

Schuyler v Sotheby's Intl. Realty, Inc.
2013 NY Slip Op 32384(U)
October 2, 2013
Sup Ct, New York County
Docket Number: 112578/2011
Judge: O. Peter Sherwood
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

HARVEY B. SCHUYLER,

Plaintiff,

-against-

SOTHEBY'S INTERNATIONAL REALTY, INC., et al.,

Defendants.

INDEX NO. 112578/2011

MOTION DATE Sept. 19, 2013

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to ____ were read on this motion to amend supplement pleadings.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____


Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion to amend supplement pleadings is decided in accordance with the accompanying decision and order.

Dated: October 2, 2013


O. PETER SHERWOOD, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE
☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

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

-----X
HARVEY B. SCHUYLER,

Plaintiff,

-against-

**SOTHEBY'S INTERNATIONAL REALTY, INC. and
ROGER ERICKSON,**

Defendants.
-----X

O. PETER SHERWOOD, J.:

I. OVERVIEW

This action for, *inter alia*, breach of fiduciary duty and breach of a real estate brokerage agreement, arises out of a failed attempt to sell the residential cooperative apartment of plaintiff Harvey B. Schuyler ("Schuyler" or "plaintiff"). Before the court is plaintiff's motion, pursuant to CPLR § 3025 (b), for an order granting leave to amend the complaint to add NRT LLC ("NRT"), Realogy Corporation ("Realogy"), Ellie Johnson and Kathryn Korte as party defendants and to also add a claim for an award of punitive damages in the amount of \$50 million. Defendants oppose the motion on the grounds that: (1) plaintiff's delay in seeking leave to amend is without excuse or justification; (2) defendants will be prejudiced by the amendment; (3) plaintiff's amendment is sought for an improper purpose and is without merit.

II. BACKGROUND

On December 29, 2008, Schuyler entered into an exclusive sales agreement with defendant Sotheby's International Realty ("Sotheby's") for the purpose of selling his cooperative apartment, 812 Fifth Avenue, #4B ("Apartment") (Castello Affirm. in Opp., Exhibit "B"). The brokerage agreement bears Schuyler's signature, as well as the signatures of proposed additional defendant Ellie Johnson ("Johnson"), as Vice President and Brokerage Manager, and defendant Roger Erickson, as Senior Managing Director ("Erickson") of Sotheby's. The brokerage agreement contains an asking price of \$3.65 million and provided for a 6% commission due to Sotheby's from the sale proceeds.

**DECISION AND
ORDER**

**Index No.: 112578/2011
Motion Sequence No.: 002**

In or about February 2009, a prospective purchaser, Demet Sabanci Centindogan (“Purchaser”), made an offer of \$3 million. On or about March 3, 2009, a Contract of Sale was executed for a purchase price of \$3 million and the Purchaser made a down payment of \$300,000.00, representing 10% of the purchase price. The deal with the Purchaser later fell through due to the Purchaser’s failure to secure co-op Board approval.

On November 4, 2011, Schuyler commenced this action against Sotheby’s and Erickson (collectively “defendants”) by filing a Summons With Notice to recover compensatory and punitive damages on theories of breach of fiduciary duty, breach of contract and negligent misrepresentation. Plaintiff alleged that defendants were acting as undisclosed dual agents in connection with the failed sale. According to defendants, a Demand for the Complaint was filed on November 22, 2011 but plaintiff failed to serve the Complaint until three months later. The Complaint asserts three causes of action against the defendants for breach of fiduciary duty (first cause of action), breach of the brokerage agreement (second cause of action) and fraudulent misrepresentation (third cause of action) and sought damages “in an amount to be determined at trial”. Plaintiff alleges, *inter alia*, that defendants were acting as “secret dual agents”; created a false market by setting the purchase price of the Apartment below the fair market value; pressured him to accept Purchaser’s offer by claiming that the purchaser could pass Board review when they knew Purchaser was not a suitable candidate; and simultaneously counseled the Purchaser to conceal from the Board that he intended to harbor a dog in the apartment and that Purchaser’s college-age children would reside in the Apartment without simultaneous occupation by their parents - - violations of the co-op policies.

No preliminary conference has been held. However, limited discovery was conducted from June 21, 2012 through October 23, 2012. Although plaintiff served notices for both party and non-party depositions, no depositions have been held.

By notice of motion dated May 23, 2013, Schuyler moved for leave to amend the complaint which, by order dated June 27, 2013, was denied, without prejudice, with leave to renew for plaintiff’s failure to submit all papers upon which his motion was based.

On this renewed motion for leave to amend plaintiff seeks to add NRT, Realogy, Johnson and Kathryn Korte (“Korte”) as party defendants and also to add a claim for an award of punitive damages in the amount of \$50 million. Plaintiff contends that NRT is the owner and operator of

Sotheby and is a wholly-owned subsidiary of Realogy and that both companies maintained “rigorous” policies disclosed in public documents to make full and fair disclosure to their customers and both exerted significant influence over its subsidiaries day-to-day affairs. Through the proposed amended complaint plaintiff seeks to “pierce the corporate veil” as to these additional corporate entities. In addition, plaintiff claims that during the course of document discovery he obtained a copy of the brokerage agreement which revealed that Johnson, as well as Erickson, executed the brokerage agreement, and learned further that Korte, a regional executive vice president of NRT, was designated by Sotheby’s as the broker of record in connection with the failed purchase of the Apartment.

Defendants oppose the motion on the ground that the vast majority of the documents defendants produced in this action and which plaintiff claims reveal information upon which he bases his motion for leave to amend, were produced by Sotheby’s in May 2010 pursuant to subpoena in an action titled *Demet Sabanci Cetindogan v Harvey B. Schuyler*, Index No. 112418/2009. That action was commenced in this court by the Purchaser against Schuyler for return of the down payment on the failed sale. Thus, for at least three years plaintiff has been in possession of the information necessary to name the proposed additional defendants. Indeed, plaintiff served notices to take the depositions of Johnson and Korte prior to making this motion. Defendants further aver that whatever new information plaintiff claims was produced in discovery regarding the proposed additional corporate defendants, NRT or Realogy, and their relationship to Sotheby’s could have been learned by plaintiff prior to commencing this action simply by reviewing Realogy’s publicly available website. Defendants also observe that plaintiff was a signatory to the brokerage agreement and, therefore, was aware of its contents and that Johnson was a signatory. Defendants claim they will be prejudiced if the court permits plaintiff to serve the proposed amended complaint as they “will need to prepare a new course of defense and re-wind the clock” (Defendants’ Memo of Law in Opp., p. 12).

In any event, defendants contend that even assuming they were acting as dual agents in the aborted sale and failed to disclose this fact, plaintiff has failed to articulate how such conduct resulted in any damages or supports his extraordinary claim for \$50 million in punitive damages. Defendants further argue that plaintiff has alleged no facts that would support piercing the corporate veil so as to permit a claim against NRT and Realogy. Defendants contend that plaintiff’s real

purpose both in adding defendants and making a claim for punitive damages is to pressure the original defendants to settle this action.

In reply, plaintiff states that this case is in an early stage and, therefore, defendants' lateness contention is without merit. Further, any delays in the progress of this litigation is due to defendants' failure, despite repeated demands, to turn over documents responsive to plaintiff's demands. Moreover, it was only in late 2012 when defendants provided limited e-mail exchanges that plaintiff learned that representatives of NRT were involved in the issues underlying this action; it was only in October 2012 when Realogy publically filed its prospectus in which it promulgated its disclosure policies that plaintiff understood the relationships among the corporate entities and that NRT exerted considerable influence over its subsidiaries' day-to-day affairs; and lastly, it was only in March 2013 when the New York State Department of State, Division of Licensing, sent him a letter regarding the investigation of his complaint against defendants that he became aware of the involvement of Johnson and Korte.

II. DISCUSSION

Leave to amend a pleading pursuant to CPLR § 3025 "shall be freely given", in the absence of prejudice or surprise (*see e.g. Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354 [1st Dept 2005]). Mere lateness in seeking such relief is not in itself a barrier to obtaining judicial leave to amend (*see, Ciarelli v Lynch*, 46 AD3d 1039 [3d Dept. 2007]). Rather, when unexcused lateness is coupled with significant prejudice to the other side, denial of the motion for leave to amend is justified (*see, Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 958 [1983]). Prejudice in this context is shown where the nonmoving party is "hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Loomis v Civetta Corinno Const. Co.*, 54 NY2d 18, 23 [1981]).

In order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated (*Thompson, supra* at 205; *Zaid, supra* at 355). Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*see Aerolineas Galapagos, S.A. v Sundowner Alexandria*, 74 AD3d 652 [1st Dept 2010]; *Thompson, supra* at 205). Thus, a motion for leave to amend a pleading must be supported by an affidavit of merit and evidentiary proof that could be considered upon a motion for summary judgment (*Zaid, supra* at 355).

As the party seeking the amendment, Plaintiffs have the burden in the first instance to demonstrate their proposed claims' merit but Defendants, as the parties opposing the motion, "must overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged in the moving papers are obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 W. 40th St. LLC*, 42 AD3d 82, 86 [1st Dept 2007]). Where there has been extended delay in seeking leave to amend, the party seeking to amend a pleading must establish a reasonable excuse for the delay (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 [1st Dept 2003]).

Here, the delay in seeking leave to amend is not particularly lengthy. Although plaintiff's explanation for not seeking to add defendants and claims at an earlier date is not convincing (especially since he signed the brokerage agreement which bears the signatures of proposed additional defendants, Johnson and Erickson), defendants will not suffer any significant prejudice if leave to amend were granted since the discovery phase of the litigation is in its early stages.

As to the merits of plaintiff's additional claims, the proposed amended complaint alleges that Realogy and NRT dominated and controlled Sotheby's management, operation, affairs and sales policies and that Sotheby's was nothing more than an alter ego, affiliate and subsidiary of Realogy and NRT. Plaintiff alleged further that Realogy, NRT and Sotheby's share the same corporate headquarters; Korte, who is an executive Vice President of NRT, was designated as the broker of record on the Schuyler transaction; the principals of Realogy and NRT control, dominate and participate in all aspects of Sotheby's management and operations and dictate its code of ethical conduct; and Realogy and NRT are united in interest with the other defendants and therefore may not invoke any parent-corporate liability shield.

New York law disfavors disregard of the corporate form. Therefore, "piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Control alone is insufficient to tie a nonsignatory to contractual obligations (*see TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998] ["Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance"]).

Here, plaintiff merely argues that NRT and Realogy dominated and controlled Sotheby's without any allegations that Realogy and NRT exercised such domination and control "in respect to the transaction attacked" and more importantly that they misused the corporate form to commit a wrong. Instead, the proposed amended complaint reveals that this action is a garden-variety breach of contract case in which the parent corporations had no significant role. Accordingly, so much of the amended complaint as seeks to add Realogy and NRT as party defendants will be denied.

As to the request to add Johnson and Korte as defendants, the proposed amended complaint fails to reveal any allegations of specific wrongdoing by either Johnson or Korte with respect to the transaction at issue. Rather, plaintiff seeks to add Johnson as she signed the brokerage agreement and to add Korte as she was designated by Sotheby's as the broker of record. These facts, even if proved, are insufficient to justify holding these individuals, both of whom are corporate officers, personally liable for wrongs of the corporation.

With regard to the addition of a claim for punitive damages, to be entitled to punitive damages, plaintiff must "demonstrate that the wrong to [him] rose to the level of 'such wanton dishonesty as to imply a criminal indifference to civil obligations' and . . . that the conduct was part of a pattern of similar, publicly-directed misconduct" (*Zimmerman v Tarshis*, 289 AD2d 230, 231 [2d Dept. 2001], quoting *Leppard v Parisi*, 271 AD2d 412, 413 [2d Dept. 2000]). The allegations of the proposed amended complaint fall far short of evidencing gross conduct involving such a high degree of moral turpitude as would warrant a punitive damages cause of action (see *Heller v Provenzano*, 303 AD2d 20 [1st Dept. 2003]). Therefore, that branch of the proposed amended complaint must also be denied.

Accordingly, it is hereby

ORDERED that the motion of plaintiff to amend the complaint is DENIED; and it is further

ORDERED that all counsel for the respective parties shall appear for a preliminary conference on Wednesday, October 16, 2013 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the Court.

DATED: October 2, 2013

ENTER,


O. PETER SHERWOOD
 JSC