

Jobar Holding Corp. v Halio

2024 NY Slip Op 32650(U)

July 10, 2024

Supreme Court, New York County

Docket Number: Index No. 655689/2017

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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JOBAR HOLDING CORPORATION, ROBERT BUCK,
ROBERT BUCK, ROBERT BUCK, INDIVIDUALLY, AND
ROBERT BUCK, AS EXECUTOR OF THE ESTATE OF
JOAN BUCK, DELIVATIVELY AS SHAREHOLDERS ON
BEHALF OF JOBAR HOLDING CORPORATION,

Plaintiffs,

- v -

BARBARA HALIO, TURMAN & EIMER LLP, YESKOO
HOGAN & TAMLYN LLP,

Defendant.

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INDEX NO. 655689/2017
MOTION DATE 04/18/2024,
04/24/2024
MOTION SEQ. NO. 013 014

**DECISION + ORDER ON
MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 013) 273, 274, 275, 276, 284, 285, 286, 288, 289, 291

were read on this motion to AMEND CAPTION.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 277, 278, 279, 280, 281, 282, 283, 287, 290, 292

were read on this motion to AMEND COMPLAINT.

Plaintiffs’ motion to remove former Defendant Yeskoo Hogan & Tamlyn LLP (“Yeskoo”) from the caption (Mot. Seq. No. 13) is **granted**. Plaintiff’s motion to file a third amended complaint to restore dismissed claims against Turman & Eimer LLP (“T&E”) (Mot. Seq. No. 14) is **denied** without prejudice to any argument that may be raised in Plaintiffs’ pending appeal.¹

¹ As a result of a Referee Application and stipulation (NYSCEF 286-287), the return date for these motions was May 23, 2024, and they were marked “fully submitted” on that date. Defendant Barbara Halio subsequently sought to adjourn the return date to June 24, 2024, and Plaintiffs opposed (NYSCEF 289-292). No opposition papers have been received and the Court finds that no further papers are required to decide these motions.

A. Plaintiffs' Motion for Leave to Reargue Styled as a Motion to Amend is Denied

By order dated September 23, 2019, the Court (Scarpulla, J.) dismissed without prejudice Plaintiff's Complaint as against T&E for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, accountant malpractice, fraud, and negligent misrepresentation due to the "mixing of derivative and individual claims. . ." (*Jobar Holding Corp. v Halio*, 2019 N.Y. Slip Op. 32813[U], 7 [N.Y. Sup Ct, New York County 2019]). Plaintiffs subsequently filed an Amended Complaint asserting claims against T&E for Civil RICO, fraud, aiding and abetting fraud, aiding and abetting breach of fiduciary duty and breach of the covenant of good faith and fair dealing.

By order dated October 7, 2020, the Amended Complaint was dismissed as against T&E on the grounds that the RICO claims were conclusory; that Plaintiffs continued to mix derivative and individual claims; and because certain claims were untimely (NYSCEF 184, NYSCEF 235 [Transcript at 41-466]).

Plaintiffs now move for leave to amend on based on the First Department's decision in *1650 Broadway Assoc., Inc. v Sturm*, 210 NYS3d 19 [1st Dept 2024] [*"1650 Broadway"*]). In *1650 Broadway*, the First Department reinstated claims for accounting malpractice and aiding and abetting fraud based on allegations that the defendant did not comply with the "standard of a reasonable accountant under similar circumstances. . ." (*id.*).

Plaintiffs argue that their Third Amended Complaint (NYSCEF 280) seeking to re-assert claims from their previously dismissed Complaint and Amended Complaint should be accepted because it pleads claims consistent with those in *1650 Broadway*. T&E was not served with a copy of the motion to amend. However, T&E learned of the motion in connection with Plaintiff's request for an extension of time to perfect an appeal. T&E subsequently submitted a letter dated July 1, 2024, in opposition to Plaintiff's motion.

While styled as a motion to amend, Plaintiffs motion is actually a motion to reargue the Court's prior dismissal order based on new case law (*Mears v Chrysler Fin. Corp.*, 243 AD2d 270, 272 [1st Dept 1997] citing *George W. Collins, Inc. v Olsker-McLain Indus., Inc.*, 22 AD2d 485, 488 [4th Dept 1965] [a motion affecting a prior order must be made pursuant to CPLR 2221]). CPLR 2221(e)(2) provides, in relevant part, that the Court may grant leave to renew if the movant can "demonstrate there has been a change in the law that would change the prior determination. . ." A new decision that applies existing law is not a "change in the law" that warrants renewal (*Kreisler v B-U Realty Corp.*, 198 AD3d 568, 568 [1st Dept 2021]). Similarly, a new decision that is decided on inapposite facts is not sufficient to warrant renewal (*Lucente v Riverbay Corp.*, 58 AD3d 451, 452 [1st Dept 2009]).

Contrary to Plaintiff's assertions, *1650 Broadway*, does not warrant renewal or leave to amend. *1650 Broadway* applied the law as it existed at the time of the Court's dismissal order and does not concern derivative claims or timeliness concerns. Accordingly, leave to renew and leave to amend are not warranted.

B. Plaintiffs' Motion to Amend the Caption is Granted

This action was discontinued with prejudice against Yeskoo (NYSCEF 145). However, the clerk returned Plaintiffs' Second Amended Complaint because there was no order directing Yeskoo to be dropped from the caption as required by CPLR 1003 (NYSCEF 275).

CPLR 1003 provides, in relevant part, that "[p]arties may be dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just." Yeskoo should be removed from the caption which shall now read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
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BEHALF OF JOBAR HOLDING CORPORATION,

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Plaintiffs,

- v -

BARBARA HALIO

Defendant.

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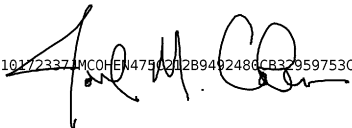
Accordingly, it is

ORDERED that Plaintiffs’ motion to remove Yeskoo Hogan & Tamlyn LLP from the caption (Mot. Seq. No. 13) is **GRANTED** as set forth above; it is further

ORDERED that Plaintiffs’ motion for leave to file a Third Amended Complaint (Mot. Seq. No. 14) is **DENIED**; it is further

ORDERED that Plaintiffs promptly re-file their Second Amended Complaint and that Defendants respond within ten days per the parties’ stipulation (NYSCEF 287).

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

7/10/2024
DATE

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 type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE