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

PRESENT: CAHN PART 49

Justice

[illegible]

- v -

[illegible]

INDEX NO. 605246/98

MOTION DATE 12/12/03

MOTION SEQ. NO. 018

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

SEP - 2 2004

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM [illegible] IN MOTION SEQUENCE [illegible]

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 8/18/04

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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VENTURETEK, L.P., RICHARD ELKIN, ANTOINE BERNHEIM, STACY BERNHEIM, and GENSTAR, LTD., individually and as shareholders of Rand Publishing Co., Inc.,

Plaintiffs,

-against-

Index No. 605046/98

RAND PUBLISHING CO., INC., MASON P. SLAINE, MICHAEL E. DANZIGER, WARBURG PINCUS VENTURES, L.P. and E.M. WARBURG, PINCUS & CO., L.L.C.,

Defendants.

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CAHN, J.

Defendant Mason P. Slaine moves, pursuant to CPLR 3025 (b), for leave to amend his answer to plaintiffs' second amended complaint to add four additional affirmative defenses and a counterclaim.

BACKGROUND

The facts underlying this motion have been detailed in several prior decisions and orders of this court, familiarity with which is presumed. Briefly, plaintiffs are investors and shareholders in Rand Publishing Co., Inc. (Rand), a small Delaware corporation that allegedly was formed for the purpose of investing in niche trade publications. In their complaint, plaintiffs alleged, inter alia, that, in 1997, defendant Slaine, one of the company's corporate officers and directors, usurped various corporate investment opportunities belonging to Rand, by

acquiring four niche publishing businesses for Information Ventures L.L.C., another information publishing business that Slaine had recently formed with defendant E.M. Warburg, Pincus & Co., L.L.C.

Slaine has denied that these four acquisitions were corporate opportunities belonging to Rand, and argued that, even if these were business opportunities which should have been offered to Rand, the company would not have had the resources to purchase these publications, given its limited cash position at the time. In earlier submissions on prior motions, plaintiffs have disputed Slaine's contention that Rand would have been unable to take advantage of these opportunities, arguing that Rand's investor/shareholders would have been willing and able to invest additional capital in Rand, to enable it to make such acquisitions.

In 1998, Information Ventures went public, as Information Holdings, Inc. (IHI), and has been highly successful. At the time, Rand's investors were offered an opportunity to invest all of Rand's available funds in IHI's initial public offering, at a favorable price, but they declined this offer and proceeded to commence the instant suit.

Slaine contends that he has now uncovered evidence, through discovery, which establishes that, contrary to plaintiffs' prior position, plaintiffs Venturetek, Antoine Bernheim, Stacy

Bernheim, and Genstar, Ltd. were neither willing nor anxious to invest additional monies in Rand, to enable it make the acquisitions at issue. Specifically, Slaine contends that Venturetek, on its recently produced 1996 tax returns, represented to the Internal Revenue Service that it had suffered a complete loss of its $2.95 million investment in Rand during that year. Slaine argues that this representation is completely inconsistent with Venturetek's claim that it would have been willing and anxious to invest more money in Rand, in 1997, in order to make the additional acquisitions. Slaine further argues that this representation was a deliberate tax fraud designed only to reap substantial tax benefits for Venturetek's partners, as there was no good-faith basis for Venturetek's claimed loss, since Rand still had slightly over $2 million in assets.

Slaine additionally contends that, in a recently received supplementary response to his interrogatories, plaintiffs Antoine Bernheim, Stacy Bernheim and Genstar have now conceded that they would not have invested further monies in any entity involving Slaine in 1996 or 1997. Slaine argues that this concession directly contradicts these three plaintiffs' earlier position, that they were both able and willing to invest further money in Rand to support the additional acquisitions.

Based on this new evidence, Slaine seeks to assert, as additional affirmative defenses, (1) that plaintiff Venturetek is

estopped by its tax fraud from claiming in this action that it still regarded Rand as a viable investment in 1997, and that it was prepared to invest additional capital in Rand at the time; (2) that plaintiffs Antoine Bernheim, Stacy Bernheim, and Genstar, are estopped from claiming that Rand should have been given an opportunity to acquire the four niche publication companies, or that they suffered any damages as a consequence of its failure to be given such an opportunity; and, (3) that Venturetek's equitable claims are barred by the doctrine of unclean hands. Slaine further seeks to assert a counterclaim for a declaratory judgment that, by formally representing to the U.S. government that it had suffered a total loss on its investment in Rand, Venturetek irrevocably abandoned its investment, and thereby forfeited all of its rights, as a shareholder of Rand, as of December 31, 1996. Additionally, based on this abandonment, the counterclaim also seeks the imposition of a constructive trust on Venturetek's shares in Rand, for the benefit of the remaining shareholders.

Finally, based on certain deposition testimony by Venturetek's general partner, elicited on November 19, 2003, Slaine seeks leave to add, as a fourth additional affirmative defense, that plaintiffs failed to mitigate their damages. Purportedly, during his deposition, Venturetek's general partner conceded that IHI has been a very successful company, and that

its success as an investment may properly be judged in hindsight. Based on this concession, Slaine contends that plaintiffs' refusal to allow Rand to invest its remaining assets in THI's initial public offering in 1998, constituted a failure to mitigate damages.

DISCUSSION

Generally, motions for leave to amend pleadings should be liberally granted in the absence of prejudice or surprise (CPLR 3025 [b]; Thomas Crimmins Contr. Co. v City of New York, 74 NY2d 166 [1989]; Masterwear Corp. v Bernard, 3 AD3d 305 [1st Dept 2004]). However, in an effort to conserve judicial resources, an examination of the underlying merits of the proposed amendment is warranted when considering such motions, and, where the proposed pleadings are palpably insufficient as a matter of law or fail to state a cause of action, leave to amend should be denied (Ancrum v St. Barnabas Hosp., 301 AD2d 474 [1st Dept 2003]; Davis & Davis, P.C. v Morson, 286 AD2d 584 [1st Dept 2001]; Non-Linear Trading Co. v Braddis Assoc., Inc., 243 AD2d 107 (1st Dept 1998]).

Insofar as defendant Slaine seeks leave to assert an affirmative defense of estoppel against Venturetek, based on the representations that it previously made to the U.S. government in its 1996 tax returns, or against the Bernheims and Genstar, based on the inconsistent positions that these plaintiffs have taken

during the course of this proceeding, the motion is denied. Judicial estoppel, also known as the doctrine of inconsistent positions, precludes a party who successfully assumed a certain position in a prior legal proceeding, and secured a judgment or favorable ruling therein, from assuming a contrary position in another action simply because his or her interests have changed (Leonia Bank v Kouri, 3 AD3d 213 [1st Dept 2004]; All Terrain Props., Inc. v Hoy, 265 AD2d 87 [1st Dept 2000]). The doctrine "rests upon the principle that a litigant 'should not be permitted . . . to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise'" (All Terrain Props., Inc., supra at 93, quoting Environmental Concern v Larchwood Constr. Corp., 101 AD2d 591, 593 [2d Dept 1984] [citations omitted]).

The allegedly inconsistent representations made by Venturetek on its 1996 tax return, even if financially beneficial to Venturetek, were not made in the context of a legal proceeding, and thus, do not warrant application of this doctrine (cf. Ferring v Merrill Lynch & Co., 244 AD2d 204 [1st Dept 1997] [plaintiff's appearance before the Social Security Administration, which did not entail a hearing, did not constitute the type of prior legal proceeding that can form the basis for the application of judicial estoppel]). Nor is the doctrine applicable to the inconsistent positions taken by

Bernheims and Genslar during the course of this proceeding. Even if plaintiffs should be considered beneficiaries of this court's prior rulings, denying dismissal of this action based, in part, upon their previously assumed position that they were willing and able to invest further monies in Rand, Slaine does not seek to estop these plaintiffs from taking a position inconsistent with that position. Instead, Slaine apparently seeks to estop these plaintiffs from taking a position inconsistent with their recently stated position, to which each has now submitted a sworn verification, that they were unwilling to invest further monies with Slaine. The doctrine of judicial estoppel is not available under these circumstances.

Slaine's motion to add an affirmative defense of unclean hands must also be denied, as this equitable doctrine is only available where the plaintiff is guilty of immoral or unconscionable conduct, that conduct is directly related to the subject matter in litigation, and the party seeking to invoke the doctrine was injured by such conduct (National Distillers & Chem. Corp. v Seyopp Corp., 17 NY2d 12 [1966]; 390 West End Assocs. v Baron, 274 AD2d 330 [1st Dept 2000]). Even assuming that Venturetek committed tax fraud in claiming Rand as a complete loss on its 1996 tax return, Slaine can allege no injury from Venturetek's alleged misconduct.

The factual allegations in Slaine's amended answer also fail

to warrant the addition of an affirmative defense alleging failure to mitigate damages. While injured parties generally have a duty to mitigate damages (see Brushton-Moira Cent. School Dist. v Fred H. Thomas Assoc., P.C., 91 NY2d 256 [1998]), they are required only to act reasonably, and not to take undue or unnecessary risks, such as investing in unproven or speculative ventures. Nor can the obligation to mitigate damages properly be judged solely in hindsight. Thus, even if plaintiffs have now conceded that, in hindsight, an investment in IHI would have been highly profitable, the obligation to mitigate damages cannot be held to require plaintiffs to have invested all of Rand's assets in an initial public stock offering, or in a company formed, in part, by the very individual charged with usurpation of corporate opportunities and breach of trust.

Finally, to the extent that Slaine seeks leave to add a counterclaim seeking a declaratory judgment and the imposition of a constructive trust on Venturetek's shares in Rand, based solely upon Venturetek's having declared its investment a total loss for tax purposes, the motion is denied. Slaine's proposed amended counterclaim not only fails to plead sufficient facts from which an inference of a knowing and intentional relinquishment of property can be drawn, but fails to plead the requisite elements for imposition of a constructive trust: "(1) a confidential or fiduciary relationship; (2) a promise, express or implied, to

convey or reconvey property; (3) a transfer in reliance upon that promise; and (4) unjust enrichment arising from the breach of that promise" (Fodiman v Zoberg, 182 AD2d 493, 494 [1st Dept 1992]; see also Sharp v Kosmalski, 40 NY2d 119, 121 [1976] [A constructive trust will be imposed only in those circumstances where "'property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest'" [citations omitted]).

Accordingly, it is

ORDERED that defendant Mason P. Slaine's motion for leave to amend his answer to plaintiffs' second amended complaint is denied.

DATED: August 18, 2004

ENTER:

J.S.C.

FILED

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