

Paraco Gas Corp. v Jay Z. Gerlitz & Assoc., Inc.

2021 NY Slip Op 34082(U)

March 9, 2021

Supreme Court, Westchester County

Docket Number: Index No. 51723/2020

Judge: Linda S. Jamieson

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeal of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp ___ Dec x Seq. No. 2 Type dismiss

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

-----X

PARACO GAS CORPORATION,

Index No. 51723/2020

Plaintiff,

DECISION AND ORDER

-against-

JAY Z. GERLITZ & ASSOCIATES, INC.,
and JAY Z. GERLITZ,

Defendants.

-----X

The following papers numbered 1 to 5 were read on this motion:

| <u>Paper</u> | <u>Number</u> |
|---|---------------|
| Notice of Motion, Affirmation and Exhibits | 1 |
| Memorandum of Law | 2 |
| Affidavit, Affirmation and Exhibits in Opposition | 3 |
| Memorandum of Law in Opposition | 4 |
| Reply Affirmation | 5 |

In September 2020, this Court issued a Decision and Order on defendants' first motion to dismiss the complaint. The Court denied the motion, but ordered plaintiff to "amend the complaint to add all relevant details so that defendants can answer (or move to dismiss)¹ a coherent and particularized complaint." The Court further ordered "plaintiff to investigate defendants' claim - made only by its counsel, and thus nonevidentiary - that

¹Once the complaint is amended, defendants may make a second motion to dismiss, if they have a valid legal basis for doing so.

Employee Benefits Solutions, LLC ("EBS"), is the entity that committed all of the alleged bad acts, and that EBS and defendants are separate, unrelated entities." The Court gave plaintiff 20 days to "conduct such an investigation, and amend the complaint."

Plaintiff only followed part of the Court's directive. It did amend the complaint, twice, but it plainly did not conduct any investigation into the relationship between defendants and EBS. Instead, it merely alleged that EBS was the "agent" of defendants, without any factual allegations to support this very significant conclusion. In fact, the emails submitted to the Court by plaintiff in opposition to this motion only show that defendants did introduce the plaintiff to EBS (calling them "an associate"); they attended certain meetings together; and that plaintiff and EBS copied defendants on multiple emails between them. Indeed, none of the emails that plaintiff relies on were to or from defendants directly, but were between plaintiff and EBS, copied to defendants. Nor did plaintiff particularize the second amended complaint to differentiate between defendants and EBS.

Consequently, defendants again seek to dismiss the complaint pursuant to CPLR §§ 3211(a)(1) and (7). The complaint asserts three causes of action, for breach of fiduciary duty; fraud; and

aiding and abetting fraud. Defendants also seek to dismiss the request for punitive damages.

Having read the papers, the Court is troubled by the way that plaintiff casually lumps defendants and EBS together, without identifying which of them allegedly took which action. Accordingly, the Court denies the motion to dismiss without prejudice. Plaintiff shall file a third amended complaint, but this time it must (1) actually conduct an investigation into the relationship between defendants and EBS. Given the number of litigations involving EBS and its principals, it should be fairly simple to obtain basic information about EBS; (2) amend its second amended complaint to add specifics about each allegation, including who the actors were for each alleged action. Plaintiff may not flippantly allege that an action was taken by "defendants and defendants' agents," but must name each person or entity specifically; and (3) in any claims for fraud, allegations must be made on more than "information and belief." *Facebook, Inc. v. DLA Piper LLP (US)*, 134 A.D.3d 610, 615, 23 N.Y.S.3d 173, 179 (1st Dept. 2015) ("Statements made in pleadings upon information and belief are not sufficient to establish the necessary quantum of proof to sustain allegations of fraud."); *Brennan v. 3250 Rawlins Ave. Partners, LLC*, 171 A.D.3d 603, 604, 99 N.Y.S.3d 5, 6 (1st Dept. 2019) ("the allegations supporting the actual fraud claim are subject to the heightened pleading standard of CPLR

3016(b), and the allegations about fair consideration do not meet that standard, because they were made upon information and belief, and the source of the information was not disclosed."). This shall be done within 30 days from receipt of this Decision and Order. Thereafter, if appropriate, defendants may seek Court permission for another motion to dismiss.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
March 9, 2021



HON. LINDA S. JAMIESON
Justice of the Supreme Court

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