SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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RSR CORPORATION and HOWARD MEYERS

Plaintiffs,

- v -

LEG Q LLC and LAWRENCE GOLUB,

Defendants.

INDEX NO. 650342/2019

MOTION DATE 06/04/2021

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

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HON. NANCY BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 158, 159, 163, 166, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 206, 222

were read on this motion to/for DISMISS.

I. INTRODUCTION

In this action arising from a dispute between shareholders of an English lead recycling company, Eco-Bat Technologies, Ltd. ("Eco-Bat"), the plaintiffs RSR Corporation ("RSR") and Howard Meyers ("Meyers") move pursuant to CPLR 3211(a)(7) to dismiss the sole counterclaim asserted by the defendant LEG Q, LLC ("LEG Q"), in its amended answer. The plaintiffs also seek sanctions against LEG Q pursuant to 22 NYCRR § 130-1.1. LEG Q opposes the motion. The motion is granted in part.

II. BACKGROUND

The court adopts the recitations describing the factual and procedural background of this case set forth in its orders dated December 21, 2020, and September 28, 2021. Briefly, as relevant to the instant motion, Meyers was the indirect majority owner of Eco-Bat until mid-

January 2020. Meyers held his majority stake through EB Holdings II, Inc. ("EB Holdings"). LEG Q was a minority shareholder of Eco-Bat. Meyers and his family are also 100% owners of RSR, a corporation with which Eco-Bat had entered agreements for services related to the operation of Eco-Bat's lead smelting facilities. After LEG Q challenged the propriety of Eco-Bat's business arrangements and transactions with RSR through Letters Before Action sent to Meyers and others in England, the plaintiffs commenced this action seeking declaratory judgment on January 17, 2019. The plaintiffs alleged, in part, that the Letters Before Action were part of a campaign by the defendants to harass Meyers and jeopardize resolution of a dispute Meyers had with certain holders of payment-in-kind ("PIK") debt issued by EB Holdings.

The amended complaint, filed on April 8, 2019, asserted four claims against the defendants sounding in (1) declaratory judgment as to whether Eco-Bat's agreements with RSR and its subsidiaries were authorized by Eco-Bat's board of directors, and whether its payments to RSR were valid, as against LEG Q; (2) breach of contract as against LEG Q; (3) tortious interference as against both defendants; and (4) declaratory judgment with respect to whether LEG Q properly executed a transfer certificate evidencing its interest in a debt instrument issued by EB Holdings. The amended answer states a single counterclaim as against Meyers only, seeking relief under New York's recently amended anti-SLAPP statute, (N.Y. Civil Rights Law §§ 70-a, 76-a).

The court's prior orders, collectively, dismissed all claims asserted in the amended complaint. In its order dated September 28, 2021, the court severed LEG Q's counterclaim.[1]

[1] Since the court's December 21, 2020, decision and order dismissed the action in its entirety as against defendant Lawrence Golub, the amended answer and the counterclaim therein, filed on February 1, 2021, are asserted on behalf of LEG Q only.

In the amended answer, LEG Q alleges that Meyers commenced and continued this action "to retaliate against LEG Q for its protected efforts to expose unlawful conduct concerning an essential market." LEG Q explains that in 2012, the European Commission, which is responsible for the enforcement of European Union competition law, investigated Eco-Bat in connection with its belief that Eco-Bat and its competitors had engaged in anti-competitive behavior in the lead-acid battery market, in violation of Article 101 on the Functioning of the European Union. Eco-Bat consequently hired outside counsel to commence an internal investigation, which LEG Q contends was restricted in scope to ensure that Eco-Bat's senior management, including Meyers, could not be implicated in Eco-Bat's unlawful activities. For example, the "independent adviser" who investigated senior Eco-Bat management was hand-picked by Meyers' personal counsel. Further, Meyers resisted turning over his own Eco-Bat-related emails to Eco-Bat's outside counsel.

In July 2013, two of Eco-Bat's minority-shareholder-appointed directors, Timothy Brog ("Brog") and Eran Ashany ("Ashany") attempted to obtain copies of a 2006 email purportedly implicating Meyers and other senior members of Eco-Bat management in the price-fixing conspiracy. Brog was LEG Q's appointee to the Eco-Bat board. When Eco-Bat's counsel refused to produce the 2006 email, Brog and Ashany sued Eco-Bat in the English High Court to obtain its disclosure (the "English High Court petition"). In response, Eco-Bat's board permitted Brog and Ashany to briefly review the 2006 email in person.

Ultimately, on February 8, 2017, the European Commission announced it would fine Eco-Bat over €32 million for its participation in a "cartel to fix the purchase prices of scrap lead-acid automotive batteries in Belgium, France, Germany, and the Netherlands" between 2009 and 2012. In March 2017, LEG Q sent several Eco-Bat directors, including Meyers, a Letter Before

Action indicating that LEG Q intended to prosecute derivative claims on behalf of Eco-Bat in connection with Eco-Bat's anti-competitive activities (the "March 2017 Letter"). The March 2017 Letter referenced the foregoing concerns about the adequacy of Eco-Bat's internal investigation and failure to disclose certain emails to the independent directors. The March 2017 Letter also referenced LEG Q's concerns about the propriety of the relationship and transactions between Eco-Bat and RSR, described more fully in the court's prior orders. In response to the March 2017 Letter, Eco-Bat's board retained outside counsel to investigate LEG Q's allegations.

Believing that any such investigation would be a "sham" due to Meyers' continued domination of Eco-Bat's board of directors, LEG Q commenced proceedings in the United States District Courts for the Northern District of Texas and the Eastern District of Wisconsin, respectively, on June 9 and 12, 2017, seeking pre-action disclosure from several of Meyers' corporate affiliates and from Johnson Controls International, one of the entities involved in the European price-fixing cartel, pursuant to 28 U.S.C. § 1782 (the "U.S. Federal Disclosure Actions"). LEG Q sought all documents concerning Eco-Bat's participation in the cartel, including the 2006 email potentially implicating Meyers. In the U.S. Federal Disclosure Actions, LEG Q averred, *inter alia*, that Meyers had "orchestrated or, at minimum, condoned Eco-Bat's participation in an unlawful cartel to fix the price of scrap automotive batteries in Europe, for which the European Commission fined Eco-Bat over €32 million." LEG Q also accused Meyers of concealing his involvement in the price-fixing scheme and stated that Eco-Bat had a history of anticompetitive conduct under Meyers' leadership. The United States District Court for the Northern District of Texas ultimately granted LEG Q's application and LEG Q obtained the 2006 email.

As explained in greater detail in the court's prior decisions, in July 2017, LEG Q also attempted to intervene in an involuntary chapter 11 petition commenced by certain holder of EB Holdings' PIK debt in the United States Bankruptcy Court for the District of Nevada. LEG Q filed a Limited Statement in Support of the Nevada Bankruptcy Action (the "Limited Statement"), wherein LEG Q again asserted that Meyers had orchestrated, condoned, or failed to prevent Eco-Bat's participation in the price-fixing cartel, thereby depressing the value of EB Holdings' interest in Eco-Bat, which was EB Holdings' sole asset.

LEG Q asserts that the plaintiff brought and continued this action to punish LEG Q for statements made in the English High Court petition, the U.S. Federal Disclosure Actions, and the Limited Statement. It claims that it is entitled to compensatory and punitive damages for having to defend against what it avers is a strategic lawsuit against public participation prohibited by N.Y. Civil Rights Law §§ 70-a, 76-a.

III. LEGAL STANDARD

On a motion to dismiss a counterclaim for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the counterclaim, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

IV. DISCUSSION

On November 10, 2020, New York amended its anti-strategic litigation against public

participation ("anti-SLAPP") law. See A.B. 5991-A. Among other things, the amendments substantially broadened the law's application, joining a number of other states that have adopted expanded anti-SLAPP protections for public speech. The amended law provides, in relevant part, that

> 1. A defendant in an action involving public petition and participation … may maintain an action, claim, cross claim, or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that:
>
> (a) Costs and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to [CPLR 3211(g) or CPLR 3212(h)], that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law;
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> (b) other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights; and
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> (c) punitive damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.

N.Y. Civil Rights Law § 70-a(1). An "action involving public petition and participation" is defined by the law as a claim based upon "any communication in a place open to the public or a public forum in connection with an issue of public interest" or "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest…" N.Y. Civil Rights Law § 76-a(1)(a). "Communication" means "any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression." Id. § 70-a(1)(c). Finally, the law provides that "'[p]ublic interest' shall be

construed broadly, and shall mean any subject other than a purely private matter." Id. § 70-a(1)(d).

Initially, the plaintiffs contend that LEG Q's counterclaim fails because LEG Q has not yet brought a successful motion pursuant to CPLR 3211(g) or CPLR 3212(h), or otherwise obtained a judicial determination that the plaintiffs' lawsuit was an action involving public petition and participation commenced or continued without a substantial basis in fact and law. In other words, the plaintiffs ask the court to impose as a condition precedent to bringing an anti-SLAAP claim a judicial finding that the claim has merit. The court declines to do so.

"When interpreting a statute, it is fundamental that a court 'should attempt to effectuate the intent of the Legislature.'" New York Skyline, Inc. v City of New York, 94 AD3d 23, 26 (1st Dept. 2012) (quoting Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583 [1998] [internal quotation marks omitted]). "'As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.'" People v Golo, 26 NY3d 358, 361 (2015) (quoting Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583 [1998]). When tasked with interpreting and applying a statute, courts "should not … add restrictions or limitations where none exist." Erie Cty. Agric. Soc. v Cluchey, 40 NY2d 194, 200 (1976). Nor, "[w]hen words have a definite and precise meaning," should courts "go elsewhere in search of conjecture so as to restrict or extend that meaning." Id. (citing McCluskey v Cromwell, 11 NY 593, 601 [1854]); see Excellus Health Plan, Inc. v Serio, 2 NY3d 166, 171 (2004) (noting the general rule that the unambiguous language of a statute is alone determinative).

The plain language of the amended anti-SLAAP law permits a defendant such as LEG Q to "maintain … a counterclaim to recover damages" in any "action involving public petition and

participation." The law then lists three sub-clauses providing that recovery pursuant to such a counterclaim is premised upon a "demonstration" that the action was commenced or continued under certain specified circumstances. Contrary to the plaintiffs' contentions, these clauses do not add any prerequisites to the ability of a party to maintain a claim pursuant to N.Y. Civil Rights Law § 70-a(1). They merely condition recovery on the party's ability to make a showing that necessary factors existed. Moreover, the reference in N.Y. Civil Rights Law § 70-a(1)(a) to "an adjudication pursuant to [CPLR 3211(g) or CPLR 3212(h)]" cannot fairly be interpreted as imposing an absolute requirement on a party to obtain such a disposition in order to state an anti-SLAAP claim. The quoted language, introduced by the qualifying word "including," connotes that the demonstration required for recovery under subsection (1)(a) *may* be made by obtaining a judicial disposition pursuant to CPLR 3211(g) or CPLR 3212(h). It does not foreclose the possibility that a party may make the requisite demonstration by other means.

In sum, the condition precedent the plaintiffs seek would require the court to read an artificial restriction into the anti-SLAAP law. Such a restriction is unsupported by the plain and unambiguous language of the law. If the state legislature had wished to make a judicial determination pursuant to CPLR 3211(g) or CPLR 3212(h) a prerequisite to the maintenance of an anti-SLAAP claim at the pleading stage, it would have done so. Since it is not for the court to substitute its own judgment for that of the legislature, the plaintiffs' first challenge to the sufficiency of LEG Q's counterclaim fails.

The plaintiffs next allege that none of the English High Court petition, the U.S. Federal Disclosure Actions, and the Limited Statement constitute "communications" in connection with an issue of public interest within the meaning of the anti-SLAAP law. Again, the plain language of the statute belies the plaintiffs' argument.

The English High Court petition, the U.S. Federal Disclosure Actions, and the Limited Statement constitute "statement[s], claim[s], or allegation[s]" in a public judicial "proceeding." They each aver that Eco-Bat's management, including Meyers as Eco-Bat's majority shareholder, was involved in orchestrating a conspiracy among Eco-Bat and other metals market players to fix the prices of lead-acid batteries, in violation of European law. The underlying price-fixing scheme received public attention and plainly impacted persons other than Meyers and LEG Q. Additionally, while Meyers' alleged involvement in the scheme may not have generated widespread public interest, it certainly could have sparked the attention of members of the metals industry, as well as those involved in other transactions with Meyers, such as the holders of EB Holdings debt. The foregoing is more than sufficient to establish that the public communications identified by LEG Q were made in connection with "any subject other than a purely private matter," as is required under the anti-SLAAP law. The court's conclusion in this regard is bolstered by the law's directive that "public interest" be "construed broadly." Thus, the plaintiffs' second challenge to LEG Q's counterclaim fails.

Lastly, the plaintiffs assert that LEG Q's counterclaim does not adequately allege that the instant action is "based upon" LEG Q's statements in the English High Court petition, the U.S. Federal Disclosure Actions, and the Limited Statement. On this point, the plaintiffs are correct. As discussed above, the plaintiffs initiated this action to obtain a declaration as to the propriety of the relationship and transactions between Eco-Bat and RSR. The plaintiffs eventually amended their complaint to seek relief arising from, *inter alia*, their allegations that LEG Q interfered with Meyers' restructuring negotiations with the PIK noteholders (the "PIK Noteholders") by revealing unspecified information about Eco-Bat. The plaintiffs made no allegations related to the English High Court petition and the U.S. Federal Disclosure Actions.

The Limited Statement was relevant only insofar as it reflected the starting point for LEG Q's efforts to become directly involved in the PIK Noteholders dispute. On its face, this action is not based on any of LEG Q's protected communications.

Nor does the timing of this action support an inference that it was commenced or continued in response to LEG Q's statements in the English High Court petition, the U.S. Federal Disclosure Actions, or the Limited Statement. At the time of the amendment of the complaint to include matters other than the propriety of the Eco-Bat-RSR relationship, almost two years had passed since the latest of LEG Q's alleged communications in connection with a matter of public interest. Approximately six years had passed since the first such alleged communication.

The lack of an explicit connection between the plaintiffs' pleadings and LEG Q's communications is relevant, but not necessarily dispositive to LEG Q's counterclaim. Nonetheless, LEG Q offers no non-speculative allegation tending to support an inference that the plaintiffs commenced or continued this action, however ill-advised such continuation might have been upon the resolution of the PIK Noteholders dispute, with a prohibited retaliatory motive. While discovery may shed light on allegations made at the inception of an action, the mere possibility that the facts sufficient to state a claim will be disclosed at some future time does not excuse a party from its pleading requirements. Moreover, the court notes that while discovery has been ongoing in this matter for the past year, LEG Q has not offered any additional facts to support its counterclaim. Nor has LEG Q attempted to supplement its opposition to the plaintiffs' motion to dismiss with facts garnered through the discovery process.

For the foregoing reasons, LEG Q's counterclaim is dismissed. Since the defects identified by the court may be cured, dismissal is without prejudice.

The branch of the plaintiffs' motion seeking sanctions against LEG Q pursuant to 22 NYCRR § 130-1.1 is denied upon the plaintiff's failure to establish entitlement to that relief.

V. CONCLUSION

Accordingly, it is

ORDERED that the plaintiffs' motion pursuant to CPLR 3211(a)(7) to dismiss the counterclaim of the defendant LEG Q, LLC, and pursuant to 22 NYCRR § 130-1.1 for sanctions against LEG Q, LLC, is granted to the extent that the counterclaim asserted in the amended answer of LEG Q, LLC, is dismissed without prejudice, and the plaintiffs' motion is otherwise denied; and it is further

ORDERED that, the counterclaim of LEG Q, LLC, having been the only surviving claim in this action, the Clerk shall mark the action disposed.

This constitutes the Decision and Order of the court.

DATED: October 1, 2021

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON