Deerin v Ocean Rich Foods, LLC
2015 NY Slip Op 32747(U)
August 6, 2015
Supreme Court, Nassau County
Docket Number: 600536-2014
Judge: Timothy S. Driscoll
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ORIGINAL

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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PATRICIA DEERIN as Executor of the Estate of Douglas Deerin,

Plaintiff,

-against-

OCEAN RICH FOODS, LLC, a/k/a OCEAN EDGE FOODS, RICHARD MARINO, and DEAN BERMAN,

Defendants.

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TRIAL/IAS PART: 14
NASSAU COUNTY

Index No. 600536-2014
Motion Seq. No. 4
Submission Date: 7/10/15

Papers Read on this motion:

Notice of Motion, Affirmation in Support,
Affidavit of C. Young and Exhibits.....x
Affirmation in Opposition and Exhibit.....x
Reply Affirmation.....x

This matter is before the court on the motion filed by Plaintiff Patricia Deerin as Executor of the Estate of Douglas Deerin ("Plaintiff") on May 4, 2015 and submitted on July 10, 2015. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 2221, 1) granting Plaintiff leave to renew and reargue a) the prior motion by Defendants Ocean Rich Foods, LLC d/b/a Ocean Edge Foods, Richard Marino and Dean Berman ("Defendants' Prior Motion") and b) the prior cross motion by Plaintiff ("Plaintiff's Prior Motion"), both of which were decided by the Court in its prior decision ("Prior Decision") dated February 6, 2015 (Ex. 1 to Nelson Aff. in Supp.); and

2) upon renewal and reargument, denying Defendants' Prior Motion and granting Plaintiff's Prior Motion.

Defendants Ocean Rich Foods, LLC d/b/a Ocean Edge Foods ("Company"), Richard Marino ("Marino") and Dean Berman ("Berman") ("Defendants") oppose the motion.

B. The Parties' History

In their Prior Motion, Defendants moved for an Order, pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7), dismissing the amended complaint. In its prior Order ("Prior Order") dated August 6, 2014, the Court converted Defendants' Prior Motion to a motion for summary judgment. As noted in the Prior Order, Plaintiff alleges that in January 2009, Marino, Berman and decedent Douglas Deerin ("Deerin") entered into a Cross-Purchase Agreement ("Agreement") which states that life insurance policies had been taken out in the amount of $1.5 million on the lives of each of the three members of the Company, and that "The Company shall be the sole owner of the policies purchased by and issued to it" (Am. Compl. at ¶ 9). The Agreement allegedly specifies that the Company was the owner and beneficiary of John Hancock Policy No. 81 602 369 in the amount of $1.5, insuring the life of Deerin ("Policy"). The Agreement also allegedly provides that, upon the death of a member, "The Company shall pay such life insurance proceeds to the legal representative of the deceased Member as part payment or payment in full, as the case may be, on account of the purchase price of the interest of the deceased Member" (Am. Compl. at ¶ 11). As noted in the Prior Order, the Agreement on which Plaintiff relies is unsigned.

The Amended Complaint contains eight (8) causes of action: 1) Marino and Berman breached the Agreement by refusing to pay the life insurance proceeds to Deerin's Estate in exchange for its membership interest in the Company, 2) Marino and Berman breached their fiduciary duty to Deerin and, upon his death, to Deerin's Estate by failing to distribute the life insurance proceeds to the Estate; 3) Marino and Berman breached the implied covenant of good faith and fair dealing by failing to distribute the life insurance proceeds to the Estate; 4) Marino and Berman, parties to the Agreement, are liable for tortious interference with contract by failing to distribute the life insurance proceeds to the Estate; 5) pursuant to New York Limited Liability Company Law ("LLCL") § 509, Plaintiff should receive the fair market value of 1/3 of the Company, as determined by an independent appraiser; 6) Plaintiff seeks dissolution of the Company, pursuant to LLCL § 702, on the grounds that it is financially unfeasible to continue the

operations of the Company; 7) Plaintiff, as the representative of the Estate, seeks an accounting of the Company; and 8) Defendants have been unjustly enriched in the sum of $1,500,000 which was to be paid out to Plaintiff as representative of the Estate.

Subsequent to the issuance of the Prior Order, Plaintiff filed her Prior Motion, a cross motion in which she sought leave to amend the Amended Complaint and the disqualification of John E. Ryan, Esq. ("Ryan") and the law firm of Ryan Brennan & Donnelly, LLP ("Ryan Firm") as counsel for Defendants. In its Prior Decision, the Court 1) denied the branch of Plaintiff's Prior Motion seeking the disqualification of Ryan and the Ryan Firm as counsel for Defendants based on the Court's conclusion that, although there was concededly a prior attorney-client relationship between counsel for Defendants and Deerin, Plaintiff had not established that the matters involved in both representations were substantially related; 2) granted Defendants' Prior Motion for dismissal, which the Court converted to one for summary judgment, with respect to the first, second, third, fourth, fifth, sixth, and eighth causes of action in the Amended Complaint based on the Court's conclusion that the Policy in the amount of $1.5 million, insuring the life of Deerin, was an unambiguous contract that clearly names the Company as the sole owner and beneficiary and, therefore, parol evidence was inadmissible to alter or add a provision to the Policy; 3) concluded that further discovery was not warranted, pursuant to CPLR § 3212(f), because none of the non-hearsay submissions before the Court supported the conclusion that the Members signed or agreed to be bound by the unsigned Agreement on which Plaintiff relies; 4) dismissed the fifth cause of action asserted pursuant to LLCL § 509, in which Plaintiff seeks the fair market value of 1/3 of the Company, in light of the unrefuted May 6, 2014 affirmation of counsel for Defendants that Plaintiff had not accepted Defendants' offers for the fair value of Deerin's membership interest in the Company and that Defendants had "done everything possible" to provide Plaintiff with her membership interest in a reasonable time but those offers had been rejected, and because the affirmation of Christopher W. Young ("Young") submitted in connection with Plaintiff's Prior Motion did not salvage this cause of action because he provided no information regarding the specific offer made by Defendants and the appropriateness of that offer; 5) dismissed the sixth cause of action, seeking dissolution pursuant to LLCL § 702, because Plaintiff had not established that cause for such dissolution exists; 6) dismissed the

eighth cause of action, alleging unjust enrichment, because the Policy is a contract that governs the parties' dispute; 7) declined to dismiss the seventh cause of action in light of Defendants' agreement to provide Plaintiff with an accounting of the Company; and 8) denied the branch of Plaintiff's Prior Motion for leave to amend based on the Court's conclusion that Plaintiff's proposed amended complaint, like the Amended Complaint, alleges that the Members entered into the Agreement and seeks relief based on that Agreement. In light of the Court's determination that the Policy is an unambiguous contract that entitles Defendants to dismissal of the Amended Complaint, the Court concluded that the proposed Second Amended Complaint was devoid of merit and that the requested amendment should not be permitted.

In support of the motion now before the Court, Young provides an affidavit dated May 1, 2015 ("2015 Young Affidavit") "to supplement" his prior affidavit dated October 24, 2014, submitted in connection with the Prior Motions, and "to provide the court with my Estimate of Value of plaintiff's interest in [the Company]" (2015 Young Aff. at ¶ 3). Young affirms that he has been provided with U.S. Federal Partnership Tax Returns for the Company for the years 2012 and 2013 ("2012 and 2013 Tax Returns") (Exs. A and B to 2015 Young Affidavit), as well as financial statements for the years 2008, 2012 and 2013 (Exs. C, D and E to 2015 Young Affidavit). Young affirms that, based on the data in these documents, he prepared the Valuation Report for the Company, dated May 1, 2015 (Ex. F to 2015 Young Aff.). Young affirms that, with a reasonable degree of economic and financial certainty, and based on the data in the documentation provided, it is his professional opinion that Plaintiff's 33.33% membership interest of the Company was worth between $1,249,386 and $4,406,706, as of December 31, 2013. Young avers that he cannot provide a valuation of Plaintiff's interest in the Company as a "single number Opinion of Value" (2015 Young Aff. at ¶ 7) until the Company complies with and provides the data and documents reflected in The Business Valuation Document Request List of Sobel & Co, which he annexes to his 2015 Affidavit.

Under the heading of his 2015 Affidavit titled "Plaintiff's Interest Not Recognized," Young affirms that the 2012 and 2013 Tax Returns reflect that Berman and Marino's ownership of the Company went from 33.33% each at the end of 2012 to 50% each at the end of 2013 and, as of December 31, 2013, Plaintiff's ownership interest in the Company was no longer

recognized. Under the heading of his 2015 Affidavit titled "Unequal Distribution," Young affirms that the Company's 2013 Return reflects that $11,140, $256,725 and $298,190 was distributed to Deerin, Berman and Marino respectively.

Young also affirms that he is aware that Plaintiff has alleged that the Company's members purchased the Policy, the proceeds of which are mentioned in his Valuation Report, in connection with an agreement that the proceeds would be used by the Company to purchase a Member's interest following his death. Young opines that "Firm's [sic] often buy life insurance with this agreement. This agreement is common and a typical agreement entered into by firms and its members" (2015 Young Aff. at ¶ 10).

In further support of the motion, counsel for Plaintiff ("Plaintiff's Counsel") affirms that Plaintiff seeks renewal based on the 2012 and 2013 Tax Returns "which had not been provided by defendants prior to" the Prior Decision (Nelson Aff. in Supp. at ¶ 7). Plaintiff submits that, in light of the 2015 Young Affidavit and Valuation Report, renewal of Defendants' Prior Motion to dismiss the fifth cause of action is appropriate and, upon renewal the Court should deny Defendants' Prior Motion to dismiss the fifth cause of action asserted pursuant to LLCL § 509, in which Plaintiff seeks the fair market value of 1/3 of the Company. Plaintiff submits that the Court's rulings have resulted in Defendants making no payments to Plaintiff, and also not recognizing Plaintiff's interest in the Company.

In opposition, counsel for Defendants ("Defendants' Counsel") affirms that the 2012 and 2013 Tax Returns do not constitute new evidence in light of the fact that they were incorporated into the Financial Statements attached to Defendants' Prior Motion and first served on Plaintiff on June 6, 2013. In support, Defendants provide an email string dated June 6, 2013 (Ex. H to Ryan Aff. in Opp.) consisting of 1) an email from Defendants' Counsel to attorney David Miller ("Miller") with the subject line "Financial Statements" containing an attachment, and 2) a subsequent email from Miller to Defendants' Counsel reading "Thank you for the financial information. What is the proposal of the company or remaining members regarding the purchase or redemption of Mr. Deerin's membership interest?"

Defendants also dispute Plaintiff's contention that the Court erred in failing to consider all of Plaintiff's prior submissions, including those containing hearsay, in addressing CPLR § 3212(f) in the Prior Decision (*see* Nelson Aff. in Supp. at ¶ 14). In connection with the Prior

Motions, Plaintiff submitted an October 23, 2014 Affirmation in Opposition of Greg Haber ("Haber"), Plaintiff's prior counsel ("Haber Affirmation in Opposition") (Ex. 10 to Nelson Aff. in Supp.), in which Haber affirmed that he was providing his Affirmation in Opposition to 1) inform the court of the substance of what Marc Levy told him concerning the subject life insurance; [1] 2) provide the court with the documents that he received in response to a subpoena duces tecum served on Marc Levy; 3) inform the court of his conversation with Michael Eng, in house counsel for MetLife; and 4) inform the court what happened relative to a subpoena served on Marc Levy which sought his deposition (Haber Aff. in Opp. at ¶ 2). Plaintiff did not submit an affidavit of Marc Levy or Michael Eng, individuals referred to in the Haber Affirmation in Opposition. Defendants submit that "[a]voiding the inevitable, Plaintiff also fails to provide any explanation as to why[] the Affidavits of Marc Levy and/or Michael Eng, the persons best suited to provide their own sworn statements, were not presented" (Ryan Aff. in Opp. at ¶ 12).

In reply, Plaintiff *inter alia* 1) disputes Defendants' contention that the 2012 and 2013 Tax Returns were incorporated into financial statements previously provided to Plaintiff; 2) contends that Plaintiff's breach of contract claim is viable because Plaintiff is not seeking to alter the terms of the Policy but, rather, is "seeking to enforce the Agreement which was entirely consistent with the terms of the Policy" (Nelson Reply Aff. at ¶ 11); 3) submits that, with respect to the Court's analysis of CPLR § 3212(f), the prior Haber Affirmation in Opposition addresses the reasons that Plaintiff did not submit an affidavit of Marc Levy, and Plaintiff did not submit an affidavit of Michael Eng because "he was the attorney for Mr. Levy and Met Life and plaintiff was not seeking proof from him personally" (Nelson Reply Aff. at ¶ 12); and 4) contends that the Court erred in denying Plaintiff's application to disqualify Ryan and the Ryan Firm, submitting that Plaintiff established that Ryan's prior representation of the Company included the Agreement and the purchase of the Policy.

C. The Parties' Positions

Plaintiff submits *inter alia* that 1) renewal of the Prior Motion is appropriate because the 2012 and 2013 Tax Returns constitute new evidence, not available when the Prior Motions were filed, that demonstrates the viability of Plaintiff's fifth cause of action; 2) the Court erred in denying further discovery pursuant to CPLR § 3212(f) because Plaintiff demonstrated that facts

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[1] As noted in the Prior Decision, Marc Levy is the insurance broker who obtained the Policy for the Deceased.

may exist but cannot yet be stated that would establish that the parties agreed that the life insurance was to be used by the Company to purchase a deceased member's interest following his death; 3) the Court erroneously concluded that Plaintiff sought to alter the terms of the Policy but "[t]he Agreement did not seek to alter the terms of [the] Policy" and Plaintiff only "sought to enforce the Agreement which specifically referenced the Policy" (Nelson Aff. in Supp. at ¶ 23); 4) the Court, in dismissing Plaintiff's cause of action pursuant to LLCL § 509, overlooked the fact that it was Defendants' failure to provide certain documentation that prevented Young from submitting evidence of the fair value of Plaintiff's interest; 5) the Court erred in denying Plaintiff's application to disqualify Ryan and the Ryan Firm, in part because the Court overlooked the fact that Ryan's prior representation included the Agreement and the purchase of the Policy; and 6) the Court erred in denying Plaintiff leave to amend her complaint, in part because Plaintiff's causes of action "did not seek to vary the Policy, but alleged an Agreement that was entirely consistent with the terms of the Policy and business practices" (Nelson Aff. in Supp. at ¶ 46).

Defendants oppose the motion, submitting that "Plaintiff is simply attempting to get the [proverbial] second bite at the apple raising the same arguments posed in her original cross-motion and opposition to Defendants' motion for summary judgment" (Ryan Aff. in Opp. at ¶ 11). Defendants also dispute Plaintiff's contention that the 2012 and 2013 Tax Returns constitute new evidence warranting renewal, submitting that Plaintiff had the information contained in those returns when she submitted her opposition to Defendants' Prior Motion and filed her Prior Motion.

RULING OF THE COURT

A. Leave to Renew

A motion for leave to renew must be supported by new or additional facts not offered on the prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion. *Schenectady Steel Co., Inc. v. Meyer Contracting Corp.*, 73 A.D.3d 1013, 1015 (2d Dept. 2010), quoting CPLR §§ 2221(e)(2) and (3) and citing, *inter alia*, *Barnett v. Smith*, 64 A.D.3d 669 (2d Dept. 2009) and *Chernysheva v. Pinchuk*, 57 A.D.3d 936 (2d Dept. 2008).

B. Leave to Reargue

A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion. *Matter of American Alternative Insurance Corp. v. Pelszynski*, 85 A.D.3d 1157, 1158 (2d Dept. 2011), *lv. app. den.*, 18 N.Y.3d 803 (2012), quoting CPLR § 2221(d)(2). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Mazinov v. Rella*, 79 A.D.3d 979, 980 (2d Dept. 2010), quoting *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999).

C. Application of these Principles to the Instant Action

The Court denies the motion. This action is premised on an undated, unsigned agreement which, Plaintiff contends, should be enforced and interpreted in conjunction with the Policy. Plaintiff has failed to provide any credible evidence that the Agreement on which she relies was, in fact, agreed to by the Members of the Company, and has failed to present sufficient evidence warranting further discovery. The Court also concludes that the Tax Returns on which Plaintiff relies do not constitute new evidence supporting renewal because Plaintiff has not demonstrated that those Tax Returns, or the information contained in them, were not available to her when she opposed Defendants' Prior Motion and filed her Prior Motion. The Court also concludes that Plaintiff has not demonstrated that the Court overlooked or misapprehended matters of fact or law in the Prior Decision.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Certification Conference on September 18, 2015 at 9:30 a.m.

ENTER

DATED: Mineola, NY
August 6, 2015

HON. TIMOTHY S. DRISCOLL
J.S.C.