SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
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JEFFREY GOLDBERG,

Plaintiff,

-against-

DIAL CAR, INC, ALEX BRUDOLEY, NOOR ALEXANDER SOOFI, JIMMY SARDELIS, TASOS KOSTARELOS, MANSOOR AHMED, SULTAN FAIZ, LEV LODZHEVSKY and IZZY YAKOBZON,

Defendants.
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Index No.: 515521/2017
Motion Date: 11-23-20
Mot. Seq. No.: 5-6

DECISION/ORDER

Upon the following e-filed documents, listed by NYSCEF as item numbers 81-123, 127-129, the motion and cross-motion are decided as follows:

In this action for, *inter alia*, breach of contract, the plaintiff, JEFFREY GOLDGERG ("Goldberg"), moves for, among other things, an order pursuant to CPLR §3212 granting him summary judgment on his cause of action for breach of contract (**Mot. Seq. No. 5**). Defendant Dial Car Inc. ("Dial") cross-moves for an order granting it leave to amend its answer to include the affirmative defenses of collateral estoppel, fraud and illegality (**Mot. Seq. No. 6).**

Background:

Goldberg commenced this action claiming that Dial breached its contract with him by failing to provide him with retirement benefits. Dial counterclaimed for damages claiming that Goldberg improperly ran up expenses on the company credit card for personal and improper expenses. Goldberg, in sum and substance, claims that Dial is precluded asserting counterclaims and from raising any defenses to his breach of contract claim by virtue of a general release. The general release is dated November 9, 2015 and is part of the contract that Goldberg claim Dial breached. The contract served to terminated Goldberg's employment with Dial and required Dial to pay him retirement benefits. In the release, Dial agreed to "irrevocably, unconditionally and generally release[] [Goldberg] from all actions, causes of action, suits…claims, and demands

whatsoever, in law, admiralty or equity, which against Dial Car and its successors and assigns ever had, now have or hereafter can, shall or may have." (emphasis added).

Dial claims that Goldberg is collaterally estopped from relying on the release by virtue of decisions and orders issued by the trial court and the Appellate Division in an action entitled *Guzman v. Kordonsky*. Dial also claims that the release is unenforceable because it was a product of fraud and illegality. Dial did not, however, allege in its answer the affirmative defenses of collateral estoppel, fraud, illegality and now seeks to amend its answer to include these defenses.

A. **That Branch of Dial's Motion to Amend its Answer to Include the Defense of Collateral Estoppel:**

The Court will first address Dial's Motion to Amend its answer (Mot. Seq. No. 6). On or about October 5, 2015, certain shareholders of Dial commenced a derivative action which included Goldberg and Dial, among others, as defendants. The action is entitled *Yakov Guzman et al v. Michael Kordonsky* et al, (Index No. 512059/2015). During the pendency of the *Guzman* action, the plaintiffs served an amended complaint alleging several causes of action on behalf of Dial against current and former members of Dial's board, including Goldberg, for breach of fiduciary duty, mismanagement, misconduct, conversion and unjust enrichment. The defendants moved for an order dismissing the amended complaint. In the notice of motion, the defendants specifically requested, among other things, an order "dismissing claims asserted against Defendant Goldberg pursuant to CPLR § 3211 (a)(1) and (5) as a released party." Defendants' counsel specifically argued that the release that Goldberg now maintains precludes Dial's defenses to the action for breach of contract and Dial's counterclaims barred the action. In the memorandum of law submitted in support of the motion, defendants' attorney argued:

> [T]he Release itself stands as documentary evidence establishing that Dial Car unequivocally released any past, present and future claims it may have against Goldberg (including those alleged in Plaintiffs' Amended Complaint). Thus, given that the language in the Agreement is clear, unambiguous and undisputed, any claims in this action against Goldberg are barred by the documentary

evidence and should be dismissed in accordance with CPLR 3211 (a)(1) and (5).

By order dated January 11, 2017, the trial court in *Guzman* rejected this argument and denied defendants' motion. Defendants' appealed and on November 15, 2019, the Appellate Division, Second Department issued a Decision and Order affirming the order.

"Under the doctrine of collateral estoppel, or issue preclusion, 'a party is precluded from relitigating an issue which has been previously decided against him [or her] in a prior proceeding where he [or she] had a full and fair opportunity to litigate such issue' " (*Franklin Dev. Co., Inc. v. Atlantic Mut. Ins. Co.*, 60 A.D.3d 897, 899, 876 N.Y.S.2d 103, quoting *Luscher v. Arrua*, 21 A.D.3d 1005, 1007, 801 N.Y.S.2d 379; *see D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 664, 563 N.Y.S.2d 24, 564 N.E.2d 634). "The doctrine of collateral estoppel is 'intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it' " (*Franklin Dev. Co., Inc. v. Atlantic Mut. Ins. Co.*, 60 A.D.3d at 899, 876 N.Y.S.2d 103, quoting *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455, 492 N.Y.S.2d 584, 482 N.E.2d 63). " 'The two elements that must be satisfied to invoke the doctrine of collateral estoppel are that (1) the identical issue was decided in the prior action and is decisive in the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior issue' " (*Franklin Dev. Co., Inc. v. Atlantic Mut. Ins. Co.*, 60 A.D.3d at 899, 876 N.Y.S.2d 103, quoting *Luscher v. Arrua*, 21 A.D.3d at 1007, 801 N.Y.S.2d 379; *see Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d at 455, 492 N.Y.S.2d 584, 482 N.E.2d 63).

Under CPLR 3025(b), a party may amend a pleading "at any time" by leave of the court (CPLR 3025 [b]), even after trial (*see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]). Leave to amend "shall be freely given upon such terms as may be just including the granting of costs and continuances" (CPLR 3025 [b]). Generally, courts should grant leave to amend when (1) there has been no "prejudice or surprise resulting directly from the delay in seeking leave," and (2) the proposed amendment is neither palpably insufficient nor patently devoid of merit (*Lucido v Mancuso*, 49 AD3d 220, 222 [2008]; *see Katz v Castlepoint Ins. Co.*, 121 AD3d 948,

950 [2014]). The party opposing the application has the burden of establishing prejudice (*see Kimso Apts., LLC v Gandhi*, 24 NY3d at 411), which requires a showing that the party "has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position" (*Loomis v Civetta Corinno Constr. Corp*., 54 NY2d 18, 23 [1981]; *see Kimso Apts., LLC v Gandhi*, 24 NY3d at 411).

Here, the proposed affirmative defense of collateral is neither palpably insufficient nor patently devoid of merit. Indeed, defendant Dial's moving papers demonstrated that the defense has merit. Clearly, Goldberg was aware of the prior orders of the trial Court and Appellate Division in the *Guzman* action and will not be surprised, hindered in the preparation of his case nor prevented from taking some measure in support of his position in this case of Dial; is granted leave to amend its answer to include the defense of collateral estoppel. Accordingly, that branch of Dial's motion for leave to amend its answer to include the defense of collateral estoppel is **GRANTED**.

B. **Those Branches of Dial's Motion to Amend its Answer to Include the Defenses of Fraud and Illegality:**

"Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail" (CPLR 3016[b]). The working of Dial's proposed affirmative defense of fraud is as follows: "Plaintiff's claims are barred, in whole or in part, by the doctrine of fraud." Clearly, the proposed amendment fails to comply with the pleading requirement of CPLR 3016[b] and is therefore palpably insufficient.

The proposed amended affirmative defense of "illegality" is palpably insufficient. Dial's moving papers make clear that its defense of illegality is really based on a breach of trust. Defendant Dial seeks to amend its answer to allege that "Plaintiff's claims are barred, in whole or in part, by the doctrine of illegality." Thus, Dial's proposed affirmative defense of illegality also fails to the pleading requirements of CPLR 3016[b]. Accordingly, those branches of Dial's motion for leave to amend its answer to include the defenses fraud and illegality are **DENIED.**

C. Goldberg's Motion for Summary Judgment (Mot. Seq. No. 5).

Turning to Goldberg's motion for summary judgment, Goldberg established his prima facie entitlement to partial summary judgment on the issue of liability on his breach of contract claim by demonstrating, as a matter of law, that Dial breach the contract dated November 9, 2015 by failing to provide him with the retirement benefits called for under the contract. Dial failed to raise a triable issue of fact on its claims of fraud and illegality since those defenses are not asserted in its answer, or on any of the other defenses alleged in its answer. In order to defeat Goldberg's motion by asserting that it has valid counterclaims against him, it was necessary for Dial to assemble and reveal its proof in support of the alleged counterclaims (*cf. Dodwell & Co. v. Silverman*, 234 App.Div. 362, 254 N.Y.S. 746). *M & S Mercury Air Conditioning Corp. v. Rodolitz*, 24 A.D.2d 873, 874, 264 N.Y.S.2d 454, 455–56 (1965), *aff'd,* 17 N.Y.2d 909, 218 N.E.2d 898 (1966). The mere assertion of a counterclaim, unsupported by proof that it is meritorious, does not bar relief to a plaintiff who is otherwise entitled to summary judgment (*id)*. Dial has failed to assemble and reveal its proof in support of its counterclaims.

Furthermore, the two counterclaims are sufficiently separable from Goldberg' breach of contract claim so that they should not be permitted to defeat plaintiff's present entitlement to partial summary judgment (*Dalminter v. Dalmine*, S.p.A., 29 A.D.2d 852, 288 N.Y.S.2d 110, Aff'd 23 N.Y.2d 653, 295 N.Y.S.2d 337, 242 N.E.2d 488; *Pease & Elliman v. 926 Park Ave. Corp.*, 23 A.D.2d 361, 260 N.Y.S.2d 693, Aff'd 17 N.Y.2d 890, 271 N.Y.S.2d 992, 218 N.E.2d 700. "On the other hand, the proof submitted by plaintiff was insufficient to establish that the counterclaim[s] [were] without merit.

Under the circumstances, Goldberg is entitled partial summary judgment on the issue of liability on his breach of contract claim but is not entitled to a dismissal of the counterclaims (see *Nopco Chemical Co. v. Milner*, 12 A.D.2d 942, 210 N.Y.S.2d 874; *Bethlehem Steel Corp. v. Solow*, 70 A.D.2d 850, 723, 418 N.Y.S.2d 40, 42, *modified*, 51 N.Y.2d 870, 414 N.E.2d 395).

Accordingly, it is hereby

ORDRED that Mot. Seq. No. 5 is **GRANTED** to the extent that Goldberg is awarded partial summary judgment on the issue of liability on his breach of contract claim and the matter will proceed to trial on the issue of damages; it is further

ORDERED that Mot. Seq. No. 6 is **GRANTED** solely to the extent that Dial is granted leave to amend its answer to include the affirmative defense of collateral estoppel.

This constitutes the decision and order of the Court.

Dated: March 29, 2021

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020