26 of 26 DOCUMENTS

FELIX E. FERRER, Plaintiff, v. STAHLWERK ANNAHUTTE MAX AICHER GMBH & CO. KG, SAS STRESSTEEL INC., PETER MEYER, MATTHIAS SCHEIBE, and FLORIAN HUDE, Defendants.

DOCKET No. BER-C-323-13

SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, BERGEN COUNTY

2014 N.J. Super. Unpub. LEXIS 619

March 21, 2014, Argued
March 21, 2014, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Injunction denied by Ferrer v. Stahlwerk Annahutte Max Aicher GMBH & Co., 2014 N.J. Super. Unpub. LEXIS 1058 (Ch.Div., May 9, 2014)

COUNSEL: [*1] Michael J. Plata, Esq. and Michelle Ferrer, Esq. appearing on behalf of the plaintiff, Felix E. Ferrer (Plata Ferrer & Gutierrez LLC).

Jeffrey J. **Greenbaum,** Esq. (Sills Cummis & Gross) and Michael Roberts, Esq. of the Ohio bar, admitted pro hac vice (Graydon Head) appearing on behalf of the defendants, Stahlwerk Annahutte Max Aicher GmbH Co. KG, SAS Stressteel Inc., Peter Meyer, Matthias Scheibe and Florian Hude.

Benjamin Curcio, Esq. appearing on behalf of the proposed third-party defendant, Kevin Dowling (Curcio Law Group).

JUDGES: Honorable Peter E. Doyne, A.J.S.C.

OPINION BY: Peter E. Doyne

OPINION

CIVIL ACTION

Introduction

On November 13, 2013, plaintiff, Felix E. Ferrer ("Ferrer" or "plaintiff") had a complaint filed on his behalf against Stahlwerk Annahutte Max Aicher GmbH & Company KG ("SAH"), SAS Stressteel Inc. ("SAS"), Peter Meyer ("Meyer"), Matthias Scheibe ("Scheibe"), and Florian Hude ("Hude" when referenced individually, "defendants" when referenced collectively). The defendants caused a counterclaim to be filed on December 27, 2013. The instant motion, filed by the defendants, concerns the amending of their counterclaim and filing of a third-party complaint to join additional parties.

Facts/Procedural [*2] *History*

SAH is a corporation organized pursuant to the laws of Germany and is the leading manufacturer worldwide of special thread bars and steel accessories used in construction. SAH established SAS to distribute these

products throughout North, Central, and South America and SAH retained eighty-five (85) percent ownership of SAS. SAS is a New Jersey corporation with its principal place of business in Essex County, New Jersey. In June 2002, SAS, with SAH apparently acting as guarantor, entered into an Employment Agreement ("Agreement") with Ferrer to have him become its President. The Agreement provided Ferrer a ten (10) percent interest in SAS with the authority to purchase up to a twenty-five (25) percent interest. The Agreement established Ferrer would report to the Chief Executive Officer ("CEO") as determined by the Board of Directors ("Board"). SAH contends their bylaws require a four person Board. Ferrer would be responsible for sales, marketing, financial and administrative responsibilities of SAS and also any operational responsibilities determined by the Board. The Agreement set Ferrer's starting salary at $150,000 with increases at the beginning of each calendar year to [*3] be not less than one (1) percent greater than the previous year's Consumer Price Index but in no case less than two (2) percent.

On January 24, 2004, Ferrer exercised his option to purchase an additional five (5) percent interest in SAS; thus bringing his total interest in the company to fifteen (15) percent. Ferrer asserts SAS experienced substantial growth during his presidency as the company transformed from sustaining losses of approximately $429,160 in 2002 to having profits of $815,848.56 in 2013 as of the date of the complaint, with the full 2013 year profits expected to exceed a million dollars. Ferrer also asserts he was instrumental in developing the concept and obtaining approvals for the use of Grade 97 threaded bar reinforcement steel which provided SAS with a competitive edge as it is not currently manufactured domestically.

Prior to joining SAS, Ferrer had established an engineering consulting firm, FNA, Associates, Inc. ("FNA"). Ferrer contends SAH was aware of FNA prior to his employment, it was addressed in the Agreement and SAH consented to his continuing activities with regard to that enterprise. Ferrer also asserts he used FNA to promote and showcase SAS products [*4] including Grade 97 steel. Ferrer had FNA engineers create, evaluate, and optimize designs by recommending and utilizing SAS products. Ferrer alleges he invented and patented a pre-fabricated modular reinforcement cage system ("cage system") for the construction of concrete structures such as high rise buildings. FNA utilized the cages in many of its designs and recommended the use of SAS products. Ferrer housed FNA within SAS facilities but Ferrer asserts this was only so the two companies could work efficiently together; FNA still purchased its own equipment and supplies. Certain employees of FNA also worked with SAS as project managers when SAS products were purchased based on an FNA design; these employees received separate compensation from each company.

Ferrer asserts his decisions to utilize FNA, gain approvals of Grade 97 steel, and his purported invention of the cage system contributed to the success of SAS. He contends he accounts for eighty (80) percent of all SAS major sales, with the remaining sales directly resulting from his established relationships with clients.

Ferrer asserts SAH made decisions solely in its best interest. In 2007, SAH purportedly, unilaterally, decided [*5] to alter its distribution agreement with SAS and created a new company, Stressteel CA ("Stressteel CA"), headquartered in Fremont, California to provide for territories in the western United States and Canada. Ferrer alleges he objected as this decision was made without regard to the effect on SAS' sales or his interest in the company. In 2009, SAH required SAS to borrow $300,000 to pay money owed to SAH. Ferrer contends SAH also imposed a $100,000 management fee on SAS even though he managed the day-to-day operations and SAH was only involved during two yearly shareholder meetings. Ferrer also alleges SAH unilaterally decided to have SAS alter Ferrer's bonus structure as set forth in the Agreement. Ferrer asserts he has not been paid approximately $172,653 in commissions earned nor has he received salary increases set forth in the Agreement since 2008. Ferrer further asserts SAH denied his request to purchase an additional ten (10) percent of SAS as permitted in the Agreement and SAH has prevented SAS from issuing dividends.

In 2012, SAH, Meyer, the CEO of SAH and chairman of SAS' Board, and Scheibe, a member of the Board, required Ferrer to pay $22,337 for alleged losses taken in [*6] 2011 as a result of their decision to write off all inventory from the prior ten (10) years. In 2012, Ferrer exercised his option to extend the term of the Agreement for an additional five (5) years. After which, SAH, Meyer, and Scheibe purportedly began to ask Ferrer for more information regarding FNA as they asserted they were unaware of the relationship between

Ferrer and FNA. Ferrer contends this notion is untrue and references a 2008 letter describing the relationship between FNA and SAS and asserts the relationship was the subject of several Board meetings. Meyer also visited SAS on several occasion and observed the working relationship between the companies.

Ferrer contends SAH, Meyer, and Scheibe wished to combine SAS and FNA as they found it would be "critical" to the "future viability of SAS" according to the minutes of the February 2012 Board meeting. Ferrer and Meyer discussed combining FNA and SAS but were unable to reach an agreement. Ferrer asserts Meyer's unreasonable demands caused Ferrer to move FNA from SAS' facilities on December 31, 2012.

Thereafter, Max Aicher ("Aicher"), the principal owner of SAH, visited with Ferrer in New Jersey to discuss SAH purchasing FNA. [*7] Ferrer contends he informed Aicher he was not interested in selling any shares of FNA but addressed the need for SAS to cover FNA's operating costs if SAS wished to have FNA continue to market its products. Ferrer and Aicher agreed SAS and FNA would enter into an exclusive service agreement for a period of one (1) year and would discuss SAH purchasing an interest in FNA in December 2013. Ferrer asserts while the terms were agreed upon in principle, the parties could not agree on the contractual language. Thus, in February 2013, Ferrer and his counsel traveled to Germany to finalize the service agreement.

Ferrer asserts the focus of the February 2013 meetings was on SAH's interest in purchasing shares of FNA or merging FNA with SAS. SAH purportedly insisted a Memorandum of Understanding ("MOU") be entered into regarding revisiting SAH purchasing FNA's shares in December 2013. Ferrer rejected the proposed MOU and allegedly advised SAH if the terms of the service agreement could not be reached, FNA would cease working for and/or with SAS.

On July 31, 2013, after months of disagreeing, Ferrer emailed Meyer explaining FNA's shares were not for sale and constructive negotiations needed to [*8] occur with regard to the service agreement. Ferrer suggested a simple service agreement be executed for 2013 and the parties could meet in November to discuss a more concrete agreement for 2014. Ferrer received no response from Meyer.

On September 11, 2013, Ferrer received notice SAH scheduled a special shareholders meeting and Board meeting for September 25, 2013. The purpose of the shareholders meeting was to announce Hude as a new director; the purpose of the Board meeting was to announce the appointment of John Hritz, Esq. ("Hritz") the new CEO of SAS. Ferrer asserts he was not aware SAH was seeking to hire a new CEO or add a fourth director. During the shareholders meeting, Ferrer objected to Hude's appointment as he believed Hude had not acted in the best interest of SAS in the past and the sole purpose of his appointment was to allow him to vote in the Board meeting immediately following to secure the assent of three (3) directors. Following Ferrer's objection, no vote was taken on Hude's appointment.

After the shareholders meeting, the Board meeting was held and Meyer announced Hritz as the new CEO. Hritz's employment contract had been executed three weeks prior on September [*9] 6, 2013. Ferrer objected to Hritz's appointment as Hritz would be located out of New Jersey and would assume many of Ferrer's responsibilities, an alleged violation of the Agreement. During the Board meeting, Ferrer requested a copy of Hritz's employment contract and resume. After several requests, Ferrer received a copy of these documents on October 21, 2013. Hude was added to the Board by SAH's written consent utilizing its eighty-five (85) percent interest and Meyer notified Kevin Dowling ("Dowling"), the CFO, via letter.

A subsequent Board meeting was held on October 22, 2013. Meyer resigned as CEO and Hritz was appointed over Ferrer's objection. The Board proposed an Executive Board for SAS and new rules of procedure. Counsel for Ferrer indicated both would be in violation of the Agreement. No vote was taken and discussion was tabled for meetings in Germany to be held on November 15, 2013. Meyer also announced he had hired Jaime Silva ("Silva") as an engineer for SAS to become Ferrer's successor. Ferrer objected as he was not consulted in the matter and did not indicate he was retiring. Furthermore, Ferrer asserts the Agreement did not expire until March 2017 and it provided he [*10] was solely responsible for the company's hiring. Ferrer was provided a copy of Silva's employment agreement on November 9, 2013 which was executed on October 11, 2013. Silva's employment agreement indicated he was hired as SAS' Chief Operating Officer ("COO"). Ferrer alleges he had been serving as COO and was responsible for the day-to-day operations and the appointment of Silva was a

breach of his Agreement. Ferrer also contends the hiring of Silva oppresses him as a minority shareholder and frustrates his expectations as a shareholder and President of SAS.

SAH's counsel was to travel to New Jersey on October 30, 2013 to discuss a remedy to these issues with Ferrer. However, the meeting was cancelled on October 29, 2013. In 2013, Ferrer asserts he was constructively discharged.

Pleadings

Ferrer had a six count verified complaint filed on his behalf in Bergen County on November 12, 2013 alleging oppression of a minority shareholder, breach of fiduciary duty, breach of the Agreement, breach of the covenant of good faith and fair dealing, violation of the New Jersey Wage Payment Law, and intentional wrongdoing (the "Bergen matter").

Defendants had an answer and a twelve count counterclaim [*11] filed on December 27, 2013. Defendants contend the Agreement only allowed Ferrer to engage in businesses which were secondary activities and Ferrer's role in FNA did not allow him to devote sufficient time, energy, and effort to SAS. Defendants also assert Ferrer breached his fiduciary duty to SAS and allowed other employees to do the same such as Juan Correa who was allowed to operate Same Day Solutions while an employee of SAS. Defendants contend when FNA moved out of the SAS facility, Ferrer caused four SAS employees to join FNA. Therefore, defendants seek a declaratory judgment regarding ownership of patents, request punitive damages and allege breach of contract, breach of covenant of good faith and fair dealing, breach of fiduciary duty, conspiracy, conversion, usurpation of corporate opportunity, interference with employment relations, interference with business and prospective contracts and spoliation. Ferrer had an answer to the counterclaims filed on his behalf on January 28, 2014.

The court entered a Case Management Order on January 30, 2014, which set forth no amendments to pleadings adding additional parties or causes of action requiring further discovery would be permitted, [*12] absent a motion requesting the same, returnable no later than March 21, 2014.

Thereafter, on March 7, 2014, defendants had filed a motion on short notice to amend their counterclaim and to file a third-party complaint joining additional parties ("defendants' motion"). The plaintiff also had filed a motion on short notice to amend his verified complaint filed on the same date. The plaintiff's motion was unopposed. Opposition to the defendants' motion on behalf of the plaintiff was received on March 13, 2014.

On March 13, 2014, Dowling had a complaint filed on his behalf in Essex County against SAS, SAH, and Hritz alleging breach of contract, defamation, intentional infliction of emotional distress and common law wrongful termination (the "Essex matter"). Dowling, as the proposed third-party defendant, submitted opposition to the defendants' motion on March 14, 2014.

Oral argument on the defendants' motion was entertained on March 21, 2014.

Analysis

A. Motion to Amend Counterclaim

The defendants seek to amend their pleadings to add additional claims against Ferrer for misappropriation of trade secrets and breach of contract/fraud. The claims regarding trade secrets relate to Stressbar Systems [*13] LLC ("Stressbar"), a corporation founded by Ferrer after his departure from SAS. The breach of contract and fraud claims relate to a purported $180,000 payment made to Ferrer in 2013 in anticipation that the parties would conclude negotiations for acquisition or merger of FNA to SAS.

Rule 4:9-1 provides that leave to amend pleadings "shall be freely given in the interest of justice." The New Jersey Supreme Court has made it clear that "Rule 4:9-1 requires that motions for leave to amend be granted liberally" and that "the granting of a motion to file an amended complaint always rests in the court's sound discretion." *Kernan v. One Washington Park Urban Renewal Associates*, 154 N.J. 437, 456-57, 713 A.2d 411 (1998); *see also Notte v. Merchants Mut. Ins, Co.*, 185 N.J. 490, 501, 888 A.2d 464 (2006). The court's exercise of discretion "requires a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." *Notte, supra*, 185 N.J. at 501. In *Notte*, the Court agreed with the Appellate Division's holding that there was no prejudice to defendants when "the newly asserted claims are based on the same underlying facts and events set forth in the original [*14] pleading." *Ibid.* The Court

stated that, "while motions for leave to amend are to be determined without consideration of the ultimate merits of the amendment, those determinations must be made in light of the factual situation existing at the time each motion is made." *Ibid.* Finally, the Court explained that "courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted." *Ibid.*

While motions to amend "are ordinarily afforded liberal treatment, the factual situation in each case must guide the court's discretion, particularly where the motion is to add new claims or new parties late in the litigation." *Bonczek v. Carter-Wallace, Inc.*, 304 N.J. Super. 593, 701 A.2d 742 (App. Div. 1997). A motion to amend is properly denied where its merits are marginal and allowing the amendment would unduly protract the litigation. *See Stuchin v. Kasirer*, 237 N.J. Super. 604, 609, 568 A.2d 907 (App. Div. 1990).

Plaintiff only opposes the addition of Count 14, the breach of contract/fraud claim by the defendants. Ferrer asserts the payment of $180,000 [*15] was not made directly to him but instead was paid to FNA for services rendered. Thus, Ferrer contends the evidence reveals he personally never received such a payment nor did any such agreement between the parties exist, thereby rendering the claim frivolous. However, the decision to grant a motion to amend should not consider the ultimate merits of the claim. If the plaintiff believes any of the pleadings are frivolous, the appropriate letter can be drafted pursuant to *R.* 1:4-8. As motions to amend should be liberally granted and are within the sole discretion of the court, the defendants shall be allowed to amend their counterclaim to include both additional counts.

B. Motion to File Third-Party Complaint

The more interesting question is how to address defendants' third-party claim against Dowling. The defendants seek to add three third-party defendants: FNA, Stressbar and Dowling, SAS' former CFO. The defendants contend the claims against FNA relate to unjust enrichment, the claims against Stressbar concern misappropriation of trade secrets and proprietary information and the claims against Dowling stem from his purported participation in Ferrer's alleged misconduct.

Motions for third-party [*16] practice are governed by *R.* 4:8-1. The decision to grant or deny a motion for leave to proceed against a third-party defendant is left to the discretion of the trial judge. *Scott v. Garber*, 82 N.J. Super. 446, 451, 198 A.2d 103 (App. Div. 1964). The motion "should be considered sympathetically, in order to avoid a circuity of actions." *Miranda v. Fridman*, 276 N.J. Super. 20, 23, 647 A.2d 167 (App. Div. 1994). "The motion may be denied if granting it would unduly complicate or delay the trial or otherwise prejudice the parties, particularly if the defendant's cause of action will survive to support a separate action." *New Jersey Dept. of Envtl. Protection v. Dimant*, 418 N.J. Super. 530, 547, 14 A.3d 780 (App. Div. 2011). Additionally, as the entire controversy doctrine applies solely to claims and no longer to parties, "the potential preclusion of the proposed claims against the third-party defendant" should not be considered for such a motion. Pressler & Verniero, *Current N.J. Court Rules*, comment on *R.* 4:8-1 (2012).

Dowling objects to being joined as a third-party defendant as it would delay the scheduled trial and prejudice the litigants. The discovery end date in the Bergen matter is set for August 1, 2014 and a trial has [*17] been scheduled for November 4, 2014. Dowling did have an action filed in Essex County, albeit after receiving notice of this pleading in Bergen. He avers his employment claims in Essex County will require at least three hundred (300) days of discovery, at least according to established tracking protocol, which Dowling's counsel estimates would conclude on January 15, 2015. Dowling contends failure to join him as a third-party defendant will not prejudice the defendants. If joinder is not permitted, SAS would still have the opportunity to address the claims against Dowling in the Essex matter as the entire controversy doctrine does not apply to non-joined parties. The addition of Dowling as a third-party defendant, he asserts, would cause unnecessary delay in the schedule for the Bergen case and could unfairly prejudice him as he would become enmeshed in a contest in which he asserts he is but a peripheral figure.

Defendants have identified Dowling as a non-party and have correctly contested his procedural standing to offer opposition. A proposed third-party defendant does not have a procedural mechanism by which to file opposition to the current motion. "*R.* 4:8-1(b) describes the manner [*18] and terms on which a third-party defendant asserts defenses *after* being joined and served. When a defendant moves to file a third-party complaint,

the proposed third-party defendant is not yet a party." *Miranda v. Fridman*, 276 N.J. Super. 20, 23, 647 A.2d 167 (App. Div. 1994) (emphasis added). Although the court is concerned with substance over form and every rule may be relaxed in the interests of justice, *R.* 1:1-2, it would be inappropriate to ignore the procedural mandates set forth by *R.* 4:8-1. *R.* 1:1-2 is to be sparingly utilized in an effort to preclude its evisceration of the carefully constructed structure of the rules. The court is mindful this ruling may possibly require the unnecessary step of an additional application, which at first blush may be favorably reviewed, but it is necessary pursuant to the mandates of the rule. As such, the court will reluctantly permit joinder of Dowling premised upon the requirements set forth in *R.* 4:8-1.

It is also noted that the complaint in this matter was filed in November 2013 and the defendants' answer was filed in December 2013. Counsel for the defendants admit Dowling was "part of this case in December 2013, when the conspiracy claim was asserted." [*19] (Defs. Reply at 3). At oral argument, counsel for the defendants asserted Dowling was not initially included as a party because Hritz was unaware which employee was allegedly passing information to Ferrer. Counsel contends the defendants purportedly discovered it was Dowling and attempted to resolve the matter with him. Those negotiations broke down, resulting in the filing of this motion. Counsel for Dowling refutes these assertions and avers the negotiations were conducted by the defendants in bad faith; however, these matters need not be considered today as before the court is a motion to amend. *R.* 4:8-1 grants the defendant the right to file a third-party complaint within ninety (90) days of service of the original answer. Defendants correctly assert this action falls within the ninety (90) day time period permitted to file a third-party complaint pursuant to *R.* 4:8-1. Therefore, due to the requirements of the rule and the timeliness of the application, joinder of Dowling will be permitted.

Conclusion

The defendants shall be permitted to amend their counterclaim to include the two additional claims. As no opposition has been offered, the defendants will be permitted to add third-party [*20] defendants, FNA and Stressbar. The defendants will also be permitted to add Dowling as a third-party defendant as he does not currently have standing, as a non-party, to oppose the motion pursuant to *R.* 4:8-1. The defendants shall file and serve the amended pleadings within twenty (20) days from date this decision. A case management conference now is scheduled for Thursday, April 24, 2014 at 9:00am.