

Azrak v Carter Enters. LLC

2021 NY Slip Op 32413(U)

November 19, 2021

Supreme Court, Kings County

Docket Number: 510149/15

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of November, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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DIANA AZRAK, individually, and on behalf of, CARTER INDUSTRIES, INC. and JOSEPH COHEN and DAVID NAKASH, as Administrators of the Estate of MARVIN AZRAK, and on behalf of CARTER INDUSTRIES, INC.,

Plaintiffs,

- against -

Index No. 510149/15

CARTER ENTERPRISES LLC, SAUL WOLF, CARTER INDUSTRIES, INC., CHAIM WOLF, ABRAHAM BACKENROTH and EPHRAIM ADLER,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

600-610 605-610, 612 605-610, 614-615 617

Opposing Affidavit (Affirmation) _____

627-658 679-710 731-762 827-856

_____ Reply Affidavit (Affirmation) _____

864 867-

870

Upon the foregoing papers in this shareholder derivative action, defendant Carter Industries, Inc. (Carter Industries) moves (in motion sequence [mot. seq.] 27) for an order, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (5) and (a) (7), dismissing all causes of action asserted against it in the amended complaint with prejudice. Defendants Chaim

Wolf and Carter Enterprises LLC (Carter Enterprises) collectively move (in mot. seq. 28) for an order, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (5) and (a) (7), dismissing all causes of action asserted against them in the amended complaint with prejudice. Defendant Saul Wolf moves (in mot. seq. 29) for an order, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (5) and (a) (7), dismissing all causes of action asserted against him in the amended complaint with prejudice.

“Putative Defendants” Abraham Backenroth (Backenroth) and Ephraim Adler (Adler) move (in mot. seq. 30) for an order (1) dismissing or striking all claims asserted against “the Non-Parties,” pursuant to CPLR 3025 and 3211, and (2) imposing sanction against plaintiffs and their counsel “for filing a frivolous pleading that purports to add the Putative Defendants without leave of Court[.]” pursuant to 22 NYCRR §130-1.1 (Part 130).

Background

This Shareholder Derivative Action

On August 17, 2015, Diana Azrak commenced this shareholder derivative action seeking to obtain an interest in Carter Industries and damages because defendants allegedly misappropriated business opportunities from Carter Industries. Carter Industries was allegedly formed in 1995 by Saul Wolf and Marvin Azrak, Diana Azrak’s late husband, to manufacture military and other tactical garments for the United States military. The original complaint alleged that Saul Wolf and Marvin Azrak each held 50%

of the issued shares of Carter Industries, and that, after Marvin Azrak passed away on January 22, 2008, Diana Azrak became the owner of his 50% share in Carter Industries. The complaint alleged that, since 2008, Saul Wolf and his son, Chaim Wolf, have been using Carter Enterprises, a competing business entity controlled by them, to usurp Carter Industries' corporate business opportunities. The original complaint also alleged that on or about May 25, 2007, Saul Wolf unilaterally, and without Marvin Azrak's knowledge or consent, transferred title to the Carter factory from Carter Industries to his brother's own charitable entity for no consideration.

The original complaint asserted nine causes of action: (1) the first cause of action against Saul Wolf for breach of his fiduciary duties; (2) the second cause of action for a constructive trust over Carter Enterprises and Saul Wolf's charitable entities; (3) the third cause of action against Carter Industries and Carter Enterprises for an accounting; (4) the fourth cause of action for an injunction enjoining Saul Wolf, Chaim Wolf and Carter Enterprises from using Carter Industries' identity, trademark, reputation, intellectual property and good-will; (5) the fifth cause of action for an injunction and damages from Saul Wolf, Chaim Wolf and Carter Enterprises for trademark infringement; (6) the sixth cause of action against Saul Wolf, Chaim Wolf and Carter Enterprises for violation of New York General Business Law (GBL) §§ 360-l and 360-m; (7) the seventh cause of action against Saul Wolf, Chaim Wolf and Carter Enterprises for unfair competition; (8) the eighth cause of action against Saul Wolf, Chaim Wolf, Carter Enterprises and the

charitable entities for unjust enrichment; and (9) the ninth cause of action to undo the fraudulent transfer of the Carter factory.

On or about October 21, 2015, defendants filed a pre-answer motion to dismiss. By a May 13, 2016 decision and order, the court (Rothenberg, J.) dismissed the second cause of action for a constructive trust over Carter Enterprises and Saul Wolf's charitable entities, the eighth cause of action asserted against Saul Wolf, Chaim Wolf, Carter Enterprises and the charitable entities for unjust enrichment, and the ninth cause of action to rescind the May 2007 Transfer of the Carter Factory based upon a lack of consideration and fraud (NYSCEF Doc No. 60).

On December 2, 2016, defendants answered the original complaint, denied that Diana Azrak owned 50% of the issued and outstanding shares of Carter Industries and asserted an affirmative defense challenging Diana Azrak's standing to prosecute this action. After issue was joined, discovery ensued.

In response to a series of discovery motions, the court (Rothenberg, J.) issued orders on July 12, 2018 and March 6, 2019, bifurcating this action so that the issue of Diana Azrak's alleged ownership interest in Carter Industries would be decided first.

Azrak's Motion For Leave To Amend

On October 10, 2019, Diana Azrak moved (in mot. seq. 20) for leave to amend the complaint to add Marvin Azrak's estate as a party plaintiff, to add Backenroth and Adler as party defendants, to add additional allegations and to assert additional causes of action

against the original defendants and Backenroth and Adler.¹ Azrak also sought to modify the court's prior orders that bifurcated the action and to compel defendants to produce documents. Defendant Carter Industries cross-moved to compel discovery from Azrak. Meanwhile, by a December 24, 2019 "Transfer Order," this action was administratively transferred from Justice Rothenberg (in Part 35) to Justice Knipel (in Commercial Part 4).

By a March 13, 2020 decision and order, this court held that branch of Diana Azrak's motion (mot. seq. 20) seeking to amend the complaint in abeyance, denied that branch of her motion seeking to modify Justice Rothenberg's July 12, 2018 and March 6, 2019 orders, adhered to the court's prior orders and directed a "bifurcated trial solely on the issue of Diana Azrak's ownership in Carter Industries, to commence on 6-16-20." This court also ordered that the parties "conduct discovery w/in 90 days hereof only on the ownership issue, in anticipation of the bifurcated trial." By another March 13, 2020 decision and order, this court ordered the parties to produce outstanding discovery "as related to the claimed ownership of plaintiff, Diana Azrak, of Carter Industries . . ." and that depositions shall be completed by May 4, 2020.

On April 5, 2021, Diana Azrak moved (in mot. seq. 25), by order to show cause, for an order, pursuant to CPLR 1002 (a), 1003, 2001 and 3025 (b), "amending the Complaint to, *inter alia*, add the Estate of Marvin Azrak as a party plaintiff, and amending the caption to reflect same, as requested in Motion Sequence Number 20 . . ."

¹ See proposed amended complaint, NYSCEF Doc No. 400.

and compelling defendants Saul Wolf and Carter Industries to produce discovery.

The Court's April 28, 2021 Amended Decision and Order

By an April 28, 2021 amended decision and order, this court held that:

“[b]y order dated 7/12/18 Justice Rothenberg directed a bifurcated trial with the issue of ownership to be tried first. With the benefit of hindsight, it now appears that said bifurcation was improvident, and that *the granting of plaintiff's motion to add the estate of M[arvin] Azrak would largely moot out the need to bifurcate.*

“Accordingly, the instant OSC [by Diana Azrak] is granted *only to the extent that* the motion previously held in abeyance *to add the Estate of Marvin Azrak as a party plaintiff* is granted. This matter shall proceed unbifurcated” (emphasis added).

Thus, this court *only* granted Diana Azrak leave to amend the complaint to add the Estate of Marvin Azrak as a party plaintiff and did not grant Diana Azrak leave to amend the complaint to add her other proposed amendments (additional factual allegations, additional causes of action and Backenroth and Adler as additional party defendants).

On June 2, 2021, Diana Azrak appealed from this court's April 28, 2021 amended decision and order.

The Amended Complaint

Meanwhile, on May 3, 2021, Diana Azrak filed a verified amended complaint adding Joseph Cohen and David Nakash, as Administrators of the Estate of Marvin Azrak and on behalf of Carter Industries, as party plaintiffs, as authorized by the April 2021 order. Regarding the Estate, the amended complaint alleges that “Marvin Azrak passed

away prematurely in 2008, and his interest in Carter Industries is now owned together by Plaintiffs, who are his widow Diana Azrak and his Estate[,]" "Joseph Cohen and David Nakash are residents of New York State and are the duly appointed administrators of the Estate of Marvin Azrak (the 'Estate' and with D. Azrak, 'Plaintiffs'), which owns at least Twenty-Five (25%) of the issued and outstanding shares of Carter Industries" "[a]ny ownership interest in Carter Industries which Marvin Azrak held upon his death passed to the Estate, where it remains" and "[t]ogether, Plaintiffs hold a 50% ownership interest in Carter Industries" (amended complaint at ¶¶ 1, 4, 20 and 21).

Importantly, the verified amended complaint also contains additional factual allegations, the addition of Backenroth and Adler as party defendants and additional causes of action against the original defendants and Backenroth and Adler which this court did not grant Diana Azrak leave to assert. Essentially, with the exception of the title of the document, plaintiffs' amended complaint (NYSCEF Doc No. 591) is identical to Diana Azrak's proposed amended complaint (NYSCEF Doc No. 400), the majority of which was considered and rejected by this court in the April 28, 2021 amended decision and order.

The amended complaint alleges that Backenroth and Adler each claim to own 25% of the shares of Carter Industries because in March 2017, during the pendency of this action, Saul Wolf sold his shares to them. The amended complaint alleges that Saul Wolf still runs Carter Industries, and that the sale was a sham transaction intended to shield

Saul Wolf from liability. The amended complaint asserts the following twelve causes of action: (1) the first cause of action against Saul Wolf for breach of fiduciary duty; (2) the second cause of action against Saul Wolf, Carter Industries, Backenroth and Adler for an accounting; (3) the third cause of action against Carter Industries for a constructive trust; (4) the fourth cause of action against Saul Wolf, Chaim Wolf and Carter Enterprises for use of Carter Industries' name with intent to deceive in violation of GBL § 133; (5) the fifth cause of action against Saul Wolf, Chaim Wolf and Carter Enterprises for infringement of Carter Industries' protected trade name and mark in violation of GBL §§ 360-k and 360-m; (6) the sixth cause of action against Saul Wolf, Chaim Wolf and Carter Enterprises for injury to Carter Industries' business reputation in violation of GBL §§ 360-l and 360-m; (7) the seventh cause of action against Saul Wolf, Chaim Wolf and Carter Enterprises for unfair competition; (8) the eighth cause of action against Saul Wolf, Chaim Wolf and Carter Enterprises for unjust enrichment; (9) the ninth cause of action against Backenroth and Adler for breach of fiduciary duty; (10) the tenth cause of action against Backenroth and Adler for aiding and abetting breach of fiduciary duty; (11) the eleventh cause of action against Backenroth and Adler for aiding and abetting unfair competition; and (12) the twelfth cause of action against Backenroth and Adler for tortious interference with business relations.

Defendants' Instant Motions

On June 14, 2021, the original defendants filed three pre-answer motions to

dismiss the amended complaint: (1) Carter Industries filed a motion to dismiss the second and third causes of action asserted against it; (2) Chaim Wolf and Carter Enterprises collectively filed a motion to dismiss the fourth through eighth causes of action asserted against them; and (3) Saul Wolf filed a motion to dismiss the first, second, fourth, fifth, sixth, seventh and eighth causes of action asserted against him. Backenroth and Adler also collectively moved to dismiss or strike the claims asserted against them in the amended complaint (second and ninth through twelfth causes of action) and for the imposition of Part 130 sanctions against Diana Azrak for “filing a frivolous pleading that purports to add the Putative Defendants without leave of Court . . .”

Defendants asserted several substantive grounds to dismiss the causes of action asserted in the amended complaint. In addition, defendants argued that Azrak’s addition of new factual allegations, new causes of action and two new party defendants, Backenroth and Adler, exceeded the scope of the court’s April 28, 2021 amended decision and order, and should, therefore, be stricken.

Discussion

CPLR 1003 provides, in relevant part, that “[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared . . .”

Additionally, CPLR 3025 (b) provides, in relevant part, that:

“[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time *by leave of court* or by stipulation of all parties . . . Any motion to amend or supplement pleadings

shall be accompanied by the proposed amended or supplemented pleading clearly showing the changes or additions to be made to the pleading” (emphasis added).

New York courts, including the Second Department and the Court of Appeals, have held that “[a] plaintiff’s failure to seek leave pursuant to CPLR 1003 to add a new defendant is a jurisdictional defect, and an amended complaint that is not filed in accordance with CPLR 1003 and 3025 is a legal nullity” (*Hulse v Wirth*, 175 AD3d 1276, 1279 [2d Dept 2019]; see also *Perez v Paramount Communications, Inc.*, 92 NY2d 749, 753 [1999] [holding that “(t)he joinder of an additional defendant by the filing of a supplemental summons and amended complaint may be accomplished only with prior judicial permission, and noncompliance renders the pleadings jurisdictionally defective”]; *Nikolic v Fed’n Emp. & Guidance Serv., Inc.*, 18 AD3d 522, 524 [2d Dept 2005] [holding that “the plaintiff’s service of the amended summons and complaint was a nullity since he served these papers without leave of court or a stipulation of the parties in accordance with CPLR 3025 (b)"]; *Ospina v VIMM Corp.*, 203 AD2d 440, 441 [2d Dept 1994] [holding that “(t)he plaintiff’s failure to seek leave pursuant to CPLR 3025 (b) and CPLR 1003 to serve an amended summons and complaint purporting to join VIMM Machine, Inc., as a party defendant is a jurisdictional defect”]; *Yonker v Amol Motorcycles, Inc.*, 161 AD2d 638, 638 [2d Dept 1990] [holding that where “(t)he plaintiff failed to obtain leave pursuant to CPLR 3025 (b) and 1003 to serve an ‘amended summons and complaint’ . . . the failure to obtain leave of the court constitutes a jurisdictional defect

requiring dismissal of the action against the party so joined”).

Furthermore, the Second Department has long held that if an amendment to a pleading “was not warranted under the permission granted” by the court’s prior order, the appropriate remedy is to strike out the excessive portions of the amended pleading (*see Ias Bicolor Corp. v Mezrahi*, 22 AD2d 898, 899 [1964]; *see also Sackett v Est. of Konigsberg*, 74 AD3d 777, 778 [2010] [holding that “the Supreme Court properly granted the defendants’ motion to strike the amended complaint based upon her failure to comply with CPLR 3025”]; *Beverly Milk Yonkers Co. v Conrad*, 5 AD2d 682, 683 [1957] [upholding order striking affirmative defenses where “amended answer was served pursuant to permission granted on a prior motion, and there was no provision in that order which would permit interposition of the second, third and fourth affirmative defenses”]).

Here, in October 2019 and April 2021, Diana Azrak moved (in mot. seq. 20 and 25) for leave to amend her 2015 complaint to add Marvin Azrak’s estate as a party plaintiff. Importantly, Azrak’s motions for leave to amend also sought permission to add Backenroth and Adler as additional party defendants, to allege additional factual allegations and to assert additional causes of action against the original defendants and Backenroth and Adler. This court issued the April 28, 2021 amended decision and order granting Diana Azrak’s motion “*only to the extent that* the motion previously held in abeyance to add the Estate of Marvin Azrak as a party plaintiff is granted” because “the granting of plaintiff’s motion to add the estate of M[arvin] Azrak would largely moot out

the need to bifurcate” (emphasis added).

Consequently, Diana Azrak’s service of the supplemental summons and the amended complaint is a nullity to the extent it added anything other than Joseph Cohen and David Nakash, as Administrators of the Estate of Marvin Azrak, as party plaintiffs, which was the only amendment for which Azrak was granted leave in the April 28, 2021 order. The only authorized amendments to the original complaint are *the sentence* in paragraph 1 of the amended complaint alleging that “Marvin Azrak passed away prematurely in 2008, and his interest in Carter Industries is now owned together by Plaintiffs, who are his widow Diana Azrak and his Estate[,]” paragraph 4 of the amended complaint alleging that “Joseph Cohen and David Makash are residents of New York State and are the duly appointed administrators of the Estate of Marvin Azrak (the ‘Estate’ and with D. Azrak, ‘Plaintiffs’), which owns at least Twenty-Five (25%) of the issued and outstanding shares of Carter Industries[,]” paragraph 20 of the amended complaint alleging that “[a]ny ownership interest in Carter Industries which Marvin Azrak held upon his death passed to the Estate, where it remains” and paragraph 21 of the amended complaint alleging that “[t]ogether, Plaintiffs hold a 50% ownership interest in Carter Industries.” With the exception of the foregoing allegations in paragraphs 1, 4, 20 and 21 of the amended complaint regarding the Estate of Marvin Azrak, the remainder of the amended complaint is stricken as it exceeded the limited leave granted in the April 28, 2021 amended decision and order.

In light of the status of the amended complaint, which Diana Azrak shall re-file as directed herein, this court does not reach the merits of the original defendants' pre-answer motions to dismiss claims in the amended complaint, all of which have been rendered moot. Accordingly, it is

ORDERED that the amended complaint (NYSCEF Doc No. 591) is hereby stricken, and Diana Azrak shall re-file an amended complaint that is consistent with this decision and order and this court's April 28, 2021 amended decision and order within 20 days after service of this decision and order with notice of entry thereof; and it is further

ORDERED that Carter Industries' dismissal motion (mot. seq. 27), Chaim Wolf and Carter Enterprises' dismissal motion (mot. seq. 28) and Saul Wolf's dismissal motion (mot. seq. 29) are all denied as moot; and it is further

ORDERED that Backenroth and Adler's motion (mot. seq. 30) is only granted to the extent that the amended complaint is hereby stricken; the motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE