7-17-2021

Rainforest Production Holdings, Inc., derivative suit, Order Granting Leave to File Third Amended Complaint

Kelly Lee Ellerbe
Judge, Superior Court of Fulton County, Metro Atlanta Business Case Division

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

BERNARD H. BRONNER, derivatively on behalf of Rainforest Production Holdings, Inc. and directly on behalf of himself,	)	
Plaintiff,	)	Civil Action File No. 2014CV248023
v.	)	
ROBERT E. HARDY, II, WILLIAM E. PACKER, JR. and TRF PRODUCTIONS, LLC,	)	Bus. Case Div. 3
Individual Defendants,	)	
and	)	
RAINFOREST PRODUCTION HOLDINGS, INC.	)	
Nominal Defendant.	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE HIS THIRD AMENDED COMPLAINT

This matter comes before the Court on Plaintiff's Motion for Leave to File his Third Amended Complaint, filed May 6, 2021 ("Motion"). Having reviewed the record and considered the written arguments and submissions of counsel, the Court enters the following order.

1. INTRODUCTION

Plaintiff seeks leave to amend his breach of contract claim to add a derivative breach of contract claim against two defendants and a direct breach of contract claim against another defendant. Defendants argue the delay in bringing such an amendment is both prejudicial and unexcusable such that leave should not be granted.

2. BACKGROUND

2.1 General History and the Initial Round of Summary Judgment Motions

This matter concerns a long-standing fight among former business partners in a film production business, Rainforest Production Holdings, Inc. ("Rainforest"). Plaintiff Bernard H. Bronner invested in the business. It was founded and primarily operated by individual Defendants Robert E. Hardy, II and William E. Packer, Jr. (sometimes referred to as "Founders"). In October of 2010, Bronner, Hardy, Packer, and Rainforest signed a Reconciliation Agreement to resolve various differences that had arisen in the business relationship ("Reconciliation Agreement"). It outlined certain financial obligations and reporting requirements.

The Reconciliation Agreement has been a sticking point in the litigation as the Plaintiff's arguments about this contract have shifted twice, both in response to adverse court rulings. Throughout the early phases of the case, Plaintiff argued the Reconciliation Agreement was unenforceable and sought relief for the Defendants'

alleged breach of an earlier Subscription Agreement. Rainforest Prod. Holdings, Inc. v. Bronner, Nos. A19A1684, A19A2157 (Ga. App., Mar. 4, 2020), pp. 14-16. By contrast, Defendants asserted the Reconciliation Agreement was enforceable and filed a counterclaim for its breach. (Counterclaim, ¶¶ 23-36, 40, 58-63.) In ruling on the first round of summary judgment motions, this Court agreed with Defendants that the Reconciliation Agreement was enforceable and that any breach claim under the Subscription Agreement was barred by its release language as well as the statute of limitations. Rainforest Prod., at 15-16, 30-32. However, this Court further determined that a jury question remained as to whether Defendants breached the Reconciliation Agreement and thus denied Defendants' motion for summary judgment on the breach of contract claim. Id. at 16-18.

In reviewing the decision, the Court of Appeals found this Court, "erred in transforming Plaintiff's breach of contract claim – expressly raised in the complaint against [Defendant TRF Productions, LLC] for violations of the Subscription Agreement – to include claims against Hardy and Packer for violations of the Reconciliation Agreement." Id., at 17-18. Accordingly, the appellate court reversed the denial of summary judgment for breach of the Subscription Agreement. Id., at 18.

The judgment order on the appellate remittitur was entered on May 1, 2020. After the remittitur, the only remaining claims in the action were Plaintiff's claims

against Hardy and Packer for breach of fiduciary duty and waste/missappropriation of corporate assets as well as Defendants' claims for breach of the Reconciliation Agreement's non-disparagement clause. (Cons. Pre-Trial Ord., § 8.)

2.2 The Second Amended Complaint and the Second Round of Summary Judgment Motions regarding Financial Provisions of the Reconciliation Agreement

On October 21, 2020, Plaintiffs filed their Second Amended Complaint. The only new claim found in the Second Amended Claim was Plaintiff's direct claim against Hardy and Packer for breach of the Reconciliation Agreement. (Order on Cross Mots. for Summ. J., pp. 16-17.)

The Reconciliation Agreement expressly stated Hardy and Packer were "primarily responsible for and actively involved in the management and oversight of the day-to-day operations and affairs of [Rainforest] and its affiliates . . ." (Reconciliation Agreement, Recitals, ¶ 4.) Article II of the Reconciliation Agreement addressed financial and compensation issues. Section 2.1 provides,

> [Rainforest] shall continue to use Rainforest Films or another operating entity of or controlled by [Rainforest] to engage in all Core Business Projects in which either of the Founders receives any compensation or other payment for his services as a result of such Core Business Project. No compensation or other payment may be made to either of the Founders on account of any service performed by a Founder with respect to any Core Business Project, except as provided in this Agreement or unless such compensation or other payment is approved by the Board of Directors . . .

Section 2.2 established base annual salaries of $175,000 for Hardy and Packer for their work on "Core Business activities." Section 2.3 addressed how revenue would be shared with Rainforest on Core Business Projects where Hardy or Packer worked individually, and 2.4 addressed revenue-sharing obligations for those same projects where the two Founders worked together. Section 2.5 requires Rainforest to annually establish a year-end bonus pool ("Year-End Bonus Pool") that would be equally divided among Hardy, Packer and Bronner.

Section § 1.6 of the Reconciliation Agreement further required Rainforest to provide Bronner with a certain financial report accounting for revenues earned by the feature film *Trois*.

While Plaintiff sought leave to file this Second Amended Complaint, the Court determined leave was not necessary under the clear terms of O.C.G.A. § 9-11-15(a) which allows a party to freely amend their pleadings prior to the entry of a pre-trial order. (Order on Mots. re: Second Am. Compl., entered October 29, 2020, p. 3.) Defendants sought the opportunity to file a dispositive motion on the newly framed contract claim, and, on November 18, 2020, the Court set forth a briefing schedule for Defendants' anticipated motion. That same day, the Court entered a Consolidated Pre-Trial Order, ending the ability of the parties to amend their pleadings without permission of the Court.

The parties filed motions seeking summary judgment on the new breach of contract claim, and on April 26, 2021, the Court entered an Order on Cross Motions for Partial Summary Judgment, granting Defendants' motion and entering summary judgment in favor of Defendants on Plaintiff's newly asserted breach of contract claim. The portions of that order pertinent to the present Motion are detailed below.

2.2.1 Reconciliation Agreement, § 2.2-2.4 / Compensation

Plaintiff claimed Hardy and Packer unilaterally abandoned the compensation structure outlined in Article II of the Reconciliation Agreement to pursue independent projects and diverted Rainforest opportunities for their own benefit. The Court found any recovery for Rainforest's lost revenues and opportunities would inure to the benefit of all Rainforest shareholders, not just Bronner, and should be pursued derivatively. Accordingly, summary judgment was granted on the direct claim. (Order on Cross Mots. for Summ. J., p. 30.)

2.2.2 Reconciliation Agreement, § 2.5 / Year-End Bonus Pool

With regard to § 2.5 of the Reconciliation Agreement, the Court determined Bronner could pursue a direct claim as the Year-End Bonus Pool benefited only him, Hardy and Packer such that Bronner suffered a special injury not borne by other shareholders. (Id.) The Court also determined a question of fact existed as to the breach, noting "the Court of Appeals has adopted this Court's prior finding that material questions of fact exist as to the circumstances whereby Defendants

abandoned the Reconciliation Agreement's compensation structure." (Id. at 25.) However, summary judgment was granted because the Reconciliation Agreement placed the Year-End Bonus Pool obligation on Rainforest, not Hardy or Packer individually. (Id. at 31-33.)

2.2.3 Reconciliation Agreement § 1.6 / *Trois* Financial Report

Reconciliation Agreement § 1.6 required Rainforest to provide Plaintiff a report, "setting forth in reasonable detail the financial results of the feature film *Trois*, which report shall be prepared consistent with prevailing financial accounting practices in the feature film industry." In its recent ruling, the Court found that this claim could be pursued directly by Bronner because, construing the record in the light most favorable to him, he suffered an injury separate and distinct from other shareholders (Id. at 29.) Applying that same standard, the Court found disputed evidence of a breach such that the question should be resolved by the fact finder. (Id. at 23-25.) Again, however, the Court granted summary judgment, finding that the claim was improperly directed at Packer and Hardy, not at Rainforest, the party expressly obligated to provide the report under the Reconciliation Agreement. (Id. at 31-33.)

2.3 The Motion Seeking Leave to File a Third Amended Complaint

On May 6, 2021, ten days after the Court entered its order on the cross motions for summary judgment, Bronner filed the present Motion. He is seeking leave under

O.C.G.A. § 9-11-15(a) to file a Third Amended Complaint with the aim of "align[ing] his claims with this Court's most recent pronouncements." (Motion, p. 2.) The only "new" claims contained within the Third Amended Complaint are direct claims against Rainforest, rather than Hardy and Packer, for breach of §§ 1.6 and 2.5 of the Reconciliation Agreement and derivative, not direct, claims against Hardy and Packer for breach of §§ 2.2-2.4 of the Reconciliation Agreement. (Motion, Ex. E, ¶¶ 82-86, 99-102.) Hardy, Packer and Rainforest filed their objection to the Motion on June 4, 2021.

3. STANDARD OF REVIEW

3.1 The General Standard of Review for Motions to Amend Pleadings after the Entry of a Pre-Trial Order

After the entry of a pre-trial order, O.C.G.A. § 9-11-15(a) provides a "party may amend his pleading only by leave of court or by written consent of the adverse party. Leave shall be freely given when justice so requires." O.C.G.A. § 9-11-15(a) "is to be liberally construed in favor of allowance of amendments, particularly when the opposing party is not prejudiced thereby. Like the right of amendment, the discretion of the trial court in controlling it is very broad. Determinations of the trial court in this regard will not be disturbed absent a manifest abuse of discretion." Glynn-Brunswick Mem'l Hosp. Auth. v. Gibbons, 243 Ga. App. 341, 346 (2000).

3.2 Considering Delay when Evaluating a Late-Filed Amendment

This Motion raises the question about how delay should be considered when evaluating prejudice to the party defending against the late-filed amendment under O.C.G.A. § 9-11-15(a). The interplay of delay and prejudice was thoroughly addressed in Total Car Franchising Corp. v. Squire, 259 Ga. App. 114 (2003) where a trial court denied plaintiff leave to amend solely because the case had been scheduled for trial and had appeared on prior trial calendars at the time leave was sought. In reviewing the trial court's decision, the Court of Appeals began by focusing on the rationale behind pre-trial orders. "The purpose of the pretrial order is to formulate and simplify the issues for trial, but these objectives should not operate contrary to the spirit of the Civil Practice Act which is to ensure that cases be decided on their merits and that decisions based on other considerations be avoided." Id. at 116 (Citation and punctuation omitted). The Court of Appeals also noted Georgia's history of liberally allowing the amendment of pre-trial orders. Id.

With that rationale in mind, the appellate court then considered how a court should evaluate late attempts to modify a pre-trial order.

> Generally, a proposed amendment will not be barred because it is offered late in the case so long as the other party is not prejudiced. The burden is on the party seeking amendment to show lack of laches or lack of unexcusable delay. When exercising discretion to allow or disallow amendments, the trial court must balance possible unfair prejudice to the nonmoving party with the movant's reasons for delay. But mere delay in seeking leave to amend is not a sufficient reason for its denial.

Id. (Citations and punctuation omitted).

4. ANALYSIS

4.1 The Parties' Contentions

Bronner contends the amended complaint would not prejudice the Defendants. He contends the facts at the heart of the most recent amendment are not new and were clearly alleged in the initial complaint – the failure to provide *Trois* Accounting, failure to report Rainforest revenue, and the improper compensation the individual Defendants paid to themselves. (Ver. Compl., ¶¶ 43-64, 94-95.) While Plaintiff's initial complaint did not seek recovery under the Reconciliation Agreement, Defendants immediately put the agreement in issue with their counterclaim, so it has been part of the litigation almost since its inception. (Counterclaim, ¶¶ 23-36, 40, 54-55, 58-63.) The appellate opinion noted Defendants "acknowledged that Plaintiff had made allegations concerning their fulfillment of the terms of the Reconciliation Agreement . . ." dating back to Bronner's January 26, 2017 deposition. Rainforest Prod., at 16-17. Accordingly, Bronner concludes nothing about the claims asserted in the amended complaint should take Defendants by surprise or impede their ability to defend these new claims.

Defendants oppose the Motion, arguing they will be prejudiced if the amended claim is allowed to proceed because they have not had the opportunity to perform discovery and because this new amendment would add to the prejudice they have

experienced defending Plaintiff's "litany of meritless claims." (Response, pp. 9-10.) They also assert Bronner failed to meet his burden of establishing a lack of laches or unexcusable delay. (Id. at pp. 7-8.) In this same vein, Defendants argue there has been no new evidence or theory that would explain Plaintiff's delay in offering these amendments. (Id. at p. 11.)

4.2 Possibility of Prejudice to the Defendants

Prejudice is the first element to be addressed in the balancing test established by Total Car Franchising. As addressed in Glynn-Brunswick Mem'l Hosp., prejudice occurs when a party is "impaired in its ability to defend against the merits" of a newly amended claim. Id. at 346.

Prejudice will often bar pleadings amendments that are offered just as a trial is beginning or has already commenced. See generally Franzen v. Downtown Dev. Auth. of Atlanta, 309 Ga. 411, 419-420 (2020) (evidence supported trial court's decision to not allow intervenor's amended objections to a bond validation proceeding that had already commenced); Ostroff v. Coyner, 187 Ga. App. 109, 111-113 (1988) (evidence supported trial court's decision not to modify pre-trial order as requested on the day of trial which was three weeks after the trial was initially set to begin); Mulkey v. Gen. Motors Corp., 164 Ga. App. 752, 754 (1982) (evidence supported trial court's decision not to allow amendment establishing a new cause of action "one working day prior to trial") (physical precedent only) rev'd

on other grounds, 251 Ga. 32 (1983); see also Harris v. Tutt, 306 Ga. App. 377 (2010) (evidence supported trial court's decision that no prejudice was created by an amendment offered during course of trial where defendants "had prior notice" of the amendment). Because this matter has yet to receive a trial setting, the prejudicial impact of the amendment is less clear.

Defendants claim they have been prejudiced by having to constantly respond to Bronner's evolving and "meritless" claims; however, they offer no case law to support that this constitutes the type of prejudice contemplated by O.C.G.A. § 9-11-15(a). (Response, p. 10.) To the extent that Defendants may have suffered damage from having to defend meritless claims in this litigation, other remedies specifically intended to address that harm are available to Defendants, most notably O.C.G.A. § 9-15-14.

The most compelling argument of prejudice offered by Defendants concerns their inability to conduct discovery on these particular claims as the initial breach of contract claim filed by the Plaintiffs concerned the Subscription Agreement, not the Reconciliation Agreement. (Response, pp. 9-11.) Accordingly, Defendants argue their prior discovery efforts were directed by that focus. (Id.) However, Defendants have failed to identify with any specificity what discovery they lack.

The record reveals a great deal of discovery was performed concerning the *Trois* accounting and whether Rainforest complied with its obligation to provide a

report "setting forth in reasonable detail the financial results of the feature film *Trois*, which report shall be prepared consistent with prevailing accounting practices in the feature film industry." (Reconciliation Agreement, § 1.6.) It is undisputed that Defendants provided Plaintiff with a single-page financial report that, by Defendants' own admission, lacked some key information. (See generally Order on Cross Mots. for Summ. J., p. 24.) However, it is also undisputed that Defendants provided Plaintiff with open access to meet with the company accountant to discuss *Trois* finances and that Plaintiff never objected to the information the accountant provided and never asked for any further clarification. (Hardy Aff., ¶ 38; Packer Aff., ¶ 37; Ballier Dep., pp. 55-62; Watson Dep. pp. 202-205, 209-211.) This particular claim will turn on whether Rainforest substantially complied with its obligation to provide Bronner with a reasonably detailed *Trois* financial report as required by the Reconciliation Agreement. See TRST Atlanta, Inc. v. 1815 Exch., Inc., 220 Ga. App. 184, 187 (1996) ("substantial compliance with the terms of the contract is sufficient"). The Court finds Defendants have been provided an adequate opportunity to conduct discovery on this particular claim.

As to the remaining breach claims concerning Article II and the compensation provisions of the Reconciliation Agreement, many of the same underlying facts also support Plaintiff's corporate waste and breach of fiduciary duty allegations which

were lodged in the initial complaint.[1] (Ver. Compl., ¶¶ 55, 63, 93-94, 104(a)-(b).) Indeed, during the most recent round of summary judgment briefing, Defendants argued Plaintiff's claims for breach of the Reconciliation Agreement were duplicative of his tort claims. Specifically, Defendants argued, "Bronner's breach of Reconciliation Agreement claim premised upon the *alleged* compensation structure and financial report provisions is duplicative of the fiduciary duty and corporate waste claims, and, thus, subject to summary judgment." (Defs. Memo. in Supp. of Summ. J., p. 19.) These tort claims received the benefit of an extensive discovery period. Having recently taken the position Plaintiff's contract claims are duplicative of his tort claims, Defendants' current argument, that they would be

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[1] In his initial complaint, Bronner alleged,

> [i]n 2010, [the Founders] took action to set their annual salaries at $175,000.00 each. At the same time, [the Founders] took additional actions to allow each to divert 50% of the revenue received by [Rainforest] on certain projects within [Rainforest's] core competency (the "Diverted Business Opportunities"). Specifically, each agreed that the other could provide certain services to third parties that were expressly within Rainforest's core business offering and directly divert 50% of such revenues to himself personally or to his personally-owned holding company. . .

(Ver. Compl., ¶ 55.)

Bronner further alleged that Hardy and Packer,

> changed their compensation during calendar year 2012 or 2013 without Mr. Bronner's knowledge, consent or authorization. Specifically, [the Founders] changed their compensation so that **100%** of payments made for the Diverted Business Opportunities now go to [the Founders]. As such, Rainforest was not permitted to retain any monies for such Diverted Business Opportunities. (Emphasis found in original.)

(Ver. Compl., ¶ 63.)

Plaintiff's Proposed Third Amended Complaint contains allegations that are virtually identical. (Motion, Ex. E, ¶¶ 56, 64.)

prejudiced by a lack of discovery should the amendment be allowed, is unconvincing.

Accordingly, the Court finds the defense will not be impaired by the late amendment.

4.3 Laches and Movant's Reasons for Delay

The alleged breaches occurred in 2012. This suit was brought in 2014. Depositions where testimony was given suggesting the Reconciliation Agreement was breached occurred in 2017 and 2018. There is clear evidence of delay in this case. However, delay alone is insufficient reason to bar a late-filed amendment. Total Car Franchising, at p. 116. Having determined Defendants will not be prejudiced by the late-filed amendment, there is nothing for the Court to balance under the Total Car Franchising test. Id. at p. 114 ("a proposed amendment will not be barred because it is offered late in the case so long as the other party is not prejudiced").

5. CONCLUSION

While the Court is mindful of Defendants' frustration with Plaintiff's evolving contract claims, the Court finds Plaintiff should be allowed leave to file his Third Amended Complaint. While packaged in different ways, Plaintiff has made these same or similar allegations of Defendants' financial misconduct throughout the litigation so that the defense of these claims will not be impeded by this late

amendment to the pleadings. Further, any potential prejudice is minimized as this matter has yet to receive a trial setting. Finally, the Court finds permitting this amendment is consistent with the directive of O.C.G.A. § 9-11-15(a) that provides leave to file pleading amendments after the entry of a pre-trial order "shall be freely given" and is also in keeping with the "spirit of the Civil Practice Act which is to ensure that cases be decided on their merits . . ." Id. at p. 116.

In light of the foregoing, it is hereby ORDERED that Plaintiff shall be granted leave to file its Third Amended Complaint which shall be done promptly, no later than **two weeks** after the entry of this order.

The Court will conduct a conference call with counsel on **June 22, 2021 at 8:30 a.m.** to discuss scheduling issues raised by this late-filed amendment – whether Defendants anticipate any dispositive motions, trial setting, etc.

SO ORDERED this 17th **day of June, 2021.**

Kelly Lee Ellerbe

JUDGE KELLY LEE ELLERBE
Superior Court of Fulton County
Metro Atlanta Business Case Division
Atlanta Judicial Circuit

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