2018 IL App (1st) 171087-U

Appellate Court of Illinois,
First District,
FIRST DIVISION.

John BUCKLEY and Mama Gramm's Bakery, Inc., an Illinois Corporation, Plaintiffs–Appellants,
v.
Haitham ABUZIR a/k/a Mike Abuzir, Defendant–Appellee.

No. 1–17–1087
|
June 18, 2018

Appeal from the Circuit Court of Cook County, No. 10 CH 27736, The Honorable Anna H. Demacopoulos, Judge Presiding.

ORDER

PRESIDING JUSTICE PIERCE delivered the judgment of the court.

***1** ¶ 1 *Held:* The circuit court's orders granting summary judgment in favor of defendant and denying plaintiffs' motion for leave to file an amended complaint are affirmed. Plaintiffs failed to establish any genuine issue of material fact on plaintiffs' corporate veil-piercing claim as to whether adhering to the corporate fiction would promote an injustice. The circuit court did not abuse its discretion in denying plaintiffs' motion to amend the complaint, as the request was untimely, and the proposed amendments were prejudicial and would not have cured any defects in the pleading.

¶ 2 Plaintiffs John Buckley and Mama Gramm's Bakery, Inc. (Mama Gramm's), obtained a default judgment against Silver Fox Pastries, Inc. (Silver Fox), for alleged violations of the Illinois Trade Secrets Act (765 ILCS 1065/1 *et seq.* (West 2016)) (the underlying action). Plaintiffs subsequently initiated this action seeking to pierce Silver Fox's corporate veil and collect on the default judgment directly from defendant Haitham Abuzir. The circuit court granted defendant's motion for summary judgment and denied plaintiffs' subsequent motion for leave to file a second amended complaint. Plaintiffs appeal. For the following reasons, we affirm the circuit court's judgment.

¶ 3 BACKGROUND

¶ 4 The underlying dispute in this case spans more than a decade and is before this court for the third time. In 2007, plaintiffs obtained a default judgment against Silver Fox in the amount of $421,582.50 for Silver Fox's alleged violation of the Illinois Trade Secrets Act (765 ILCS 1065/1 *et seq*. (West 2016)). Plaintiffs alleged that Silver Fox wrongfully obtained Mama Gramm's bakery recipes and customer lists by hiring Mama Gramm's head baker and obtaining recipes, processes, techniques, formulas, and a customer list from her, and then producing and selling bakery goods that were identical to those of Mama Gramm's to some of Mama Gramm's former customers. Plaintiffs initiated postjudgment citation proceedings but were unable to collect from Silver Fox because it had gone out of business. During the citation proceedings, plaintiffs learned that defendant had loaned $45,000 to Silver Fox during its formation, of which Silver Fox repaid defendant $15,000 from proceeds from the sale of Silver Fox's assets.

¶ 5 In 2011, plaintiffs initiated this action seeking to pierce Silver Fox's corporate veil and hold defendant liable for the default judgment. Plaintiffs alleged that defendant's sister Suna Abuzir held herself out as being Silver Fox's "owner," and her husband, Ali Alsahli (Ali), as the president and registered corporate agent, but that defendant was the one who made all of Silver Fox's business decisions and exercised such control over Silver Fox that the corporation did not exist separately. Plaintiffs alleged that defendant personally "headhunted" Sherry Sloan, Mama Gramm's head baker, and Betty Jenkins, Mama Gramm's cake decorator, for the sole purpose of stealing Mama Gramm's recipes and customer lists.

***2** ¶ 6 Defendant moved to dismiss plaintiffs' complaint under section 2–619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2–619(a)(9) (West 2010)), asserting

that plaintiffs' complaint failed to allege sufficient facts to establish a unity of interest between defendant and Silver Fox because defendant was not an officer, director, or shareholder of Silver Fox. The circuit court granted defendant's motion and plaintiffs appealed. We reversed and remanded, finding that defendant's motion was incorrectly styled as section 2–619 motion and that plaintiffs were prejudiced by the motion's incorrect designation. *Buckley v. Abuzir*, 2012 IL App (1st) 112246–U, ¶¶ 14–15, 20 (*Buckley I*).

¶ 7 After remand, defendant again moved to dismiss the complaint pursuant to section 2–615 of the Code. The circuit court granted defendant's motion and plaintiffs appealed. We again reversed and remanded for further proceedings. *Buckley v. Abuzir*, 2014 IL App (1st) 130469 (*Buckley II*). We concluded that "the lack of shareholder status—and indeed, lack of status as an officer, director, or employee—does not preclude veil-piercing," and that plaintiffs had alleged sufficient facts to establish a unity of interest and ownership between defendant and Silver Fox. *Id.* ¶¶ 29, 32. We observed that many of plaintiffs' allegations were conclusory and that plaintiffs had not explained precisely how defendant allegedly used Silver Fox to perpetrate a violation of the Trade Secrets Act or otherwise engage in fraud or deception. We found that plaintiffs had not explained "*why* [a]dherence to the fiction of a separate corporate existence would sanction a fraud, promote injustice, and/or promote inequitable consequences; *how* defendant perpetrated an injustice; or *what* 'injuries' were alleged in the underlying complaint." (Emphases in original and internal quotation marks omitted.) *Id.* ¶ 39. We concluded, however, that plaintiffs' allegation that defendant "created and started [Silver Fox] and hired [Sloan] for the express purpose of switching over accounts, taking customer lists, and using the trade secrets and recipes belonging to and owned by [p]laintiffs," sufficiently alleged an unfairness or inequity that would result from adhering to the fiction of Silver Fox's separate corporate existence. *Id.* ¶¶ 36–40. We could infer from that allegation—for the purpose of a section 2–615 motion to dismiss—that defendant hired Sloan to obtain Mama Gramm's customer list and recipes in violation of the Trade Secrets Act. *Id.* ¶ 40.

¶ 8 After our remand in *Buckley II*, the parties engaged in discovery. Plaintiffs did not seek leave to amend the complaint. Defendant subsequently moved for summary judgment pursuant to section 2–1005 of the Code (735 ILCS 5/2–1005 (West 2016)). Defendant argued that there were no facts from which plaintiff could "satisfy the second prong of the alter ego test," because defendant "has not engaged in an unfair act sufficient to justify piercing the corporate veil." Defendant's motion was accompanied by his own affidavit and an affidavit from Suna.

¶ 9 Defendant averred that he merely helped Suna and Ali start Silver Fox because of defendant's close relationship with his sister. Although he loaned money to Silver Fox and aided Suna with various business-related aspects of the corporation, defendant did not work for Silver Fox and was not an owner, officer, or director of Silver Fox. Defendant asserted that he did not know either Sloan or Jenkins, did not recruit or interview them, and had no participation in Suna's decision to hire them. Defendant further averred that he later learned that Sloan and Jenkins previously worked for Mama Gramm's but maintained that he did not know it at the time Suna hired them and that he never met them or had ever spoken with them. Defendant asserted that he "did not cause Silver Fox to be formed to steal Mama Gramm's customers, customer lists, or recipes," that he had "no knowledge of Sloan or Jenkins taking trade secrets from Mama Gramm's" and "never saw such materials in the possession of Silver Fox," and "never tried to obtain business for Silver Fox by asking a customer of Mama Gramm's to breach a contract that it had with Mama Gramm's."

***3** ¶ 10 Suna averred that in the spring of 2006, she and a woman named Selma decided to open a bakery together. Suna had no prior experience in baking or managing a bakery, and she asked defendant for help. Suna specifically sought defendant's help in securing a lease for Silver Fox because of defendant's business experience. Suna averred that she was responsible for ordering supplies, baking and selling goods, and hiring and supervising employees. Suna stated that she handled some of Silver Fox's paperwork but that Ali handled most of it, including payroll. Suna averred that defendant never worked or helped in any capacity with running Silver Fox's day-today operations. Shortly after opening, Selma left the business, leaving Silver Fox without a baker. Suna averred that she considered closing the bakery, but she was persuaded to stay in business after defendant loaned Silver Fox money and a vehicle and agreed to help promote Silver Fox by having restaurants that defendant owned buy baked goods from Silver Fox. Suna then met

Claudia Massell, a baker and representative from Dawn Baking Company. Massell taught Suna how to cook and provided Suna with recipes. Suna averred that she placed an ad in a local paper seeking help and that Sloan and Jenkins responded to the ad. Suna interviewed them and ultimately hired them without asking for or checking any references. Suna averred that she "did not hire Jenkins or Sloan to switch over accounts, take customer lists, and use trade secrets and recipes owned by Mama Gramm's" because when she hired them, she "did not even know they had worked for Mama Gramm's." She further averred that defendant "played no role in [the] hiring of Jenkins and Sloan," as "[she] alone placed the ad," and defendant "did not interview Jenkins or Sloan" nor was he ever consulted prior to Suna hiring them. Suna stated that she obtained her recipes from Massell, obtained her customers from defendant by word-of-mouth, and trained Sloan and Jenkins based on what Massell had taught her. Finally, Suna averred that that she did not know that Jenkins and Sloan previously worked for Mama Gramm's, she never discussed with defendant that Sloan and Jenkins previously worked for Mama Gramm's, and she did not know that defendant's restaurants previously bought bakery goods from Mama Gramm's.

¶ 11 Defendant's motion for summary judgment was fully briefed. The circuit court conducted a hearing at which it heard oral argument. There is no transcript of the summary judgment hearing in the record. On March 17, 2017, the circuit court entered a written order granting summary judgment in favor of defendant. The circuit court found that defendant presented uncontroverted evidence that he was not involved in hiring Sloan and had never met her, was not aware Sloan or Jenkins ever worked for Mama Gramm's, never formed Silver Fox for the express purpose of stealing Mama Gramm's trade secrets, and that Suna was solely responsible for hiring Sloan and Jenkins without any knowledge that either worked for Mamma Gramm's. The circuit court explained that for plaintiffs to rebut defendant's claims, they would have to rely on affidavits or other direct evidence because the only witnesses who may have personal knowledge of plaintiff's allegations—Sloan, Jenkins, and Mrs. Buckley, who ran Mama Gramm's—were deceased. The circuit court observed that there were no affidavits, deposition testimony, or other direct evidence created prior to their deaths. Accordingly, plaintiffs would have to rely on hearsay, which would be inadmissible. The circuit court concluded that plaintiffs failed to identify any evidence to rebut defendant's evidence that he had no involvement in the decision to hire Sloan and Jenkins. The circuit court also observed that Buckley had no personal knowledge of whether defendant hired Sloan or attempted to obtain Mama Gramm's recipes. Therefore, the circuit court concluded that that defendants failed to create any genuine issue of material fact that would preclude the entry of summary judgment in favor of defendant.

¶ 12 Plaintiffs filed a timely motion to reconsider and a motion for leave to file a second amended complaint asserting a veil-piercing claim against defendant under a theory of *respondeat superior*. Defendant responded to the motions and the circuit court held a hearing at which it heard oral argument. There is no transcript of the circuit court's hearing on plaintiffs' motions to reconsider and for leave to file a second amended complaint. The circuit court denied both of the motions in a written order that did not set forth its reasoning. Plaintiffs timely filed a notice of appeal.

¶ 13 ANALYSIS

¶ 14 Plaintiffs raise two arguments on appeal. First, plaintiffs argue that the circuit court erred in granting defendant's motion for summary judgment because genuine issues of material fact exist as to whether defendant engaged in fraud or deception such that a public interest justifies piercing Silver Fox's corporate veil. Second, plaintiffs argue that the circuit court abused its discretion by denying plaintiffs' postjudgment motion for leave to file a second amended complaint seeking to hold defendant liable for the default judgment under a theory of *respondeat superior*. We address these arguments in turn.

¶ 15 Summary judgment is appropriate if the pleadings, depositions, affidavits, and other admissions on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2016); *Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 17. An issue is "genuine" if there is a factual dispute as to the material facts or, if the material facts are undisputed, if reasonable persons could draw different inferences from those undisputed facts. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 518 (1993). A material fact is one that "might affect the outcome of the suit" under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 248 (1986). The purpose of summary judgment is not to try a question of fact, but rather to determine whether one exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). "In determining whether a genuine issue of material fact exists, the court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the nonmovant." *West Bend Mutual Insurance Co. v. DJW–Ridgeway Building Consultants, Inc.*, 2015 IL App (2d) 140441, ¶ 20. A party moving for summary judgment bears the initial burden of production and may satisfy it by either showing that some element of the case must be resolved in its favor or that there is an absence of evidence to support the nonmoving party's case. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). Once the moving party satisfies that initial burden, the burden shifts to the nonmoving party to come forward with some factual basis that would entitle it to a favorable judgment. *Id.* We review a circuit court's ruling on summary judgment *de novo*. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 15.

***4** ¶ 16 In Illinois, courts will pierce the corporate veil when "(1) there is such a unity of interest and ownership that the separate personalities of the corporation and the parties who compose it no longer exist, and (2) circumstances are such that adherence to the fiction of a separate corporation would promote injustice or inequitable circumstances." *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1033–34 (2007).

¶ 17 Here, defendant moved for summary judgment on the second prong, which requires showing that adherence to the fiction of Silver Fox as a separate corporation would promote an injustice or inequitable circumstances. The parties' arguments on appeal relate solely to whether there was any genuine issue of material fact on the second prong, and we limit our analysis accordingly. Under this prong, we must ask whether there is some unfairness, such as fraud or deception, or whether some other compelling public interest exists that might justify piercing Silver Fox's corporate veil. See *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 507 (2005). In this case, the second prong turns on whether there is any evidence that defendant engaged in wrongdoing with respect to allegedly obtaining Mama Gramm's customer lists, recipes, and trade secrets.

¶ 18 Plaintiffs contend that there are numerous "contradictions and inconsistencies" between defendant's and Suna's summary judgment affidavits and the testimony given by defendant, Suna, and Ali in connection with the citation proceedings and their depositions. Plaintiffs argue that these alleged contradictions and inconsistencies create genuine issues of material fact as to whether defendant "controlled and ordered everything occurring in [Silver Fox's] business from its beginning, including directing his employee, [Suna], to hire Sloan and Jenkins to steal trade secrets, recipes and customer lists." We conclude, however, that plaintiffs have failed to establish that any of the alleged inconsistencies or contradictions create a genuine issue of material fact on the issue of whether adhering to Silver Fox's separate corporate existence would promote an injustice because plaintiffs failed to present any evidence that defendant participated in or had any knowledge of Suna's decision to hire Sloan and Jenkins.

¶ 19 Plaintiffs first contend that there were discrepancies as to who actually started Silver Fox and the degree to which defendant, Suna, and Ali participated in the business. Plaintiffs contend that Suna averred that she and Selma decided to start the bakery while defendant averred that he helped Suna and Ali start the bakery. Plaintiffs further contend that defendant averred that he and his accountant helped prepare the paperwork to form Silver Fox, but that during a citation examination, defendant denied any involvement in setting up the corporation. Plaintiffs contend that defendant and his accountant created numerous companies together but Silver Fox was the only business the two created in which defendant was not listed as the president or registered agent. Plaintiffs further contend that there is conflicting testimony surrounding Suna's statement in her affidavit that Ali handled most of the paperwork, including paying bills. Plaintiffs assert that Ali testified in the citation proceedings that he had nothing to do with Silver Fox's business and that he handled some bills but that Suna ran the business. Plaintiffs, however, fail to explain how these alleged contradictions are material or what inferences should be drawn in plaintiffs' favor from these allegedly conflicting statements. Furthermore, these statements are irrelevant to the issue of whether defendant ever had any contact with Sloan or whether defendant created Silver Fox in order to take over Mama Gramm's customer list, trade secrets, or recipes.

***5** ¶ 20 Plaintiffs further contend that Suna averred that she ordered supplies and hired and supervised employees, which allegedly contradicts her citation testimony that she let defendant take care of the business and that she entrusted everything to him. Plaintiffs, however, take Suna's citation testimony out of context. During the citation proceedings, Suna was asked a series of questions about the officers and directors of Silver Fox, whether there were any shareholders, and whether she knew "of any corporate books that were ever there at" Silver Fox. Suna responded that she did not know any of that information and that she entrusted that side of the business to defendant. We fail to see how Suna's averment that she was responsible for ordering supplies and hiring and supervising employees conflicts with her prior statement that she left the management of the corporate details of the business to defendant.

¶ 21 Plaintiffs argue that Suna's statement in her affidavit that she received recipes from Massell is contradicted by Massell's deposition testimony. At her deposition, Massell testified that she could only recall one recipe that she gave Suna, and testified that Suna was using recipes from other sources including from Dawn Baking Company, a "bakery provider" that placed recipes on its bags. We find that there is nothing inconsistent or contradictory about Suna's averment and Massell's deposition testimony. Plaintiffs do not identify any evidence in the record in which Suna claimed that the only source of her recipes was Massell, and Massell did not offer any testimony to suggest that she had personal knowledge of all of the recipes that Suna used. Furthermore, plaintiffs' complaint in the underlying action alleged that Silver Fox sold a number of different bakery goods that were "identical in appearance to items baked and sold" at Mama Gramm's, but plaintiffs fail to direct our attention to any evidence in the record as to what bakery items Silver Fox actually sold. Therefore, there are no facts from which we might draw any inferences as to the source or sources of Suna's recipes.

¶ 22 Plaintiffs further assert that defendant "would have this [c]ourt believe that it was just a coincidence that the only [two] people who responded to [Suna's] newspaper ad had previously been [p]laintiff's employees," that Suna admitted that she had no business or bakery experience, and that Suna never previously interviewed prospective employees. Suna stated in her affidavit and at her deposition that she placed an ad in a newspaper seeking help, that Sloan and Jenkins responded to the ad, and that Suna alone interviewed and hired them. Plaintiffs do not identify any evidence in the record that contradicts Suna's assertions. At his deposition, Buckley stated that he had no knowledge of whether defendant contacted, interviewed, or spoke to Sloan, and did not know who hired Sloan on behalf of Silver Fox. Instead, plaintiffs suggest that an inference must be drawn in plaintiffs' favor that because Suna was so inexperienced and her statements are so unbelievable that defendant must have played some role in the hiring of Sloan and Jenkins, despite both Suna and defendant's unequivocal statements to the contrary. Plaintiffs' incredulity is not enough to create such an inference, and neither we nor the circuit court are "required to entertain unreasonable inferences raised in opposition to a motion for summary judgment." *West Bend Mutual Insurance*, 2015 IL App (2d) 140441, ¶ 26. Plaintiffs further argue, "It is simply absurd that [Suna] alone would be involved in the decision to hire [Sloan and Jenkins] when [d]efendant was involved in every other decision along the way and allegedly put $50,000 of his own money into the business." Plaintiffs, however, have not adduced any facts to contradict defendant and Suna's statements that Suna alone made the decision to hire Jenkins and Sloan.

***6** ¶ 23 In sum, we find that plaintiffs have failed to identify any evidence tending to show that defendant was involved in Suna's decision to hire Sloan and Jenkins, or that Silver Fox hired Sloan and Jenkins in order to steal Mama Gramm's customer list, trade secrets, and recipes. Even if there were facts tending to show defendant's involvement in the corporate aspects of Silver Fox's business, those facts do not give rise to any inference that defendant knew Sloan worked for Mama Gramm's or that defendant directed Suna to hire Sloan for the purpose of stealing trade secrets. Plaintiffs did not identify any evidence that contradicted defendants' evidence submitted in support of his motion for summary judgment. Plaintiffs needed to come forward with some evidence linking defendant to the hiring of Sloan for the purpose of obtaining Mama Gramm's recipes and customer lists. Plaintiffs have not done so. We therefore affirm the circuit court's order granting summary judgment in favor of defendant.

¶ 24 Plaintiffs next argue that the circuit court erred in not granting their motion for leave to file a second amended complaint. Plaintiffs' main contention is that they should

be allowed to conform their pleadings to the proofs based on Suna's citation testimony in 2009 in which she stated that she was an employee of Silver Fox. Plaintiffs argue that if this were true, defendant could be held liable under *respondeat superior* for Suna's decision to hire Sloan and Jenkins, and therefore the circuit court erred by denying leave to amend.

¶ 25 Amendments may be made "[a]t any time before final judgment * * * on just and reasonable terms," and may also be amended before or after judgment "to conform the pleadings to the proofs." 735 ILCS 5/2–616 (a), (c) (West 2016). Motions to amend under section 2–616 are to be "liberally construed to allow cases to be decided on their merits rather than on technicalities." *Lawry's The Prime Rib, Inc. v. Metropolitan Sanitary District of Greater Chicago*, 205 Ill. App. 3d 1053, 1058 (1990). The circuit court's decision whether or not to allow an amendment is within its sound discretion, "and the test for determining whether it has abused that discretion is whether its decision furthers the ends of justice." *Id.* See also *In re Estate of Hoover*, 155 Ill. 2d 402, 416 (1993) (abuse of discretion standard for reviewing denials of section 2–616 motions). In order to determine whether the circuit court abused its discretion in denying a party leave to file an amended pleading, we consider whether (1) the proposed amendment would cure the defective pleading, (2) other parties would sustain prejudice or surprise by virtue of the proposed amendment, (3) the proposed amendment is timely, and (4) previous opportunities to amend the pleading could be identified. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992).

¶ 26 Here, the circuit court's order denying plaintiffs' motion for leave to file a second amended complaint did not set forth the circuit court's reasoning and there is no transcript of the hearing on the plaintiffs' motion. Plaintiffs advance no argument on appeal to explain how the proposed second amended complaint satisfies any of the factors we consider when determining whether the circuit court should have allowed leave to replead. It is clear, however, that based on the allegations set forth in the proposed second amended complaint, the circuit court properly exercised its discretion in denying plaintiffs leave to amend.

¶ 27 First, the proposed amendment would not cure any defects in the first amended complaint. According to plaintiffs, the only amendment they intended to make was the addition of a *respondeat superior* theory of liability based on Suna's statement that she was an employee of Silver Fox. Under *respondeat superior* liability, "an employer may be liable for the negligent, willful, malicious or even criminal acts of its employees when such acts are committed in the course of employment and in furtherance of the business of the employer." *Webb v. Jewel Companies, Inc.*, 137 Ill. App. 3d 1004, 1006 (1985). Here, the proposed second amended complaint alleges that defendant "created and started [Silver Fox] and hired [Sloan] for the express purpose of switching over accounts, taking customer lists, and using the trade secrets and recipes belonging to and owned by [p]laintiffs." It further alleges that Suna was an employee of Silver Fox and that Suna "interviewed and hired [Sloan] for the express purpose of switching over accounts, taking, customer lists, and using the trade secrets and recipes belonging to and owned by [p]laintiffs." It alleges that defendant knew that Sloan was employed by Mama Gramm's and then asserts "[defendant] alone was directly involved in hiring [Sloan]."

***7** ¶ 28 The uncontroverted evidence at summary judgment showed that Suna had no knowledge of Sloan or Jenkins's previous employment with Mama Gramm's and plaintiffs identified no evidence tending to show that Suna hired Sloan and Jenkins in order to obtain plaintiffs' customer list, recipes, or trade secrets. As the circuit court noted in its order, Sloan, Jenkins, and Mrs. Buckley were the only people that might have knowledge of whether Suna hired Sloan and Jenkins with knowledge of their previous employment at Mama Gramm's and for the purpose of obtaining Mama Gramm's recipes and customer lists. Those three individuals, however, are all deceased and did not give any testimony prior to their deaths that might create a genuine issue of material fact in light of defendant and Suna's affidavits and Buckley's deposition testimony. Plaintiffs' proposed second amended complaint contains substantially similar factual allegations to those in the first amended complaint, which plaintiffs failed to substantiate during the summary judgment proceedings. The proposed second amended complaint therefore does not cure the defects in plaintiffs' first amended complaint. This factor weighs against allowing plaintiffs leave to replead.

¶ 29 As to the second factor, defendant would be prejudiced by allowing plaintiffs leave to amend the complaint to assert a new legal theory based on facts that have been known to plaintiffs since 2009. Plaintiffs

could have pursued a *respondeat superior* theory from the beginning, but instead chose to only pursue defendant directly. Furthermore, plaintiffs elected to stand on their first amended complaint following our decision in *Buckley II* in which we identified a number of deficiencies in the first amended complaint. Under these circumstances, allowing plaintiffs to pursue a new legal theory based on factual allegations that have already been shown to be unsupported by the factual record, and which would undoubtedly be disposed of through a nearly identical motion for summary judgment, would result in prejudice to defendant. Finally, plaintiffs had ample time to amend the complaint but only sought to do so after the circuit court entered judgment in favor of defendant. This factor weighs against allowing leave to replead.

¶ 30 Third, plaintiffs' motion was untimely. Suna's testimony was made in 2009, which was prior to plaintiffs initiating this action. Following our remand in *Buckley II*, the parties engaged in nearly two years of discovery. Plaintiffs did not seek leave to replead, however, until after the circuit court granted summary judgment in favor of defendant and after the circuit court concluded that plaintiffs had failed to identify any facts to show that defendant had any involvement in hiring Jenkins or Sloan. There are simply no facts to show that plaintiffs' motion for leave to file a second amended complaint was timely. This factor weighs against granting leave to replead.

¶ 31 Finally, plaintiffs were previously granted leave to amend the complaint in 2011 and had ample opportunity to seek leave to amend following our remand in *Buckley II*, but did not do so. This factor also weighs against granting leave to replead.

¶ 32 In consideration of all four factors, we conclude that the circuit court did not abuse its discretion in denying plaintiffs leave to file the proposed second amended complaint.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 35 Affirmed.

Justices Mikva and Griffin concurred in the judgment.

All Citations

Not Reported in N.E.3d, 2018 IL App (1st) 171087-U, 2018 WL 3037731