

<b>New York One LLC v Alves</b>
2017 NY Slip Op 32669(U)
December 14, 2017
Supreme Court, New York County
Docket Number: 653156/17
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7

NEW YORK ONE LLC,

Plaintiff,

-against-

JIMMY ALVES, G.K. FOOD VENDING CORP.,  
E.J. FOOD SUPPLIES INC., and GEORGE KROKIDAS  
a/k/a GEORGIOS KROKIDAS

Defendants.

Index No.: 65156/17  
**DECISION/ORDER**  
Motion Seq. No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion for leave to amend the complaint.

<b>Papers Numbered</b>	<b>NYSCEF Documents</b>
Plaintiff's Notice of Motion.....	16-22
Defendants' Affirmation in Opposition.....	32-36
Plaintiff's Reply Affirmation in Further Support of Motion.....	37

*Stuart M. Steinberg P.C.*, New York (Sharon Simon of counsel), for plaintiff.  
*Solomos & Storms*, New York (Derrick Storms of counsel), for defendants G.K. Food Vending Corp., E.J. Food Supplies Inc., and George Krokidas a/k/a Georgios Krokidas.

Gerald Lebovits, J.

Plaintiff commenced this action on June 8, 2017, asserting four causes of action — conversion against defendant Jimmy Alves; breach of fiduciary duty against Alves; unjust enrichment against defendants Alves, G.K. Food Vending Corp. (GK Food), E.J. Food Supplies Inc. (EJ Food), and George Krokidas a/k/a Georgios Krokidas; and breach of contract against Alves.

According to the complaint, Alves was a part-time delivery driver for plaintiff at various non-continuous times from early 2013 to about 2015. Alves's assignment as a delivery driver included deliveries to plaintiff's customers within the New York City area. (Plaintiff's Verified Complaint, at ¶¶ 8, 10.)

Plaintiff alleges that from 1980 to 2013, defendants GK Food, EJ Food, and Krokidas were longstanding customers of plaintiff. (*Id.* ¶ 9.)

Plaintiff alleges in its complaint that in July 2015, plaintiff discovered that defendants had been, and were, engaging in knowing and intentional conversion of plaintiff's food product

and money, which plaintiff entrusted to Alves. Alves delivered only a portion of the food product that plaintiff’s customers had ordered from plaintiff. He retained for himself a part of the merchandise intended for plaintiff’s customers, and then sold the retained merchandise to third parties at increased prices, thus wrongly retaining the difference in price for his own benefit after remitting the day’s money receipts to plaintiff. (*Id.* ¶¶ 15-19.)

Plaintiff alleges that GK Food, EJ Food, and Krokidas intentionally purchased the converted merchandise from Alves, knowing that the merchandise belonged to plaintiff. (*Id.* ¶ 20.) The alleged scheme resulted in a loss of business for plaintiff: its customers became dissatisfied with receiving partial orders from plaintiff, and customers had to order merchandise from other suppliers. (*Id.* ¶ 22.)

Plaintiff now moves under CPLR 3025 (b) to amend the complaint to add a breach-of-contract cause of action against GK Food, EJ Food, and Krokidas.

Plaintiff’s motion for leave to amend the complaint to add a cause of action for breach of contract under CPLR 3025 (b) is granted. CPLR 3025 (b) allows parties to amend their pleadings at any time by leave of court. Courts shall, “in the absence of prejudice or surprise to the opposing party,” freely grant such leave to amend the pleading “unless the proposed amendment is palpably insufficient or patently devoid of merit.” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; *accord Russo v Lapeer Contr. Co., Inc.*, 84 AD3d 1344, 1344 [2d Dept 2011]; *Unger v Leviton*, 25 AD3d 689, 690 [2d Dept 2006].) In seeking leave to amend, parties are “not required to establish the merit of the proposed amendment in the first instance.” (*Lucido v Mancuso*, 49 AD3d 220, 227 [2d Dept 2008].)

A. Proposed Amendment Neither Palpably Insufficient Nor Patently Meritless

Plaintiff’s proposed amendment to add a cause of action against GK Food, EJ Food, and Krokidas alleging breach of contract is neither palpably insufficient nor patently meritless.

This court must determine whether movant has “made a prima facie showing that the proposed amendment is not specious” as the proper standard of review. (*Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [1st Dept 2007] [finding that motion “court erred in construing the ultimate effect of only two items of proof raised by Pier 59 vis-à-vis the subleases rather than deciding whether Pier 59 had made a prima facie showing that the proposed amendment was not specious”].) An attorney affirmation in support of a proposed amendment sufficiently establishes an amendment’s merit. (*See MBIA Ins. Corp.*, 74 AD3d at 500.)

Plaintiff’s proposed amended complaint is neither palpably insufficient nor patently devoid of merit. The amended complaint sufficiently alleges a longstanding business relationship between plaintiff and defendants GK Food, EJ Food, and Krokidas from 1980 to 2013, in which defendants agreed or impliedly agreed to buy goods from plaintiff at a fair market price and on agreeable terms. Defendants’ alleged failure to pay the market price to plaintiff for accepting the converted goods/merchandise belonging to plaintiff during the relevant period may constitute a breach of contract and breach of implied contract. (Plaintiff’s Affirmation in Support of Motion,

at ¶ 4; Plaintiff's Verified Complaint, at ¶ 9; Plaintiff's Amended Verified Complaint, at ¶¶ 37-40.)

In opposition, GK Food, EJ Food, and Krokidas argue that the unjust-enrichment claim precludes the breach of contract/implied breach of contract claim. Defendants rely on *L.E.K. Consulting, Inc. v Menlo Capital Group, LLC* (148 AD3d 527 [1st Dept 2017]), and *Metro Found. Contr., Inc. v Marco Martelli Assoc. Inc.* (145 AD3d 526 [1st Dept 2016]), for the proposition that a plaintiff may not simultaneously plead claims for breach of contract and unjust enrichment. (Defendants' Affirmation in Opposition, at ¶¶ 16-18.) But pleading both theories of relief is permissible, unless recovery under "quasi contract for events arising out of the same subject matter" is precluded by "the existence of a valid and enforceable written contract governing a particular subject matter" or by the full performance of "a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties." (*See Clark-Fitzpatrick Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388-389 [1987].)

Defendants also argue that the amended complaint fails to provide adequate notice or plead a legally cognizable claim for breach of contract. Defendants argue that the breach of contract claim is pleaded solely upon information and belief and thus fails to meet CPLR 3013 pleading standards. (Defendants' Affirmation in Opposition, at ¶¶ 19-20.) CPLR 3013 requires that statements in a pleading "be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." (CPLR 3013.) Plaintiff alleges in its amended complaint its longstanding business cooperation with defendants. This business relationship may constitute an implied agreement for defendants to purchase merchandise under agreed-upon terms and for agreed-upon market price. (Plaintiff's Reply Affirmation in Further Support of Motion, at ¶ 7.)

Plaintiff submits an affidavit from Thomas Makkos, its President, who states that GK Food, EJ Food, and Krokidas knew that the merchandise they received belonged to plaintiff because the merchandise was delivered using plaintiff's truck and with plaintiff's mark on it; defendants knowingly accepted the merchandise that belonged to plaintiff from Alves because in the absence of the customary paperwork, their receipt of the goods and the payment they made were inconsistent with the normal course and terms of the longstanding business relationship between plaintiff and defendants. (Plaintiff's Affidavit of Merit in Support of Motion, at ¶ 3.) The proposed amendment adequately alleges specific facts notifying the opposing parties of the transaction and the defendants' supposed breach of it.

Neither plaintiff nor defendants assert that any written contract exists. Given the parties' allegations, plaintiff is entitled to plead both breach of contract and quasi-contract theories. (*See Joseph Sternberg, Inc. v Walber 36th St. Assoc.*, 187 AD2d 225, 228 [1st Dept 1993].)

In deciding a motion for leave to amend a pleading, courts need go no further once a plaintiff has made a prima facie showing that its proposed amendment is not specious. (*See Pier 59 Studios, L.P.*, 40 AD3d at 366.) Plaintiff's factual allegations are not vague or conclusory; therefore, no evidentiary showing of merit is required. Plaintiff's proposed amendment to add a

cause of action against GK Food, EJ Food, and Krokidas for breach of contract is neither palpably insufficient nor patently meritless.

B. Prejudice and Surprise

Plaintiff's proposed amendment to add a cause of action against GK Food, EJ Food, and Krokidas alleging breach of contract neither prejudices nor surprises defendants.

Courts will not find prejudice "in the mere exposure of the defendant to greater liability." (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981].) Prejudice requires "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." (*Id.*) Plaintiff's proposed cause of action stems from the same facts — defendants' alleged breach of the longstanding business relationship between plaintiff and defendants — as in the original complaint. (Plaintiff's Verified Complaint, at ¶¶ 15-16, 19-22; Plaintiff's Reply Affirmation in Further Support of Motion, at ¶ 3.) Defendants have not been surprised or prejudiced (*See Janssen v Incorpor. Vil. of Rockville Ctr.*, 59 AD3d 15, 27 [2d Dept 2008] [finding that plaintiff's proposed amended complaint was based on "the same facts, transactions or occurrences alleged in the original complaint."], citing *Whitehorn Assoc. v One Ten Brokerage*, 264 AD2d 516, 517 [2d Dept 1999]; *accord Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 477 [1985] [noting that no prejudice will be found when a proposed amendment "merely adds a new theory of recovery or defense arising out a transaction or occurrence already in litigation"].)

The case is in its early stage of disclosure. The proposed amendment will not cause substantial prejudice to defendants.

GK Food, EJ Food, and Krokidas allege that in a prior Fair Labor Standards Act lawsuit between plaintiff and Alves, plaintiff made clear that Alves "collected increased price[s]" from defendants and "retained the difference" but that plaintiff purposely omitted those facts from its complaint to obtain unwarranted damages against GK Food, EJ Food, and Krokidas. (Defendants' Affirmation in Opposition, at ¶¶ 9-11.) Plaintiff is not precluded from adding a cause of action against defendants for breach of implied contract.

Plaintiff has demonstrated that the proposed amended pleading is neither palpably insufficient nor patently meritless. Plaintiff's amendment does not prejudice or surprise defendants. Plaintiff's motion for leave to amend is granted.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted in its entirety, and plaintiff shall serve a copy of this decision and order on all parties; and it is further

ORDERED that the amended complaint, Exhibit 2 (NYSCEF Document No. 20), annexed to plaintiff's moving papers, shall be deemed served and filed, and the County Clerk's Office is directed to amend its records accordingly; and it is further

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

ORDERED that the parties appear for a preliminary conference in Part 7, 60 Centre Street, Room 345, on February 28, 2018, at 11:00 a.m.

Dated: December 14, 2017



**HON. GERALD LEBOVITS**  
J.S.C.