Leaver v Geller
2014 NY Slip Op 31490(U)
June 4, 2014
Sup Ct, New York County
Docket Number: 652173/12
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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ERIC LEAVER,

INDEX NO. 652173/12

Plaintiff,

-against-

RICHARD GELLER and ANDREW SIEGEL,

Defendants.

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JOAN A. MADDEN, J.:

Plaintiff moves for leave to amend the complaint to add six new defendants, Gerald, Geller, Dave Geller, David Grossman, Luigi Ceneri, Willard Geller and Sean Connerty. Defendants oppose the motion.

This is an action to collect on a judgment, asserting claims for fraudulent transfer under Debtor Creditor Law §§ 273, 273-a and 276, unjust enrichment, conversion and piercing the corporate veil. In July 2010, an arbitrator rendered an award of $65,000 plus interest in favor of plaintiff Eric Leaver and against Happy Rock Special Opportunities Fund I, LLC ("Happy Rock"). On October 20, 2010, the court confirmed the award, and a judgment was entered in the amount of $75,030.07. On June 22, 2012, plaintiff commenced the instant enforcement proceeding against defendants Richard Geller and Andrew Siegel, as individual members of judgment debtor Happy Rock, a limited liability company. Plaintiff asserts that during post-judgment discovery, he learned that Happy Rock's assets were "completely depleted," allegedly due in part to several distributions to Geller and Siegel. Also during discovery, plaintiff obtained

the Happy Rock operating agreement, which lists the names of six additional individual members, who are the new defendants plaintiff is now seeking to add to the complaint.

Defendants Geller and Siegel oppose the motion, arguing that the claims against the proposed new defendants are time-barred under section 508(c) of the Limited Liability Law, the three-year statute of limitations applicable to disbursements made to members of a limited liability company. Defendants also challenge the merits of the proposed amendment, asserting that plaintiff "altered" the language of the Purchase and Sale Agreement in an effort to establish a debtor creditor relationship between the parties as of a certain date, so as to "paint defendants' disbursement of monies as fraudulent conveyances."

In reply, plaintiff argues that defendants should be estopped from relying on the statute of limitations, since they withheld the information necessary to identify the new defendants, and that under the relation back doctrine the amendment is timely since the original and new defendants are united in interest. Plaintiff also argues that defendants' are precluded from challenging the merits of the underlying judgment.

It is well settled that leave to amend a pleading shall be freely given absent prejudice or surprise from the delay. CPLR 3025(b); Miller v. Cohen, 93 AD3d 424 (1st Dept 2012); MBIA Insurance Corp v. Greystone & Co, Inc, 74 AD3d 499 (1st Dept 2010); Pier 59 Studios, LP v. Chelsea Piers, LP, 40 AD3d 363 (1st Dept 2007). On a motion for leave to amend the complaint, plaintiff need not establish the merit of his proposed new allegations, but must "simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." MBIA Insurance Corp v. Greystone & Co, Inc, supra; accord Miller v. Cohen, supra; Pier 59 Studios,

LP v. Chelsea Piers, LP, supra. Where as here a question is raised as to the timeliness of the proposed amendment, the court should consider the statute of limitations issues in determining whether the amendment is "devoid of merit." See Whitfield-Oritz v. Department of Education, 116 AD3d 580 (1st Dept 2014); Garcia v. New York-Presbyterian Hospital, 114 AD3d 615 (1st Dept 2014).

The parties do not dispute that the relevant statute of limitations is the three-year period in section 508(c) of the Limited Liability Company Law, which provides that a "member who receives a wrongful distribution from a limited liability company shall have no liability under this article or other applicable law for the amount of the distribution after the expiration of three years from the date of the distribution." Plaintiff does not dispute defendants' assertion that the last and final distribution to Happy Rock's members was in or about September 2010, so at the latest, the three-year limitations period expired in September 2013. Since plaintiff did not move to amend until October 2013, his proposed amendment is time-barred unless he can establish that an exception to the statute of limitations applies. As noted above, plaintiff relies on two exceptions, relation back and equitable estoppel.

"[T]he relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a co-defendant for Statute of Limitations purposes where the two defendants are 'united in interest.'" Buran v. Coupal, 87 NY2d 173, 177 (1995) (quoting CPLR 203(c)). For the relation back doctrine to apply, three conditions must be satisfied: 1) the claims must arise out of the same conduct, transaction or occurrence; 2) the new defendants must be united in interest with the original defendants, and by

reason of that relationship can be charged with such notice of the institution of the action that they will not be prejudiced in maintaining their defense on the merits; and 3) the new defendants knew or should have known that but for plaintiff's mistake as to the identity of the proper parties, the action would have been brought against them as well. See id.

Here, plaintiff fails to made a sufficient showing that the six new defendants and the original defendants are united in interest. Unity of interest is generally a question of law and not of fact. See LeBlanc v. Skinner, 103 AD3d 202 (2nd Dept 2012). Defendants are united in interest when, by virtue of some jural or legal relationship between them, they have the same defenses to plaintiff's claims, such that they will stand or fall together and judgment against one will similarly affect the other. See id; Lord Day & Lord, Barrett, Smith v. Broadwall Management Corp, 301 AD3d 361 (1st Dept 2003); Raymond v. Melohn Properties, Inc, 47 AD3d 504 (1st Dept 2008); Xavier v. RY Management Co Inc, 45 AD3d 677 (2nd Dept 2007). Unity of interest exists where the relationship between the parties gives rise to potential vicarious liability, such as between partners and co-partners, employers and employees, business corporations and their employees, and principals and agents. See Connell v. Hayden, 83 AD2d 30 (2nd Dept 1981).

Plaintiff has not established any relationship between the original and proposed new defendants giving rise to vicarious liability of one for the conduct of the other. Plaintiff commenced the instant action to enforce and collect the judgment against Happy Rock, a limited liability company. The original complaint names two individual members of Happy Rock, and the amended complaint names six additional individual members. Under the limited liability

company law, individual members are shielded from personal liability for the obligations of the company. See Limited Liability Company Law §§ 609, 610; Matias v. Mondo Properties, LLC, 43 AD3d 367 (1st Dept 2007); Retropolis, Inc v. 14th Street Development LLC, 17 AD3d 209 (1st Dept 2005). Although the doctrine of piercing the corporate veil applies to limited liability companies so as to impose liability on individual members, see Matias v. Mondo Properties, LLC, supra, plaintiff has not come forward with evidence showing or suggesting any type of interrelationship between the individual members that would give rise to vicarious liability so that the proposed defendants may be potentially liable for the acts of the original defendants and entitle plaintiff to rely upon the relation back doctrine. See Stokes v. Komatsu America Corp, ___ AD3d ___, 2014 WL 1698365 (3rd Dept 2014); Jaliman v. DH Blair & Co Inc, 105 AD3d 646 (1st Dept 2013).

Finally, the record is insufficient to warrant the application of the equitable estoppel doctrine. Equitable estoppel will preclude a defendant from asserting a statute of limitations defense where the defendant's affirmative wrongdoing, fraud, misrepresentation or deception induced the plaintiff to refrain from commencing a timely action. See Zumpano v. Quinn, 6 NY3d 666 (2006); Corsello v. Verizon New York, Inc, 18 NY3d 777 (2012); Weisel v. 310 East 46 LLC, 62 AD3d 516 (1st 2009). Plaintiff must also demonstrate reasonable reliance on defendants' misrepresentations. See Zumpano v. Quinn, supra.

Plaintiff alleges defendants "intentionally concealed" the identity of the six additional Happy Rock members, when defendants Geller and Siegel refused to produce documents and testify, respectively in October 2011 and January 2012, as to the identity of the additional

members; and later when they responded to plaintiff's document demand and produced a redacted copy of Happy Rock's operating agreement removing the names and addresses of the additional members. Plaintiff asserts that not until the preliminary conference in June 2013, when this court ordered defendants to produce an un-redacted copy of the operating agreement, was plaintiff "finally aware" of the additional members names and addresses.

In response, defendants assert that "as early as 2011," plaintiff had information as to the identity of "every person or entity that received any monies" from Happy Rock, based on bank statements provided to plaintiff during post-judgment discovery proceedings, which "clearly evidence monthly disbursements" to each additional member. Defendants assert plaintiff had such information at the commencement of this action in June 2012.

Plaintiff's reply papers neither address nor dispute defendants' assertions as to the information contained in Happy Rock's bank statements identifying the names of the additional members. Moreover, plaintiff does not specify the date when the un-redacted copy of the operating agreement was actually received. Notably, the court's preliminary conference order directed defendants to produce the un-redacted copy "no later than 6/28/13," and the court's September 26, 2013 compliance conference order stated that the "preliminary conference order has been complied with by all parties." In any event, an examination of the redacted copy shows that it still included the signatures of the six additional members, so even if those members could not be identified by name from their signatures, plaintiff could have named them as "John Doe" defendants for the purposes of commencing a timely action against them. Under these circumstances, plaintiff has not established that defendants engaged in any affirmative

wrongdoing, fraud, misrepresentation, or deception which induced him to refrain from commencing a timely action against the six additional members. See id.

Based on the foregoing, plaintiff has failed to make a sufficient showing as to applicability of the equitable estoppel and relation back doctrines. Thus, since plaintiff's proposed amendment is time-barred, his motion for leave to amend the complaint is denied. In view of this conclusion, the court need not consider the balance of defendants' arguments in opposition.

Accordingly, it is

ORDERED that plaintiff's motion for leave to amend the complaint is denied in its entirety.

DATED: June 4, 2014

ENTER:

J.S.C.
HON. JOAN A. MADDEN
J.S.C.