

<b>Arent Fox LLP v JDN AA, LLC</b>
2019 NY Slip Op 31593(U)
June 7, 2019
Supreme Court, New York County
Docket Number: 151654/2018
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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ARENT FOX LLP,	INDEX NO. <u>151654/2018</u>
Plaintiff,	MOTION DATE <u>03/25/2019</u>
- v -	MOTION SEQ. NO. <u>006</u>
JDN AA, LLC D/B/A AUDI/NEWTON, SUBARU 46 LLC, DCN AUTOMOTIVE LLC	
Defendant.	<b>DECISION + ORDER ON MOTION</b>

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 194, 195, 196, 197, 198, 200, 203, 206, 207, 208, 209, 210, 211

were read on this motion to AMEND CAPTION/PLEADINGS.

Arent Fox LLP seeks to recoup unpaid legal fees from former clients JDN AA, LLC D/B/A Audi/Newton, Subaru 46 LLC, and DCN Automotive LLC (collectively, “Original Defendants”). In its initial complaint Plaintiff asserted claims for breach of contract, account stated, quantum meruit, unjust enrichment, and promissory estoppel against the Original Defendants.<sup>1</sup>

Plaintiff now seeks leave to file a second amended complaint to include claims under two New Jersey fraudulent transfer statutes, N.J.S.A. 25:2-25 and 25:2-27, against the Original Defendants and several new defendants (JDN VW LLC, Joseph Natale, Evan Christodoulou, Dominic Natale, and John Does 1-10, collectively, “Proposed Additional Defendants”).

<sup>1</sup> This Court dismissed the First Cause of Action, Breach of Contract, against Defendants Subaru 46 LLC and DCN Automotive LLC. That claim should be excluded from any future amended complaint.

For the reasons stated below, Plaintiff's motion is denied, without prejudice, because the proposed amended complaint is deficient. Plaintiff can seek leave to amend if it is able to cure those deficiencies.

### **Discussion**

#### **A. Legal Standard**

CPLR 3025(b) provides that "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court ...." "Motions for leave to amend should be freely granted, absent prejudice or surprise ... unless the proposed amendment is palpably insufficient or patently devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499 (1st Dep't 2010). A party opposing leave to amend "must overcome a heavy presumption of validity in favor of [permitting amendment]." *CIFG Assur. N. Am., Inc. v. J.P. Morgan Sec. LLC*, 146 A.D.3d 60, 65 (1st Dep't 2010).

That said, a complaint that "allege[s] ... fraud" but is "lacking in particularity..." may be considered palpably insufficient. *See 12 Broadway Realty, LLC v. Lakhani Enters. USA, Corp.*, 114 A.D.3d 503, 505 (1st Dep't 2014); *see also Hartford Cas. Ins. Co. v. Vengross Williams & Assocs., Inc.*, 306 A.D.2d 435, 436-437 (2d Dep't 2003) (affirming denial of leave to amend because "defendants failed to set forth the requisite elements of fraud with particularity."); *Sehera Food Servs. Inc. v. Empire State Bldg. Co. LLC*, 74 A.D.3d 542, 543 (1st Dep't 2010) (affirming denial of leave to amend because plaintiff's proposed claim of fraudulent activity was "not viable."). More broadly, the party seeking to amend its Complaint must satisfy the pleading standards set forth in the CPLR to state a viable claim for relief. *See Jean v. Chinitz*, 163 A.D.3d 497, 497 (1st Dep't 2018) (affirming denial of leave to amend in part because the complaint failed to state a claim).

The broad scope of permissible amendments under CPLR 3025 includes the right to add defendant parties. *See Fulgum v. Town of Cortlandt Manor*, 19 A.D.3d 444 (2d Dept. 2005) (affirming lower court's order granting motion to amend complaint naming an additional party). Specifically, CPLR 1003 provides that "[p]arties may be added at any stage of the action by leave of court ...." CPLR 1003. Leave to add additional parties may be denied if the opposing party would be unfairly surprised or prejudiced. *See Murray v. City of New York*, 43 N.Y.2d 400, 406 (1977).

As relevant here, CPLR 3013 requires that a plaintiff provide sufficient notice of allegations asserted against Defendants. A claim can be dismissed if the plaintiff fails to articulate what the claim is, the grounds upon which it rests, and against whom it is asserted. *See* CPLR 3211(a)(7). Further, when a plaintiff brings a cause of action based upon fraud, "the circumstances constituting the wrong shall be stated in detail." CPLR 3016(b). To state a viable cause of action, pleadings must contain facts that are "sufficient to permit a reasonable inference of the alleged conduct." *Sargiss v. Magarelli*, 12 N.Y.3d 527, 531 (2009).

**B. Newly Added Allegations and Parties**

Plaintiff alleges that Defendants violated New Jersey's Uniform Fraudulent Transfer Act, N.J.S.A. 25:2-25; 2-27. Section 25:2-25, entitled, "Transfers fraudulent as to present and future creditors," governs intentionally fraudulent conduct. Section 25:2-27, entitled, "Transfers fraudulent as to present creditors," is for constructively fraudulent conduct. The two proposed new causes of action allege that "Defendants" engaged in a series of fraudulent transfers with "Defendants" without receiving fair compensation to hinder, delay, or defraud Arent Fox.

The proposed amended complaint also includes individuals and entities alleged to be transferees of one or more of the transfers, though it fails to allege which "Defendants"

participated in which transfers. Plaintiff also claims that JDN VW LLC must be added as a defendant as it was the “real party in interest.”

**C. The Proposed Second Amended Complaint is “Palpably Insufficient”**

The Court finds that Plaintiff’s proposed amended complaint is palpably insufficient because it could not survive a motion to dismiss for failure to sufficiently plead its new claims. Accordingly, leave to amend is denied. If Plaintiff can plead its proposed claims with the requisite clarity and particularity, it can seek leave to file such an amended complaint.<sup>2</sup>

**a. Arent Fox Failed to Meet the Threshold Level of Detail to Use Group Pleading**

The newly added causes of action reference alleged conduct by “Defendant” or “Defendants,” without distinguishing between or among the Original and Proposed Additional Defendants. It does not indicate which “Defendant” was a transferee in any particular transaction in which “Defendants” are transferors. Such group pleading fails to give each defendant fair notice of what it is alleged to have done, which is particularly important when it comes to allegations of fraudulent behavior. *See, e.g., Aetna Cas. & Sur. Co v. Merchants Mut. Ins. Co.*, 84 A.D.2d 736 (1st Dep’t 1981) (affirming dismissal of a complaint where the claims were “pleaded against all defendants collectively without any specification”); *Ritchie v. Carvel Corp.*, 180 A.D.2d 786, 787 (2d Dep’t 1992) (holding that “allegations of fraud that refer only to the ‘defendants’ without connecting particular misrepresentations to the particular defendants are

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<sup>2</sup> The proposed amended complaint comes near the end of fact discovery, and likely would require an extension of schedule to permit additional disclosure and potentially dispositive motions. Given that the information underlying the amended claims became available during discovery, the Court does not find that delay and prejudice, standing alone, would warrant denial of Plaintiff’s motion for leave to amend.

insufficient”). The affidavit submitted in support of the motion does not remedy these deficiencies.

*Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 491 (2008), is distinguishable. In that case, the nature of the fraud gave rise to a “reasonable inference ... that the officers, as individuals ... were involved in the fraud.” *Id.* at 493. Accordingly, the Court of Appeals held that it was not necessary to “state the details of the individual defendants’ personal participation in, or actual knowledge of, the alleged concealment.” *Id.* at 491. Similarly, in *47-53 Chrystie Holdings LLC v. Thuan Tam Realty Corp.*, 167 A.D.3d 405 (1st Dep’t 2018), the court found that it was reasonable to infer that each of the defendants were involved with the alleged fraud and that the specific act was common among the individuals. Accordingly, the reference in the complaint to “individual defendants” clearly referred to the eight shareholders of the defendant corporation. *Id.* at 406, 407. By contrast, the proposed amended complaint in this case does not address or establish a connection between the individuals amongst the Proposed Additional Defendants and the Defendant companies. The proposed amended complaint does not allege which corporate assets allegedly were transferred to or from which Defendant.<sup>3</sup> .

The group pleading concerns extend beyond the new fraud claims. Because the defendants are grouped together, the complaint does not clearly articulate whether the five previous causes of action apply broadly to the Proposed Additional Defendants. The claims are asserted against “Defendants.” Thus, it is unclear whether and to what extent the Proposed

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<sup>3</sup> While Plaintiff is correct that it should have latitude in pleading its claim when certain information is peculiarly within the knowledge of the defendants, more is required than a blanket allegation leveled without differentiation among a group of entities and individuals. That is particularly so here, where Plaintiff has been taking discovery from the Original Defendants and has deposed at least one of the Proposed Additional Defendants (Joseph Natale).

Additional Defendants are incorporated into the existing claims for relief and the basis upon which such claims might properly be made against them.<sup>4</sup>

**b. Arent Fox Has Not Met the Heightened Pleading Standard for Allegation of Fraud**

Group pleading concerns aside, the proposed claims for fraudulent transfer do not meet the heightened requirements for pleading fraud. The Proposed Second Amended Complaint asserts various allegations based on Plaintiff's "information and belief." While such allegations are not automatically disqualifying, the First Department has held that allegations of fraud "asserted upon information and belief" will not meet the "heightened pleading" standard if they are lacking sufficient detail. *Manda Int'l Corp. v. Yager*, 139 A.D.3d 594, 594 (1st Dep't 2016). Here, Plaintiff's proposed second amended complaint lacks basic details such as: which corporation's assets were transferred to which individual defendants, when the transfer of assets occurred, and what consideration, if any, the individual defendants provided to the corporations in exchange for the assets. For the most part, the proposed second amended complaint simply restates the language of the New Jersey statutes. N.J.S.A. 25:2-25; 2-27. The Court finds that Plaintiff did not meet the heightened pleading standard for fraud claims.

Because Plaintiff has failed to plead the proposed additional allegations with particularity and because the Proposed Second Amended Complaint fails to put each defendant on notice of its respective actions, Plaintiff's Proposed Second Amended Complaint is palpably insufficient, warranting a denial of its motion to amend. *See CIFG Assur. N. Am., Inc. v. J.P. Morgan Sec.*

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<sup>4</sup> During a conference held on June 4, 2019, counsel for both parties indicated that the Original Defendants' assets were transferred to unrelated third parties. The proposed amended complaint alleges, however, that "Defendants" (which includes several related parties) were the "transferees" of the assets.

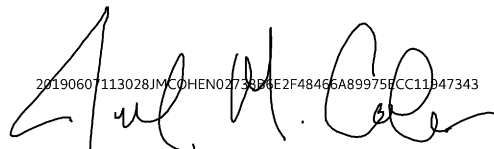
*LLC*, 146 A.D.3d 60, 65 (1st Dep't 2010); *12 Broadway Realty, LLC v. Lakhani Enters. USA, Corp.*, 114 A.D.3d 503, 505 (1st Dep't 2014); *Hartford Cas. Ins. Co. v. Vengross Williams & Assocs., Inc.*, 306 A.D.2d 435, 436-437 (2d Dep't 2003); *Sehera Food Servs. Inc. v. Empire State Bldg. Co. LLC*, 74 A.D.3d 542, 543 (1st Dep't 2010).

Therefore it is:

ORDERED that Plaintiff's Motion for Leave to Amend the Complaint is Denied without prejudice; it is further

ORDERED that Plaintiff is to serve this Order with Notice of Entry on Defendants within 5 days from the date of this Order.

6/7/2019  
DATE

  
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JOEL M. COHEN, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

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DENIED

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

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REFERENCE