

Wex Capital, Inc. v Bakhchi

2022 NY Slip Op 30313(U)

January 27, 2022

Supreme Court, New York County

Docket Number: Index No. 657573/2019

Judge: Richard G. Latin

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

PRESENT: HON. RICHARD LATIN PART 46V

Justice

-----X

WEX CAPITAL, INC. F/K/A ALWEX, INC.,

Plaintiff,

- v -

MARC BAKHCHI, MARC B. INC.

Defendant.

-----X

INDEX NO. 657573/2019

MOTION DATE N/A

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ordered that defendants' motion to dismiss pursuant to CPLR 3211(a)(3), (5), and (7) is determined as follow:

Plaintiff commenced the instant action to recover for the alleged fraudulent misconduct of the defendant Marc Bakhchi when he was an insurance broker employed by the plaintiff from 2010 to 2018. Defendant Bakchi had previously moved to, inter alia, dismiss plaintiff's complaint pursuant CPLR 3211(a)(1), (4), (5), and 7. Defendant's motion to dismiss was denied by order dated May 19, 2021. In that same order, plaintiff was directed to serve supplemental pleadings naming Marc B. Inc. as an additional defendant solely to the extent that defendant Bakhchi argued that this was where the subject commissions were deposited. Thereafter, plaintiff filed and served a supplemental summons and amended complaint that enumerated the same two causes of action for a violation of NY GBL § 349 and fraud. The only discernable difference between the initial and supplemental pleading was that Marc B. Inc. was added as an additional party. After being served with the supplemental summons and amended complaint, defendants now move pursuant to CPLR 3211(a)(3), (5), and (7) to dismiss plaintiff's amended complaint.

Pursuant to CPLR 3211, a party may move to dismiss a pleading for any of the grounds listed in subdivision (a) before an answer is required, but it may only do so once (CPLR 3211[e]). This provision is commonly referred to as “the single motion rule.” It is also well settled that once an amended complaint is served it becomes the only complaint in the action and supersedes the initial complaint (*see Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89 [1st Dept 2012]). Therefore, as a general rule, there is no bar to a second motion to dismiss after a complaint has been amended (*see Shelley v Shelley*, 180 Misc2d 275, 282 [Sup Ct, Westchester County 1999]).

However, where an amended complaint is essentially the same as the original pleading, courts have stopped defendants from escaping the scope of the single motion rule (*see B.S.L. One Owners Corp. v Key Intern. Mfg., Inc.*, 225 AD2d 643 [2d Dept 1996]; *Swift v New York Medical College*, 48 AD3d 671 [2d Dept 2008]). Similarly, even after an amended complaint is submitted, where a defendant has already had “the opportunity to address the merits of the original cause of action” the single motion rule would apply (*Barbarito v Zavi*, 107 AD3d 416, 420-21 [1st Dept 2013]).

Here, defendants’ motion to dismiss plaintiff’s complaint pursuant to CPLR 3211(a)(7) must be denied. Defendant Bakhchi previously moved to dismiss essentially the same complaint. While defendant Marc B. Inc. did not have the opportunity to previously move, it is a nominal co-defendant as the purported depository of Bakhchi’s commissions and agency fees and is represented by the same counsel as defendant Bakhchi. With this second motion, no new arguments are advanced concerning CPLR 3211(a)(7) that are narrowly tailored to the nominal co-defendant Marc B. Inc. As a result, both based on the single motion rule and for the same reasons stated in the May 19, 2021 order, defendants’ motion to dismiss plaintiff’s complaint

pursuant to CPLR 3211(a)(7) is denied. Whether the plaintiff can ultimately prevail on these allegations against defendants is not relevant on this pre-answer motion to dismiss.

As to the branch of the motion pursuant to CPLR 3211(a)(3), defendants' motion must also be denied. With this argument the defendants contend that plaintiff does not have standing to sue since it appears that Acrisure is the successor of Alwex and likely assigned the rights to the causes of action. Similarly, they state that Travelers was assigned those rights as well. Defendants further argue that lack of standing, as opposed to lack of capacity to sue, is not one of the enumerated CPLR 3211(a) bases for a motion to dismiss despite specifically styling this motion as one pursuant to CPLR 3211(a)(3).


CPLR 3211(a)(3) states that a party may move to dismiss a cause of action where the party asserting the cause of action lacks the capacity to sue (CPLR 3211[a][3]). Further, any objection or defense based upon CPLR 3211(a)(3) is waived unless raised in a motion to dismiss or in a pleading (CPLR 3211[e]). Here, contrary to defendants' contention, "[t]he defenses of standing and capacity to sue are both subject to the same waiver rule under CPLR 3211(e)" (*Mortgage Electronic Registration Systems, Inc. v Orinthia Gifford*, 133 AD 429 [1st Dept 2015](defense of standing waived and would not have deprived the Court of subject matter jurisdiction)). Thus, the defense of lack of standing was waived inasmuch as it was not raised in the initial pre-answer dismissal motion on essentially the same complaint. Accordingly, this branch of the motion is denied.

Lastly, the branch of defendants' motion to dismiss pursuant to CPLR 3211(a)(5) and essentially 3211(a)(1), based on documentary evidence of a release, is also denied. While it is true that a motion with additional documentary evidence that is "neither repetitive nor based on [an] alternative ground" may survive the single motion rule, that evidence must still be undeniable and

definitely dispose of plaintiff’s claim (*Ultramar Energy v Chase Manhattan Bank*, 191 AD2d 86, 88 [1st Dept 1993]; *Simon v FrancInvest, S.A.*, 192 Ad3d 565, 566 [1st Dept 2021]; *see generally Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]). With this motion, defendants now submit that affidavit of Harvey Wexelman to prove that there was a release, which states that “Alwex did not release any other claims besides those alleged in the Complaint in that prior action.” However, it is well established that affidavits do not constitute documentary evidence (*see Art and Fashion Group Corp. v Cyclops Production, Inc.*, 120 AD3d 436 [1st Dept 2014]; *Flowers v 73rd Townhouse LLC*, 99 AD3d 431 [1st Dept 2012]). Moreover, even if this statement did constitute sufficient evidence, it demonstrates that if there was a release that it was specific to the other action and not a general release of all claims between the parties. Thus, this branch of defendants’ motion is denied.

Accordingly, it is ORDERED that defendants’ motion to dismiss is denied in its entirety.

This constitutes the decision and order of this Court.

<u>1/27/2022</u> DATE		 RICHARD LATIN, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE