Park Premium Enter. Inc. v Kahan
2023 NY Slip Op 31764(U)
May 24, 2023
Supreme Court, Kings County
Docket Number: Index No. 504991/2020
Judge: Wayne Saitta
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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of May 2023.

P R E S E N T:

HON. WAYNE SAITTA, Justice.

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PARK PREMIUM ENTERPRISE INC.
D/B/A PARK DEVELOPERS & BUILDERS,

Plaintiff

-against-

JOSEPH KAHAN

Defendants

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Index No. 504991/2020

Decision and Order
MS #3

The following papers read on this motion:

	NYSCEF Doc Nos
Notice of Motion/Order to Show Cause/ Petition/Affidavits (Affirmations) and Exhibits	49-52
Cross-motions Affidavits (Affirmations) and Exhibits	
Answering Affidavit (Affirmation)	53-54
Reply Affidavit (Affirmation)	69-70
Supplemental Affidavit (Affirmation)	

Defendant KAHAN moves for leave to amend his answer to add an additional defendant and four counterclaims, as well as 15 additional affirmative defenses.

The proposed amended answer lists Aaron Lebovits as an "Additional Defendant on the Counterclaims" and lists JOSEPH KAHAN and Esther Kahan as "Plaintiffs on the Counterclaims".

As a preliminary matter, it is not proper to seek to add claims not part of the original action against new parties through an amendment to an answer. These are not counterclaims as they are not asserted against the Plaintiff or any party that has asserted

a claim against the Defendant in this action. The proper procedure is to commence a third-party action, or commence a separate proceeding and then seek to have the actions joined (*Werner Spitz Construction Co v. Vanderlinde,* 64 Misc2d 157 [County Ct, Monroe Co 1970]). For this reason alone, the motion must be denied.

Further, it appears the reason that the Defendant has sought to add these parties and claims through an amended answer is because the statute of limitations periods on these claims have run. The first three proposed counterclaims are for 1) intentional infliction of emotional distress, 2) assault, and 3) battery. The statute of limitations period for all three causes of action is one year (CPLR 215(3)).

The latest incident alleged in the answer occurred on December 12, 2020, more than one year after Defendant moved to amend his answer to assert these counterclaims.

While normally, pursuant to CPLR 203(d) [formerly 203(c)], a counterclaim is not barred as untimely if it was not barred on the date of the original complaint, that is not the case with a counterclaim asserted in an amended answer.

A counterclaim asserted in an amended answer is governed by CPLR 203(f) [formerly 203[e]) which provides that such a counterclaim "is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading".

A counterclaim first asserted in an amended answer where the original pleading does not give notice of the transactions or occurrences on which the counterclaim is based, is deemed interposed at the time the motion for leave to amend the answer is made (*Calamari v. Panos* 131 AD3d 1088 [2d Dept 2015]; *Vastola v. Maer,* 48 AD2d 561 [2d Dept 1975], aff'd 39 NY2d 1019 [1976]).

Here, the actions alleged in the complaint do not give notice of the actions or occurrences in which the proposed counterclaims are based. The complaint alleges an entirely different set of facts from the allegations in the proposed counterclaims.

The complaint alleges various defamatory statements made by Defendant KAHAN about Lebovits, and that KAHAN advised people not to do business with PARK PREMIUM or Lebovits. The proposed counterclaims, however, are based on allegations that Lebovitz harassed, assaulted, and battered KAHAN. Nothing in the complaint would have put Lebovits on notice of KAHAN's claims regarding these separate incidents.

Even if Lebowitz knew of these alleged incidents, that would not be sufficient to bring the three counterclaims within CPLR 203(f). Mere notice alone of the transaction or occurrences on which counterclaims in an amended pleading are based independent of the original pleading is inadequate; the pleadings themselves must give the requisite notice (*MacDonald v. Windfield Business Papers, Inc.,* 270 AD2d 399 [2d Dept 2000]; *Shapiro v. Schoninger,* 122 AD2d 38 [2d Dept 1986]).

Defendant's reliance of the continuing tort doctrine is unavailing. The case of *Estreicher v. Oner,* 148 AD3d 867 (2d Dept 2017), cited by Defendant, held that the continuing tort doctrine "permits claims based on 'wrongful conduct occurring more than one year prior to commencement of the action, so long as the final actionable event occurred within one year of the suit'" (*id* at 868). Here the latest event in the proposed answer is alleged to have occurred in December of 2020, approximately 2 1/2 years prior to this motion.

Similarly, Defendant's argument, in the alternative, that these counterclaims should be allowed as a recoupment to offset against Plaintiff's claims is unavailing because these counterclaims are based on acts of non-party Lebovitz, not Plaintiff PARK

PREMIUM. KAHAN, cannot use his claims against Lebovitz to offset against PARK PREMIUM's claims.

Defendant KAHAN's fourth proposed counterclaim must also be disallowed. The fourth proposed counterclaim asserts claims of breach of contract, fraud, and unjust enrichment.

As to the claim of breach, the proposed answer does not allege an enforceable contract between KAHAN and either PARK PREMIUM or Lebowitz. It does not allege any terms of a contract that were breached or when such breach occurred.

As to the claim of fraud, the proposed answer does not state in detail the circumstances constituting the wrong as required by CPLR 3016(b). Further, while many of the allegations in the proposed answer are undated, all of the dates set forth in the proposed amended answer, with one exception, are earlier than the three-year limitations period for fraud. The one allegation that is alleged to have occurred within three years of this motion is an incident where Lebovitz allegedly chased and threatened KAHAN in synagogue during a Chanukah celebration on December 12, 2020. This alleged incident is unrelated to any claim of fraud.

As to the claim of unjust enrichment, the proposed answer does not allege how PARK PREMIUM and Lebovitz were unjustly enriched except for alleging that they submitted unspecified false invoices and retention of some monies they received from KAHAN due to third parties. The proposed answer does not identify the invoices or what dates they were alleged to have been submitted.

These allegations are too vague to make out a claim that it would be inequitable or unconscionable to allow PARK PREMIUM or Lebovitz to retain whatever unspecified monies KAHAN paid them.

The proposed answer also alleges that PARK PREMIUM and Lebovitz "accepted large sums of money from Kahan on a regular basis" but did not credit to KAHAN's account until after he terminated their relationship. It would appear from that allegation that KAHAN was in fact credited for these payments albeit late.

WHERFORE, it is hereby ORDERED that Defendant's motion to amend his answer is Denied.

This constitutes the decision and order of the Court.

E N T E R:

JSC