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CHRISTOPHER HERMANNS *Plaintiff,* v. WILLIAM J. HERMANNS and W.H. LINEN SUPPLY CO., INC., a New Jersey Corporation *Defendants.*	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION GENERAL EQUITY PART BERGEN COUNTY DOCKET No. BER-C-029-16 CIVIL ACTION DECISION

Argued: August 10, 2017
Decided: August 23, 2017

Honorable Robert P. Contillo, P.J.Ch.

Vafa Sarmasti, Esq. appearing on behalf of the plaintiff, Christopher Hermanns. (Sarmasti, PLLC).

Jonathan S. Liss, Esq. and John T. Wolak, Esq. appearing on behalf of the defendants, William J. Hermanns and W.H. Linen Supply Co., Inc. (Gibbons, P.C.).

DECISION

I. Statement of the Case

Before the Court is a Motion to Amend the Complaint, which was filed by the plaintiff, Christopher Hermanns ("Plaintiff"), on June 8, 2017. The defendants, William N. Hermanns and W.H. Linen Supply Co., Inc. (collectively, Defendants"), filed an Opposition thereto on July 13,

2017. On July 25, 2017, Plaintiff filed a Reply. Oral argument was had on August 10, 2017.[1] The court reserved decision.

This litigation is a dispute between a father and a son regarding a family business, W.H. Linen Supply Co., Inc. ("W.H. Linen"), which is named as a Defendant herein. W.H. Linen is engaged in the business of renting out uniforms, linens, towels, and other products to businesses and personnel in the restaurant industry. Complaint at ¶ 1.[2] Defendant William ("Bill") N. Hermanns is the father of Plaintiff Christopher Hermanns. Ibid. Bill is the sole shareholder of W.H. Linen. Ibid. Plaintiff serves has W.H. Linen's President, and has done so for at least six years. Ibid.

Plaintiff, who previously taught as an adjunct professor at Ramapo College, alleges that he quit teaching and began working at W.H. Linen full-time at the request of his father. Id. at ¶¶ 25–26. Plaintiff maintains that, throughout his years working at W.H. Linen, his father repeatedly assured Plaintiff "that he had sweat equity in the Company and a secure job." Id. at ¶ 6; Proposed Amended Complaint at ¶ 56.

It is also Plaintiff's position that, in April 2016, Bill informed Christopher that he had been diagnosed with Alzheimer's disease in 2015. Complaint at ¶¶ 60–61; Proposed Amended Complaint at ¶¶ 63–64. In the Complaint, Plaintiff states that, during this same conversation, Bill told Christopher: "You need to buy the Company from me right away." Complaint at ¶ 62. This allegation has been omitted from the proposed pleading. Instead, Plaintiff now claims that, during the conversation in which Bill informed Christopher of his diagnosis, Bill expressed is

[1] Also argued on the same date was Plaintiff's Motion for Reconsideration and to Disqualify Gibbons P.C. as counsel for W.H. Linen and Defendants' Cross-Motion thereto.

[2] References to the "Complaint" refer to the pleading originally filed in this action. References to the "proposed pleading" or the "Amended Complaint" refer to the proposed First Amended Complaint.

desire to transfer his ownership interest in W.H. Linen to Christopher. Proposed Amended Complaint at ¶ 65.

Notwithstanding the foregoing, both pleadings allege that, following this conversation in April 2016:

> Plaintiff and his Father started meeting with Mr. Neil Fang, [Bill's] attorney, to discuss ways in which ownership in [W.H. Linen] could be transferred to Plaintiff's name and what amounts could be paid to his Father for the rest of his life on a monthly basis that would allow his Father to maintain as much of the lifestyle to which he was accustomed.

Id. at ¶ 67; Complaint at ¶ 64. For disputed reasons, the transfer of ownership contemplated by the parties never materialized. Plaintiff contends that Bill's Alzheimer's disease frustrated and, eventually, derailed this process, which culminated with Plaintiff's sudden ouster from the Company. Proposed Amended Complaint at ¶¶ 68–81; Complaint at ¶¶ 65–79.

Plaintiff also takes the position that, in Plaintiff's absence from the Company's management, Bill's Alzheimer's disease has placed the Company in jeopardy. Proposed Amended Complaint at ¶ 84; Complaint at ¶ 84. One specific aspect of W.H. Linen that Plaintiff argues is at risk is the Company's confidential and proprietary information, including W.H. Linen's pricing strategy. Proposed Amended Complaint at ¶¶ 99–104; Complaint at ¶¶ 99–104.

Except for the aforementioned distinctions between the pleadings, the allegations contained in the Complaint and the proposed amendment are very similar. In the proposed pleading, Plaintiff seeks to supplement the allegations already pled in Count I, which seeks a declaratory judgment and injunctive relief, and to add a Count IV, which asserts a cause of action for unjust enrichment.[3] Proposed Amended Complaint at ¶¶ 112–134; 147–151.

[3] Additionally, several of the allegations set forth under Count II (Breach of Contract) have been omitted from the proposed pleading.

In the proposed amendments to Count I, Plaintiff seeks to add allegations to the effect that Christopher made many significant sacrifices for, and contributions to, his father and W.H. Linen. Id. at ¶¶127–134. These include quitting his profession and discontinuing graduate school in order to work for W.H. Linen, where Christopher achieved several milestones and accomplishments. Id. at ¶¶ 127–128. Christopher maintains that he continued to make sacrifices and other contributions to the Company after he accepted employment. Id. at ¶ 132. These include accepting less compensation than he was otherwise entitled to and only minimally contributing to his 401K retirement plan, all of which were done in reliance on Bill's repeated promises and assurances that Christopher "had a secure job, sweat equity in the family business, and would succeed . . . as the owner of W.H. Linen." Id. at ¶¶ 130–134. In addition to Plaintiff's foregoing contributions and dedication to the Company, Plaintiff alleges that Bill's promises of a lifetime job from which Christopher would not be terminated, and ultimate ownership of W.H. Linen, is further evidenced by Bill's Last Will & Testament, in which he designated Christopher as the beneficiary to W.H. Linen's ownership. Id. at ¶ 129.

In the wherefore clause of the proposed Count I:

> Plaintiff demands judgment in his favor and against Defendants for declaratory relief that Plaintiff is and continues to be the President of [W.H. Linen], and that he is not and was not terminated[;] that Defendants are estopped from terminated Plaintiff and transferring ownership in [W.H. Linen] to any other person other than Plaintiff[;] along with declaratory judgment and injunctive relief that bars Defendants from transferring ownership in [W.H. Linen] to any other person other than Plaintiff and from claiming Plaintiff is terminated or no longer the president of [W.H. Linen;] and from interfering with or engaging in conduct that interferes with Plaintiff in his role and responsibilities and actions as President of [W.H. Linen;] along with judgment in Plaintiff's favor for his attorney's fees and costs associated with the application for temporary restraining order ad preliminary injunction, and such other further and appropriate remedy and relief as the Court deems proper.

The proposed Count IV is an entirely new claim for unjust enrichment, which arose during the course of this litigation. Id. at ¶¶ 147–151. In particular, Plaintiff pleads that he has incurred costs in the form of attorneys' fees and out-of-pocket expenses to preserve the confidentiality of W.H. Linen's proprietary and otherwise confidential information and records. Id. at ¶ 148. Additional expenses have been incurred as a result of Bill's failure to act and/or actions that are contrary to the best interests of the Company or could otherwise harm or jeopardize W.H. Linen's proprietary and confidential information and records. Id. at ¶ 149. As a result of the foregoing, Plaintiff alleges that Defendants have been unjustly enriched at Plaintiff's expense, for which Plaintiff is entitled to recovery. Id. at ¶¶ 150–151.

II. Plaintiff's Argument

Plaintiff asserts two arguments in support of his Motion to Amend the Complaint. Brief at 2–4. First, Plaintiff argues that there is no prejudice to Defendants by the proposed amendment because the asserted allegations arise from the same facts and events contained in the Complaint or are based on facts and events that arose subsequent to the filing of the initial pleading. Id. at 2–3 (citing Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501 (2006)). In support, Plaintiff relies on Notte, supra, in which the court ruled that "'defendants have no cause to complain of the late assertion against them of claims grounded on the same conduct already alleged in the complaint.'" Id. at 2 (citation omitted) (quoting Notte, supra, 185 N.J. at 501). Specifically, Plaintiff contends that the claims set forth in the proposed pleading, except for the unjust enrichment claim, which arose after the commencement of this litigation, were previously alleged and argued before the Court. Id. at 2–3 (citing Ex. 4 to Certification of Vafa Sarmasti, Esq.).

In further support of his position that Defendants are not prejudiced by the amendment, Plaintiff emphasizes Defendants' Seventh and Ninth affirmative defenses, which address "Plaintiff's claims . . . that Defendants promised to Plaintiff that he would be gifted ownership of W.H. Linen." Id. at 3 (internal quotation marks omitted) (quoting Ex. 2 to Sarmasti Cert.). Plaintiff argues that these affirmative defenses demonstrate that Defendants were aware not only of Plaintiff's asserted right to own W.H. Linen, but also of the allegations underlying Plaintiff's claim. Id.

In closing Plaintiff, stresses that, to date, Defendants have not propounded any discovery demands in this case. Ibid. Nor have Defendants conducted any depositions of the Plaintiff or of other witnesses. Ibid. Additionally, the discovery end date in this matter is January 15, 2018, and trial is scheduled for March 26, 2018. Ibid. For the foregoing reasons, Plaintiff submits that Defendants will not be prejudiced by an amendment to the Complaint at this juncture. Ibid.

Second, Plaintiff argues that the proposed pleading "would not be futile inasmuch as it provides sufficient facts to support the alleged causes of action alleged." Id. at 3–4. Other than reciting the applicable law, Plaintiff does not further support this argument. Ibid.

III. Defendants' Opposition

Defendants assert two arguments in opposition to Plaintiff's motion to amend the Complaint. Opposition Brief at 5–15. First, Defendants argue that leave to amend should be denied because Plaintiff's claim that he was promised ownership of W.H. Linen is futile. Id. at 6–11. Second, Defendants similarly argue that Plaintiff's application should also be denied as to the proposed Count IV as Plaintiff's claim for unjust enrichment is likewise futile. Id. at 11–15. The Court addresses each of Defendant's arguments in turn.

Defendants spell out their opposition to the proposed Count I in two arguments. First, Defendants contend that Plaintiff's claim of an oral agreement to inherit the business is not cognizable because New Jersey law requires that such agreements be in writing to be enforceable. Id. at 7–11. In support, Defendants emphasize N.J.S.A. § 3B:1-4, which expressly requires that contracts to make a will or a specific devise be in writing. Id. at 7–8. Likewise, New York, where Bill Hermanns currently resides, has a similar provision requiring that an agreement to make a bequest be in writing to be enforceable. Id. at 7 (citing N.Y. Est. Powers & Trusts Law § 13-2.1). Based on the foregoing, Defendants contend that Plaintiff's claim that Defendants breached a contract to devise W.H. Linen to him through Bill's Will is barred by the statute as Plaintiff has not pled—and is unable to plead—the existence of a written contract, which sets forth the terms of the parties' purported agreement. Id. at 7–8 (citations omitted).

Defendants emphasize that the proposed Amended Complaint contains only a single allegation regarding the existence of a written document evidencing the parties' supposed agreement. Id. at 8. This allegation is set forth at Paragraph 57 of the proposed pleading and states: "'[I]n his Last Will and Testament, Plaintiff's father has designated Plaintiff as the beneficiary and successive owner to the family business, WHLS.'" Ibid. However, Defendants argue that this allegation fails to satisfy the requirements of N.J.S.A. § 3B:1-4, which mandates that the Will set forth the material provisions of the contract or expressly reference the contract. Ibid. Plaintiff cannot meet these requirements because the Will does not contain any reference to a contract to devise W.H. Linen to Christopher let alone state the material terms of that supposed contract. Id. at 8–9. Because Bill Hermanns has the absolute right to change his Will at any time before his death, and also because the proposed pleading does not reference any other Will or

writing that evidences the parties' agreement, Defendants submit that Plaintiff's application for leave to amend the pleading must be denied. Id. at 9.

Second, Defendants contend that, even if an oral contract to devise W.H. Linen to Christopher were enforceable, the proposed pleading fails to plead the existence of one. Id. at 9–11. Defendants explain that the only allegation contained in the pleading concerning the creation of a supposed contract is the statement, which is repeated at length throughout the proposed pleading, that "'[d]uring all the years that Plaintiff has been managing WHLS, Plaintiff's father had repeatedly assured him that he had a secure job, sweat equity in, and would succeed to the Company.'" Id. at 10 (footnote omitted) (quoting Proposed Amended Complaint at ¶¶ 6, 56, 127, 131, 139). Even though Plaintiff repeats this allegation throughout the proposed pleading, he does not allege when these purported assurances were made, or the particular words used by Bill Hermanns. Id. at 10–11. Plaintiff's vague and conclusory allegations fail to evidence any "'particular overt acts.'" Id. at 11 (quoting Delbridge v. Office of Public Defender, 238 N.J. Super. 288, 314 (1989)). Additionally, Plaintiff admits that he received monetary compensation in the form of a salary for his services to the Company. Id. at 11. Based on the allegations contained in the proposed Amended Complaint, Defendants submit that Christopher cannot, as a matter of law, claim that he would succeed to W.H. Linen in exchange for his services. Ibid.

With respect to Plaintiff's proposed claim for unjust enrichment, Defendants contend that the claim is futile and is nothing more than a ploy to improperly shift responsibility for Plaintiff's attorneys' fees onto Defendants. Id. at 11–14. In support, Defendants emphasize that, to state a claim for unjust enrichment, a plaintiff must allege (i) that the defendant received a benefit, (ii) that retention of that benefit without payment would be unjust, (iii) that the plaintiff expected remuneration from the defendant at the time he conferred the benefit, and (iv) that a reasonable

person in the defendant's position would have expected to provide remuneration for the benefit. Id. at 12 (quoting VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994)) (citing Nat'l Amusement, Inc. v. New Jersey Turnpike Auth., 261 N.J. Super. 468, 47778 (Law Div. 1992); Avery v. Sielcken-Schwarz, 5 N.J. Super. 195, 200 (App. Div. 1949)).

Defendants maintain that the proposed amendment is futile because Plaintiff has failed to allege all of these necessary elements of an unjust enrichment claim. Id. at 12. In support of this position, Defendants specify that Plaintiff fails to allege that he actually conferred a benefit on Defendants. Ibid. Instead, Plaintiff alleges only that he "'incurred costs in the form of attorney's fees and out-of-pocket expenses' to 'preserve the confidentiality of WHLS's proprietary and confidential information and documents.'" Id. (quoting Proposed Amended Complaint at ¶ 148). Defendants contend that this allegation is legally insufficient as well as contrary to the facts. Id. Defendants insist that they have always agreed that confidentiality measures are necessary. Id. at 12–13.

Defendants argue further that Plaintiff's allegation that Defendants were unjustly enriched "is conclusory and doomed to fail." Id. at 13–14 (citing Delbridge, supra, 238 N.J. Super. at 314)). Apart from failing to specify what benefit he conferred on Defendants, Plaintiff also neglects to allege how any benefit conferred on Defendants was unjust. Id. at 14. Nor are there any facts alleged in the proposed pleading from which a reasonable factfinder could conclude that Plaintiff expected remuneration at the time he performed his alleged services and that a reasonable person in Defendants' position would have understood that Plaintiff expected remuneration. Ibid.

In reality, Plaintiff, through counsel, vigorously pursued overbroad confidentiality provisions—an effort that Defendants' counsel was very much involved in. Ibid. Due to

Defendants' role in crafting the resulting confidentiality order, as well as the adversarial relationship, Defendants assert that Plaintiff could not in good faith allege that he expected remuneration from Defendants. Ibid. Furthermore, no litigant would expect to have to pay for his adversary's attorneys' fees and expenses because the adversary chose an overly aggressive course of conduct in the litigation. Ibid. In closing, Defendants submit that Plaintiff is not entitled to proceed with the proposed Count IV because Plaintiff fails to plead all of the necessary elements of a claim for unjust enrichment, the theory underlying which "is ludicrous." Ibid.

IV. Plaintiff's Reply

In his Reply Brief, Plaintiff primarily argues that Defendants' sole reliance on N.J.S.A. 3B:1-4 is misplaced for numerous reasons. Reply Brief at 3–7. To reiterate, Defendants contend that the proposed amendment is futile because, pursuant to N.J.S.A. § 3B:1-4, which requires an agreement to provide a bequest to be in writing, "'Plaintiff has not—and cannot—provide a written document containing the terms of his alleged agreement to inherit W.H. Linen.'" Id. at 3 (quoting Opposition Brief at 1).

Plaintiff argues that Defendants' opposition is without merit, and reliance on N.J.S.A. § 3B:1-4 is erroneous, because N.J.S.A. § 3B:1-4 does not apply to this action. Id. at 4. In support, Plaintiff explains that Title 3B, entitled "Administration of Estate—Decedents and Others", of which N.J.S.A. § 3B:1-4 is a part, governs the administration of estates. Id. at 4 (citations omitted). Accordingly, N.J.S.A. § 3B:1-4, by its own terms, does not apply in instances were an estate is not being administered. Id. This case does not concern the administration of an estate. Ibid. Nor are do any of the issues raised by Plaintiff's complaint or

proposed amendment concern the administration of an estate or a decedent's agreement. Ibid. Because William Hermanns is alive, and the Court is not in the process of administering his estate, Plaintiff submits that Defendants' reliance on N.J.S.A. § 3B:1-4 is entirely misplaced. Ibid. Plaintiff similarly emphasizes that Defendants have not offered any authority to suggest that N.J.S.A. § 3B:1-4 is broader in scope or otherwise applicable to a litigation in which an agreement made by a living person is at issue and there is no estate being administered. Ibid.

Plaintiff argues that N.J.S.A. § 3B:1-4 is also inapplicable to this action because nowhere has it been alleged that the agreement between Plaintiff and his father provided for the transfer of ownership only after William's death. Ibid. Nor has Plaintiff at any time used the words bequeath, devise, or inherit in the Complaint or in the proposed pleading. Ibid. Instead, both pleadings allege that Plaintiff would succeed to the family business. Id. at 4–5. Plaintiff insists that any reference to William's Last Will & Testament was solely for the purpose of demonstrating the existence of an agreement between the parties that Plaintiff would own and succeed to W.H. Linen. Id. at 5.

Plaintiff similarly emphasizes that Defendants' reliance on N.J.S.A. § 3B:1-4 is newfound, as Defendants had never referred to, cited, or even mentioned the provision until now. Ibid. In support, Plaintiff points to Defendants' word choice in the Seventh and Ninth affirmative defenses. Ibid. Therein, Defendants address "Plaintiff's claims . . . that Defendants promised to Plaintiff that he would be gifted ownership of W.H. Linen." Id. at 5 (internal quotation marks omitted) (quoting Ex. 2 to Sarmasti Cert.). Plaintiff stresses that Defendants' use of the word "gifted" as opposed to bequeathed, devised, or inherit demonstrates their understanding of Plaintiff's claims. Id. Plaintiff also urges the Court to consider Defendants' discovery demands as further evidence of Defendants' understanding and recognition that

Plaintiff does not claim to have been promised succession to W.H. Linen solely as a form of inheritance. Id. at 6. Specifically, one of Defendants' requests for admission asks Plaintiff to admit that he had discussions with William Hermanns and Neil Fang regarding the possibility of William Hermanns transferring W.H. Linen stock to Plaintiff. Id. (quoting Ex. A. to Sarmasti Cert.).

Third, Plaintiff argues that, even if the Court is unpersuaded that N.J.S.A. § 3B:1-4 does not apply to this action, Plaintiff is nonetheless able to satisfy the statute. Id. at 6–7. In support, Plaintiff points to those portions of N.J.S.A. § 3B:1-4 which read: "A contract to make a will or devise, or not to revoke a will or devise . . . if executed after September 1, 1978, can be established only by . . . a writing signed by the decedent evidencing the contract." Id. at 6. Plaintiff argues that he is able to satisfy this third option with Defendant's 2014 Last Will & Testament. Id. at 7 (citing Ex. B. to Sarmasti Cert.). Plaintiff contends that a will qualifies as a writing.[4] Id. at 7 (citation omitted). Furthermore, William's Will specifically illustrates that only Plaintiff was to succeed to and become the owner of W.H. Linen pursuant to the parties' agreement. Id. Plaintiff emphasizes that William's Will does not provide for the sale of W.H. Linen or for the transfer or division of W.H. Linen amongst his heirs. Ibid. Parenthetically, Plaintiff also observes that William's Will, which was executed in 2014, establishes that lack of any intent by William to transfer, sell, or otherwise dispose of this asset during his lifetime. Ibid.

Lastly, Plaintiff discusses his added cause of action for unjust enrichment. Id. at 7–9. Plaintiff only addresses Defendants' argument that the proposed pleading fails to allege that Plaintiff conferred a benefit on W.H. Linen. Ibid. Plaintiff maintains that the benefit conferred

[4] If the Court were to determine that a person's will does not constitute a writing within the meaning of N.J.S.A. § 3B:1-4, Plaintiff contends that that finding is of no consequence because William executed a Will as recently as January 2017. Id. at 7. As a result, the 2014 Will executed by William is no longer William's Last Will and Testament. Ibid. Rather, it is simply a writing that was signed by Defendant. Ibid.

on W.H. Linen was the preservation and protection of W.H. Linen's confidential and proprietary information and documents. Id. at 8. Without specifically identifying where this is alleged in the proposed pleading, Plaintiff contends that the proposed Amended Complaint properly alleges the elements of a cause of action for unjust enrichment. Id. at 7–8.

Additionally, Plaintiff emphasizes Defendants' position that Plaintiff is only an employee-at-will. Id. at 9. If the Court agrees with Defendants, then Plaintiff argues that he, as an employee, is entitled to his out-of-pocket expenses, including legal fees and costs, incurred to preserve the confidential and proprietary information of his employer. Ibid. In closing, Plaintiff contends that any ruling to the contrary does not comport with the liberal standing applicable to motions for leave to amend a pleading at this stage of the litigation. Ibid.

V. Analysis

A. Standard of Review

Pursuant to New Jersey Court Rule 4:9-1,

> A party may amend any pleading as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is to be served, and the action has not been placed upon the trial calendar, at any time within 90 days after it is served. Thereafter a party may amend a pleading only by written consent of the adverse party or by leave of court which shall be freely given in the interest of justice.

A motion for leave to amend is to be granted liberally. Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 500-01 (2006). Therefore, "objection to the filing of an amended complaint on the ground that is fails to state a cause of action should be determined by the same standard applicable to a motion to dismiss under R. 4:6-2(e)." Pressler, Current N.J. Court Rules, comment 2.1 to R. 4.9-1 (2017). Nonetheless, motions for leave to amend pleadings are left to the sound discretion of the court in light of the factual situation existing at the time each motion

is made, particularly where the motion is to add new parties or claims on the eve of trial. Kernan v. One Washington Park, 154 N.J. 437, 457 (1998); Fisher v. Yates, 270 N.J. Super. 458 (App. Div. 1994). That exercise of discretion requires a two-step process: "1) whether the non-moving party will be prejudiced; and 2) whether granting the amendment would nonetheless be futile." Id.

To determine "futility" the court should not consider the ultimate merits of the claim; however, "those determinations must be made 'in light of the factual situation existing at the time each motion is made.'" Notte, supra at 501 (quoting Fisher v. Yeats, 270 N.J. Super. 458, 467, (App. Div. 1994)). Leave to amend should be liberally granted "even if the ultimate merits of the amendment are uncertain." G&W, Inc. v. Borough of East Rutherford, 280 N.J. Super. 507, 516 (App. Div. 1995). Notwithstanding the foregoing, "the discretion to deny a motion to amend is not mistakenly exercised when it is clear that the amendment is so meritless that a motion to dismiss under R. 4:6-2 would have to be granted, the so-called futility prong of the analysis." Pressler, Current N.J. Court Rules, comment 2.2.1. to R. 4.9-1 (2017). Accordingly, it is an "error to permit an amendment that fails to state a cause of action on which relief can be granted." Ibid.

Here, Plaintiff seeks leave to amend the Complaint to include an amended Count I and a new Count IV, asserting a cause of action for unjust enrichment. Defendant opposes Plaintiff's application on the ground that both proposed amendments are futile.

B. Count I: The Promises & Assurances of a Secure Job & to Succeed to W.H. Linen

Plaintiff's proposed amendments to Count I address Plaintiff's alleged sacrifices for, and contributions to, Bill and W.H. Linen, in both joining the Company and during his employment.

Additionally, Plaintiff also seeks to supplement Count I with the allegation that he was repeatedly promised and assured that he has sweat equity in the Company, lifetime employment with no threat of termination, and would "succeed" to W.H. Linen. The wherefore clause of Count I seeks to preclude or otherwise restrain Bill Hermanns from selling or transferring his ownership interest in W.H. Linen.

The Court observes that these allegations appear elsewhere in the original Complaint. Although the original Complaint does not address Plaintiff's sacrifices and contributions in as great of detail, the Complaint makes clear that Plaintiff claims that he left his profession and schooling to join W.H. Linen at his father's request, that he made numerous contributions to the Company during his employment, and that he was repeatedly promised and assured that he has sweat equity in the Company, lifetime employment with no threat of termination, and would "succeed" to W.H. Linen. Accordingly, the proposed amendments to Count I are duplicative of allegations elsewhere in the Complaint.

Notwithstanding the foregoing, Plaintiff's claim is far from clear. Although Plaintiff has detailed all of his accomplishments for the Company, and his contributions during his employment, notably absent from Plaintiff's Complaint and the proposed pleading are any particulars about how he was to succeed to W.H. Linen, on what terms he and his father enforceably agreed he was to succeed to W.H. Linen, and the terms of his lifetime employment. Indeed, all that Plaintiff does is reiterate that he was promised and assured that he would have a secure job and would succeed to W.H. Linen.

As the Court sees it, there are two separate claims within Plaintiff's broad allegation. First, Plaintiff contends that he was promised lifetime employment with W.H. Linen. Second,

Plaintiff maintains that he was promised and assured that he would "succeed" to W.H. Linen. These claims are distinct and must be treated as such.

i. Lifetime Employment

With respect to the first claim of lifetime employment, the Court concludes that it would not necessarily be futile to allow Plaintiff to amend the Complaint to provide for this cause of action. The Court's reasoning is set forth below.

The futility analysis effectively requires the Court to evaluate each proposed amendment as if the application were a motion to dismiss. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005). Accordingly, the Court considers whether the proposed pleading states a basis for relief and whether discovery would provide one. Ibid. If not, then dismissal of the complaint would appropriate, and thus a finding of futility. See id. However, if a generous reading of the allegations "merely suggests a cause of action," the complaint will survive the motion. F.G. v. MacDonell, 150 N.J. 550, 556 (1997).

In Savarese v. Pyrene Manufacturing Co., 9 N.J. 595 (1952), the New Jersey Supreme Court announced the general rule regarding at-will employment:

> [I]n the absence of additional express or implied stipulations as to duration, a contract for permanent employment, for life employment or for other terms purporting permanent employment, where the employee furnishes no consideration additional to the services incident to the employment, amounts to an indefinite general hiring terminable at the will of either party, and therefore, a discharge without cause does not constitute a breach of such contract justifying recovery of money damages therefor.

Id. at 600–01 (quoting Eilen v. Tappin's, Inc., 16 N.J. Super. 53, 55 (Law Div.1951)). The Court continued by addressing the generally prevailing rule regarding lifetime employment as follows:

> "[. . .] where the employee has given consideration additional to the services incident to the employment, or, as it is sometimes stated, where the employee purchases the employment, in the absence of a statute, other terms in the contract, or circumstances to the contrary, the contract for permanent employment, for life

> employment, or for other terms purporting permanent employment, is valid and enforceable and not against public policy, and continues to operate as long as the employer remains in the business and has work for the employee, and the employee is able and willing to do his work satisfactorily and does not give good cause for his discharge, a discharge without cause constituting a breach of such a contract entitling the employee to recover damages therefor."

Id. at 601 (quoting Eilen v. Tappin's, Inc., 16 N.J. Super. 53, 55 (Law Div.1951)). The Court in Savarese elaborated further that, due to the unusual nature of a contract for lifetime employment, "[t]he responsibilities assumed and the obligations imposed will be neither created nor spelled out by mere inference when they are not clearly and unequivocally expressed in the contract itself." Id. at 603.

At issue in Savarese was whether an employer's statement that "'[the plaintiff] will have a foreman's job the rest of your life'" amounted to a contract for lifetime employment. Id. at 597. The Court ruled that there existed no enforceable contract of lifetime employment upon finding that the employer's statement was too "vague and uncertain" to comport "with the precision and clarity required by the law."[5] Id. at 603. Our courts have understood the holding of Savarese to be as follows:

> Our reading of the Savarese case discloses no such refusal to recognize or enforce a contract of employment for life, as being the law of the State of New Jersey where this Court is sitting; nor does the case reflect any policy of the law of New Jersey indicating that such contracts are not binding in legal principle, or that they are contrary to public policy, but rather it emphasizes that such contracts are difficult *in fact to prove*, and that most cases involving such fail for insufficiency of evidence to establish them in fact.

Powell v. Fuller Brush Co., 15 F.R.D. 239, 242 (D.C.N.J. 1954).

With Savarese on a solid footing, the court in Shiddell v. Electro Rust-Proofing Corp., 34 N.J. Super. 278, 290 (App. Div. 1954), certif. den., 17 N.J. 408 (1955), recognized the enforceability of an oral contract for lifetime employment. More specifically, the Appellate

[5] Savarese decided the issue in the context of a motion for summary judgment, not a motion to dismiss, or, as here, a motion for leave to simply amend a pleading.

Division reversed the holding of the lower court upon finding that the plaintiff had presented sufficient evidence that specifically, and definitely, demonstrated that the parties intended a long-term commitment, such that—if proven true—a jury could find that plaintiff purchased his employment. Ibid.

Based on the foregoing, it is evident that, under New Jersey law, a litigant may bring a cause of action alleging that he or she was promised lifetime employment pursuant to an oral agreement. See also Rogozinski v. Airstream By Angell, 152 N.J. Super. 133, 143 (Law. Div. 1977) (where there was evidence of a considerable sacrifice of important economic advantages, contract contemplating permanent employment was enforceable). Here, Plaintiff has at least suggested at this cause of action, and is therefore entitled to proceed on this claim. Although the court should not consider the ultimate merits of the claim when determining "futility", Notte, supra at 501, the Court observes that Plaintiff has a high hurdle to surmount:

> Agreements of this nature have not been upheld except where it most convincingly appears it was the intent of the parties to enter into such long-range commitments and they must be clearly, specifically and definitely expressed. Only then is it grudgingly conceded that not all such contracts are "so vague and indefinite as to time as to be void and unenforceable because of uncertainty or indefiniteness."

Savarese, supra, 9 N.J. 601 (citation omitted).

ii. Promises to "Succeed" to W.H. Linen

Based on a reading of the proposed pleading as a whole, and proposed Count I in particular, the Court sees only three potential avenues by which Plaintiff may proceed on his primary claim that he was promised that he would "succeed" to W.H. Linen. First, Plaintiff could argue that he and Bill or the Company entered into an enforceable oral contract to make a will leaving the Company to Christopher. Second, Plaintiff could argue that, Bill promised to gift his shares of the Company to Christopher. Third, Plaintiff could argue that he and Bill

entered into an enforceable, oral agreement by which Bill would sell his shares in W.H. Linen to Plaintiff. None of these possibilities are articulated in the proposed pleading. As set forth below, Court finds that each of these three avenues are dead ends. Accordingly, the Court rules that the proposed amendment to Plaintiff's claim, that he was promised he would succeed to the Company, is futile.

The parties address the first option at length in their submissions. Contractual arrangements relating to death and the disposition of one's assets after death is governed by N.J.S.A. § 3B:1-4, which provides:

> A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after September 1, 1978, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

The Court finds N.J.S.A. 3B:1-4 inapplicable to the issue at hand, and not in itself a bar to the claim of the Plaintiff that his father made an enforceable promise to bequeath him the business. It has long been the law in the State of New Jersey that a child may bring an action against a parent, while the parent is still alive, to enforce an oral promise to leave assets to him or her upon the parent's death. Davison v. Davison, 13 N.J. Eq. 246 (Ch. 1861). In Davison, the Chancellor determined that a father who made a verbal agreement with his son that if he stayed and worked the farm, it would be his upon the father's death, could be held to that promise, notwithstanding that it was an oral promise.

N.J.S.A. 3B:1-4 applies when a party is seeking to enforce such a promise after the death of the promissor. That is why the provision is embedded in Title 3B, "Administration of Estate – Decedents and Others". Such promises must be in writing.

The deficiency in the tendered pleading is not that it claims an oral promise, but that it fails to claim — as Davison would permit — that the son and father entered a contract whereby the father would bequeath the business (or the shares of stock) to the son. Merely alleging that the father promised that the son would 'succeed' to the business — somehow, sometime — fails to equate to a specific promise to bequeath the business.

The fact that until recently the father's final testamentary instrument provide for his son to inherit the business does not equate to an allegation that the father ever promised the son – or entered into a contract with the son – whereby the son would inherit the business from the father.

Nor does the Plaintiff assert that the father promised to gift the business (or shares) to him. Such an allegation would be problematic, were it to be made.

It is well settled that a promise or a gift, which is not supported by consideration, does not create an enforceable obligation. Clayton v. Clayton, 125 N.J.L. 537, 539 (1941) ("The general rule on this point as we understand it is laid down in the case of Cockrell v. McKenna, 103 N.J.L. 166, by our Court of Errors and Appeals (at p, 169) as follows: 'Promises or contracts made on the basis of mere love and affection, unsupported by a pecuniary or material benefit, create at most bare moral obligations, and a breach thereof presents no cause for redress by the courts;' and in 13 C.J. 325, § 166, where 'good' and 'valuable' consideration are distinguished, it is said: 'A good consideration is such as that of blood, or of natural love and affection, as where a man grants an estate to a near relation[;]' and the text goes on to say: 'A promise founded on what is properly termed a good consideration is, according to the great weight of authority, a gratuitous one and unenforceable.'"). Accordingly, the Court concludes that any claim that Bill promised to gift his ownership of the Company to Plaintiff is unenforceable and gratuitous. As a

result, Plaintiff cannot proceed with his claim on this basis and any amendment to this effect would be futile.

Finally, Plaintiff's only other discernible option is to argue that the parties entered into an oral agreement by which Bill agreed to transfer his ownership of W.H. Linen to Christopher for some consideration. However, this theory is similarly futile because neither the Complaint nor the proposed pleading plead that the parties entered into a contract or some form of oral agreement. Notably, Plaintiff does not characterize his succession to the business other than a verbal promise or assurance of succession. Even if these vague statements were considered offers, there is no discussion of a contract, an agreement, mutual assent to material terms, or any sort of bargained-for exchange.

Plaintiff does address how, at one point, he and his father did engage in negotiations or discussions as to what amount Plaintiff would tender to purchase Bill's shares of W.H. Linen. However, Plaintiff pleads that these discussions did not culminate in any sort of purchase agreement. More to the point, Plaintiff is seemingly unable to plead any of the terms of this contract or agreement. How was Plaintiff to purchase his father's interest? Was he to pay valuable consideration for Bill's shares? If so, how much and under what terms and conditions? When was Plaintiff to acquire Bill's interest in W.H. Linen? When did the parties enter into this agreement? Furthermore, even if Plaintiff were to contend that his consideration was to come in the form of his "sweat equity" or his numerous "sacrifices and contributions" to the Company, there is no evidence in the record, and Plaintiff does not plead, that Bill Hermanns ever assented to any such terms. Cf. Rogozinski v. Airstream By Angell, 152 N.J. Super. 133, 143 (Law. Div. 1977).

Based on the foregoing, the Court concludes that the proposed pleading's allegations to the effect that Christopher has an enforceable right to 'succeed' to the business fails to state a viable cause of action and therefore the amendment to the pleading would, in that regard, be futile.

C. Count IV: Unjust Enrichment

Our Supreme Court most succinctly stated the necessary elements of a cause of action for unjust enrichment in Thieme v. Aucoin-Thieme, 227 N.J. 269, 288 (2016) as follows:

> To prove a claim for unjust enrichment, a party must demonstrate that the opposing party "received a benefit and that retention of that benefit without payment would be unjust." Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 110 (2007) (quoting VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994)). "That quasi-contract doctrine also 'requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights.'" Ibid. (quoting VRG Corp., supra, 135 N.J. at 554).

Stated differently, "unjust enrichment is an equitable remedy resorted to only when there was no express contract providing for remuneration[.]" Caputo v. Nice-Pak Products, Inc., 300 N.J. Super. 498, 507 (App. Div. 1997). Accordingly, for Plaintiff to be entitled to proceed with the proposed amendment, Plaintiff must allege that Defendants received a benefit; that retention of that benefit without payment would be unjust; that he expected remuneration from Defendants at the time he conferred the benefit; and that Defendants' failure to compensate Plaintiff enriched Defendants beyond their contractual rights.

In the proposed pleading, Plaintiff alleges that he has incurred costs in the form of attorneys' fees and out-of-pocket expenses to preserve the confidentiality of W.H. Linen's proprietary and otherwise confidential information and records. Proposed Amended Complaint at ¶ 148. Plaintiff contends that the preservation of W.H. Linen's proprietary and otherwise confidential information and records constitutes a conferred benefit. While Plaintiff fails to

specifically plead that he expected remuneration for his counsel-assisted efforts from the Company to secure the Company's confidential information in this litigation, that can be inferred from the proposed pleading, as can the balance of the necessary elements of a successful unjust enrichment claim. The Curt will allow this requested amendment.

VI. Conclusion

For the foregoing reasons, the Court grants in part and denies in part Plaintiff's Motion for Leave to Amend the Complaint. Of the proposed amendments, the Court grants Plaintiff leave to amend the Complaint to provide for a claim for lifetime employment and for unjust enrichment, and denies the request to amend to provide for a succession claim. The denials are without prejudice.

An Order accompanies this Decision.

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ROBERT P. CONTILLO, P.J.CH.

Cc: Thomas Herten, Esq. (w/encl)
VIA FACSIMILE AND MAIL