

**NMN Fabrics, Inc. v Sommers Plastic Prods. Co.,
Inc.**

2016 NY Slip Op 31605(U)

August 19, 2016

Supreme Court, New York County

Docket Number: 654445/2013

Judge: Kelly A. O'Neill Levy

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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NMN FABRICS, INC.,

Plaintiff,

- against -

SOMMERS PLASTIC PRODUCTS COMPANY, INC.,

Defendant.
-----X

DECISION AND
ORDER

Index No. 654445/2013

Mot. Seq. 003

KELLY O'NEILL LEVY, J.:

Defendant Sommers Plastic Products Company, Inc. moves pursuant to CPLR 3212 for summary judgment in this action arising out of an alleged breach of an agreement. Plaintiff NMN Fabrics, Inc. cross-moves, pursuant to CPLR 3025(b), for leave to file an amended verified complaint to add two plaintiffs and in the alternative, for leave to amend the complaint to conform it with the proof submitted in connection with this action pursuant to CPLR 3025(c). The motion is denied and the cross-motion is granted for the reasons set forth below.

Facts

Plaintiff NMN Fabrics, Inc. (NMN) provides sales services for distributors of fabrics and textiles. Defendant Sommers Plastic Products Company, Inc. (Sommers) is in the business of selling and distributing textiles, for, among other things, wholesale home furnishings, furniture, and design trades. The parties entered into a three-year contract on August 1, 2001 wherein plaintiff agreed to perform sales services for defendant's North American territory. After the three-year period expired, the contract was, by its terms, automatically renewed for a one-year period every year unless the parties were to provide notice of the contract's termination within 30 days prior to expiration. The parties continued to do business consistently and in accordance with the provisions of the original contract

from August 1, 2001 until Defendant formally terminated the contract on December 12, 2013.

After Sommers terminated the contract, NMN commenced the instant action alleging breach of contract, seeking unpaid commission fees pursuant to the terms of the contract the parties agreed to on August 1, 2001. Sommers argues that during NMN's deposition, it discovered an issue with NMN's corporate status which entitles it to summary judgment.

NMN's official corporate status was automatically terminated on November 6, 2007 for its failure to pay the statutorily-mandated yearly registration fee. Its corporate status was reinstated on December 30, 2013 (after the complaint was filed) under a slightly different name, NMN Fabrics, Inc. The new name contains an extra comma and a different corporate ID number.

Sommers moves for summary judgment to dismiss the complaint pursuant to CPLR 3212, invoking Virginia Code Section 13.1-755. NMN opposes the motion, and cross-moves for leave to amend the complaint pursuant to CPLR 3205(b) to add two additional plaintiffs, Neil M. Nahoum and NMN Fabrics Inc., and in the alternative, to amend the complaint to conform it with the evidence submitted in connection with this action pursuant to CPLR 3025(c).

Discussion

The court first considers Sommers's motion for summary judgment. "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Meridian Mgt. Corp. v. Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 (1st Dep't 2010), quoting *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once the proponent of the motion meets this requirement, "the burden then shifts to

the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial.”

Ostrov v. Rozbruch, 91 AD3d 147, 152 (1st Dep’t 2012), citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). The evidence must be viewed in the light most favorable to the party opposing the motion and summary judgment “may only be granted...when it has been clearly ascertained that there is no triable issue of fact outstanding.” *Suffolk County Dept. of Soc. Servs. v. James M.*, 83 NY2d 178, 182 (1994). If there is a genuine issue of material fact or contrary inferences can be reasonably drawn from undisputed facts, the motion must be denied. See *Hammond v. State of N.Y.*, 157 AD2d 391, 393 (1st Dep’t 1990).

Sommers alleges that because the claim arose after the termination of plaintiff’s corporate status, NMN does not have the legal right to sue. Virginia Code Section 13.1-755 titled “Survival of remedy after termination of corporate existence” provides:

The termination of corporate existence shall not take away or impair any remedy available to or against the corporation, its directors, officers or shareholders, for any right or claim existing of any liability incurred, prior to such termination. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim.

In *Harris v. T.I., Inc.*, cited by Sommers, the Supreme Court of Virginia held that in order for a terminated corporation’s claim against another corporation to survive termination, it must have accrued prior to the date of the corporation’s termination. 413 SE2d 605. In *Harris*, both the legal right to sue and the claim originated after corporate existence had been terminated. In contrast, here, plaintiff’s legal right originates from a contract entered into several years prior to the termination of its corporate status. Though this action was not commenced until after the termination of plaintiff’s corporate existence, both sides performed under the terms of the original contract until shortly before this litigation was commenced.

Plaintiff's legal right to sue comes directly from a contract agreed upon prior to corporate termination. In any event, that the parties continued to operate under the contract for years and defendant arguably derived a benefit from the relationship while plaintiff's status was terminated may trigger the corporation by estoppel doctrine. *See Boslow Family Ltd. Partnership v. Glickenhau & Co.*, 7 NY3d 664, 668 (2006). Accordingly, summary judgment is inappropriate and defendant's motion is denied.

The court now turns to plaintiff's cross-motion. Leave to amend a pleading pursuant to CPLR 3025(b) "shall be freely given absent prejudice or surprise resulting from the delay." *Fahey v. County of Ontario*, 44 NY2d 934, 935 (1978).

Here, plaintiff seeks to amend the complaint to add Neil Nahoum (sole shareholder of NMN Fabrics, Inc.) and NMN Fabrics Inc. Plaintiff seeks to add NMN Fabrics Inc. as that was the original entity that entered into the contract from which this action arises. Sommers argues that granting plaintiff leave to amend would be prejudicial at this late juncture. The court grants the cross-motion finding that the proposed amended complaint is not patently devoid of merit and would not result in substantial prejudice to defendant's rights. *See Jacobson v. Croman*, 107 AD3d 644, 645-46 (1st Dep't 2013). *See also Fulgum v. Town of Cortlandt Manor*, 19 AD3d 444, 446 (2d Dep't 2005).

Order

Accordingly, it is hereby ORDERED that the motion of defendant Sommers Plastic Products Company, Inc. for summary judgment is denied; and it is further

ORDERED that the cross-motion of NMN Fabrics, Inc. for leave to file an amended verified complaint 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 decision/order with notice of entry; and 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, in light of this decision/order, the status conference that had been scheduled for August 24, 2016 is adjourned to October 12, 2016 at 9:30 AM.

This constitutes the decision and order of the court.

Date: August 19, 2016

Kelly O'Neill Levy
HON. KELLY O'NEILL LEVY, J.S.C.