) to the existing causes of action. In addition, the motion seeks to add a conversion cause of action and to plead a judgment enforcement cause of action, both of which overlap with causes of action brought by WTC in Index Number 160367/2017 for enforcement of a judgment (the Judgment Enforcement Action). The judgment was granted in favor of WTC in Index Number 653363/2011 on a Motion for Summary Judgment in Lieu of Complaint.

At the outset, the court notes that WTC has a strong argument that the time to amend as of right under CPLR 3025 (a) has not passed, as defendants have not yet filed an answer or other pleading responding to the complaint. However, even if the time to amend as of right has passed, the court holds that leave to assert the proposed amendments should be granted.

It is well settled that leave to amend "'shall be freely given' absent prejudice or surprise resulting directly from the delay." (McCaskey, Davies & Assocs., Inc. v New York City Health & Hosps. Corp., 59 NY2d 755, 757 [1983]; see CPLR 3025 [b].) The decision whether to permit amendment of pleadings is committed to the discretion of the court. (Edenwald Contr. Co., Inc. v City of New York, 60 NY2d 957, 959 [1983].) It is further settled that on a motion for leave to amend a pleading, the movant "need not establish the merit of its proposed new allegations, but [must] 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] [internal citation omitted]; accord Miller v Cohen, 93 AD3d 424, 425 [1st Dept 2012]; Kocourek v Booz Allen Hamilton Inc., 85 AD3d 502, 505 [1st Dept 2011].)

The authorities in this Department have been in conflict as to whether or to what extent an evidentiary showing must be made in support of the motion for leave to amend. (See Ambac

Assur. Corp. v Nomura Credit & Capital, Inc., 2016 WL 7475831, * 3 n 4 [Dec. 29, 2016] [this court's prior decision discussing cases].) Recent authority has increasingly held that the party seeking leave to amend is "not required to submit an affidavit of merit or make any other evidentiary showing in support of [its] motion." (Boliak v Reilly, 161 AD3d 625, 625 [1st Dept 2018], citing Hickey v Steven E. Kaufman, P.C., 156 AD3d 436, 436 [1st Dept 2017], lv denied 32 NY3d 905 [2018]; see Reyes v BSP Realty Corp., 2019 WL 1522620, * 1 [1st Dept Apr. 9, 2019] ["An amendment is devoid of merit where the allegations are legally insufficient"].)

Defendants argue that the statute of limitations has passed on the causes of action sought to be asserted against the proposed defendants, Apax and TPG. Even assuming, without deciding, that that contention is correct, the claims against Apax and TPG are timely under the relation back doctrine. Where a new defendant is sought to be added to an existing action, three conditions must be met in order for the claims against the defendant to relate back to the claims asserted against other defendants in the action: "(1) both claims must arise out of the same conduct, occurrence or transaction; (2) the new party must be 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the lawsuit that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well." Cintron v Lynn, 306 AD2d 118, 119-120 [1st Dept 2003]; Buran v Coupal, 87 NY2d 173, 178-181 [1995] [clarifying that only a mistake, as opposed to an excusable mistake, is required where the omission of a party from the original pleading was not deliberate or undertaken in order to obtain a tactical advantage in the litigation].)

Addressing the third prong of the relation back doctrine, the court holds that Apax and TPG were on notice, from the outset of this litigation, that claims would be asserted against them. They were expressly named as defendants in a related 2010 action brought by Cortlandt Street Recovery Corp (Cortlandt), under Index Number 651693/2010, which this court dismissed based on Cortlandt's lack of standing. In the instant action, the original complaint does not name Apax and TPG as defendants. Apax and TPG are, however, referenced throughout the original complaint and are alleged to have controlled the Apax and TPG entities that are named as defendants and that were allegedly formed to acquire and "bleed-out" a telecommunications company. (E.g., Compl., ¶¶ 1-2, 28.) In the original complaint, Apax and TPG are included, with the named Apax and TPG entities, in the definition of "Private Equity Defendants." (Id., ¶ 27.) The original complaint pleads causes of action, including alter ego claims against the Private Equity Defendants, asserting they are liable for the alleged bleed-out. (Id., ¶¶ 181-185 [Fourth Cause of Action].) Further, TPG and Apax in the 2010 Action, and the named TPG and Apax entities in the 2011 Action, are represented by the same counsel. This court jointly heard and determined the motions to dismiss in both actions. (Cortlandt St. Recovery Corp. v Hellas Telecom., S.a.r.l., 47 Misc. 3d 544 [Sup Ct, NY County 2014], affd as modified 142 AD3d 833 [1st Dept 2016], affd 31 NY3d 30 [2018].)

The failure to name Apax and TPG as defendants in this action cannot be regarded as deliberate. Rather, it was the result of inartful pleading – in particular, the service of this action while the separate, but related, 2010 Action against Apax and TPG, among others, was still pending. It is noted, moreover, that since the dismissal of the 2010 Action, WTC has sought to amend this action to assert the claims against Apax and TPG.

The remaining prongs of the relation back doctrine are also satisfied. As discussed above, the claims against Apax and TPG unquestionably arise out of the transaction alleged in the original complaint. As Apax and TPG are alleged to be alter egos of the already named Apax and TPG entities, they are united in interest with those entities. (See e.g. Dziennik v Sealift, Inc., 2009 WL 10705790, at *8 [ED NY, April 1, 2009, No. CV 2005-4659 (DLI) (MDG)] [holding under the similar federal relation back doctrine, codified in Federal Rules of Civil Procedure 15(c)(1), that "relation back . . . is particularly appropriate [] given the allegations of alter ego status"].) Significantly also, the Court of Appeals has expressly held that the alter ego allegations against the already named entities were sufficiently pleaded. (31 NY3d, at 46-50.) Under these circumstances, the court holds that WTC has made a sufficient showing of merit to support the claim that Apax and TPG are united in interest with the previously named defendants.

In sum, to the extent that WTC seeks to add Apax and TPG to the existing causes of action, WTC has met its burden. To the extent that WTC seeks to add new causes of action for conversion and enforcement of the judgment previously granted to WTC, this branch of the motion will also be granted. The interests of judicial economy will best be served by maintenance of all of the claims in a single action. Any duplication of claims will be avoided as WTC represented on the record that it would withdraw the Judgment Enforcement Action in the event leave to amend were granted in this action. (Nov. 20, 2018 Transcript, at 49.)

In granting leave to amend, the court finds that defendants will not be prejudiced by the amendment. Defendants' claim of prejudice is based on the assertions that they have already filed a motion to dismiss addressed to the original complaint, that they understood that WTC would only seek to add parties, not "substantive amendments," and that because WTC has made "substantive amendments" they must now prepare and serve an additional motion to dismiss. (Defs.' Memo. In Opp., at 8.) Review of the file shows that the January 2017 motion to dismiss raised bases for dismissal that this court had not reached on the initial motion to dismiss because it had dismissed this action for lack of standing. The motion to dismiss was revived after the Appellate Division reinstated the complaint to the extent brought by WTC. Defendants knew, before they filed the January 2017 motion to dismiss, that WTC planned to move for leave to amend. (See Preliminary Conference Order, dated Dec. 13, 2016.) Defendants repeatedly stipulated to defer the motion to amend pending discovery and could likewise have sought leave to defer the motion to dismiss. In short, defendants will not be prejudiced by the amendment because, with limited exceptions, the arguments raised in the January 2017 motion are equally relevant to a motion to dismiss the proposed Amended Complaint, which incorporates most of the claims raised in the original complaint and adds some new claims.

The court has considered defendants remaining contentions and finds them without merit.

It is hereby ORDERED that the motion of Wilmington Trust Company for leave to amend the complaint is granted to the extent that the proposed amended complaint, annexed as Exhibit B to the June 22, 2018 Affirmation of Douglas E. Spelfogel, shall be deemed served upon service of a copy of this order with Notice of Entry.

This constitutes the decision and order of the court.

4/16/2019
DATE

MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE