SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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GROCERY DELIVERY E-SERVICES, INC., d/b/a HELLOFRESH,

Plaintiff,

- v -

JOHN FLYNN,

Defendant.

INDEX NO. 655837/2020

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

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

Defendant John Flynn moves for an order granting him leave to amend his answer pursuant to CPLR 3025(b) and for permission to serve interrogatories. Plaintiff Grocery Delivery E-Services, Inc., d/b/a Hello Fresh (Hello Fresh) opposes the motion and cross moves for sanctions.

Background

HelloFresh is in the business of providing meal-kit boxes to consumers (NYSCEF # 1-Complaint, ¶12). By a Service Level Agreement (SLA) dated December 13, 2017, nonparty Mariner Seafood LLC (Mariner) agreed to provide fresh salmon to HelloFresh and to compensate HelloFresh for damages in the event of a recall (*id.*, ¶¶ 17-20; NYSCEF # 6-SLA, § XI at 5-6). The SLA also required Mariner to sustain and maintain insurance coverage, including coverage for product recalls (NYSCEF #1, ¶ 28; NYSCEF #6, § XIII at 8). Mariner purchased a product contamination insurance policy from Tokio Marine (the Tokio Marine Policy), which allegedly contemplated that all claims for losses would be reimbursed to Mariner for the benefit of HelloFresh (NYSCEF # 1, ¶ 30). However, Mariner failed to name HelloFresh as an additional insured as allegedly required under the SLA (NYSCEF # 1, ¶ 28; § XIII at 8).

On November 30, 2018, Mariner informed HelloFresh of a potential Listeria contamination in seafood already shipped to HelloFresh, which caused

HelloFresh to issue a recall allegedly resulting in more than $500,000 in losses (NYSCEF # 1-Complaint, ¶¶ 21-26).

After Mariner failed to compensate HelloFresh for its losses, HelloFresh commenced an action against Mariner for breach of contract and conversion for retaining the insurance proceeds of the Tokio Marine Policy that were intended for HelloFresh's benefit (NYSCEF # 7-Mariner Seafood Complaint). In September 2020, Mariner filed for bankruptcy and did not include HelloFresh from the list of creditors (NYSCEF # 1, ¶¶ 38, 39; NYSCEF # 73-List of Creditors).

In this action, HelloFresh asserts a single cause of action for conversion against Flynn – the manager, president and sole principal of Mariner – based on allegations that he improperly converted insurance proceeds belonging to HelloFresh (*id.*, ¶¶ 41-46). Documents produced in discovery show that pursuant to a settlement agreement between Tokio Marine and Mariner, Tokio Marine deposited insurance proceeds totaling $263,366.00 into Mariner's account at Wells Fargo, Bank, N.A. (Wells Fargo) (NYSCEF # 34).

By Decision and Order dated June 3, 2022, this court denied Flynn's motion to dismiss the complaint (NYSCEF # 19), which decision was affirmed on appeal (*Grocery Delivery E-Services v Flynn*, 201 AD3d 585 [1st Dept 2022]). Flynn's subsequent motion to reargue or for leave to appeal to the Court of Appeals is pending (NYSCEF # 15).

In the meantime, Flynn answered the complaint and asserted nine affirmative defenses (NYSCEF # 22-Answer), and the parties proceeded with discovery. A preliminary conference order was issued on August 27, 2021, which provided end dates for, *inter alia*, document discovery and the exchange of ESI (by 11/1/22); for depositions (by 3/31/22), completion of discovery (4/25/22), and for filing of note of issue (5/9/22) (NYSCEF # 24). Flynn thereafter moved to quash bank subpoenas served by HelloFresh, which motion was denied by order dated November 19, 2021 (NYSCEF # 45). A compliance conference was held on December 1, 2021, and a status conference was held on February 10, 2022, at which Flynn indicated his intent to amend the answer (NYSCEF # 47). After HelloFresh did not stipulate to the proposed amendments to the answer, Flynn made this motion to amend, and for leave to serve interrogatories. Subsequently, HelloFresh moved for summary judgment on the complaint; Flynn opposed the motion and cross moved for summary judgment dismissing the complaint (NYSCEF #'s 79-127).

The proposed amended answer asserts nine additional affirmative defenses. Flynn argues that the proposed amendment is not prejudicial as discovery is still proceeding and depositions have not yet been taken, and that certain of the proposed defenses merely amplify those defenses already asserted. Flynn also

argues that he could not raise the defenses in detail earlier because he continues to investigate HelloFresh's claim and to review "thousands of pages of documentation produced in discovery or gathered in the investigative process" (NYSCEF #61-Flynn MOL at 6). Flynn also argues that the proposed amendments are sufficiently meritorious to allow them to be added.

As for the interrogatories, Flynn asserts that leave is required as under the preliminary conference order interrogatories were to be served by August 27, 2021, and Rule 11-a of Commercial Division Rules limits interrogatories to certain topics. He further asserts that while the scope of the proposed interrogatories exceeds that permitted by Rule 11-a, that leave to serve the interrogatories should be granted as they are "narrow and tailored to provide information highly pertinent to the defense of the case" and the answers will "narrow the scope of depositions" (NYSCEF # 61, at 8).

HelloFresh opposes the motion, asserting that Flynn's inexcusable delay in seeking leave to amend warrants the denial of the motion, particularly since in the December 10, 2021 compliance conference, only Flynn's deposition remain outstanding. As for Flynn's argument that its investigation revealed additional information and documentation, HelloFresh asserts that Flynn had knowledge of the facts for months or even years before he filed his answer. Additionally, HelloFresh maintains that any documents discovered by Flynn as the result of his purported investigation have not been produced by him. Moreover, HelloFresh asserts that fewer than 1,000 documents were produced in discovery that Flynn did not already have, and these documents were all produced by HelloFresh or non-party Tokio Marine on or before November 9, 2021.

HelloFresh further argues that Flynn's motion caused undue surprise and prejudice to it since the amendments are inconsistent with Flynn's prior position in the case, and would thus result in unnecessary delay and additional discovery. In particular, HelloFresh maintains that the ninth and tenth proposed affirmative defenses – that the SLA does not require Mariner to name HelloFresh as an additional insured on its product and recall policy – is inconsistent with Flynn's earlier position, and Flynn should be estopped from asserting these defenses. HelloFresh also argues that the motion should be denied as the addition of the nine proposed defenses would be futile as they are without merit. Under these circumstances, HelloFresh argues that sanctions are appropriately imposed against Flynn.

In reply, Flynn argues that proposed affirmative defenses are of sufficient merit and that contrary to HelloFresh's argument, it did not concede that Mariner breached its obligation to name HelloFresh as an additional insured as the prior arguments were made in the context of a motion to dismiss. Accordingly, Flynn asserts that the cross motion for sanctions is unavailing.

Discussion

Leave to amend a pleading pursuant to CPLR 3025 (b) "shall be freely given," in the absence of prejudice or surprise resulting from the delay (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]). It is well established that "delay alone is not sufficient ground for denying leave to amend" (*see also Greenburgh Eleven Union Free School Dist. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 298 AD2d 180, 181 [1st Dept 2002]). Instead, the party opposing that amendment must show prejudice which occurs when the party "has been hindered in preparation of its case or has been prevented from taking some measure in support of [its] position" (*Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 655 [1st Dept 2009]). In this regard, "the need for additional discovery does not constitute prejudice sufficient to justify the denial of the amendment" (*id.*, at 654).

At the same time, in order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). Thus, leave to amend will be denied when "the proposed action fails to state a cause of action, or is palpably insufficient as a matter of law" (*Thompson v Cooper*, 24 AD3d at 205 [internal citations omitted]; *see also MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]).

Here, HelloFresh has not demonstrated that Flynn's delay in moving to amend resulted in the type of prejudice or surprise warranting denial of the motion. While the majority of discovery has been completed, Flynn's deposition has not yet been taken, and the proposed amendments do not seek to add additional parties or the type of allegations that would greatly expand discovery (*322 West 47th Street HDFC v Tibaldeo*, 196 AD3d 411, 412 [1st Dept 2021] [leave to amend to add a defense and counterclaim was providentially granted when discovery was not complete and depositions had not been taken]; *compare Ness Technologies SARL v Pacter Technology Int'l Ltd.*, 180 AD3d 607, 608 [1st Dept 2020] [trial court did not abuse discretion in denying leave to amend to add affirmative defense and counterclaims when defendant "failed to explain why it waited until the brink of discovery deadline" to seek to amend to add two new defendants and the proposed new allegations against plaintiff "would entail substantial discovery and resulting delays"]).

Accordingly, the court will consider whether the proposed amendments are sufficiently meritorious to permit their addition. The proposed ninth affirmative defense alleges that the proof of claim filed by HelloFresh in the bankruptcy court seeking $530,342.14 is duplicative of the recovery sought in this action, and this action is premature. This proposed defense is wholly without merit. HelloFresh's proof of claim filed in the bankruptcy court pertains to its claim for breach of

contract against Mariner for the actual damages HelloFresh suffered as a result of the recall while in this action, HelloFresh seeks to recover from Flynn his conversion of identifiable insurance proceeds belonging to it (*see Grocery Delivery E-Services v Flynn*, 201 AD3d at 586 [finding that HelloFresh's "superior right to possession is based not on Mariner's contractual obligation to make it whole following its recall losses... but on an equitable lien it has over insurance proceeds...][internal citation omitted]). Moreover, as HelloFresh argued, any overlap in recovery can be addressed by amending the proof of claim in the bankruptcy court or reducing the damage award in this action.

As for the proposed tenth and eleventh affirmative defenses, they each allege that based the terms of the SLA, HelloFresh does not have an interest in the insurance proceeds. Specifically, the proposed tenth affirmative defense alleges that "Mariner was neither negligent nor did it fail to comply with the terms of the SLA," while the proposed eleventh affirmative defense alleges that "the SLA did not require that HelloFresh be named as an additional insured on the product recall policy" (NYSCEF # 59, ¶¶ 35, 36).

HelloFresh argues that Flynn is estopped from asserting the proposed tenth and eleventh affirmative defenses, which it asserts are premised on Flynn's new position that Mariner did not have an obligation to name HelloFresh as an additional insured – a position which contradicts his position throughout the litigation (citing *Karasik v Bird*, 108 AD2d 758, 758-759 [1st Dept 1984] ["a party who assumes a certain legal position in a proceeding may not thereafter simply because his interests have changed, assume a contrary position"]). In support, HelloFresh points to defendant's positions taken at oral argument before this court and the Appellate Division in opposition to the motions to dismiss and to Flynn's affidavit submitted in opposition to the dismissal motion. Moreover, HelloFresh asserts that these proposed defenses are futile, including because the relevant provision in the SLA requires Mariner to name HelloFresh as an additional insured.

The proposed tenth affirmative defense may be added but not the proposed eleventh affirmative defense.

The proposed tenth affirmative defense does not contain allegations relating to the requirement that Mariner name HelloFresh as an additional insured, thus estoppel does not apply to preclude this defense. The proposed defense alleges that HelloFresh was not entitled to the proceeds of the insurance policy unless it can be established that Mariner was negligent or violated under Section XI of the SLA,[1]

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[1] Section XI of the SLA provides, in relevant part,

If HelloFresh, Supplier or any governmental authority consider it necessary or appropriate, either in response to government action or otherwise, to recall any

which cannot be said to be "palpably insufficient as a matter of law" (*Thompson Cooper*, 24 AD3d at 205).

As for the eleventh affirmative defense – that HelloFresh did not have an interest in the insurance proceeds as Mariner was not required under the SLA to name HelloFresh as an additional insured – is inconsistent with Flynn's previous position. Flynn had maintained that Mariner was obligated to name HelloFresh as an additional insured and that Mariner's failure to do so constituted a breach of the SLA and thus did not give rise to a claim for conversion (NYSCEF # 14-Flynn Reply Aff, ¶ 9; NYSCEF # 67-Tr. Oral Argument at 13). Although Flynn now argues that his previous position is not binding as it was used to support a pre-answer motion to dismiss, such argument is unavailing in view of Flynn's admission in his affidavit of an intent to name HelloFresh as an additional insured (*Performance Commercial Importadora E Exportadora Ltds v Sewa Intern. Fashions Pvt. Ltd*, 79 AD3d 673, 674 [1st Dept 2010] [in light of party's admission as to fact, contrary testimony was insufficient to raise an issue of fact]).

Further, the insurance provision contained in Section XII of the SLA[2] is consistent with Flynn's admission since it obligates Mariner to provide insurance

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> Products due to Supplier's negligence or other failure to comply with the terms of the SLA, including but not limited to the requirements set forth in the Food Allergen Labeling and Consumer Protection Act of 2004, FMIA, FSMA, PPIA and or FDCA, as applicable, Supplier shall be responsible for all damages and costs of such recall and recovery....

(NYSCEF #6, Section XI, at 6-7).

[2] Section XII of the SLA provides:

> Supplier [i.e., Mariner] shall carry commercial general liability and umbrella insurance with minimum limits of $5M ($5,000,000) for each occurrence, including coverage for products liability, automobile coverage, and operations liability. This requirement may be met with a combination of General Liability and Excess Liability instance policies. Such policies must be with carriers with an A- or better rating through Bests Cumulative Rating and in a form satisfactory to HelloFresh. Such policies shall name HelloFresh as an Additional Insured and must provide for thirty (30) days advance written notice to HelloFresh of cancellation. Certificates evidencing such policies shall be provided to HelloFresh within thirty (30) days of the Effective Date. The amount of Supplier's insurance in no way limits any of Supplier's obligations pursuant to this SLA.
>
> Supplier agrees to have the coverage for (a) Worker's Compensation Insurance, with a limit of the minimum amount required by applicable law, and (b) Product Recall Insurance, with a minimum limit of $3M ($3,000,000) for each occurrence.

(Section XIII; NYSCEF #6, at 8)(emphasis added).

naming HelloFresh as an additional insured, and that the paragraph pertaining to product recall insurance does not again specify this obligation does not warrant a contrary interpretation (*see generally Matter of Stravinsky*, 4 AD3d 75, 81 [1st Dept 2003] [A written contract should be read as a whole to give each clause its intended purpose, and "[p]articular words should be considered, not as if isolated from the context, but in the light of the obligations as a whole and the intention of the parties as manifested thereby"][internal citation and quotation omitted]).

As for the proposed twelfth, thirteenth, sixteenth and seventeenth proposed affirmative defenses, these proposed defenses are based on allegations that Wells Fargo held a superior possessory interest in the insurance proceeds as recognized by the bankruptcy court in an October 5, 2020 order.[3] While HelloFresh maintains these defenses are futile since the proceeds of the insurance policy belonged to HelloFresh and could not be used to pay Mariner's debt, the defenses as to superiority of Wells Fargo's lien are sufficient to permit their addition.

The fourteenth proposed affirmative defense alleges that "even if it is determined that the SLA required that HelloFresh be named as an additional insured under the product recall policy, HelloFresh waived this right when it proceeded and continued to do business with Mariner after having knowledge that it was not named as an additional insured on the product recall policy" (*id.*, ¶ 39). As the SLA contains a non-waiver clause (NYSCEF # 6 at 11, § 18.04), this defense cannot be added.

Regarding the fifteenth proposed affirmative defense alleges that Flynn "did not participate in or obtain any personal benefit from an alleged conversion" (*id.*, ¶ 40). While HelloFresh points to evidence contradicting this proposed defense and asserts that the lack of personal benefit is not a defense to conversion (*see e,g, Merrill Lynch, Fenner & Smith Inc. v Arcturus Builders Inc,* 159 AD2d 283 [1st Dept 1990]), as Flynn has not been deposed, it cannot be said at this

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[3] Specifically, the proposed twelfth and thirteen affirmative defenses allege that Wells Fargo's perfected security interest in the insurance proceeds, respectively, "precluded Mariner from paying over the insurance proceeds to HelloFresh," or that as a result of the security interest, "HelloFresh did not hold a superior interest, right, or title to the insurance proceeds" (*id.*, ¶¶ 37, 38). The proposed sixteen affirmative defense alleges that HelloFresh "failed to mitigate its damages by failing to make claims in the bankruptcy court to the funds held by Mariner upon filing for bankruptcy protection and by failing to contest the Order of the bankruptcy court that Wells Fargo held a priority security interest in the fund" (*id.*, ¶41). The proposed seventeenth affirmative defense alleges that HelloFresh's claims are barred by the doctrines of res judicate or collateral estoppel "as the bankruptcy court held on October 5, 2020 that Wells Fargo had a superior lien" (*id.*, ¶ 42).

juncture that the addition of this defense is prejudicial or plainly lacking merit. Accordingly, the fifteenth proposed affirmative defense may be added.

Finally, as for the interrogatories, the court finds that narrowing discovery does not constitute sufficient cause for permitting Flynn to belatedly serve interrogatories related to topics not permitted under Commercial Division Rule 11-a(b). Leave to serve the interrogatories is denied.

Conclusion

In view of the above, it is

ORDERED that motion to amend by defendant John P. Flynn is granted to the extent of permitting him to amend his answer to assert the proposed tenth, twelfth, thirteenth, fifteen, sixteenth, and seventeenth affirmative defenses in the form set forth in the proposed amended verified answer with affirmative defenses annexed to the moving papers, but leave is denied with respect to the proposed ninth, eleventh, fourteenth affirmative defenses; and it is further

ORDERED that within 20 days of entry of this order, defendant John P. Flynn shall serve of copy of this order with notice of entry and the verified amended answer in conformity with this decision and order; and it is further

ORDERED that defendant John P. Flynn's request to serve interrogatories is denied; and it is further

ORDERED that the cross motion for sanctions by plaintiff Grocery Delivery E-Services, Inc., d/b/a Hello Fresh is denied.

5/12/2022
DATE

MARGARET CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
		GRANTED		DENIED	[X]	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE