SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

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AEGIS SMB FUND II, LP

Plaintiff,

- v -

SHIMON A. ROSENFELD,

Defendant.

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INDEX NO. 452123/2018

MOTION DATE 01/17/2023

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 144, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205

were read on this motion to/for AMEND CAPTION/PLEADINGS.

I. BACKGROUND

In this action to recover on a personal guaranty on a $400,000.00 promissory note, discovery is concluded and the plaintiff filed a Note of Issue on November 30, 2022. Pursuant to an order of this court, the plaintiff, on September 22, 2022, deposed the defendant, an attorney who was then in the custody of the Federal Bureau of Prisons, having pleaded guilty to a felony charge of wire fraud on May 20, 2021. In the final discovery conference order, dated November 17, 2022, the court stated that defendant had still not provided all court-ordered discovery, and directed him to do so by November 23, 2022. In the Certificate of Readiness, filed one week after that, the plaintiff represents that “discovery proceedings now known to be necessary completed” and “there are no outstanding requests for discovery.”

Just prior to filing the Note of Issue, the plaintiff filed the instant motion pursuant to CPLR 3025(b) seeking leave to serve an amended complaint to add causes of action for fraud and fiduciary duty and to demand punitive damages and attorney’s fees. The defendant opposes the motion and cross-moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff opposes the cross-motion. The motion is granted and the cross-motion is denied without prejudice.

I. DISCUSSION

A. Motion to Amend

It is well settled that leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit. See CPLR 3025(b); JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013). The burden is on the party opposing the motion to establish substantial prejudice or surprise if leave to amend is granted. See Forty Cent. Park S., Inc. v Anza, 130 AD3d 491 (1st Dept. 2015). The plaintiff has met its burden. While the plaintiff may not ultimately succeed on these causes of action, it cannot be said that they are palpably insufficient or patently devoid of merit and the defendant has not demonstrated any surprise or prejudice in allowing the amendments.

The original complaint filed by the plaintiff included only two causes of action – breach of contract and unjust enrichment. The plaintiff asserts that it was unaware of the defendant's criminal proceedings until May 2022, and that the proceedings, and conviction, support the two proposed causes of action in that in those proceedings the defendant admitted to engaging in a fraudulent scheme to defraud investors or potential investors between 2014 and 2018. At his plea allocution, the defendant stated that he convinced five unidentified investors to invest money with him by telling them that he would use their money for real estate investments and he instead invested in the stock and commodities markets due to a gambling problem. He admitted that he deceived the investors and knew what he did was wrong. The plaintiff alleges that the defendant defrauded it in the same way, and that it had made the loan and thereafter extended the maturity date on the note based on the defendant's false promises to pay. The plaintiff further avers that the defendant acted as the plaintiff's attorney at times, as well as for related entities of the plaintiff, thereby creating a fiduciary relationship, supporting the cause of action for breach of fiduciary duty.

Contrary to the defendant's contention, that the plaintiff did not seek to amend the complaint until just before it filed the Note of Issue, while not the best practice, is not fatal to the motion. CPLR 3025(b) provides that a party may seek leave to amend a pleading "at any time." Indeed, the "fact that a motion to amend is made *after* a Note of Issue does not of necessity call for its denial." Jacobson v Croman, 107 AD3d 644, 645 (1st Dept. 2013).

The plaintiff correctly argues that the proposed causes of action concern issues raised by the defendant's core defense in this action – that any cause of action premised on the promissory note is time-barred because the maturity date was in 2009 and not extended. Indeed, the facts upon which the proposed causes of action are based, the defendant's pattern of criminal activity and his conviction, were exclusively within the defendant's knowledge well before the plaintiff's became aware of them, and he was recalcitrant in providing that information and in provided any other discovery. The defendant fails to substantiate his assertion that his criminal charges and conviction were "public knowledge" for over a year before the plaintiff's motion to amend was made. Contrary to the defendant's further argument, the amendments will not delay the litigation further since discovery is concluded.

Moreover, the cause of action for fraud is not devoid of merit or palpably insufficient as the plaintiff has alleged that the defendant made a "misrepresentation or a material omission of fact which was false and known to be false by the [defendant], made for the purpose of inducing the [plaintiff] to rely upon it, justifiable reliance of the [defendants] on the misrepresentation or material omission, and injury." Lama Holding Co. v Smith Barney Inc., 88 NY2d 413 (1996) (citations omitted). The plaintiff also alleges "a breach of a duty separate from or in addition to the contractual duty." Wyle Inc. v ITT Corp., supra (citing J.E. Morgan Knitting Mills v Reeves Bros., 243 AD2d 422 [1st Dept 1997]).

To state a cause of action for breach of fiduciary duty, the plaintiff must allege (1) the existence of a fiduciary relationship, (2) misconduct by the defendants, and (3) damages directly caused by the defendants' misconduct. See Pokoik v Pokoik, 115 AD3d 428, 429 (1st Dept. 2014). "Breach of fiduciary duty is a tort that arises from a violation of a relationship of trust and confidence, such as that of an agent to his principal or a lawyer to his client. Rich v New York C. & H.R.R. Co., 87 N.Y. 382, 390 [1982])." Viole v Tewell, 12 Misc 3d 973, 978 (Sup Ct, NY County 2006 [Kornreich, J.]). The plaintiff makes those allegations. The misconduct and damages are disputed by the defendant but he does deny that he acted as the plaintiff's attorney and had a fiduciary relationship. To the extent that the defendant argues that this cause of action is duplicative of the breach of contract claim, it is without merit. The Court of Appeals has recognized that "a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract." North Shore Bottling Co. v Schmidt & Sons, 22 NY2d 171 (1968); see also Sommer v Federal Signal Corp., 79 NY2d 540 (1992).

As to the proposed demand for punitive damages, such damages "are not recoverable for an ordinary breach of contract." Rocanova v Equitable Life Assur. Soc. Of U.S., 83 NY2d 603, 613 (1994). However, breach of contract is not the only cause of action asserted. Should the plaintiff succeed on its fraud claim or breach of fiduciary duty claim, punitive damages may be applicable given the magnitude of the defendant's admitted pattern of fraud. It is well settled that punitive damages may be awarded "where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, and others who might otherwise be so prompted, from indulging in similar conduct in the future." Walker v Sheldon, 10 NY2d 401, 404 (1961); see Marinaccio v Town of Clarence, 20 NY3d 506 (2013).

Finally, the demand for contractual attorney's fees is permissible as the subject guaranty agreement signed by the defendant expressly provides that he was obligated "to pay any and all expenses (including reasonable counsel fees and expenses) incurred by lender in enforcing its rights under this guaranty." Indeed, the defendant makes no argument that this proposed amendment is improper.

B. Cross-Motion for Summary Judgment

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851 (1985); O'Halloran v City of New York, supra. This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. V Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970). There is doubt here.

The gravamen of the defendant's cross-motion for summary judgment is that the causes of action for breach of contract and unjust enrichment are time-barred. That is, he argues that since the initial maturity date of the loan was December 31, 2009, the six-year Statute of Limitations applicable to contract actions expired on December 31, 2015, and denies that any extensions from that date were granted. As to the merits, the defendant does not deny executing the guaranty but avers only that he repaid some of the debt. However, he has never substantiated that claim.

In opposition to the cross-motion, the plaintiff argues that it violates the rule against successive summary judgment motions since the defendant previously moved for that relief in June 2019 (MOT SEQ 001). Indeed, "'[s]uccessive motions for summary judgment should not be entertained without a showing of newly discovery evidence or other justification.' Jones v 636 Holding Corp., 73 AD3d at 409 (1st Dept. 2010); see Landis v 383 Realty Corp., 175 AD2d 1207 (1st Dept. 2019). The defendant responds that since that motion was made in 2019, this motion, made in 2022, cannot be considered "successive." Yes, it can. Only one summary judgment motion is permitted, and the mere passage of time does not allow for a second motion. In any event, there was no prior motion here. The defendant had moved by Order to Show Cause in June 2017 to vacate an order which struck his answer for failure to appear and for summary judgment in his favor. The court, in the signed Order to Show Cause, deleted the additional request for summary judgment as procedurally improper since there was no operative answer at that point. Summary judgment was thus not litigated on that motion.

Even absent an amended complaint, the defendant failed to establish entitlement to summary judgment on his Statute of Limitations defense or any defense in the papers submitted. He submits no affidavit of his own and, to the extent he relies upon his sworn deposition testimony, that falls far short of meeting his burden on the cross-motion as the transcript reveals that he frequently responded to the plaintiff's questions by saying that he did not recall. Furthermore, the two affidavits of the plaintiff's president, Todd Roberts, submitted in opposition, raises a triable issue of fact in that it supports the plaintiff's contention that the maturity date of the loan was extended several times between 2009 and 2017 at the defendant's request and upon his personal promises of repayment, making this action, commenced in 2018, timely.

III. CONCLUSION

Accordingly, upon the foregoing papers, it is

ORDERED that the plaintiff's motion for leave to amend the complaint pursuant to CPLR 3025(b) is granted, and it is further

ORDERED that the amended complaint in the proposed form annexed to the moving papers shall be deemed served on the defendant upon service of a copy of this order with notice of entry; and it is further

ORDERED that the defendant may file an amended answer within 30 days of service of the amended complaint, and it is further

ORDERED that the defendant's cross-motion for summary judgment pursuant to CPLR 3212 is denied without prejudice, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

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

2/14/2023
DATE

CHECK ONE:							
		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER