SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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ANTHONY MORELLO,

Plaintiff,

-against-

T & L CREATIVE SALADS, INC.,

Defendant.

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IAS Part 17
Index No.: 602011/2015
Mot. Seq. Nos. 004/005/ 006/007/008

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following papers, in addition to any memoranda of law submitted by the parties, were reviewed in preparing this Decision and Order:

004
Plaintiff's Notice of Motion, Affidavit, Affirmation & Exhibits.....1
Plaintiff's Reply Affirmation & Exhibit.....2

005
Defendant's Cross-Motion, Affirmation & Exhibits.....1
Defendant's Reply Affirmation & Exhibit.....2

006
Plaintiff's Notice of Motion, Affidavit, Affirmation & Exhibits.....1
Defendant's Affirmation in Opposition & Exhibits.....2
Plaintiff's Reply Affirmation & Affidavit.....3

007
Plaintiff's Notice of Motion, Affidavit, Affirmation & Exhibits.....1
Defendant's Affirmation in Opposition & Exhibits.....2
Plaintiff's Reply Affirmation.....3

008
Defendant's Notice of Cross-Motion & Affirmation.....1
Plaintiff's Affirmation in Opposition to Cross-Motion.....2

In 2011, plaintiff and his three sons—all co-shareholders of defendant, T & L Creative Salads, Inc.—entered into an agreement for the sons to purchase their father's shares of the company (the "Sale Agreement"). In 2012, plaintiff and T & L entered into a

consulting agreement that provides that T & L is to pay to plaintiff a weekly fee of $4,000 for as long as plaintiff desires to provide to T & L a reasonable amount of requested consulting services. Plaintiff alleges in this action, commenced in March 2015, that T & L breached the consulting agreement in December 2014 by removing him from the premises, thus preventing him from performing consulting services, and by failing to make the weekly payments. He further seeks damages under the Sale Agreement for an alleged breach of a provision obligating T & L to provide health insurance to plaintiff's son.

T & L initially asserted counterclaims claiming that plaintiff wrongfully took corporate funds after the execution of the Sale Agreement and that he breached fiduciary obligations. After obtaining court permission, T & L added additional counterclaims asserting that plaintiff misrepresented to it that the shares he sold to his sons were not the subject of any agreement with a third party. In truth, T & L alleges, plaintiff entered into a divorce stipulation of settlement with his sons' mother that required him to gift his T & L shares to his sons. This stipulation allegedly also bars plaintiff from seeking to enforce the consulting agreement because the two are claimed to be intertwined.

On July 28, 2017, the parties certified that the matter was ready for trial. A Note of Issue was filed by plaintiff on September 8, 2017.

The plaintiff now moves to dismiss defendant's Second and Third Counterclaims, which relate to the divorce agreement, as well as any "related" affirmative defenses (although plaintiff does not identify the defenses). He also moves separately for judgment on his claim and to dismiss the First Counterclaim relating to the conversion of corporate funds, as well as all of T & L's affirmative defenses.[1]

T & L cross-moves to preclude plaintiff from introducing evidence on his claim relating to the health insurance for plaintiff's son on the grounds that T & L was not a party to the Sale Agreement. It also seeks to preclude evidence supporting plaintiff's interpretation of the divorce stipulation.

In response, plaintiff moves for leave to amend its pleading to add the sons as individual defendants; to amend his claim regarding the alleged breach of the Sale

[1] In its Amended Answer and Counterclaims, T & L did not reassert its breach of fiduciary duty claim.

Agreement concerning the provision of health insurance to include him as well as his son; to add a claim seeking a declaratory judgment that he was a stockholder for the years 2012 – 2014 and entitled to his pro rata share of profit distributions; and to add a claim that his sons are jointly liable with T & L for all sums allegedly due to plaintiff, including distributions.

T & L then cross-moved to strike the Note of Issue in the event this court was to grant plaintiff's motion to amend his pleading.

LEGAL ANALYSIS

First, with respect to T & L's cross-motion to preclude evidence relating to plaintiff's claim concerning T & L's alleged failure to pay health insurance for his son, that aspect of the cross-motion is denied. T & L argues that plaintiff's sons are the true parties in interest because T & L did not sign the agreement. Although none of the signatories of the Sale Agreement signed on behalf of T & L in their capacity as a corporate officer, it is not disputed that all of the then-shareholders of T & L, a closely-held corporation, signed the agreement, including all of the plaintiff's sons. The Sale Agreement expressly provides that T & L is a party to the agreement and further explicitly states in Section 9 thereof that the "Agreement is binding upon [T & L] and agrees that [T & L] shall take all action necessary to carry out the terms thereof."

"The best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v. Philles Records,* 98 N.Y.2d 562, 569 (2002)(citations omitted). It is clear from the face of the parties' agreement that it was intended for the corporation to be a party and to be bound by its terms. The failure of a corporate officer to add his title of office to his signature is not fatal to the validity of a corporate contract where the contract on its face reflects that the corporation is to be bound. 7 *Fletcher Cyclopedia of the of Corporations*, § 3035; *see also Nussdorf v. Esses and Co.,* 63 A.D.2d 619 (1st Dept. 1978)(corporation bound by arbitration clause signed by its principals); *Valente v. International Milling Co.*, 119 A.D. 127 (2d Dept. 1907).

That part of plaintiff's motion to amend its pleading to include in the Third Cause of Action a claim for damages due to T & L's failure to pay his health insurance as well as that

of his son's is granted. The determination to permit the amendment of a pleading by a party rests within the sound discretion of the court. *Trataros Const. Inc. v. New York City School Const. Authority*, 46 A.D.3d 874 (2d Dept. 2007). Leave to amend a pleading will be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit, and will not prejudice or surprise the opposing party. *Shovak v. Long Island Commercial Bank*, 50 A.D.3d 1118, 1120 (2d Dept. 2008); *Lucido v. Mancuso*, 49 A.D.3d 220 (2d Dept. 2008). The addition of a claim for damages as a result of the claimed failure of T & L to pay plaintiff's health insurance can come as no surprise to T & L and should not require any additional discovery or necessitate delay. The pleading is deemed amended without the need to serve a new pleading, and is further deemed denied by T & L.

Plaintiff's requested amendment to his pleading to add plaintiff's sons as defendants as well as a claim seeking plaintiff's share of profit distributions (approximately $225,000) for the years 2012 - 2014 is denied. This amendment at this late date is unduly prejudicial given that all discovery in this matter has concluded and the matter has made it to the trial calendar without the participation of plaintiff's sons as individual defendants. "Although leave to amend pleadings 'shall be freely given' (CPLR 3025[b]), where, as here, a motion for leave to amend is made long after the case has been certified as ready for trial, 'judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious'." *Fischer v. RWSP Realty, LLC*, 53 A.D.3d 595 (2d Dept. 2008).

If the plaintiff's sons were personally named at the outset of this action they each may have retained their own counsel to protect their individual interests. And there is no legitimate reason for plaintiff's delay in seeking to assert the claims he now proposes (including a claim for a declaratory judgment that he was a shareholder of T & L during those years in which he was being paid for his shares). The facts upon which plaintiff bases his requested amendment—that T & L and his sons were not treating him as a shareholder during those years—were known or should have been known to plaintiff when this action was commenced since he received no profit distributions for those years or K-1 statements.[2]

[2] As a result of the denial of plaintiff's motion to amend to add new parties and claims (other than the claim concerning his health insurance), T & L's motion to vacate the Note of Issue and strike the action from the calendar is denied as moot.

Plaintiff seeks summary judgment dismissing T & L's Second Counterclaim that plaintiff breached his divorce settlement stipulation by failing to gift to his sons the T & L shares that are the subject of the Sale Agreement. T & L seeks to preclude plaintiff from arguing at trial that he was not obligated to gift his shares to his sons under the divorce Stipulation unless and until he remarried.

On a motion for summary judgment, the proponent must tender sufficient evidence to demonstrate the absence of any material issues of fact in order to set forth a *prima facie* showing that he/she is entitled to judgment as a matter of law. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). To obtain summary judgment, the moving party must establish his/her claim or defense by tendering proof, in admissible form, sufficient to warrant the court to direct judgment in the movant's favor. *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 (1979). Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation. CPLR § 3212(b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092 (1985). Where the movant fails to meet its initial burden, the motion for summary judgment should be denied. *U.S. Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

In January 2001, plaintiff and his then-wife, Louise Morello, executed a Stipulation of Settlement, resolving those parties' pending divorce action. Pursuant to the Stipulation, Louise transferred any rights or interest in T & L in exchange for an agreed-upon distributive award. The Stipulation further included a provision that states:

> Husband agrees to transfer all rights and title, waiving any claim thereto, of [T & L], to the emancipated children of the marriage, to wit: Anthony L.; Michael J. and Joseph, prior to his remarriage.

T & L argues that this provision required plaintiff to gift all of his T & L shares to his sons. (There is no dispute that during the period following the execution of the Stipulation until the Sale Agreement was executed, plaintiff gifted 75% of his ownership interest in T & L to his sons.) T & L claims that, in all events, plaintiff misrepresented in the Sale Agreement that his shares "are not the subject of any agreement entered into between Anthony Morello, Sr. and any third party other than the instant Agreement." In its Second Counterclaim, T & L alleges that it would not have purchased plaintiff's remaining T & L shares if it was aware of the terms of the Stipulation and seeks damages of $306,790, the amount it claims it paid for such shares.

But as plaintiff correctly points out, T & L did not purchase plaintiff's shares. The Sale Agreement expressly states that plaintiff's sons, Anthony Jr., Michael and Joseph are the "Purchasers," and that plaintiff's ownership interests are to be transferred to the sons. That the sons may have caused T & L to pay the purchase price on their behalf does not change the unassailable fact that the sons, and not T & L, were the purchasers of plaintiff's shares under the Sale Agreement. As a result, T & L has no standing to assert its Second Counterclaim and it is hereby dismissed.

T & L unquestionably is a party to the consulting agreement that plaintiff asserts was breached. In its Third Counterclaim, T & L alleges that plaintiff may not seek to enforce the consulting agreement because it is intertwined with the Sale Agreement and because T & L relied upon plaintiff's alleged misrepresentation, quoted above, when it agreed to the consulting agreement. Plaintiff argues that the Stipulation was not breached and did not require plaintiff to gift his remaining shares—at least until his remarriage.

This court need not and should not determine as a matter of law in this action whether there was a breach of the divorce Stipulation. The elements of T & L's counterclaim and defenses in reliance upon the claimed misrepresentation are different than a claimed breach of the Stipulation. (In October 2017, plaintiff's sons commenced an action in Suffolk Supreme Court alleging such a breach of contract.) T & L has raised an issue of fact concerning whether it was fraudulently induced into executing the consulting agreement. T & L has also raised issues of fact as to which party breached the consulting agreement and whether plaintiff converted company funds from December 2012 through December 2014

(regardless of whether plaintiff remained a shareholder during this period or not). Therefore, plaintiff's motions for summary judgment dismissing the Third Counterclaim and granting him judgment on his claims are denied.

T & L's purported "*in limine*" motion seeking to bar plaintiff at trial from introducing proof that the divorce Stipulation did not require plaintiff to gift to his sons all of his shares of T & L because he had not yet remarried is denied. *In limine* motions are more appropriately directed to the trial court. Furthermore, in support of its argument, T & L asserts that plaintiff *was* obligated to gift his children all of his T & L shares under the Stipulation as a matter of law. T & L's motion is therefore akin to an inappropriate attempt to obtain partial summary judgment on its now dismissed Second Counterclaim. *See Brewi-Bijoux v. City of New York,* 73 A.D.3d 1112 (2d Dept. 2010); *Downtown Art Co. v. Zimmerman*, 232 A.D.2d 270 (1st Dept. 1996).

This constitutes the Decision and Order of this court. Any relief requested not specifically addressed herein is denied

Dated: April 5, 2018
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

ENTERED

APR 09 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE