Kanes v Kanes
2022 NY Slip Op 35238(U)
August 22, 2022
Supreme Court, Nassau County
Docket Number: Index No. 608982/2020
Judge: Timothy S. Driscoll
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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

<u>HON. TIMOTHY S. DRISCOLL</u>
Justice Supreme Court

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ANNA KANES, AS EXECUTRIX OF THE ESTATE OF GEORGE KANES A/K/A GEORGE E. KANES and SHAREHOLDER OF KOUMBAR REALTY LTD. and LEFTOM FOODS LTD.,

Plaintiff,

-against-

PETER KANES, individually and in his capacity as shareholder of KOUMBAR REALTY LTD. and LEFTOM FOODS LTD., and THEONE KANES and PATRICIA KANES, individually and in their capacities as Temporary Co-Administrators of the Estate of Maria Kanes, and in their capacities as shareholders of KOUMBAR REALTY LTD. and LEFTOM FOODS LTD.,

Defendants.

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TRIAL/IAS PART: 5

NASSAU COUNTY

Index No: 608982-20
Motion Seq. No. 4
Submission Date: 7/19/22

Papers Read on these Motions:
Affirmation in Support...x
Memorandum of Law in Opposition...................................x
Supplemental Memorandum of Law in Opposition...............x
Reply Affirmation with Exhibit..x

Presently pending before the Court is the cross-motion to amend filed by Defendants Peter Kanes ("Peter"), Theone Kanes ("Theone"), and Patricia Kanes ("Patricia" and collectively, "Defendants").[1] For the following reasons, Defendants' cross-motion is granted to

[1] Defendant Maria Kanes ("Maria") passed away in January 2022. In May 2022, the Court appointed Theone and Patricia as temporary administrators for the Estate of Maria Kanes for the sole purpose of this action, and substituted Theone and Patricia in place of Maria in this action.

the extent that Defendants are granted leave to assert their proposed fourth counterclaim for indemnification.

The parties are reminded of the conference scheduled for September 20, 2022, at 10:00 a.m.

BACKGROUND

A. Relief Requested

Defendants cross-move for an Order, pursuant to CPLR § 3025(b), granting leave to file a further Amended Counterclaims to add a cause of action for indemnification under Business Corporation Law ("BCL") § 724.

Defendants' cross-motion was filed in conjunction with Plaintiff's motion to amend the Complaint to add a claim for indemnification pursuant to BCL § 724. On December 13, 2021, the Court granted Plaintiff's motion on the record. The Court also concluded that it could not determine Defendants' cross-motion in the absence of proposed pleadings and directed that Defendants submit a proposed amended Answer and the parties provide supplemental briefing on the cross-motion.

B. The Parties' History

The Court assumes familiarity with the factual background of this case, which is set forth in detail in its Decision and Order dated August 20, 2021. Briefly, the Complaint alleges as follows:

Ernest Kanes ("Ernest") was the father of George Kanes a/k/a George E. Kanes ("George") and his siblings, Peter, Theone, and Patricia. Ernest formed various businesses, including a diner ("Diner") located at 44-15 College Point Boulevard, Flushing, New York (the "Property"). The Diner was owned and operated by one of the Kanes family businesses, Leftom Foods Ltd. ("Leftom"). The Property was owned by another Kanes family business, Koumbar Realty Ltd. ("Koumbar"), which was formed strictly for the purposes of holding real estate. George dedicated his career to running the Diner alongside his father and, after Ernest's death, principally by himself. In September 2008, Ernest transferred his 20% interest in Koumbar and his 20% interest in Leftom to George. Later in 2008, Ernest passed away. From the time of Ernest's death until early 2018, George ran and operated the Diner.

In the spring of 2018, George was unable to work full-time due to his declining health and Theone and Patricia came to New York to run the Diner. Shortly after Theone and Patricia began operating the Diner, the business ceased giving money to George or his family. During the time that Theone and Patricia operated the Diner, a check for health insurance premiums bounced, suppliers went unpaid, and a federal wage and hour litigation against the Diner and its shareholders ensued. On several occasions, Theone and Patricia left the Diner unattended and vacationed when they were supposed to be managing the Diner. As a result, a decision was made to close the Diner and list the Property for sale. The Property was sold to East West Plaza LLC in or about July 2019 for a purchase price of $13,600,000.

Due to the mismanagement of the Diner by Theone and Patricia, Leftom was forced to pay several operating bills from the sale proceeds. Additionally, a separate escrow from the sale proceeds was set aside in the amount of approximately $1,398,247 to pay any judgment or settlement from pending wage and hour litigation. The remaining net proceeds of the sale are being held in escrow pursuant to the terms of the Agreement of Certain Shareholders of Koumbar dated in or around April 2019 ("Shareholder Agreement").

When the Diner closed on or about May 1, 2019, and the Property sold in or about July 2019, the ownership interests in Koumbar were, and are, as follows: George holds 51%, Peter holds 9%, Theone holds 13.33%, Patricia holds 13.33%, and Maria holds 13.34%. Family disputes regarding the distribution of the net proceeds of the sale of the Property began before George's death, when Theone, Patricia, and Maria began making unsubstantiated claims and refused to release the net proceeds in accordance with the parties' respective ownership interests.

In their Amended Counterclaims, Defendants allege, in relevant part, as follows:

Maria and Ernest married in 1962 and lived together until his death in November 2008. For several years prior to his demise, Ernest's physical and mental condition deteriorated. By 2008, Ernest had been hospitalized several times and was suffering from schizophrenia, depression, and other physical and mental conditions. Ernest was under the regular care of a psychiatrist and was heavily medicated. At the time of Ernest's death, neither Maria, Theone, nor Patricia were aware of a Will or any transfers of Ernest's shares in the family businesses. Ernest died intestate and George subsequently used family business assets to purchase a portion of Peter's interest in Koumbar.

In 2018, George became seriously ill with cancer and Theone and Patricia took over the day-to-day operations of the Diner. That same year, the family began to discuss selling the family businesses. Shortly after George became ill, Theone and Patricia discovered that George 1) failed to pay significant obligations of the Diner, 2) borrowed funds secured by the Diner and other properties for his personal use, 3) used corporate funds to pay his credit card expenses and other personal expenses, and 4) otherwise used the property and assets of the business for his own benefit.

During that time, George, for the first time, claimed that he alone was entitled to Ernest's previously held shares in the family businesses. In late 2018, and only after the parties engaged independent counsel, George disclosed for the first time that Ernest purportedly signed a Will just two months before his death. The Will purported to, among other things, bequeath Ernest's shares in the family businesses and other businesses to George. Maria, Theone, and Patricia vehemently objected to the validity of any such bequest for several reasons, including Ernest's obvious lack of capacity and lack of any stated intent to make the bequest. To permit a sale of Koumbar to proceed, it was agreed that all proceeds would be held in escrow until the issues regarding the disposition of Ernest's interests and accounting issues could be resolved by settlement agreement or, if necessary, by order of a court.

Plaintiff moved to dismiss Defendants' prior counterclaims on November 13, 2020 and attached purported irrevocable stock powers signed by Ernest transferring his shares in the family businesses to George ("Stock Powers"). The Stock Powers were dated four days after the date the Will was purportedly signed. Ernest passed away within weeks of allegedly signing the Stock Powers. The filing of the motion to dismiss by Plaintiff was the first time that Defendants learned that the Stock Powers existed.

1. Proposed Second Amended Counterclaims

Defendants' proposed Verified Answer with Affirmative Defenses and Amended Counterclaims to Amended Verified Complaint ("Second Amended Counterclaims") includes the first three counterclaims contained in Defendants' Amended Counterclaims and adds a fourth counterclaim pursuant to BCL § 724.

Defendants allege that prior to Ernest's demise, Maria, Patricia, and Theone collectively held a 40% interest in Koumbar and a 40% interest in Leftom. At the time of his demise, Ernest held a 20% interest in Koumbar and a 20% interest in Leftom. Ernest's estate passed by intestacy to Maria and his surviving issue, George, Peter, Patricia, and Theone. Upon Ernest's demise, Maria, Theone, and Patricia collectively held a 55% interest in Koumbar and a 55%

interest in Leftom. George used assets of Koumbar and Leftom to allegedly purchase an 11% interest in Koumbar from Peter. As a result of the purchase, 11% of the shares in Koumbar owned by Peter became treasury stock and the stockholding interest in Koumbar became: 1) Maria, Theone, and Patricia holding 61.05%, 2) George holding 24.975%, and 3) Peter holding 9.75%.

At all relevant times, Maria, Theone, and Patricia were stockholders of Koumbar and Leftom and acted as officers and directors of the entities. Maria, Theone, and Patricia acted in good faith and used their best efforts on behalf of Koumbar and Leftom. Pursuant to the BCL, Defendants are entitled to indemnification from Koumbar and Leftom relating to this litigation, including but not limited to reimbursement for legal fees, expert fees, and court costs. Defendants are entitled to indemnification for any judgment against them and for any amount paid in settlement, as well as for any attorneys' fees, expert fees, and court costs incurred in connection with the defense of this action or the prosecution of the counterclaims.

C. The Parties' Positions

Defendants argue that if Plaintiff is permitted to amend the Complaint to add an indemnification claim, Defendants should be entitled to the same relief. At this juncture, all parties are in the same position. There has been no determination as to who, if anyone, controls the majority of the stock, nor have the actions of each of the stockholders been adjudicated. Defendants should be able to avail themselves of the same rights and statutory protections and amend their counterclaims to assert a cause of action for indemnification.

Plaintiff contends, in relevant part, that Defendants' cross-motion is untimely. Any factual basis for their Second Amended Counterclaims arose on the date the original Complaint was filed. More than one year later, Defendants seek to bring an indemnification claim. Conversely, the right of George's Estate to indemnification only arose when Plaintiff was forced to respond to Defendants' counterclaims.

In a supplemental memorandum of law, Plaintiff avers that the cross-motion is procedurally defective because it fails to clearly identify the changes or additions to be made to the pleading. Additionally, the Second Amended Counterclaims reasserts a first counterclaim to set aside the transfer of Ernest's shares in Koumbar and Leftom to George that was previously dismissed by the Court as barred by the statute of limitations. Further, the proposed counterclaim for indemnification is barred by the doctrine of laches. The factual bases for the counterclaim were known to Defendants on the date that Plaintiff filed the original Complaint in October 2020. Until the parties' claims are adjudicated, Plaintiff's share of the profits from the sale of the property remain in escrow, prejudicing Plaintiff. Defendants have failed to provide an excuse for their delay in making the cross-motion.

Defendants argue that the relief they seek is the same relief that Plaintiff sought, and any delay in submitting the proposed counterclaim was due to a stay of all proceedings upon Maria's death. Plaintiff is not prejudiced by Defendants seeking the exact same indemnification, particularly as there has been no discovery in this matter since the time that Plaintiff filed its motion to amend. Defendants assert that while CPLR § 3025(d) does not require the submission of a redline, they have annexed a redline reflecting the proposed changes to the Amended Counterclaim. Defendants have appealed the Court's prior dismissal of a portion of the counterclaims based on the statute of limitations, however, the perfection of that appeal was stayed upon Maria's death and presently remains stayed. The parties are all stockholders and entitled to the same protections under the BCL.

<u>RULING OF THE COURT</u>

Defendants' cross-motion is granted to the extent that Defendants are granted leave to assert their proposed fourth counterclaim for indemnification. "Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit." *Aurora Loan Servs., LLC v. Thomas*, 70 A.D.3d 986, 987 (2d Dept. 2010).

Plaintiff does not attack the merits of Defendants' proposed counterclaim for indemnification and primarily argues that amendment should be denied based on Defendants' delay in asserting a claim that could have been interposed in prior pleadings. Delay alone, however, does warrant denial of a motion to amend. Rather, Plaintiff must establish lateness along with "significant prejudice," which requires "some indication that the [non-movant] has been hindered in the preparation of his or her case or has been prevented from taking some measure in support of his or her position." *R&G Brenner Income Tax Consultants v. Gilmartin*, 166 A.D.3d 685, 687 (2d Dept. 2018), quoting *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981). Plaintiff has failed to make such a showing. Notwithstanding the parties' prior motion practice, this matter is in its infancy. Paper discovery and depositions have not been completed, and much of the delay in this action was due to the stay of proceedings following Maria's death. Defendants' laches argument similarly fails in the absence of prejudice. *See generally Wilds v. Heckstall*, 93 A.D.3d 661, 663 (2d Dept. 2012) (the defense of laches requires, *inter alia*, injury or prejudice to the offending party if the complainant is accorded relief).

The Court, however, declines to permit the resurrection of Defendants' first counterclaim. The first counterclaim asserted in the Second Amended Counterclaims is identical to the first counterclaim asserted in the Amended Counterclaim that was dismissed pursuant to the Court's Decision and Order dated August 20, 2021. While that an appeal of that Decision may be *sub judice*, the Court's dismissal of the counterclaim is presently the law of the case, and the first counterclaim is accordingly palpably insufficient and patently devoid of merit.

CONCLUSION

Defendants' cross-motion is granted to the extent that Defendants are granted leave to assert their proposed fourth counterclaim for indemnification. Defendants are directed to file an amended pleading that conforms to the Court's directives within fourteen (14) days of the date of this Decision and Order.

The parties are reminded of the conference scheduled for September 20, 2022, at 10:00 a.m.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
August 22, 2022

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
Aug 26 2022
NASSAU COUNTY
COUNTY CLERK'S OFFICE