Worbes Corp. v Sebrow
2022 NY Slip Op 34003(U)
November 22, 2022
Supreme Court, Bronx County
Docket Number: Index No. 800583/22E
Judge: Fidel E. Gomez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
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WORBES CORPORATION and ZVI SEBROW,

Index No. **800583/22E**

Plaintiff(s),

Hon. **FIDEL E. GOMEZ**
Justice

- against -

BETTY SEBROW AND BETTY SEBROW AS ADMINISTRATOR OF THE ESTATE OF DAVID SEBROW,

Defendant(s).
----------x

The following papers numbered 1 to 6, Read on this motion noticed on 9/7/22, and duly submitted as no. 3 on the Motion Calendar of 11/21/22.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits	6	
Notice of Cross-Motion - Affidavits and Exhibits	2	
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law	3-5	

Plaintiffs' motion and defendants' cross-motion are decided in accordance with the Decision and Order annexed hereto.

Dated: 11/22/2022

_____

Hon. _____
FIDEL E. GOMEZ, AJSC

1.CHECK ONE ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION/CROSS-MOTION IS ☐ GRANTED
X DENIED (Motion)

3. CHECK IF APPROPRIATE. X GRANTED IN PART (Cross-motion)
☐ OTHER
☐ SETTLE ORDER
☐ SUBMIT ORDER
☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT
☐ REFEREE APPOINTMENT
☐ NEXT APPEARANCE DATE: January 30, 2023 @ 10am

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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WORBES CORPORATION AND ZVI SEBROW,

Plaintiff(s),

- against -

BETTY SEBROW AND BETTY SEBROW AS ADMINISTRATOR OF THE ESTATE OF DAVID SEBROW,

Defendant(s).

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DECISION AND ORDER

Index No: 800583/22E

In this action for, *inter alia*, declaratory judgment, plaintiffs move seeking an order pursuant to CPLR § 3212, granting them summary judgment, thereby allowing them to access certain funds being held by the Court after a sale of real property[1]. Saliently, plaintiffs contend that the Court's (Rosado, J.) Decision and Order, dated October, 8 2020, which dismissed a prior related action, and which was affirmed on appeal, requires summary judgment in this action on grounds of res judicata and/or collateral estoppel. Defendants oppose the instant motion, asserting, *inter* alia, that because there has been absolutely no exchange of any discovery, the instant motion is premature and

[1] On April 8, 2022, this Court granted plaintiffs' motion seeking an preliminary injunction, granted a mandatory preliminary injunction and authorized the sale of 815. 815 was sold and the funds were deposited with the Court on June 8, 2022.

should be denied pursuant to CPLR § 3212(f). Defendants also cross-move seeking an order pursuant to CPLR § 3212, granting them summary judgment on grounds that despite the restriction in the relevant shareholder's agreement, defendant BETTY SEBROW AS ADMINISTRATOR OF THE ESTATE OF DAVID SEBROW (estate), owns 50 percent of the shares in plaintiff WORBES CORPORATION, such that summary judgment is warranted in defendants' favor. Defendants also move seeking an order pursuant to CPLR § 3025, granting leave to amend their answer to, *inter alia*, interpose counterclaims. Plaintiffs oppose the defendants' cross-motion, reiterating that they are entitled to summary judgment and that as such, the cross-motion should be denied.

For the reasons that follow hereinafter, the motion is denied and the cross-motion is granted in part.

The instant action is for declaratory judgment, tortious interference with prospective business relations, abuse of process, malicious prosecution, and breach of fiduciary duty. The complaint alleges that plaintiff ZVI SEBROW (ZS) owns 50 percent of the shares in Worbes, a corporation, whose sole asset is real property located at 815 East 135 Street, Bronx, NY (815), and whose exclusive business is to own, hold, and operate 815. Worbes is governed by a Stockholder's Agreement (the agreement), dated January 2, 1997. When the agreement was executed, the shares in Worbes were equally owned by Abraham Sebrow (AS), Joseph Sebrow

(JS), ZS, and David Sebrow (DS), who each held 25 percent of the shares. Pursuant to the agreement, absent a testamentary disposition, the transfer of any of the shares in Worbes is prohibited unless agreed upon by all other stockholders. Upon AS' death in 2000, per AS' previous testamentary disposition, ZS became owner of 50 percent of the shares in Worbes. Similarly, upon JS' death, per JS' previous testamentary disposition, DS became 50 percent owner of the shares in Worbes. In 2017, DS, who was by then married to BS, died and his shares in Worbes reverted back to Worbes. Moreover, in 2018, ZS determined that Worbes could no longer operate profitably and seeking to wind up its affairs, arranged for the sale of 815. Because Worbes lacked the funds to pay taxes for 815, ZS personally paid at least $437,138.78 to prevent a tax lien foreclosure. In 2019, defendant BETTY SEBROW (BS) filed an action seeking a declaration that upon DS' death she and DS' estate became owners of 50 percent of the shares in Worbes. The foregoing action was dismissed, BS filed an appeal, moved to reargue the court's decision, and on appeal and the motion are still pending[2]. Because defendants' actions have clouded 815's title, attempts to procure defendants' consent to sell 815 have proved fruitless and defendants continue to interfere with plaintiffs' efforts to sell 815. In 2021, a tax lien foreclosure

[2] The Court's Decision and Order has been affirmed and reargument of the Court's Decision and Order has been denied.

action was initiated against Worbes and BS and is currently pending. ZS currently lacks the funds to pay the taxes due at 815, which continue to accrue interest. On January 5, 2022, ZS entered into a contract on behalf of Worbes to sell 815 to Maujer, LLC (Maujer) for $5,500,000. The foregoing contract discloses the existence of this action and the prior action, which, if decided against plaintiffs, would impact plaintiffs' ability to consummate the transaction[3].

MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs' motion and defendants' cross-motion for summary judgment are denied insofar as they are both premature as a matter of law. Significantly, it is undisputed that the parties have not engaged in any discovery and have never appeared for a Preliminary Conference.

Pursuant to CPLR § 3212(f), a motion for summary judgment will be denied if it appears that facts necessary to oppose the motion exist but are unavailable to the opposing party. Denial is particularly warranted when the facts necessary to oppose the motion are within the exclusive knowledge of the moving party (*Franklin National Bank of Long Island v De Giacomo*, 20 AD2d 797, 297 [2d Dept 1964]; *De France v Oestrike*, 8 AD2d 735, 735-736 [2d Dept 1959]; *Blue Bird Coach Lines, Inc. v 107 Delaware Avenue,*

[3] As already noted, this Court authorized the sale of 815 and said sale already occurred.

N.V., Inc, 125 AD2d 971, 971 [4th Dept 1986]). However, when the information necessary to oppose the instant motion is wholly within the control of the party opposing summary judgment and could be produced via sworn affidavits, denial of a motion for summary judgment pursuant to CPLR § 3212(f) will be denied (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999).

A party claiming ignorance of facts critical to defeat a motion for summary judgment is only entitled to further discovery and denial of a motion for summary judgment if he or she demonstrates that reasonable attempts were made to discover facts which, as the opposing party claims, would give rise to a triable issue of fact (*Sasson v Setina Manufacturing Company, Inc.*, 26 AD3d 487, 488 [2d Dept 2006]; *Cruz v Otis Elevator Company*, 238 AD2d 540, 540 [2d Dept 1997]). Implicit in this rationale is that the proponent of further discovery must identify facts, which would give rise to triable issues of fact. This is because a court cannot condone fishing expeditions and as such, "[m]ere hope and speculation that additional discovery might uncover evidence sufficient to raise a triable issue of fact is not sufficient" (*Sasson* at 501). Thus, additional discovery should not be ordered, where the proponent of the additional discovery has failed to demonstrate that the discovery sought would produce relevant evidence (*Frith v Affordable Homes of America, Inc.*, 253 AD2d 536, 537 [2d Dept 1998]).

Notwithstanding the foregoing, CPLR § 3212(f) mandates denial of a motion for summary judgment when a motion for summary judgment is patently premature, meaning when it is made prior to the preliminary conference, if no discovery has been exchanged (*Gao v City of New York*, 29 AD3d 449, 449 [1st Dept 2006]; *Bradley v Ibex Construction, LLC*, 22 AD3d 380, 380-381 [1st Dept 2005]; *McGlynn v. Palace Co.*, 262 AD2d 116, 117 [1st Dept 1999]). Under these circumstances, the proponent seeking denial of a motion as premature need not demonstrate what discovery is sought, that the same will lead to discovery of triable issues of fact or the efforts to obtain the same have been undertaken (*id.*). In *Bradley*, the court denied plaintiff's motion for summary judgment as premature, when the same was made prior to the preliminary conference (*Bradley* at 380). In *McGlynn*, the court denied plaintiff's motion seeking summary judgment, when the same was made after the preliminary conference but before defendant had obtained any discovery whatsoever (*McGlynn* at 117).

Here, as urged by defendants, plaintiffs' motion is premature as a matter of law since the parties have yet to even attend a Preliminary Conference. In fact, a review of the Court's file[4] evinces that this case has not yet been scheduled for a Preliminary

[4] It is well settled that a court can take judicial notice of any and all undisputed court records and files (*Khatibi v Weill*, 8 AD3d 485, 485 [2d Dept 2004]; *Allen v Strough*, 301 AD2d 11, 18 [2d Dept 2002]; *Sam & Mary Housing Corp. v Jo/Sal Market Corp.*, 100 AD2d 901, 903 [2d Dept 1984]).

Conference and that no such conference has ever been held. Accordingly, contrary to plaintiffs' assertion, because the parties have yet to appear for a Preliminary Conference, the instant motion is premature as a matter of law and must be denied (*Gao* at 449; *Bradley* at 380-381; *McGlynn* at 117). Notably, as evinced by plaintiffs' arguments in support of their motion, they fail to appreciate the distinction between CPLR § 3212(f)'s application to cases which are premature as a matter of law - those where no Preliminary Conference has been held - and cases where there has been discovery - including a Preliminary Conference - and where denial on grounds of prematurity is then only warranted if the opponent of such motion can articulate what discovery has yet to be provided and how the same is dispositive (*Sasson* at 488; *Cruz* at 540). Based on the foregoing, defendants' cross-motion must also be denied. Indeed, it is hard to fathom how, as urged by defendants during oral argument, this Court could deny plaintiffs' motion as premature, while concomitantly granting defendants' application for identical relief.

CROSS-MOTION TO AMEND THE ANSWER

Defendants' cross-motion seeking leave to amend their answer to, *inter alia*, interpose counterclaims, is granted. Significantly, a review of the proposed answer evinces the amendments sought are not palpably devoid of merit nor does the record establish that plaintiffs would be prejudiced thereby.

Generally, leave to amend a pleading shall be freely granted absent prejudice or surprise resulting directly from the delay in seeking the proposed amendment (*McMcaskey, Davies and Associates, Inc. v New York City Health & Hosps. Corp*, 59 NY2d 755, 757 [1983]; *Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). Delay, however, in seeking leave to amend a pleading is not in and of itself a barrier to judicial leave to amend. Instead, "[i]t must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 958 [1983]. A failure to adequately explain the delay in seeking to amend the pleadings, if coupled with prejudice, will generally warrant denial of a motion to amend a pleading.

Where once, the proponent of an order seeking leave to amend a pleading was expressly required to demonstrate that the proposed amendment had merit (*Thomas Crimmins Contracting Co., Inc. v City of New York*, 74 NY2d 166, 170 [1989]["Where a proposed defense plainly lacks merit, however, amendment of a pleading would serve no purpose but needlessly to complicate discovery and trial, and the motion to amend is therefore, properly denied."]; *Herrick v Second Cuthouse, Ltd.*, 64 NY2d 692, 693 [1984][Court concluded that defendant could amend its answer when the amendment would not prejudice plaintiff and where the amendment was found to have merit]; *Mansell v City of New York*, 304 AD2d 381, 381-382 [1st Dept

2003]), requiring the proffer of evidence establishing that the proposed amendment had merit (*Curran v Auto Lab Serv. Ctr.*, 280 AD2d 636, 637 [2d Dept 2001]; *Heckler Elec. Co. v Matrix Exhibits-N.Y.*, 278 AD2d 279, 279 [2d Dept 2000]), there is no longer such a requirement (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] ["On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations."]; *Lucido v Mancuso*, 49 AD3d 220, 227 [2d Dept 2008] ["These cases make clear that a plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance."]). Instead, absent prejudice, a motion to amend a pleading ought to be granted unless the proposed amendment is palpably insufficient or patently devoid of merit[5] (*US Bank N.A. v Murillo*, 171 AD3d 984, 986 [2d Dept 2019]; *WDF, Inc. v Trustees of Columbia Univ.*, 170 AD3d 518, 519 [1st Dept 2019]; *MBIA Ins. Corp.* at 500; *Lucido* at 226-227).

Leave to amend a complaint will not be granted unless the proposed amendment, as pleaded, establishes a cause of action (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]; *Davis & Davis v*

[5] In this Court's view, this is a distinction without a difference. In other words, there is really no way to ascertain whether a pleading is palpably insufficient or patently devoid of merit unless the proponent of the amendment proffers evidence in support of the merits of the amendment. Thus, but for semantics, the old rule and the new one are essentially the same.

Morson, 286 AD2d 585, 585 [1st Dept 2001]). Moreover, the court must examine the proposed pleading for patent sufficiency, it is axiomatic that the proposed pleading must be provided with a motion seeking leave to amend the same and that a failure to do so warrants denial of the motion (*Loehner v Simons*, 224 AD2d 591, 591 [2d Dept 1996]; *Branch v Abraham and Strauss Department Store*, 220 AD2d 474, 476 [2d Dept 1995]; *Goldner Trucking Corp. v Stoll Packing Corp.*, 12 AD2d 639, 640 [2d Dept 1960]).

In support of the instant motion, defendants submit an amended answer. The amended answer contains 21 affirmative defenses, each one claiming that the claims asserted in the complaint are barred by, *inter alia*, latches, waiver, and ratification[6]. The amended answer also contains three counterclaims. The first counterclaim interposes a claim for declaratory judgment, wherein it is alleged that the limitation in the shareholder's agreement promulgated by section 6 therein does not bar the intestate disposition of DS' shares in Worbes to the estate, such that it should be declared that the estate owns 50 percent of the shares in Worbes. The second counterclaim interposes a claim for breach of fiduciary duty, wherein it is alleged that because the estate received offers to sell 815 for more than $8 million, which were rejected without due deliberation and consideration by ZS, ZS breached the fiduciary

[6] Notably, the first answer interposed by defendants, dated February 22, 2022, only interposed four affirmative defenses and no counterclaims.

duty owed to Worbes. Lastly, the third counterclaim interposes a claim for an accounting, wherein it is alleged that insofar as ZV has had exclusive control of Worbes and its books, it owes the estate, owner of 50 percent Worbes' shares, an accounting.

Based on the foregoing, defendants' motion for leave to amend their answer to interpose additional affirmative defenses and three counterclaims is granted. As noted above, leave to amend a pleading shall be freely granted absent prejudice or surprise resulting directly from the delay in seeking the proposed amendment (*McMcaskey, Davies and Associates, Inc.* at 757; *Fahey* at 935). Here, where the instant action is only several months old and where leave to amend the answer is sought less than a year from its initiation and less than nine months after defendants interposed their answer, there is clearly little delay in seeking the instant relief. Moreover, since the affirmative defenses and counterclaims are related to defenses and causes of action which naturally stem from the allegations in the complaint as well as issues litigated in the related prior action, plaintiffs cannot credibly claim prejudice or surprise; nor do they.

Additionally, since absent prejudice, a motion to amend a pleading ought to be granted unless the proposed amendment is palpably insufficient or patently devoid of merit (*US Bank N.A.* at 986; *WDF, Inc.* at 519; *MBIA Ins. Corp.* at 500; *Lucido* at 226-227), here, upon a review of the amended answer, and more specifically,

the counterclaims, it is clear that they are not devoid of merit. Indeed, the counterclaims are premised on almost undisputed facts and seek recovery on the salient, albeit disputed issue in this case - whether DS' shares in Worbes were, by operation of intestate distribution, transferred to the estate. Since resolution of this issue rests on unsettled and unclear law, it cannot be said that the counterclaims are palpably devoid of merit. It is hereby

ORDERED that defendants are granted leave to interpose the amended answer, annexed to the instant cross-motion and filed on September 2, 2022. It is further

ORDERED that defendants serve the amended answer upon plaintiffs within thirty (30) days hereof. It is further

ORDERED that all parties appear for an Preliminary Conference on January 30, 2023 at 10am. It is further

ORDERED that the defendants serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : November 22, 2022
Bronx, New York

HON. FIDEL E. GOMEZ, AJSC