

Besen Partners LLC v 36 W. 128th, LLC

2023 NY Slip Op 34244(U)

November 30, 2023

Supreme Court, New York County

Docket Number: Index No. 652043/2022

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARLENE P. BLUTH **PART** **14**

Justice

-----X

BESEN PARTNERS LLC

Plaintiff,

- v -

36 WEST 128TH, LLC,

Defendant.

-----X

INDEX NO. 652043/2022

MOTION DATE 11/29/2023

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 59, 60, 61, 62, 63, 72, 73, 74, 75, 76, 80, 81

were read on this motion to/for

AMEND CAPTION/PLEADINGS

Plaintiff's motion to amend to add Sean Tyroler as a defendant is granted.

Background

This action concerns a dispute about a broker's commission. Plaintiff is a real estate broker and insists that defendant cheated it out of a commission related to the sale of a building owned by defendant. Defendant insists that the agreement is unenforceable.

Plaintiff now moves to amend the complaint to add Sean Tyroler, defendant's principal, as a defendant. It claims that defendant received \$331,855 in proceeds from the sale of the property and, despite the fact that defendant knew that plaintiff was seeking a commission, defendant transferred the entire amount of the proceeds to an account held by Mr. Tyroler. Plaintiff argues that this transfer rendered defendant insolvent and nothing remains in defendant's bank account.

It also insists that Mr. Tyroler transferred these funds for personal expenses and that he did not give anything in exchange to defendant for receiving the sale proceeds. Plaintiff wants to

add a fraudulent conveyance claim against Mr. Tyroler that voids this transfer to ensure that defendant has sufficient funds to cover a judgment, should plaintiff prevail.

In opposition, defendant claims that there was no valid contract between plaintiff and defendant and therefore there is no reason to permit the addition of Mr. Tyroler as a defendant. It contends that there were various versions of the alleged agreement between the parties and that although defendant signed a “third version” of the agreement on May 27, 2021, defendant “revoked” its acceptance of the agreement on July 7, 2021.

In reply, plaintiff insists that defendant’s opposition is misplaced as it attempts to convert the instant motion to one for summary judgment. It argues that defendant failed to show that the proposed amended pleading is palpably insufficient or devoid of merit. Plaintiff emphasizes that defendant’s principal diverted assets to himself after the closing of the sale of the property.

Discussion

“On a motion for leave to amend a pleading, movant need not establish the merit of the proposed new allegations, but must simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit” (*Miller v Cohen*, 93 AD3d 424, 425, 939 NYS2d 424 [1st Dept 2012] [internal quotations and citation omitted]).

The Court finds that plaintiff met its burden on a motion for leave to amend. It seeks to add a single cause of action for fraudulent conveyance in which it alleges that Mr. Tyroler transferred defendant’s assets without receiving equivalent value in return and which rendered defendant insolvent (*see* NYSCEF Doc. No. 62 at 11] [proposed amended pleading]). At his deposition, Mr. Tyroler admitted that some of the sale proceeds went to defendant while the vast majority of the money from the sale went to pay off other debts (NYSCEF Doc. No. 63 at 193-95). When asked if the sale proceeds were still in defendant’s account, Mr. Tyroler admitted that

they were not and that he was “living off of them” (*id.* at 197). The assertions in the proposed amended pleading plus Mr. Tyroler’s admissions at his deposition state a cognizable cause of action for fraudulent conveyance under Debtor Creditor Law § 273.

Defendant did not raise anything in opposition sufficient to defeat the motion. In his affidavit in opposition, Mr. Tyroler does not deny that defendant is insolvent or that he transferred defendant’s assets to his personal accounts. Defendant does not adequately explain why plaintiff’s fraudulent conveyance cause of action is palpably insufficient.

Instead, defendant makes dispositive arguments about the merits of the entire case. Those arguments are misplaced; they have no bearing on a motion for leave to amend. That defendant believes the entire agreement is not enforceable is not sufficient to defeat the instant motion. CPLR 3025(b) provides that motions for leave to amend “shall be freely given.” Merely disputing factual assertions is not sufficient opposition to a motion for leave to amend as plaintiff only has to allege a cognizable claim. Moreover, the Court observes that defendant did not cross-move for dispositive relief and so the Court need not make any findings about the enforceability of the contract in this decision.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers as NYSCEF Doc. No. 62 shall be uploaded as a separate document on NYSCEF by December 14, 2023; and it is further

ORDERED that the amended pleading shall be deemed served as against defendant upon service of a copy of this order with notice of entry thereof and plaintiff shall serve the newly added defendant Sean Tyroler within 30 days of the date of this decision ; and it is further

ORDERED that defendants shall serve an answer to the amended complaint or otherwise respond pursuant to the CPLR; and it is further

ORDERED that the action shall bear the following caption:

**SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK : PART 14**

----- X

BESEN PARTNERS LLC,
Plaintiff, **Index No. 652043/2022**

36 WEST 128TH, LLC, SEAN TYROLER,
Defendants.


-----X

And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk’s Office, who are directed to mark the court’s records to reflect the party being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website].

See NYSCEF Doc. No. 79 concerning the next conference.

<u>11/30/2023</u> DATE			 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<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