Simon v Kyrejko
2015 NY Slip Op 31497(U)
August 7, 2015
Supreme Court, New York County
Docket Number: 156277/2014
Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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PETER SIMON, as a minority shareholder in The City Foundry Inc. and Industry City Distillery, Inc., and DR. DOUGLAS SIMON,

Plaintiffs,

-against-

DAVID KYREJKO, ZACHARY BRUNER, together, Majority Shareholders in The City Foundry Inc., and Industry City Distillery, Inc., THE CITY FOUNDRY INC. and INDUSTRY CITY DISTILLERY, INC.,

Defendants.

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DECISION AND ORDER

Index No. 156277/2014

HON. ANIL C. SINGH, J.

This is a derivative shareholder action brought by plaintiff Peter Simon ("Simon") in his capacity as a minority shareholder in The City Foundry, Inc., ("TCF") and Industry City Distillery, Inc. ("ICD"). The other named plaintiff, Dr. Douglas Simon ("Dr. Simon"), is an owner of a convertible note against ICD. Plaintiffs move for leave to file an amended complaint pursuant to CPLR 3025. Defendants oppose the motion.

Background:

Plaintiffs seek to hold David Kyrejko ("Kyrejko") and Zachary Bruner ("Bruner") liable for self-dealing for allegedly executing a scheme to eliminate all of their co-founders in their two companies, The City Foundry, Inc., and Industry City Distillery, Inc., which are in the business of developing, manufacturing and selling lines of locally distilled spirits. Plaintiffs initially alleged claims for breach of fiduciary duty against both defendants (First Cause of Action), fraud in the inducement against David Kyrejko (Second Cause of Action), fraud against both defendants

(Third Cause of Action), civil conspiracy to commit fraud and breach of fiduciary duty against both defendants (Fourth Cause of Action), and *quantum meruit* against TCF and ICD (Fifth Cause of Action).

Plaintiffs now allege that the limited eight-month period of discovery taken to date – and business decisions made by defendants after the initial complaint was filed – give rise to additional claims. Specifically, plaintiffs move to: (1) join Richard Watts ("Watts") as a plaintiff; (2) add causes of action for defamation *per se* against David Kyrejko (Sixth Cause of Action); (3) breach of contract and breach of implied covenant of good faith and fair dealing against TCF and ICD (Seventh Cause of Action); (4) declaratory judgment against TCF (Eighth Cause of Action); and (5) tortious interference with contract and with business relations against Andrew Kyrejko (Ninth Cause of Action), and to expand their original Fourth Cause of Action to include a civil conspiracy to commit tortious interference claim against Andrew Kyrejko ("A. Kyrejko").

Discussion:

Under CPLR 3025, "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom." MBIA Ins. Corp. v. Greystone & Co., Inc., 74 AD3d 499, 500 [1st Dept 2010]. The proposed amendments must not be "palpably insufficient or patently devoid of merit." Id. Moreover, plaintiffs may establish their amendments by proffering an affidavit of merits and such other evidence as is appropriate on a motion for summary judgment. Nichols v. Curtis, 104 AD3d 526, 528 [1st Dept 2013].

To establish prejudice, "there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." Giambrone v. Kings Harbor Multicare Ctr., 104 A.D.3d 546, 548, 961

N.Y.S.2d 157, 159 (2013) (internal quotes omitted). Where defendants are found to have "sufficient knowledge to motivate the type of litigation preparation and planning needed to defend against the entirety of the particular plaintiff's situation," a defendant is not hindered in the preparation of his case and is not precluded from taking measures in support of his position. Id.

Here, not only have plaintiffs asked defendants to consent to their request to amend the complaint to add claims and parties in March, April and May 2015, but defendants also have sufficient knowledge to motivate the type of litigation preparation and planning needed to defend against the entirety of plaintiffs' proposed amendments. See id. As such, there is no prejudice or surprise with respect to the proposed amendments.

First, the parties seek to add Richard Watts and A. Kyrejko, who were involved in the ICD business, took part in the transactions from which this dispute arose, and would be affected by the judgment. In light of these facts, there is no prejudice or surprise sufficient to deny the joinder of these parties.

Next, the termination of Simon from ICD and TCF that occurred subsequent to the filing of the initial complaint raised new claims that were previously unavailable. This includes the proposed seventh cause of action (breach of contract and breach of implied covenant of good faith and fair dealing claims arising out of Simon's termination), the eighth cause of action (declaratory judgment as to the ownership of an alleged TCF spinoff), and the ninth cause of action (tortious interference with contract and business relations against A. Kyrejko). The record also shows that plaintiffs promptly notified defendants of their intention to amend the complaint to add the defamation *per se* claim (sixth cause of action) three days after Scott Rosenbaum, the director of T. Edward Wines (and distributor of ICD's vodka product), was deposed and gave

testimony that gave rise to the set of facts underlying this cause of action. The proposed additional claims do not, therefore, prejudice or surprise defendants.

Moreover, under the circumstances of this case, an affidavit of merits is unnecessary, since the events giving rise to the additional claims occurred post-filing to the complaint.

Although no surprise or prejudice exists with respect to the proposed amendments, defendants argue that the proposed amendments are patently devoid of merit. See MBIA, 74 AD3d at 500.

1. Proposed Joinder of Watts

Defendants argue that plaintiffs should not be permitted to add Watts as a party because any claims Watts may have are barred by the general release contained in an agreement signed by him. This argument is without merit. The release is limited, and carves out a narrow exception for Watts's rights as a shareholder, permitting him to bring claims in a derivative action. Watts seeks to sue in his representative capacity "on behalf of ICD and TCF shareholders." Denying this joinder would infringe upon Watts's rights as a shareholder, since he would be affected by any judgment. See Joanne S. v. Carey, 115 A.D.2d 4, 7 (1st Dep't 1986) ("It is well settled that '[t]he primary reason for compulsory joinder of parties is to avoid multiplicity of actions and to protect non-parties whose rights should not be jeopardized if they have a material interest in the subject matter.'") (internal citations omitted). Accordingly, his joinder would not be palpably insufficient or devoid of merit.

The release limits the claims that Watts may bring, however, to those accruing after December 31, 2013. Therefore, Watts is permitted to join the first cause of action (Breach of Fiduciary Duty) insofar as it relates to events occurring after December 31, 2013. Watts is entirely precluded from joining in the second cause of action (Fraud in the Inducement) as it does

not relate to Watts and involves events occurring before December 31, 2013. Watts is permitted to join the third cause of action insofar as it relates to events occurring after December 31, 2013. Watts is permitted to join the fourth cause of action, but is limited to the breach of fiduciary duty claim, and only insofar as these causes of action pertain to events occurring after December 31, 2013. Since the conspiracy to commit tortious interference claim does not pertain to Watts or minority shareholders generally, Watts may not join it. Likewise, Watts may not join the fifth, sixth, seventh, or ninth causes of action, since they do not involve shareholders' rights. Lastly, Watts may join the eighth cause of action (declaratory judgment) since it pertains to TCF's potential ownership of a company, as to any post December 31, 2013 declarations.

2. Defamation *Per Se*

Next, defendants argue that plaintiffs' proposed sixth cause of action of defamation *per se* against Kyrejko is improper since it is based on deposition testimony of a non-party, Scott Rosenbaum, who was not served with, or given a chance to review, a copy of the transcript. Defendants argue that this is a violation of CPLR 3116(a), which states that, "*The deposition shall be submitted to the witness for examination* and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them." (emphasis added). This argument is supported by Ramirez v. Willow Ridge Country Club, Inc., where the First Department held that "[a] failure to comply with [CPLR] 3116 (a) results in a party being unable to use the transcript . . ." 84 A.D.3d 452, 453, 922 N.Y.S.2d 343, 345 (1st Dep't 2011). Defendants also argue that the testimony, if it stands, is insufficient to prove that Kyrejko made defamatory remarks.

With respect to CPLR 3116, plaintiffs point out correctly, however, that transcripts have been precluded from admission into evidence only at trial or in support of a motion for summary judgment. Id. (precluded from using transcript during cross-examination at jury trial); Palumbo v. Innovative Communs. Concepts, 175 Misc.2d 156, 157-58 (Sup. Ct. NY Co. 1997) (precluded from using transcript in support or opposition of summary judgment motion); Jacobs v. Herrera, 4 Misc.3d 1018(A) (Dist. Ct. Nassau Co. 2004) (precluded from using transcript in support of summary judgment motion). Moreover, a motion for leave to amend is distinguished from evidence at trial or a summary judgment motion because there is no looming final judgment.

Assuming the accuracy of the testimony, plaintiffs' allegations are sufficient to state a prima facie claim for defamation. The elements of a cause of action for defamation consist of "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se." Dillon v. City of N.Y., 261 A.D.2d 34, 38 (1st Dep't 1999). Under New York Law, words are *per se* defamatory if they would tend to injure a party's trade, occupation, or business. See Wasserman v. Haller, 216 A.D.2d 289, 289, 627 N.Y.S.2d 456, 457 (1995) ("Words which affect a person in his or her profession by imputing to him or her any kind of fraud, dishonesty, misconduct, or unfitness in conducting one's profession may be actionable."). Plaintiffs allege that Kyrejko made false remarks branding Peter Simon a liar and an incompetent professional. To support this allegation, plaintiffs provided testimony from Rosenbaum in which he stated that, at some point after filing this lawsuit in June 2014, Kyrejko told Rosenbaum that Simon was "inept" at his job, and "not forthcoming" with documents. Accordingly, plaintiffs' defamation *per se* claim is not devoid of merit.

3. Breach of Contract and Implied Covenant of Good Faith and Fair Dealing

Plaintiffs' proposed seventh cause of action (breach of contract and breach of implied covenant of good faith and fair dealing) arises from Simon's termination (an event that occurred subsequent to the filing of the initial complaint).

Plaintiffs allege three separate breaches of the ICD and TCF Founders agreements: (1) the termination of Simon violated Sections 9 of both the ICD and TCF agreements because the businesses were always required to include at least three original co-founders; (2) defendants' elimination of the original co-founders of ICD and TCF was a "change of control" as defined in Sections 2(b) of the ICD and TCF Founders Agreements, triggering the vesting of all co-founders' unvested shares; and (3) all of defendants' actions following Simon's termination violate Sections 9 of the ICD and TCF contracts in that they are *ultra vires*.

As to the first alleged breach, defendants argue that Simon's breach of contract claim should fail because it is predicated on a misreading of the ICD and TCF Founders Agreement. The agreements state, in pertinent part, that, "in the event that a Founder is no longer employed by the Distillery, or any of its affiliates, then the Distillery shall not, without the prior written consent of at least two out of three Founders, approve any of the following: (i) terminate the employment of any Founder . . ." Paragraph 9(b) of the TCF Founders Agreement. Defendants' position is that Simon's termination was permitted by the contract because two founders voted in favor of it, and that more than three founders remained as of the date of Simon's termination.

As to the second alleged breach, defendants argue that plaintiffs' interpretation of the TCF and ICD Founders Agreements' definition of "Change of Control" is improper, rendering the amendment patently without merit. Defendants argue that "Change of Control" occurs in

only two sets of circumstances: (a) if the applicable entity "is consolidated with or acquired by another entity in a merger, reorganization, consolidation or other form of business combination;" or (b) "in the event of a transfer or sale of all or substantially all of the [entity's] assets." Defendants' position is that neither event occurred. Both defendants' arguments are unavailing.

While leave to amend should be freely granted, when a proposed amendment is devoid of merit or fails to state a cause of action, the proposed amendment should be denied. Corman v. LaFountain, 38 A.D.3d 706, 707, 835 N.Y.S.2d 201, 202 (2007). "When an agreement is clear and complete on its face, it should be enforced according to its terms," and a proposed claim that is inconsistent with those terms is necessarily devoid of merit. See id. By extension, therefore, a proposed amendment that rests on the interpretation of an agreement with ambiguous language would not be patently devoid of merit.

As plaintiffs correctly argue, the first two alleged breaches create issues of interpretation in which the language of the agreement appears to be ambiguous. With respect to the first alleged breach, ambiguity may exist in the definition of "Change of Control," since it is unclear if the change from four founders to two created a failure of sufficient voting control to constitute a change of control requiring the vesting of shares. Regarding the second alleged breach, ambiguity arguably exists in the absence of instruction in the management of TCF and ICD with less than three original founders. The first two breach of contract claims are, therefore, permitted and not devoid of merit.

Plaintiffs' third alleged breach of contract claim, which defendants do not address, must also survive. Plaintiffs allege that the ICD and TCF Founders Agreements never contemplated that the companies would be managed by only two of the original founders. Plaintiffs further allege that for defendants to manage TCF and ICD, alone, they must amend the agreements and

receive 75% of the vested share votes in both TCF and ICD – a vote, plaintiffs allege, they cannot win. As such, plaintiffs contend that every action taken since the termination of Peter Simon is *ultra vires*. Because this allegation is a direct result of Peter Simon's termination, and because it is uncontested by the defendants, it is not devoid of merit.

Likewise, plaintiffs' amendment to add a breach of the covenant of good faith and fair dealing claim is also allowed. Merely satisfying the minimum standards of a contract does not relieve a party from the implied covenant of good faith and fair dealing and license the party to act in bad faith. See Prakhin v. Fulton Towers Realty Corp., 122 A.D.3d 601, 603 (2d Dep't 2014). Here, Simon's shares vest depending on the amount of time Simon was employed by ICD and TCF. Plaintiffs allege that defendants fired Simon in bad faith to consolidate power and reap the benefit of his unvested shares. This allegation, when read with the original facts alleged by plaintiffs, is not devoid of merit.

4. Declaratory Judgment

Defendants argue that the proposed eighth cause of action, a declaratory judgment claim that seeks to determine the ownership of an alleged TCF spinoff, Brooklyn Cider Works ("BCW"), is without merit because the certificate of incorporation for BCW shows that the sole incorporator of BCW was Peter Simon. Defendants' maintain that there is no evidence that shares of stock in BCW have ever been issued or transferred to TCF. Defendants fail to consider, however, that this defense, even if true, is insufficient to warrant a denial of plaintiffs' proposed eighth cause of action, since the court's independent research has availed no legal authority holding that a person who files a corporation's incorporation papers with New York State automatically owns all of that corporation's shares.

"The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 99 (1st Dep't 2009). Moreover, declaratory judgment claims are appropriate where the determination would "have an immediate and practical effect of influencing defendant's conduct." M&A Oasis, Inc. v. MTM Assoc., L.P., 307 A.D.2d 872, 764 N.Y.S.2d 9 (1st Dep't 2003).

Here, plaintiffs allege that, as per the direction of TCF's in-house lawyer, Simon listed himself as BCW's incorporator with the instruction to name TCF as the sole shareholder of BCW. Moreover, plaintiffs allege that there were numerous documents, including corporate records filed with New York State and an email sent by TCF's in-house lawyer identifying BCW as being owned by ICD, to support this claim. BCW now has unresolved debts and liabilities. Therefore, not only would a declaratory judgment quiet an actual dispute with respect to the parties' obligations, see Thome, 70 A.D.3d at 99, but determining ownership over BCW would have the immediate and practical effect of influencing both parties' conduct moving forward. See M&A Oasis, Inc., 307 A.D.2d 872. As such, a declaratory judgment claim is not without merit.

5. Tortious Interference With Contract and Business Relations

Defendants argue that the proposed ninth cause of action – a tortious interference with contract and business relations claim against A. Kyrejko – should not be added.

Defendants' first argument rests on their earlier position that there was no breach of contract. Specifically, defendants' argue that since recovery for tortious interference with a contract is predicated on a breach of contract, plaintiffs' claim is without merit (the underlying

assumption being that there was no predicate breach). Plaintiffs alleged in their seventh cause of action that defendants breached their contract with Simon by creating a false pretext to terminate him.

At this stage, the breach of contract claim still stands. Thus, any argument against the proposed ninth cause of action that rests on the non-existence of a breach must fail. See Kosson v. Algaze, 203 A.D.2d 112, 113, 610 N.Y.S.2d 227, 228 (1st Dep't 1994) (explaining how a plaintiff cannot recover for tortious interference with a contract absent a breach).

Defendants also argue that since A. Kyrejko was acting in his capacity as an agent of TCF and was unaware of the specific terms of the contracts that were supposedly breached, he could not be held liable for interfering with them.

"Although a defendant need not be aware of all the details of a contract, it must have actual knowledge of the specific contract." Medtech Products Inc. v. Ranir, LLC, 596 F. Supp. 2d 778, 796 & n.13 (S.D.N.Y. 2008). Here, Peter Simon signed A. Kyrejko's consulting agreement on behalf of TCF and ICD. See Beg Aff. Ex. 13. That Simon was employed by TCF and ICD and had contracts with them, therefore, was a fact that A. Kyrejko was likely aware of.

Likewise, although a party cannot be held liable for tortiously interfering with its own contract, see, e.g. Lobel v. Maimonides Med. Ctr., 39 A.D.3d 275, 276, 835 N.Y.S.2d 28, 30 (1st Dep't 2007), and although employees of a company who do not act outside the scope of their responsibilities for the company cannot be held liable for tortious interference with any contract of the company, see Kosson, 203 A.D.2d at 113, 610 N.Y.S.2d at 228, the record is clear that A. Kyrejko was arguably acting as a consultant. Typically, an independent consultant is not a company's agent, or an employee under the company's control, see, e.g. DeFeo v. Frank Lambie, Inc., 146 A.D.2d 521, 521 (1st Dep't 1989). Moreover, whether A. Kyrejko is an employee is an

issue of fact that need not be resolved at the pleading stage. Accordingly, this argument must also fail.

Additionally, defendants' argument that the tortious interference with contract claim is improper because plaintiffs fail to allege that A. Kyrejko was a but-for cause of Simon's termination, is similarly unavailing. While defendants are correct in that to establish a cause of action for tortious interference with a contract, "a plaintiff must allege that the contract would not have been breached but for the defendant's conduct," Burrowes v. Combs, 25 A.D.3d 370, 373, 808 N.Y.S.2d 50, 53 (2006) (internal quotes omitted), plaintiffs, in their amended complaint, specifically alleged that A. Kyrejko's acts "created further division between Simon and Bruner and Kyrejko, leading to the pretextual termination of Simon from ICD and TCF." In other words, plaintiffs allege that, but for A. Kyrejko's acts, the pretextual termination would not have occurred. Therefore, defendants' argument regarding causation does not render plaintiffs' claim devoid of merit.

Next, plaintiffs' cause of action for tortious interference with prospective business relations is patently without merit. Plaintiffs' fail to identify any third party who did not enter into relations with Simon due to A. Kyrejko's alleged tortious interference. See Business Networks of New York Inc. v. Complete Network Solutions, Inc., 265 A.D.2d 194, 195, 696 N.Y.S.2d 433, 434 (1st Dep't 1999)). Further, plaintiffs fail to allege that A. Kyrejko knew of Peter Simon's alleged potential business relationships with specified third parties, and not just that Peter Simon had relationships. See Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y.2d 183, 428 N.Y.S.2d 628 (1980)). Finally, plaintiffs do not allege that A. Kyrejko directed his alleged wrongful conduct to such third parties. (G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762, 768 (2d Cir. 1995)). As such, the tortious interference claim is devoid of merit.

Finally, the proposed expansion of the fourth cause of action to include conspiracy to commit tortious interference is denied, as New York does not recognize an independent cause of action for civil conspiracy (Rose v. Different Twist Pretzel, Inc., 123 A.D.3d 897, 898 [2d Dept., 2014]).

ORDERED that plaintiffs' motion for leave to amend the complaint herein is granted insofar as the amended complaint is consistent with this decision; and its further

ORDERED, the amended complaint in the proposed form annexed to the moving papers, less those changes, shall be deemed served upon service of a copy of this order with notice of entry; it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a preliminary status conference in Room 218, 60 Centre Street, on September 24, 2015, at 10:30 AM.

Date: August 7, 2015
New York, New York

Anil C. Singh