

ZEF Records, LLC v BMG Rights Mgt. (US), LLC
2020 NY Slip Op 30866(U)
March 27, 2020
Supreme Court, New York County
Docket Number: 656022/2019
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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ZEF Records, LLC.,

Plaintiff,

- v -

BMG Rights Management (US), LLC.,

Defendant.

INDEX NO.	656022/2019
MOTION NO.	001

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

This dispute arises out of an agreement (“the Agreement”) between Plaintiff ZEF Records, LLC (“ZEF”) and Defendant BMG Rights Management (US), LLC (“BMG”). Pursuant to the Agreement, ZEF granted BMG an exclusive license to distribute, license, rent, lease, sell, copy, manufacture, market, promote, and/or otherwise exploit and permit the public performance of a newly recorded album featuring musical artists Watkin Tudor Jones (“Jones”) and Anri du Toit (“du Toit”), who are collectively professionally known as the group Die Antwoord (“the Group”). *See* Complaint, NYSCEF Doc. No. 1.

Plaintiff brings a single cause of action for breach of the Agreement, alleging that Defendant failed to pay Plaintiff certain monetary advances as required under the Agreement. Before the Court is Defendant’s motion sequence 001 to amend its Answer to assert Counterclaims. Defendant seeks to add two counterclaims, (1) fraudulent inducement, and in the alternative, (2) breach of the implied covenant of good faith and fair dealing.

Defendant requests to add allegations that Defendant was fraudulently induced to enter into the Agreement with Plaintiff because Plaintiff withheld information that, had it been known

to Defendant, would have caused Defendant not to enter into the Agreement. Specifically, Defendant alleges that following the execution of the Agreement, Defendant discovered public videos seeming to show members of the Group engaged in racist, homophobic and violent acts. Defendant alleges these videos were known to Plaintiff prior to the execution of the Agreement and Plaintiff did not disclose the existence of the videos despite an obligation to do so.

Under CPLR 3025(b) leave to amend should be freely given, absent surprise or prejudice resulting from the delay. On a motion for leave to amend a pleading, the “movant need not establish the merit of the proposed new allegations but must simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit”. *See Cruz v. Brown*, 129 A.D.3d 455 (2015) *citing Miller v. Cohen*, 93 A.D.3d 424 (1st Dep’t.2012). *See also* § 237 Amendment by Leave, Siegel, N.Y. Prac. § 237 (6th ed.) (“[o]n a motion to amend, the court will not ordinarily consider the merits of the proposed new matter unless it is so obviously lacking in merit as to have no chance of success whatever, in which case the motion may be denied on that ground”).¹ Leave to amend will be denied where the proposed pleadings fail to state a claim or are otherwise “palpably insufficient as a matter of law...” *Davis & Davis. v. Morson*, 286 AD2d 584, 585 (1st Dep’t 2001) (citations omitted).

Here, Defendant correctly asserts that there can be no surprise or prejudice resulting from the proposed amendments. The parties discussed the proposed amendments before this motion was filed, including at the recent preliminary conference with the Court in January 2020.

¹ *See NYASHA Servs., Inc., Self-Ins. Tr. v. People Care Inc.*, 156 A.D.3d 99, 102 (3rd Dep’t 2017) for an in-depth discussion of the application of CPLR 3025, (stating “the liberal standard for leave to amend that was adopted by the drafters of the CPLR is inconsistent with requiring an evidentiary showing of merit on such a motion. If the opposing party [on a motion to amend] wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment...” (internal citations omitted)).

Defendant also alleges in the proposed Amended Answer and Counterclaims that there were contemporaneous discussions about the conduct at issue immediately following the execution of the Agreement. Additionally, this case is in the very beginning stage of discovery and thus Plaintiff will have ample time to respond and conduct discovery on the counterclaims.

In opposition, Plaintiff argues that the proposed counterclaims are meritless. Specifically, Plaintiff argues that Defendant cannot state a claim for fraudulent inducement because Plaintiff owed no duty to Defendant, Defendant has not alleged justifiable reliance, and Defendant has not alleged fraudulent intent. Plaintiff argues that the Agreement was an arms-length transaction between sophisticated parties, no fiduciary relationship exists, and Defendant should have performed due diligence prior to executing the Agreement. Plaintiff states that the videos described in the proposed amendments were public before the Agreement was executed and that Plaintiff had no obligation to disclose publicly available information.

Where a party alleges fraud (or fraudulent inducement) based on an omission of information, rather than an affirmative misrepresentation, typically a special relationship is required to state a claim. However, in the absence of a special relationship, a party may still properly allege fraud where there are special facts such that one party had superior knowledge of certain information, not readily available to the other party. *See P.T. Bank Central Asia v ABN AMRO Bank N.V.*, 301 A.D.2d 373 (1st Dep't 2003) (citing cases).

Plaintiff is correct that there is no fiduciary or other special relationship between the parties to give rise to a duty to disclose the relevant information. Nevertheless, the Court finds that Defendant has alleged sufficient facts in the proposed Amended Answer and Counterclaims to proceed under the special facts doctrine. In particular, the proposed Amended Answer and Counterclaims allege at ¶¶ 29 – 30 that:

- ZEF had superior knowledge of the Videos and the events they appear to capture because each of them directly allegedly involved the Group, Jones, and du Toit, and, upon information and belief, were filmed by [the Group's] former cameraman with [the Group's] knowledge, and in the course of [the cameraman's] employment by [the Group];
- ZEF or ZEF's representatives were in communications with or about ZEF's former cameraman as BMG and ZEF were negotiating the Agreement or prior to finalizing the Agreement, but ZEF did not disclose to BMG information concerning the cameraman or the Videos;
- Knowledge of the existence of the Videos and their content was not readily available to BMG before signing the Agreement because [the videos] did not become widely circulated until after that time.

In sum, because Plaintiff (ZEF) had a direct relationship with the Group, Plaintiff likely had information about the content and extent of the videos, and their potential impact on negotiations, before the videos surfaced publicly. Therefore, the special facts doctrine supports the proposed amendment.

The Court also finds that Defendant has sufficiently alleged justifiable reliance and fraudulent intent, which are both inherently fact-intensive allegations. *See Cohen Bros. Realty Corp. v. Mapes* (1st Dep't. 2020) (finding plaintiffs sufficiently pleaded fraud causes of action with the information available to them in a pre-discovery posture).

Turning to the proposed counterclaim for breach of the implied covenant of good faith and fair dealing, Plaintiff argues that Defendant fails to state a claim. Plaintiff correctly notes that the implied covenant of good faith and fair dealing does not impose any obligation inconsistent with express terms of the contract at issue. Instead, as Defendant notes, the implied covenant "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *See* Restatement (Second) of Contracts § 205, Comment.

Here, Defendant alleges a host of facts in support of its claim for breach of the implied covenant of good faith and fair dealing. Most significantly, Defendant cites conversations with

Plaintiff the day after the execution of the Agreement about the conduct that is the subject of the counterclaims. Defendant alleges that Plaintiff acknowledged that the deal was “dead” during those discussions, recognizing the impact the videos that had recently become public would have on the deal. Defendant has alleged sufficient facts to state a claim for breach of the implied covenant of good faith and fair dealing. The Court finds that this claim may proceed so long as it is explicitly indicated that it is pled in the alternative. Since Defendant seeks rescission of the Agreement as a remedy for the proposed fraudulent inducement claim, breach of the implied covenant of good faith and fair dealing can only be pled in the alternative. While Defendant’s Memorandum of Law indicates that the latter claim is in the alternative, the proposed pleading does not do so on its face – this should be corrected before filing the amended pleading.

Accordingly, it is hereby,

ORDERED that Defendant’s motion to amend is granted; and it is further

ORDERED that Defendant file (serve by email and later e-file) its Amended Answer and Counterclaims by April 27; and Plaintiff shall answer the Amended Counterclaims twenty days after service; and it is further

ORDERED that discovery shall continue and the parties shall appear for a status conference in Room 232 on June 2, 2020 at 9:30.

Dated: March 27, 2020

Barry R. Ostrager
BARRY R. OSTRAGER, J.S.C.

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CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE