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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DAWN MECCA, INDIVIDULALY and AS A SHAREHOLDER OF PAYBACK REPO, INC., D/B/A PRI AND PAYBACK REPO INC., and AS A SHAREHOLDER OF RISK MANAGEMENT and LOSS MITIGATION SERVICES INC, and RISK MANAGEMENT AND LOSS MITIGATION SERVICES, INC.,

Plaintiffs,

-against-

SCOTT LENNON, INDIVIDUALLY and AS PRESIDENT OF PAYBACK REPO, INC., D/B/A PRI AND PAYBACK REPO INC, AND AS PRESIDENT OF RISK MANAGEMENT and LOSS MITIGATION SERVICE, INC., and RISK MANAGEMENT AND LOSS MITIGATION SERVICES, INC.

Defendants.

Case No.: 2: 16-cv-01414-LDW-ARL

REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT[1]

Plaintiff Mecca's Complaint is exactly the type of defective, conclusory pleading that civil procedure rules intend to weed out in the early stages of litigation. The Complaint is riddled with procedural defects under both FRCP 12(b)(5) and CPLR 3012(b) for failure to timely serve prior to removal, as well as under BCL § 626 for failure to plead demand futility. Substantively as well, the Complaint is inadequate. There is not one claim sufficiently stated within the four corners of the Complaint, under any possible legal theory. There is a very strong basis for Defendants' Motion to Dismiss ("the Motion") pursuant to FRCP 12(b)(5) for failure to timely serve the Complaint prior to removal and FRCP 12(b)(6) for failure to state a claim. Plaintiff had the opportunity to amend her Complaint in response to Defendants' Motion, but failed to do so, likely because the facts are not on her side. Instead, Plaintiff submitted an Opposition Memorandum that, like Plaintiff's Complaint, contains bare conclusory statements which fail to address the necessary legal issues. Respectfully, this frivolous Complaint must be dismissed, with prejudice.

ARGUMENT

I. DEFENDANTS' MOTION IS TIMELY.

Defendants' Motion is timely pursuant to the Federal Rules, New York law, and Your Honor's Individual Rule 2(B). Pursuant to Your Honor's Individual Rule 2(B), a Motion is timely if the letter request for a pre-motion conference is timely filed in

[1] All terms are as defined in Defendants' Motion to Dismiss (the "Motion"), unless otherwise noted.

accordance with the Federal Rules of Civil Procedure. FRCP 81(c) specifically governs "civil actions which have been removed to federal court," and requires, in relevant part, a defendant who did not serve an answer prior to removal, to serve an answer by the longer of "21 days after receiving . . . a copy of the initial pleading . . . or 7 days after the notice of removal is filed." FRCP 81(c). FRCP 12(b) makes clear that a motion to dismiss, such as this Motion, must be made before a defendant's answer. FRCP 12(b). In regard to timely service, the Second Circuit has held that when an extension is granted under the Federal Rules, service must be made on the plaintiff within the time period under the extension. *Schachter v. Terte*, No. 89 CIV. 2009, 1989 WL 119436, at *1 (E.D.N.Y. Oct. 3, 1989), *aff'd,* 907 F.2d 144 (2d Cir. 1990). In New York, a stipulation extending defendant's time to answer a complaint also extends defendant's time to move against the complaint. *Tatar v. Port Auth. of New York & New Jersey*, 291 A.D.2d 554, 555 (1st Dep't. 2002); *Rich v. Lefkovits,* 56 N.Y.2d 276, 279–280 (Ct. App. 1982); *Santos v. Chappell,* 313 N.Y.S.2d 320, 320 (Sup. Ct. Nassau County, 1970). Defendants' Motion is timely because, as explained below, Defendants filed their pre-motion conference request letter with this Court within the time period under the extension stipulated by counsel.

On March 21, 2016, prior to removal to this Court, counsel for Defendants Lennon and Payback filed a stipulation, signed by undersigned counsel and Plaintiff's counsel, with Nassau County Supreme Court. This stipulation extended Defendants' time to answer the Complaint until April 6, 2016. (*See Mecca et al. v. Lennon et. al.*, Nassau County, Index No. 605687/2015, Dkt. No. 7, "the Stipulation," attached to Second Decl. of Christine A. Rodriguez, dated June 27 ("2d Rodriguez Decl."), Ex. H.)

Defendants informed the Court of this Stipulation on April 6, 2016 in their letter requesting a pre-motion conference regarding this Motion. (Letter dated Apr. 6, Dkt. No. 4, "[T]his request is made in lieu of Defendants' answer, which is due today, April 6, 2016 pursuant to a stipulation between Plaintiff and Defendants extending Defendants' time to answer up to and including April 6.") Plaintiff did not oppose Defendants' pre-motion conference request. The Parties then stipulated to a motion schedule, which the Court approved on May 4, and with which the Parties have complied. (Stipulated Order dated Apr. 27, Dkt. No. 5.) Defendants' Motion is timely.

II. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED PURSUANT TO FRCP 12(B)(5) FOR INSUFFICIENT SERVICE.

A. Plaintiff Concedes that CPLR 3012(b) Governs Sufficiency of Service Completed Prior to Removal and that Her Complaint was Served Months Past the Deadline.

In her Opposition, Plaintiff concedes that CPLR 3012(b) applies to the sufficiency of service of her Complaint since service was completed in Nassau County Supreme Court, prior to removal to this Court. (Opp. at 5.) Defendants agree, and briefed this issue in their Memorandum of Law in Support of their Motion. (Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint "Memo in Support of Defendants' Motion" at 6-11.) Defendants' Motion should be granted.

Plaintiff also concedes that she served the Complaint in violation of the twenty day deadline set by CPLR 3012(b). (Decl. of Charles J. Casolaro ¶ 3, "Defendants' counsel correctly alleges that a delay of nearly 5 months elapsed [after Defendants' served their Demand for a complaint] . . . until plaintiff filed and served the Complaint

on March 4.") Defendants agree, and the record reflects this to be correct. (*See Mecca et al. v. Lennon et. al.*, Nassau County, Index No. 605687/2015, Dkt. Nos. 1, 3, 4, 6, attached to 2d Rodriguez Decl., Ex. I.) Defendants have grounds for dismissal of Plaintiff's untimely Complaint pursuant to CPLR 3012(b) and their Motion to dismiss should be granted.

B. Plaintiff Can No Longer Rely on CPLR 2004 to Ask for an Extension of Time to Serve Her Complaint After Removal and Even if Plaintiff Could, that Motion Would Nonetheless Fail.

Plaintiff did not make a motion to Nassau County Supreme Court for an extension of time to serve under CPLR 2004, and now that this case has been removed, she cannot rely on CPLR 2004 for relief *nunc pro tunc*. It is well settled in this District that after an action is removed from state court, the case will proceed as if it had been brought in federal court originally, such that removed cases will be governed according to the Federal Rules of Civil Procedure and all other provisions of federal law relating to procedural matters. *See e.g., G.G.G. Pizza, Inc. v. Domino's Pizza, Inc.*, 67 F. Supp. 2d 99, 102 (E.D.N.Y. 1999) (referencing 14C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 3738, at 390–91 (1998)). Plaintiff argues in her Opposition that because she eventually served a verified Complaint, albeit five months past the twenty day deadline, she is now entitled, under the holding in *A & J Concrete Corp. v. Arker,* 54 N.Y. 2d 870 (Ct. App. 1981) to ask this court for a *nunc pro tunc* extension of time under CPLR 2004. Plaintiff is wrong. Despite Plaintiff's filing of a conclusory, though verified, Complaint in Nassau County Supreme Court, Plaintiff never properly made motion under CPLR 2004, nor has she properly cross moved now.

Had Plaintiff made such a motion, she would've had the burden of establishing good cause for the delay and also that Defendants would not be prejudiced by the extension. To ask for an extension of time *nunc pro tunc* under CPLR 2004, Plaintiff would have to have done so prior to removal, promptly after or concurrent with, serving the verified Complaint in September, which was five months past deadline. Now, after removal, this issue is moot since the CPLR no longer applies. Plaintiff's improper purported cross motion under CPLR 2004 should be denied.

Even if Plaintiff properly moved for an extension of time under CPLR 2004, her motion would fail because Defendants have already moved to dismiss and would now be prejudiced by a *nunc pro tunc* extension of time. CPLR 2004 provides in relevant part that ". . . the court may extend the time fixed by any statute, rule, or order for doing any act, upon such terms as may be just and upon *good cause shown*, whether the application for extension is made before or after the expiration of the time fixed." CPLR 2004. It is well settled in New York that state courts enjoy a somewhat broader range of discretion when considering a motion for an extension of time under CPLR 2004 *which precedes any motion to dismiss* than when considering a motion to dismiss pursuant to CPLR 3012, whether or not countered by a motion for extension of time. *Sostre v. New York City Transit Auth.* 91 A.D.2d 560, 560-61 (1st Dep't., 1982) (denying plaintiff's CPLR 2004 motion where defendant already moved for dismissal.); (emphasis added) (citations omitted). Plaintiff's reliance on *A & J Concrete* in her Opposition is misplaced. The First Department in *Sostre* correctly limited the ruling in *A&J Concrete* to CPLR 2004 motions brought *before a motion to dismiss has been made*, reasoning that once a Defendant brings a

motion to dismiss under CPLR 3012, the Defendant would be prejudiced by a *nunc pro tunc* extension of time to serve. 91 A.D.2d at 560-61. Here, like in *Sostre*, Plaintiff's motion comes as a counter to Defendants' motion to dismiss, and would thus prejudice Defendants, if granted. Plaintiff's late request under CPLR 2004 should be denied.

Plaintiff also failed to demonstrate good cause under CPLR 2004, as required by the Rule. In New York, it is well settled that attorney error alone is insufficient to sustain a finding of good cause under CPLR 2004 as a counter to a motion to dismiss. *See Sostre* 91 A.D.2d at 560-61 (denying CPLR 2004 motion as a counter to a motion to dismiss where plaintiff failed to provide any good cause for delay, except attorney error.) Plaintiff provides no good cause for the delay except the excuse that counsel did not have adequate information to file a complaint within twenty days after filing the summons. (Decl. of Charles J. Casolaro ¶¶ 4-6.) If Plaintiff's counsel did not have enough information to file a Complaint within twenty days of serving the Summons, or at least shortly thereafter, then Plaintiff should have waited to initiate this action. There was no factor which compelled Plaintiff or her counsel to serve the Summons before counsel was able to get enough information to draft a complaint within the deadline. Also, once the deadline passed, Plaintiff's counsel did not ask Defendants' counsel to stipulate to an extension of time to serve the Complaint, despite Defendants' counsel's inquiries to Plaintiff's counsel, after the deadline. (*See* "Emails," attached to First Decl. of Christine A. Rodriguez, dated May 5, Ex. D.) This was a gross oversight and miscalculation on Plaintiff's part, and her counsel's part, and cannot substantiate a finding of good cause. Plaintiff's request for a *nunc pro tunc* extension of time should be

denied.

III. PLAINTIFF FAILS TO STATE A CLAIM UNDER FRCP 12(B)(6)[2].

A. Plaintiff's Complaint Fails to State a Valid Claim for Each Cause of Action Pleaded, Directly and Derivatively, and Plaintiff Has Not Offered Any Further Legal or Factual Basis to Support Her Claims.

Plaintiff's Complaint fails to state a claim for breach of contract. Plaintiff has still not pointed to the existence of a valid contract between Plaintiff and Defendants. Instead, Plaintiff merely recites the requirements for the formation of a contract, without applying the facts. (Opp. at 11.) Even under the most liberal pleading standard, with all facts taken in the light most favorable to Plaintiff Mecca, she fails to make out a claim for breach of contract. Plaintiff does not provide sufficient facts to show that a contract was formed or what the terms of the contract were, let alone that Defendants breached any terms of this alleged contract. Plaintiff's Complaint should be dismissed.

Plaintiff's Complaint fails to state a direct claim for conversion of Plaintiff's property. To withstand a motion to dismiss on a conversion claim in New York, a plaintiff must allege: (1) the property subject to conversion is a specific identifiable thing; (2) plaintiff had ownership, possession or control over the property *before its conversion*; and (3) defendant exercised an *unauthorized* dominion over the thing in

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[2] In her Opposition, Plaintiff defends the allegations in her Complaint under the CPLR, though the Federal Rules of Civil Procedure correctly apply now that this case has been removed. *See* FRCP 81(c); *also see G.G.G. Pizza,* 67 F. Supp. 2d at 102. As a practical matter, the pleading standards under the CPLR and FRCP are substantially similar so Defendants will respond to Plaintiff's arguments as if they were made under the Federal Rules, notwithstanding Plaintiff's error. *See Siegel, N.Y. Prac*. § 631 (5th ed.)("The basic New York pleading requirement contained in CPLR 3013 has its counterpart in Rule 8(a) of the Federal Rules of Civil Procedure . . .")

question, to the alteration of its condition or to the exclusion of the plaintiff's rights. *See e.g., DeAngelis v. Corzine*, 17 F. Supp. 3d 270, 282 (S.D.N.Y. 2014) (emphasis added). When money is the property alleged to be subject to conversion, the plaintiff must specifically identify the funds which were converted. *See, e.g., Fundacion Museo de Arte Contemporaneo de Caracas-Sofia Imber v. CBI-TBD Union Bancaire Privee*, 160 F. 3d 146, 148 (2d Cir. 1998) (funds deposited in general bank account insufficiently identifiable in relation to bank's other funds to support claim for conversion). Plaintiff does not make out any of the elements of conversion. By Plaintiff's own admission, she did not have possession of the funds prior to the alleged conversion by Defendant Lennon. (Opp. at 11, "[the complaint sets forth that] . . . defendant, Scott Lennon, diverted money that was *owed to the corporation,* more specifically to plaintiff, for himself.") (emphasis added.) If the funds alleged to be converted were owed to the corporation, Plaintiff did not possess those funds prior to the alleged conversion. Plus, if those funds belong to the corporation, Plaintiff has no right to directly recover those funds herself. Plaintiff also did not specifically identify the funds which were converted, and failed to show that Lennon, the majority shareholder, was acting outside of his authority in allegedly exercising control of those corporate funds. Plaintiff has failed to state a claim for conversion of her personal property.

B. Plaintiff's Opposition Makes Clear that the Complaint Confuses Direct and Derivative Claims in the Closely Held Defendant Corporation Payback and the Complaint Must be Dismissed.

The fact that Defendant Corporation Payback is a closely held corporation does not give Plaintiff standing to bring direct claims, since the harm she alleges was

suffered by the corporation. It well settled in New York that "even where the corporation is closely held, and the defendants might share in the award, the claims belong to the corporation, and damages are awarded to the corporation rather than directly to the derivative plaintiff." *Wolf v. Rand*, 258 A.D.2d 401, 403 (1st Dep't. 1999). Plaintiff argues incorrectly that because Defendant Corporation Payback only has two shareholders, herself and Defendant Lennon, and the Complaint alleges misappropriation of corporate funds by Lennon, that Mecca as the second shareholder, has a direct claim against Lennon for conversion. (Opp. at 9-11.) It is irrelevant that the Complaint alleges that Lennon and Mecca are the only two shareholders. A derivative action is still required when the harm is suffered by the corporation, even when the corporation is closely held. Any harm suffered to Mecca by the alleged conversion of corporate funds is a consequence of her alleged relationship to the corporation, as a shareholder. The Complaint must be dismissed for lack of standing.

C. Any Attempt to Amend the Complaint Would be Futile.

Any attempt at amending the Complaint would be futile. It is within the Court's discretion to consider whether an amendment to a complaint should be allowed after a responsive pleading is filed. Leave to amend should be denied where there is "undue delay, bad faith, dilatory motives or undue prejudice to the opposing party" or where such amendment would be futile. FRCP 15(a); *see also Foman v. Davis* 371 U.S. 178, 182 (1962); *Orthocraft, Inc. v. Sprint Spectrum L.P.,* No. 98 CV 5007 (SJ), 2002 WL 31640477, at *1 (E.D.N.Y. Nov. 16, 2002); *Ruffolo v. Oppenheimer & Co.,* 987 F.2d 129, 131 (2d Cir.1993) (upholding denial of leave to amend, where amendment was unlikely to be productive).

Plaintiff's Complaint, which was filed five months past the deadline, substantively fails to state any valid claims, confuses direct and derivative claims (which warrants dismissal on its own (*see* Memo in Support of Defendants' Motion, at 11-17)) and is procedurally defective on multiple grounds. In response to Defendants' Motion, Plaintiff filed a conclusory Opposition that makes flimsy legal arguments in defense of the defective Complaint. Significantly, this Opposition was submitted instead of an amended complaint to meet the pleading standards. Clearly Plaintiff cannot meet the pleading standards, and any attempt to amend the complaint would be futile and waste court resources.

CONCLUSION

For the forgoing reasons, Plaintiff's Complaint should be dismissed with prejudice.

Dated: June 27, 2016
New York, New York

Respectfully submitted,

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