

Waxstein v Mesivtha Tifereth Jerusalem of Am.

2020 NY Slip Op 33711(U)

November 5, 2020

Supreme Court, New York County

Docket Number: 657219/2017

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

ARTHUR WAXSTEIN,

Plaintiff,

- v -

MESIVTHA TIFERETH JERUSALEM OF AMERICA,

Defendant.

-----X

INDEX NO. 657219/2017
MOTION DATE 05/30/2019
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

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

ORDER

Upon the foregoing documents, it is hereby

ORDERED that plaintiff Arthur Waxstein's motion to amend the summons and complaint is GRANTED only to the extent of adding the cause of action for reformation and is OTHERWISE DENIED; and it is further

ORDERED that plaintiff Arthur Waxstein's motion to add defendant Yisrael H. Eidelman to all causes of action is DENIED; and it is further

ORDERED that plaintiff Arthur Waxstein shall serve the amended summons and complaint in the form as set forth herein upon defendants within 15 days of service of a copy of this order with notice of entry; and it is further

ORDERED that defendants shall their answer(s) to the amended complaint within 20 days of its service pursuant to CPLR 3025(d); and it is further

ORDERED that counsel are directed to submit a proposed discovery conference status order or a competing proposed discovery status conference order at 59nyef@nycourts.gov and NYSCEF on or before December 14, 2020.

DECISION

In this contract dispute, plaintiff Arthur Waxstein moves, pursuant to CPLR 3025 (b) and CPLR 1003, to file and serve an amended complaint. Defendant Mesivtha Tifereth Jerusalem of America (hereinafter, MTJ), opposes.

Background

In 1998 plaintiff transferred a total of \$910,697.95 to MTJ, a yeshiva and 501(c)(3) organization, as a loan. MTJ, by way of its executive vice-president, Rabbi Yisrael H. Eidelman (hereinafter, Eidelman), acknowledged receipt of the loan, as well as plaintiff's testamentary instructions as to distribution of the money. By correspondence dated January 11, 2002, plaintiff purportedly amended his wishes and gifted the funds as a charitable donation to MTJ, stating in part, ". . . I hereby direct Mesivtha Tifereth Jerusalem to retain 100% of said moneys to be used only for the purposes of Mesivtha Tifereth Jerusalem." During this time, the funds had been maintained in

brokerage accounts. While there is a dispute over how much control plaintiff had over these accounts, it is estimated that the increase in value of the fund totals approximately \$5 million. In 2017, plaintiff requested a return of the funds, to which MTJ complied, returning the initial \$910,697.95, but withholding the \$5 million additional monies.

Plaintiff moves to amend the pleadings to include causes of action sounding in deceit, reformation, and breach of implied covenant of good faith and fair dealing against MTJ and Eidelman, and to add Eidelman to the initial causes of action sounding in breach of contract, accounting, constructive trust, unjust enrichment, fraud and misrepresentation, conversion, injunctive relief, and misappropriation of funds¹.

Plaintiff argues that proposed amendments to pleadings are to be granted liberally and would not prejudice MTJ or Eidelman, especially since discovery is ongoing. He contends that there was a fiduciary relationship between Eidelman and plaintiff that would support claims against Eidelman, individually. Moreover, plaintiff asserts that his motion to amend is made as a result

¹ While defendants also oppose the causes of action plead in the initial complaint, the court addresses only those that plaintiff proposes to amend (see Stein v Doukas, 128 AD3d 803, 804 [2d Dept 2015] [new causes of action]; Enriquez v Home Lawn Care & Landscaping, Inc., 49 AD3d 496, 496 [2d Dept 2008] [personal liability]).

of discovery that was produced pursuant to a subpoena and the deposition testimony of the plaintiff, which revealed the fiduciary relationship.

Defendant opposes the motion arguing that the claim for reformation is time barred by the statute of limitations and the proposed breach of the covenant of good faith and fair dealing is duplicative of plaintiff's claim for breach of contract. Moreover, defendant argues that the claim of deceit has not been plead with the heightened pleading requirement and is duplicative of the fraud cause of action. The amendments and addition of a new defendant, it contends, would result in significant prejudice to MTJ, who has already deposed plaintiff in Israel. Finally, MTJ argues that since there are no allegations that Eidelman acted in his personal capacity, any allegations proposed against him in an individual capacity should not be granted.

DISCUSSION

Pursuant to CPLR 3025 (b), leave to amend a pleading should be freely granted, provided that "the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit" (Belus v Southside Hosp., 106 AD3d 765, 766 [2d Dept 2013], quoting Douglas Elliman, LLC v Bergere, 98 AD3d 642, 643 [2d Dept 2012]). Plaintiffs are not required to submit an affidavit of merit or make any other

evidentiary showing in support of their motion' (see Berkeley Research Group, LLC v FTI Consulting, Inc., 157 AD3d 486, 490 [1st Dept 2018]; see also Hickey v Steven E. Kaufman, P.C., 156 AD3d 436, 436 [1st Dept 2017]). Where the proposed new claim is based on the "same occurrences . . . and the original complaint put defendants on notice of those occurrences," the amendment should be permitted (O'Halloran v Metropolitan Transp. Auth., 154 AD3d 83, 87 [1st Dept 2017]). Moreover, when a party seeks to assert claims against persons sought to be joined as additional parties in the action pursuant to CPLR 1003, "the court may also consider the prejudice to the other defendants, the extent of the delay in moving to add the new parties and the reasons therefor" (Antollino v Wright, 2013 WL 1783554, *4, 2013 NY Misc LEXIS 7133, *10 [Sup Ct, NY County 2013]; see Haughton v Merrill Lynch, Pierce, Fenner & Smith Inc., 305 AD2d 214, 215 [1st Dept 2013]).

Prejudice "requires some indication that the [opposing party] has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position" (Kocourek v Booz Allen Hamilton Inc., 85 AD3d 502, 504 [1st Dept 2011] [internal quotation marks and citation omitted]).

In other words,

"[t]he showing of prejudice that will defeat a motion for leave to amend 'must be traced right back to the omission from the original pleading of whatever it is

that the amended pleading wants to add-some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one now wants to add' "

(Acevedo v Holton, 239 AD2d 194, 195 [1st Dept 1997] [citation omitted]).

"The Supreme Court has broad discretion in determining whether to grant leave, and its determination will not be lightly disturbed" (Belus, 106 AD3d at 766). A party opposing leave to amend "must overcome a heavy presumption of validity in favor of [permitting amendment]" (CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC, 146 AD3d 60, 65 [1st Dept 2010] [internal citations and quotation marks omitted]).

First, defendant argues that the reformation claim is time barred. "Where an action for reformation or rescission is based on fraud, it must be brought either within six years of the commission of the fraud, or within two years from the discovery of the fraud or from when the fraud could have been discovered with reasonable diligence; these statutes of limitations govern all claims sounding in fraud" (Goldberg v Manufacturers Life Ins. Co., 242 AD2d 175, 180 [1st Dept 1998], lv dismissed in part, denied in part 92 NY2d 1000 [1998], citing CPLR 213 [8]; 203 [g]). Here, according to plaintiff's proposed amended complaint,

"MTJ and Rabbi Eidelman drafted letters of intention for the Plaintiff to sign, including the initial letter sent to Bank Hapoalim directing Bank Hapoalim to transfer the Initial Deposit directly to an account held in MTJ's name. Plaintiff signed this letter, unaware of Rabbi Eidelman and MTJ's fraudulent intent,"

his claim of reformation, based on the most recent letter on January 11, 2002, would be time-barred pursuant to CPLR 213(8). However, when calculating the accrual pursuant to CPLR 203(g), the claim is timely, since discovery of the alleged fraud would have arguable occurred when defendants failed to return the increased value of the funds in July 2017, and plaintiff commenced his action in December 2017. Therefore, defendant's statute of limitation argument fails and the court turns to the issue of whether the claim is palpably insufficient or without merit. Having reviewed the proposed amended complaint and the facts that have been elaborated within, the court finds that the claim for reformation is sufficient (Lucido v Mancuso, 49 AD3d 220, 227 [2d Dept 2008] ["a plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance [and] the legal sufficiency or merits of . . . a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt"] [internal quotation marks and citation omitted]).

Second, in order "[f]or a complaint to state a cause of action alleging breach of an implied covenant of good faith and

fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract" (Aventine Inv. Mgt. v. Canadian Imperial Bank of Commerce, 265 AD2d 513, 514 [2d Dept 1999]), or "exercised a right malevolently, for its own gain as a part of a purposeful scheme designed to deprive plaintiffs of the benefits" of the contract (Richbell Info. Servs. v Jupiter Partners, 309 AD2d 288, 302 [1st Dept 2003]). Such a claim cannot be sustained where "it is premised on the same conduct that underlies the breach of contract cause of action and is 'intrinsically tied to the damages allegedly resulting from a breach of the contract'" (MBIA Ins. Corp. v Merrill Lynch, 81 AD3d 419, 420 [1st Dept 2011], quoting Hawthorne Group v RRE Ventures, 7 AD3d 320, 323 [1st Dept 2004]). Here, plaintiff's proposed amended claim as to the breach of the covenant of good faith and fair dealing is nearly identical to the breach of contract claim and alleges the same underlying conduct. Where a claim is duplicative of another claim, it is palpably insufficient (Tecchia v Bellati, 170 AD3d 600, 600 [1st Dept 2019]; Genet v Buzin, 159 AD3d 540, 540 [1st Dept 2018]). Accordingly, leave to amend to supplement the breach of the covenant of good faith and fair dealing claim shall be denied.

Third, as to the addition of the cause of action for deceit, plaintiff argues that it is duplicative of the fraud

claim and does not meet the heightened pleading requirements pursuant to CPLR 3016 (b). A review of the proposed claim for deceit compared to the fraud claim in plaintiff's initial complaint reveals that it is almost identical, and is therefore duplicative (see Tecchia, 170 AD3d at 600). Leave to add the cause of action sounding in deceit is therefore denied.

The court shall deny the motion to amend to the extent that it seeks to add Rabbi Yisrael Eidelman as an individual defendant. Plaintiff's claims against the proposed individual defendant are "'palpably insufficient or patently devoid of merit' MBIA Ins. Corp. v. Greystone & Co., Inc., 74 AD3d 499, (1st Dept 2010)" because they seek to impose individual liability even though the amended complaint alleges that the acts of the proposed individual defendant were carried out as an officer of the corporation. See Pomerance v McGrath, 124 AD3d 481, 482 (1st Dept 2015). As such, those causes of action are meritless as no facts are asserted in the complaint that would allow for the imposition of individual liability.

<u>11/5/2020</u> DATE	<u><i>Debra A. James</i></u> DEBRA A. JAMES, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE