

BEC Capital, LLC v Bistrovic
2020 NY Slip Op 31789(U)
June 9, 2020
Supreme Court, New York County
Docket Number: 153737/2016
Judge: Andrew Borrok
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

BEC CAPITAL, LLC, KELP CAPITAL LLC, DREW MYERS,
JEFF FEINGLAS

Plaintiff,

- v -

BOJAN BISTROVIC, MARSONIA CAPITAL
MANAGEMENT, LLC, MARSONIA INVESTMENT
MANAGEMENT, LLC,

Defendant.

-----X

INDEX NO. 153737/2016
MOTION DATE 02/18/2020
MOTION SEQ. NO. 005

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 154, 155, 156, 157,
158, 159, 160, 161, 162, 163, 164, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177

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

Upon the foregoing documents, Bojan Bistrovic, Marsonia Capital Management, LLC and
Marsonia Investment Management, LLC's (the Defendants) motion to amend their answer,
counterclaims and third-party complaint (the Pleadings) pursuant to CPLR 3025 is granted.

RELEVANT FACTS AND CIRCUMSTANCES

In a decision dated November 12, 2019 (the Appellate Decision; NYSCEF Doc. No. 150), the
Appellate Division, First Department, inter alia, modified a prior decision of the court (Ramos,
J.), which denied the Defendants' prior motion for leave to amend dated March 4, 2018 to assert
claims for defamation and accounting, to allow the counterclaim for defamation, writing as
follows:

The alleged defamatory statements in the June 2016 email, upon which
defendants rely, are not protected by the common-law privilege that applies to

statements made in the context of a judicial proceeding or the statutory privilege set forth in Civil Rights Law § 74 (*see Bridge C.A.T Scan Assocs. v Ohio-Nuclear, Inc.*, 608 F Supp 1187, 1194-1195 [SD NY 1985] [applying NY law]; *Williams v Williams*, 23 NY2d 592, 599 [1969]). Nor is the proposed counterclaim barred by the statute of limitations (see CPLR 203[d]). Leave to amend the answer to assert a counterclaim for an accounting, however, was properly denied as defendants have failed to establish that the claim is not palpably insufficient, and, on its face, conclusory.

(NYSCEF Doc. No. 150 at 3-4).

The Defendants promptly filed and served their amended Pleadings on November 21, 2019 (NYSCEF Doc. No. 149). However, by letter dated December 9, 2019, the plaintiffs/third-party defendants (collectively, the **Plaintiffs**) objected to the Pleadings based on the Defendants' allegations of alter-ego liability therein (NYSCEF Doc. No. 150 ["we hereby demand that you strike the alter-ego allegations immediately and re-file your Amended Answer and extend our time to respond"]).

At a status conference on December 19, 2019, counsel for the parties allegedly agreed that the Defendants would remove the references to alter-ego liability in their amended Pleading, subject to the Defendants being able to pursue discovery of alter-ego issues, and that the Plaintiffs would answer the amended Pleadings. The So-Ordered Stipulation from that status conference provides:

DEFENDANTS/COUNTERCLAIMANTS/3RD PARTY PLAINTIFFS SHALL
FILE AN AMENDED PLEADING ADDING A COUNTERCLAIM FOR
DEFAMATION ON 1/10/20

(NYSCEF Doc. No. 151).

The Defendants served their revised amended Pleadings on January 10, 2020, removing all the alter-ego allegations as agreed (NYSCEF Doc. No. 152). The Plaintiffs, however, again refused to answer, raising a number of new objections based on the fact that the Pleadings allegedly included additional changes beyond the new defamation counterclaim (NYSCEF Doc. No. 162).

At a status conference on January 30, 2020, the parties entered into a new So-Ordered Stipulation as follows:

1. [PLAINTIFFS'] COUNSEL TO SPEAK WITH CLIENTS RE: AMENDMENTS IN 1/10/20 PLEADING BY 2/3/2020 & ADVISE [DEFENDANT'S] COUNSEL BY 2/3/20
2. IF [PLAINTIFFS] WANT TO PURSUE THEIR OBJECTIONS TO THE AMENDMENTS [DEFENDANTS] SHALL FILE AN OSC TO AMEND BY 2/17/20....

(NYSCEF Doc. No. 153).

Thereafter, the Plaintiffs did not consent to the amended Pleadings and the Defendants now move by Order to Show Cause for leave to amend.

DISCUSSION

The Defendants' proposed revised and amended Pleadings here allege a new counterclaim for defamation, clarify certain prior allegations and assert the first and fourth counterclaim (e.g., compare Proposed Amended Pleadings, 1st Counterclaim, 4th Counterclaim, and ¶¶ 114, 117, 124, 128, 129, 143-148, NYSCEF Doc. No. 176 with Current Pleading, NYSCEF Doc. No. 155) as to certain additional parties. The allegations for the new defamation claim are set forth at paragraphs 130, and 154-157 of the proposed amended Pleadings (*id.*). The proposed amended Pleadings also seek to add a third-party defendant qSpark Capital Management (QCM) as a

party, which appears to have been consented to on the record during argument on a prior motion (Mtn. Seq. No. 004, September 5, 2018 Tr. at 3:9-19, NYSCEF Doc. No. 123).

Pursuant to CPLR § 3025, leave to amend a pleading shall be freely granted so long as the amendment does not cause prejudice or surprise to the opposing party (CPLR § 3025; *Solomon Holding Corp. v Golia*, 55 AD3d 507, 507 [1st Dept 2008]). For a showing of prejudice, the opponent must show that he or she “has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position” (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]). Where there is an extended delay in seeking leave to amend, the movant must provide a reasonable excuse for the delay in making the motion and an affidavit of merit should also be submitted in support of the motion (*id.*, citing *Volpe v Good Samaritan Hosp.*, 213, AD2d 398 [2d Dept 1995]).

Here, the First Department expressly allowed the amendment with respect to the defamation counterclaim. Inasmuch as certain other proposed tweaks to the Pleadings were not before the First Department on the prior appeal, and depositions have not yet taken place, the First Department has not ruled on the proposed amendment and the Plaintiffs simply are not prejudiced. Significantly, because of significant motion practice in this action, discovery here is still in its infancy and it cannot be said that the Defendants waited unreasonably as the Defendants sought to file their amended Pleadings within weeks of getting the Appellate Decision giving them leave to do so.

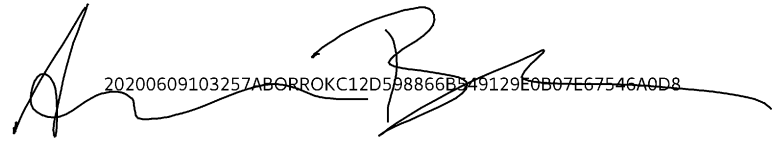
Accordingly, it is

ORDERED that the motion for leave to amend is granted and the proposed amended pleading shall be deemed served; and it is further

ORDERED that the plaintiffs serve a response within 20 days of this decision and order; and it is further

ORDERED that the parties appear for a status conference in this matter on July 16, 2020 at 11:30 AM.

6/9/2020
DATE



20200609103257ABORROK12D598866B349129E0B07E67546A0D8

ANDREW BORROK, J.S.C.

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