SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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POTEN & PARTNERS INC,

Plaintiff,

DECISION/ORDER
Index No. 600895/2010

-against-

RICHARD GRECO, FILANGIERI ADVISORY CORP, FILANGIERI CAPITAL PARTNERS, COLUMBUS CAPITAL FUND, NINEPOWER CORP, MARCO IORI, MARCO BERTETTI, PIERLUIGI SERRA, ENTITIES A TO Z

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action, plaintiff Poten & Partners Inc. ("Poten" or "plaintiff") moves pursuant to CPLR § 3025(b) to amend its complaint. It additionally moves pursuant to CPLR § 1002(b) to join Marla Greco, wife of defendant Richard Greco, and Cleomax Marice Corp. ("Cleomax"), a corporation that is wholly-owned by Marla Greco, as defendants in this action.[1]

[1] In its moving papers, plaintiff also moved pursuant to CPLR § 2201 to stay filing the note of issue pending discovery on the amended complaint. However, in its reply affirmation, plaintiff's counsel noted, "[a]ssuming Marla is produced for her deposition as promised by counsel, Poten no longer anticipates a need to stay the filing of the note of issue. The only potential discovery would be for any documents that become necessary as a result of Marla's deposition testimony." Accordingly, I treat this notation as plaintiff's withdrawal of its motion pursuant to § 2201, and this Decision and Order will not address that request for relief.

This case arises out of Richard Greco's prior employment with plaintiff. Unless otherwise noted, the following facts are drawn from plaintiff's complaint filed on or around April 9, 2010 ("Original Complaint"). In June 2009, Richard Greco accepted employment with plaintiff, who describes itself as "a global broker and commercial advisor for the energy and ocean transportation industries," and he executed an agreement setting forth certain terms of his employment. The agreement included a discussion of relationships and board roles ("Advisory Clients") that Richard Greco and his companies, Filangieri Advisory Corporation ("FAC") and Filangieri Capital Partners ("FCP," and collectively with FAC and Richard Greco, the "Greco Defendants") had gained, and it allocated an amount of time Richard Greco could spend on Advisory Clients. The agreement also stated "[y]ou will be employed on a full-time basis and exclusively by Poten. Therefore, any clients, transactions and other opportunities identified by you will be solely for the benefit of Poten." (Emphasis removed)

After allegedly requesting a delay to the start of his employment, in the beginning of September 2009, Richard Greco formally began working at Poten. Towards the end of September 2009, Poten alleges that it learned that Richard Greco had a 25% stake in at least one company ("Solar Companies") which was working on solar power projects in Italy ("Solar Project"). Richard Greco allegedly stated that ownership in the Solar Companies was shared with Marco Iori ("Iori"), Marco Bertetti ("Bertetti"), and Pierluigi Serra ("Serra" and collectively the "Parners"). Plaintiff alleges, upon information and belief, that Richard Greco learned about the Solar Project through one of his Advisory Clients in the period from approximately mid-June 2009 through the beginning of

September 2009 before he formally began working for plaintiff "to develop and secure a personal stake in the Solar Project without disclosing it to [plaintiff]."

Towards the end of September 2009, Richard Greco allegedly told plaintiff about the Solar Project for the first time, and he made certain representations about authorizations that subsidiaries of Columbus Capital Fund ("CCF")[2] had applied for and received in connection with the Solar Project. Plaintiff avers that it told Richard Greco that, pursuant to his agreement with plaintiff, the Solar Project needed to be Poten's project. Plaintiff alleges that Richard Greco claimed that he and/or FAC and FCP owned a 25% stake in the Solar Project without Poten.

Plaintiff alleges that in a meeting held at the beginning of November 2009, Richard Greco, Iori, and CCF "represented that CCF and/or its subsidiaries had assembled a portfolio of '*autorizzazioni uniche*' for the production of 550 MW of electricity, with 600 MW expected by Christmas.". At or around this time, Richard Greco, Iori, Bertetti, Serra, and CCF additionally allegedly represented in a presentation to plaintiff that authorizations could be transferred; that construction had begun on a certain 10 megawatt (MW) facility in Italy (the "Uta Project"); "and . . . that as of November 5, 2009, the portfolio of authorizations obtained by CCF has been valued at between €192,500,000 and €330,000,000 by an independent investment bank specializing in renewable energy companies in Italy."

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[2] According to a presentation, dated November 5, 2009, submitted in support of plaintiff's motion, "Columbus Capital srl is owned 95% by Columbus Capital Fund, a Delaware Corporation." Additionally, the presentation states, "[t]he exclusive business of Columbus Capital Fund is the development of solar energy parks."

In reliance on these representations, plaintiff alleges that it signed an agreement with Richard Greco ("November Agreement"), which discussed Richard Greco's stake in the Solar Project. In part, the agreement allegedly states that "Poten & Partners will be granted 40% of the equity in the 'Solar Companies' which includes Columbus Capital Fund (Delaware), Columbus Capital (Italy), Green Project 1 S.r.l. (Italy), Nine Partners and all other companies relating to solar energy development." (Emphasis removed)

At the beginning of 2010, Richard Greco allegedly represented to plaintiff that an agreement had been reached with Iori, Bertetti, and Serra in connection with the division of equity for the Solar Project. Based on this representation, plaintiff alleges "[it] drafted documents confirming the transfer of equity interests in the project to [plaintiff]'s subsidiary and provided them to defendants [Richard Greco], [Iori], [Bertetti], and [Serra]." In February 2010 Richard Greco allegedly told "[plaintiff] that CCF, its subsidiaries, and the other defendants had, in fact, not developed the Uta Project, as he previously represented. Instead, the authorizations for the Uta Project had been purchased from a third-party and that the project was encumbered by a potential lawsuit against CCF's subsidiary as a result of the purchase transaction." Richard Greco allegedly later told

> [plaintiff] that (i) [Richard Greco] had not properly represented [plaintiff] in his discussions with CCF and the Italian Partners and was remorseful for his conduct and (ii) [Richard Greco] planned to travel to Italy to correct the situation, including the documentation of the share ownership in the Solar Project Entities to [plaintiff] as provided for in the November Agreement.

A few days later, a communication allegedly sent from Richard Greco to plaintiff indicated that his negotiation with the Partners yielded an agreement whereby the

company that held the Solar Project authorizations would be divided in two, with Serra owning less than half of the authorizations and a new company owned by Richard Greco, Bertetti, and Iori holding the rest of the authorizations, including the Uta Project. Pursuant to Richard Greco's alleged negotiations with the Partners, Richard Greco would own 57% of this new company, and he suggested offering plaintiff 20 points of the 57% he owned (35% of his interest in the new company). Plaintiff alleges that it rejected Richard Greco's offer to transfer a percent of the new company to plaintiff. Days later, Richard Greco allegedly told "[plaintiff] that CCF and/or its affiliates had, in fact, not secured '*autorizzazioni uniche*' to produce 550 MWs, as previously represented, and that only 78 MWs had been fully authorized." Thereafter, plaintiff terminated Richard Greco's employment for cause.

In its Original Complaint, plaintiff brought claims against Richard Greco for breaches of contract, breach of fiduciary duty, fraud, unjust enrichment, and theft of corporate opportunity against Richard Greco; and claims against Iori, Bertetti, Serra, and CCF for fraud and/or interference with contract.[3] The Original Complaint also requested a declaratory judgment against all defendants.

Following the deposition of Richard Greco on November 25, 2014, plaintiff now moves to amend its complaint ("Proposed Amended Complaint") to add a cause of action for fraudulent conveyance under New York's Debtor & Creditor Law ("DCL") § 276 and to add a cause of action for constructive fraudulent conveyance under DCL §§ 273, 273-

[3] In an affirmation in support of its motion, plaintiff notes that it has reached settlements in principle with Iori, Bertetti, and Serra.

a, and 275, with both claims being brought against Richard Greco, Marla Greco, and Cleomax. Plaintiff additionally moves to add Marla Greco and Cleomax as defendants in this action.[4]

In support of its motion, plaintiff argues that it meets the standard for leave to amend because its motion cannot come as a surprise to Richard Greco. It submits a letter, dated December 12, 2014, that counsel for plaintiff allegedly sent to counsel for Richard Greco, wherein counsel stated that it would move for leave to amend to add Marla Greco as a defendant and to add causes of action for fraudulent conveyance against Richard and Marla Greco. It also argues that the amendment will cause "no prejudicial delay . . . because, despite having been commenced in 2010, this case has taken significant time and resources to litigate, and will continue to require more of both before it can be certified for trial."

Plaintiff further argues that its proposed additional causes of action "are [not] palpably insufficient or patently devoid of merit." In support, plaintiff submits an email chain between Marla Greco and Richard Greco. The chain includes an email, dated March 7, 2010, from Richard Greco, stating "Marla, I am very scared right now that tomorrow Poten will file a lawsuit against me." Later in the chain, in an email with the same date, Marla Greco wrote to Richard Greco, stating,

> My father just called and mentioned to me that if you are really worried about anyone suing you, we should consider transferring everything like the house, stock accounts, etc. into my name. No one can sue me and we can say that it was an

[4] Although plaintiff's notice of motion and affirmation in support of its motion only reference adding Marla Greco as a defendant, I note that in the Proposed Amended Complaint, plaintiff also proposes adding Cleomax as a defendant.

> estate planning decision. Not 100% foolproof but it would hedge agst [sic] people suing you."

Plaintiff also submits the transcript from Richard Greco's deposition wherein he stated that Cleomax, a company wholly-owned by Marla Greco, obtained an interest in the Solar Project when, in July 2010, it acquired a 30-35% interest in Columbus Capital SRL. Richard Greco testified that Marla Greco invested around 3,000 Euros for this interest. He also testified that he "[p]robably" received power of attorney to act for Cleomax.

Plaintiff also argues that Marla Greco should be joined as a defendant in this action. It maintains that joinder of Marla Greco to this action will cause no undue prejudice because depositions are still ongoing, and Marla Greco's deposition is necessary regardless of whether or not she is joined in this action. Additionally, it argues "that Marla's involvement in the fraudulent conveyance is critical to the series of transactions and occurrences forming the basis of this action."

In opposition to plaintiff's motion, the Greco Defendants maintain that plaintiff's contention "that it has 'recently learned' of Marla Greco's involvement in a scheme to render her husband 'judgment proof' by transferring to her his interest in the Solar projects at issue in this litigation" is untenable. First, the Greco Defendants highlight the fact that the emails cited by plaintiff are from plaintiff's server and dated from a month before plaintiff initiated this lawsuit in April 2010. Second, the Greco Defendants note that plaintiff has known who had an interest in the Solar Project, including Cleomax,

since April 2011 when it received a letter from Greco's former attorneys containing this information.

Discussion

I. Motion to Amend

Pursuant to CPLR § 3025(b), "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." "Leave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay." *See Fahey v. Cnty. of Ontario*, 44 N.Y.2d 934, 935 (1978) (citing CPLR § 3025[b]; *Sindle v. New York City Transit Auth.*, 33 N.Y.2d 293, 296–97 [1973]). "Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment." *Valdes v. Marbrose Realty, Inc.*, 289 A.D.2d 28, 29 (1st Dep't 2001).

In making its motion for leave to amend, "plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dep't 2010) (internal citation omitted).

Section 276 of the DCL states, "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." In support of its 276 claim, plaintiff highlights the March 2010 email

from Marla Greco to Richard Greco wherein she suggests transferring assets to her name because Richard Greco was worried plaintiff would file suit against him. It also highlights Richard Greco's deposition testimony when he discussed how Cleomax—a corporation wholly-owned by Marla Greco— obtained an interest in the Solar Project months after the email exchange between Marla and Richard Greco. This evidence, plaintiff maintains, shows Marla and Richard Greco's intent to defraud creditors, such as Poten.

Plaintiff also moves to add a constructive fraudulent conveyance claim under sections 273, 273-a, and 275 of the DCL due to insufficient consideration tendered by Marla Greco in exchange for a stake in Columbus Capital SRL.[5] In support of this claim, plaintiff emphasizes Richard Greco's deposition testimony in which he states that in exchange for 35% of Columbus Capital SRL, Marla Greco contributed approximately 3,000 Euros. Plaintiff also submits a presentation made by Greco and the Partners to plaintiff in which it states that "[t]he portfolio of authorizations obtained by Columbus

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[5] Section 273 of the DCL states, "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." Under section 273-a,

> [e]very conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

Pursuant to section 275, "[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors."

Capital Fund has been valued at between €192,500,000 and €330,000,000 by an independent investment bank specializing in renewable energy companies in Italy."

Plaintiff's submission of evidence indicates that its proposed additional claims "[are] not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp.*, 74 A.D.3d at 500. Defendant's opposition to plaintiff's motion to amend relates mainly to plaintiff's delay in seeking this amendment. However, "[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine." *Edenwald Contracting Co. v. City of New York*, 60 N.Y.2d 957, 959 (1983) (internal quotation marks and citation omitted). Accordingly, plaintiff's motion to amend its complaint to add its fifteenth and sixteenth causes of action for fraudulent conveyance under DCL § 276 and constructive fraudulent conveyance under DCL §§ 273, 273-a, and 275 is granted.

II. Motion to Join Marla Greco and Cleomax as Defendants

CPLR § 1002(b) states, "[p]ersons against whom there is asserted any right to relief jointly, severally, or in the alternative, arising out of the same transaction, occurrence, or series of transactions or occurrences, may be joined in one action if any common question of law or fact would arise." "[T]he burden of proof is upon the party objecting [to joinder] to show undue prejudice." *Bossak v. Nat'l Sur. Co. of N.Y.*, 205 A.D. 707, 709 (1st Dep't 1923). "Mere delay . . . without prejudice to defendants, does not bar the joinder or the related amendments." *Krolick v. Natixis Sec. N. Am. Inc.*, 36 Misc.3d 1227(A), 2011 N.Y. Slip Op. 52525(U), *4 (Sup Ct, NY County 2011). *See generally Matter of Leone v. Bd. of Assessors*, 100 A.D.3d 635, 637 (2d Dep't 2012)

(quoting CPLR § 1002(a) and stating "[t]he Court of Appeals has held that the joinder statute should be liberally construed").

Here, the claims against Marla Greco and Cleomax are based on the same transactions and occurrences as those against Richard Greco. *Cf. Krolick*, 2011 N.Y. Slip Op. 52525(U), *4 ("The claims that plaintiff alleges against Gindre arise from the same transactions and occurrences as the claims already alleged against the Natixis defendants."). Amongst other allegations, plaintiff avers that because Richard Greco was concerned plaintiff would bring suit against him, "defendant [Richard Greco] colluded with defendant [Marla Greco] to create defendant Cleomax for the sole purpose of fraudulently sheltering [35% of the Solar Project]." It additionally alleges that Marla Greco tendered insufficient consideration for the stake of the Solar Project that Cleomax holds. Furthermore, the Greco Defendants make no argument for why joinder should not be granted. Moreover, in its reply affirmation, plaintiff's counsel states that "Defendants have consented to Marla's deposition irrespective of the outcome of this Motion. MarlaGreco's deposition is the only discovery Poten requires relating to its new claims for fraudulent conveyance." Accordingly, plaintiff's motion to add Marla Greco and Cleomax as defendants in this action is granted.

In accordance with the foregoing, it is hereby

ORDERED that the plaintiff's motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the plaintiff's motion to join Marla Greco and Cleomax Marice Corp. as defendants in this action is granted; and it is further

ORDERED that the defendants 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 the caption be amended to reflect the addition of defendants Marla Greco and Cleomax Marice Corp. and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

ORDERED that counsel are directed to appear for a status conference in Room 208, 60 Centre Street, on January 13, 2016, at 2:15 PM.

This constitutes the decision and order of this Court.

DATE : 11/30/2015

SALIANN SCARPULLA, JSC