Matter of Densply Sirona, Inc. Shareholders Litig. v XXX
2020 NY Slip Op 30342(U)
February 6, 2020
Supreme Court, New York County
Docket Number: 155393/2018
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SALIANN SCARPULLA** **PART** **IAS MOTION 39EFM**

Justice

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IN RE DENSPLY SIRONA, INC. SHAREHOLDERS LITIGATION

Plaintiff,

- v -

XXX,

Defendant.

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INDEX NO. 155393/2018

MOTION DATE 12/17/2019

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 186, 187, 188, 189, 190, 191, 192, 195, 196, 197

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

In this action for violations of the Securities Act of 1933 ("33 Act"), plaintiffs John Castronovo and Irving Golombeck (together, "Plaintiffs") move, pursuant to CPLR 5015, to vacate the Court's September 30, 2019 Judgment (the "Judgment"). Plaintiffs also move, pursuant to CPLR 3025, for leave to file a second consolidated amended complaint.

This case stems from the acquisition by dental equipment company Dentsply International Inc. ("Dentsply Intl.") of another dental equipment company, Sirona Dental Systems, Inc. ("Sirona") (the "Acquisition"). A prospectus ("Prospectus") and joint proxy statement ("Proxy") were filed in connection with the Acquisition (together, the "Registration Statement") and the SEC declared the Registration Statement effective on

December 7, 2015. As a result of the Acquisition, which took place on February 29, 2016, a combined company – Dentsply Sirona – was formed.

Plaintiffs' consolidated amended complaint ("CAC"), filed on November 2, 2018, alleged that defendants Dentsply Sirona Inc. ("Dentsply Sirona"), Jeffrey Solvin ("Solvin"), Bret W. Wise ("Wise"), Christopher T. Clark ("Clark"), Michael C. Alfano ("Alfano"), Eric K. Brandt ("Brandt"), Paula H. Cholmondeley ("Cholmondeley"), Michael J. Coleman ("Coleman"), Willie A. Deese ("Deese"), William F. Hecht ("Hecht"), Francis J. Lunger ("Lunger"), John L. Miclot ("Miclot"), John C. Miles, II ("Miles"), Thomas Jetter ("Jetter"), David Beecken ("Beecken"), William K. Hood ("Hood"), Arthur D. Kowaloff ("Kowaloff"), Harry M. Jansen Kraemer, Jr. ("Kraemer") and Timothy P. Sullivan ("Sullivan") (collectively, the "Individual Defendants" and together with Dentsply Sirona, "Defendants") made statements in the Registration Statement about demand, inventory and industry competition but failed to disclose material information regarding each of these topics in violation of Sections 11, 12(a)(2) and 15 of the'33 Act.

Plaintiffs alleged that Dentsply Intl.'s and Sirona's three main distributors – Henry Schein, Inc. ("Henry Schein"), Patterson Companies, Inc. ("Patterson") and Benco Dental Supply Co. ("Benco") (together, the "Distributors") – engaged in an Anticompetitive Scheme that controlled the distribution of dental products, limited competition and inflated prices and that Dentsply Intl. and Sirona knew of and were complicit in the Anticompetitive Scheme.

Defendants moved to dismiss Plaintiffs' consolidated amended complaint ("CAC") and I granted that motion in a decision dated September 26, 2019 (the "September 2019 Decision") and directed the Clerk to enter judgment in favor of Defendants. On September 30, 2019, the Clerk entered the Judgment which dismissed the action.[1]

Plaintiffs now move to vacate the Judgment in the interests of substantial justice and to be granted leave to amend.

Discussion

Motion to Vacate

CPLR 5015(a) provides that a party can move to vacate a judgment based on:

> 1. excusable default…; or
> 2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404; or
> 3. fraud, misrepresentation, or other misconduct of an adverse party; or
> 4. lack of jurisdiction to render the judgment or order; or
> 5. reversal, modification or vacatur of a prior judgment or order upon which it is based.

"However, CPLR 5015 does not 'provide an exhaustive list of the grounds for vacatur.'" *City of New York v. OTR Media Group, Inc.*, 175 A.D.3d 1163, 1163 (1st Dept. 2019) (citation omitted); *see also State v. Moore*, No. 526757, 2020 WL 20420 at *1 (3d Dept. N.Y. Jan. 2, 2020). In addition to the enumerated grounds in the statute, "a court may

[1] The Clerk entered Defendants' proposed form of judgment but crossed out the words "with prejudice."

vacate its own judgment for sufficient reason and in the interests of substantial justice." *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 68 (2003).

Plaintiffs argue that if they had brought claims under New York law, this motion would be unnecessary because Plaintiffs could bring a new action, pursuant to CPLR 205(a), within six months of this action's termination.[2] Plaintiffs then theorize that because their claims were brought under the federal '33 Act, "it is at least arguable that any new action timely filed in accordance with CPLR §205 would – as a matter of federal law – nonetheless be deemed barred by the federal three-year statute of repose for 1933 Act claims under 15 U.S.C. §77m." As a result, it is Plaintiffs' position that its situation is unprecedented and that the interests of justice require vacating or modifying the Judgment to permit Plaintiffs to file another amended complaint in this action.[3] Plaintiffs also argue that the September 2019 Decision did not intend to deprive Plaintiffs of an opportunity to replead because it did not state that the dismissal was "with prejudice."

Defendants argue that Plaintiffs' concerns about the statute of repose is not a ground for vacatur. Additionally, Defendants state that Plaintiffs were aware of the federal statute of repose and possible inapplicability of the relation back principle at the

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[2] Under CPLR 205, where an action was timely commenced and "terminated in any other manner than by voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff… may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination."

[3] Plaintiffs further contend that allowing an amended complaint, which would "relate back" to the original action's filing even under federal law, would obviate "difficult" issues that would arise if the Judgment were not vacated.

time the action was commenced and the September 2019 Decision acknowledged the applicability of 15 U.S.C. §77m.[4] Defendants further state that courts' power to vacate is not absolute but can only be utilized to relieve a party from a judgment resulting in, among other things, fraud and mistake, and that as these circumstances do not exist in this case, Plaintiffs' motion should be denied.

Although courts may grant vacatur for reasons other than those delineated in CPLR 5015, the courts' "power to exercise control over its judgments is not plenary, and should be resorted to only to relieve a party from judgments taken through [fraud,] mistake, inadvertence, surprise or excusable neglect." *Long Island Lighting Company v. Century Indemnity Company*, 52 A.D.3d 383, 384 (1st Dept. 2008); *see also LaSalle Bank, N.A. v. Delice*, 175 A.D.3d 1283, 1283 (2d Dept. 2019) (finding that motion to vacate was properly denied where "plaintiff offered no evidence of fraud, mistake, inadvertence, surprise, or excusable neglect warranting vacatur in the interests of substantial justice"). Here, Plaintiffs' proffered grounds for vacatur are not that the Judgment was the result of "fraud, mistake, inadvertence, surprise, or excusable neglect" necessitating vacatur in the interests of substantial justice. *See Equity Inv. & Mtge. Co. v. Smith*, 173 A.D.3d 690, 690-691 (2d Dept. 2019).

In addition, Plaintiffs have not identified, nor has the Court found, any cases in support of their argument that CPLR 5015 allows vacatur based on an "injustice"

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[4] Plaintiffs incorrectly state that the September 30, 2019 rejected Defendants' argument that the original complaint was time-barred. Rather, the September 30, 2019 stated that "defendants have raised issues of fact regarding when the statute began to run that will be addressed at a later stage if this litigation proceeds."

stemming from application of federal law on a federal claim in state court. Plaintiffs' cases are distinguishable in that those cases involve excusable neglect, misconduct or mistake which are within the Court's authority to vacate whereas this case does not entail these circumstances and thus is outside the Court's power to vacate.[5]

I find the remainder of Plaintiffs' arguments in favor of vacatur unavailing, thus Plaintiffs' motion to vacate is denied.[6]

Leave to Amend

Under CPLR 3025, "motions for leave to amend should be freely granted." *Lucido v. Mancuso*, 49 A.D.3d 220, 226-27, 851 N.Y.S.2d 238 (2d Dept. 2008); *see also Global Liberty Ins. Co. v. Tyrell*, 172 A.D.3d 499, (1st Dept. 2019). Plaintiffs seeking to amend need only "show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dept. 2010).

Plaintiffs seek leave to file a second consolidated amended complaint ("SAC") "that would expand on the facts alleged in the CAC by providing additional factual

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[5] For example, in *City of New York v. OTR Media Group, Inc.,* 175 A.D.3d at 1163, the First Department found that the interests of justice warranted vacatur because at the time a contempt order was entered (based upon defendants' failure to pay), the defendants had actually made the payments but they were mistakenly misapplied by the plaintiff. In *Goldman v. Cotter*, 10 A.D.3d 289, 291-93 (1st Dept. 2004), the court reversed the denial of a motion to vacate a default judgment due to a failure to file and serve opposition papers because the failure was caused by a paralegal's misconduct, which the court deemed excusable.

[6] Plaintiffs, however, are not without remedy. They can appeal the September 2019 Decision and Judgment and, in fact, filed a notice of appeal on October 25, 2019.

support for their allegations," should the Court reopen the Judgment. Defendants argue that Plaintiffs have not made the required showing to merit granting their request to amend. I agree.

First, because the CAC has already been dismissed, and I denied Plaintiffs' motion to vacate the Judgment, there are no claims before the Court to amend. *Tanner v. Stack*, 176 A.D.3d 429, 429 (1st Dept. 2019).

Second, even if vacatur was granted, Plaintiffs' motion for leave to amend would still be denied. "In New York's First Department," parties "seeking leave to replead must submit an affidavit of merit along with [the] proposed pleading." *Henkel v. Wagner*, No. 12-CV-4098, 2016 WL 1271062, at *6 (S.D.N.Y. Mar. 29, 2016). While leave to amend is freely given in the absence of prejudice, "leave to amend 'may not be granted upon mere request, without appropriate substantiation.'" *JP Morgan Chase Bank, N.A. v. Hall*, 122 A.D.3d 576, 582 (2d Dept. 2014). To succeed on a motion for leave to amend, a plaintiff must show that the amendment "would cure the fatal deficiencies of the [] complaint" and "submit a copy of any proposed amendment." *Seven Seventeen Corp. v. JP Morgan Chase & Co.*, 32 A.D.3d 802, 802 (1st Dept. 2006).

Here, Plaintiffs failed to attach a proposed SAC to the motion. Instead, Plaintiffs simply note that if the Court prefers to review a draft SAC prior to determining whether to grant leave to amend, then Plaintiffs request 45 days. Plaintiffs also failed to show how a proposed SAC would remedy the defects of the CAC. Plaintiffs merely make the conclusory argument that they "likely could remedy [the] perceived pleading deficiencies and "likely could also remedy any… deficiency regarding personal jurisdiction over

certain nonresident individual defendants." In their reply memorandum, "to provide further guidance to the Court," Plaintiffs state that the amendments would be comprised of facts drawn from other sources without elaborating on the facts and thus the reply suffers from the same defects as the memorandum in support.

Lastly, Plaintiffs erroneously posit that, in their opposition to the motion to dismiss, they requested leave to amend which should support the granting of such leave now. In fact, the final sentence of Plaintiffs' memorandum in opposition stated, "[i]f the Court dismisses any claim, however, plaintiffs respectfully request leave to amend." This prior one-line request, like the motion for leave to amend before me, did not elucidate what the new pleadings would contain and cannot substantiate Plaintiffs' bid to amend. *See JP Morgan Chase Bank, N.A. v. Hall*, 122 A.D.3d 576, 582 (2d Dept. 2014) (finding that lower court was correct to deny plaintiff's request for leave to amend where the request was advanced in a footnote on the last page of the plaintiff's memorandum and did not indicate what the new pleadings would include).

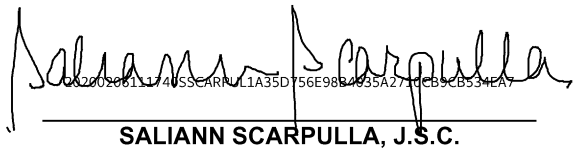
For these reasons, I deny Plaintiffs' motion for leave to amend.

In accordance with the foregoing, it is

ORDERED that Plaintiffs' motion to vacate the Court's September 30, 2019 Judgment is denied in its entirety; and it is further

ORDERED that Plaintiffs' motion for leave to file a second consolidated amended complaint is denied in its entirety.

This constitutes the decision and order of the Court.



2/6/2020
DATE

SALIANN SCARPULLA, J.S.C.

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