New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 252—NO. 51
FRIDAY, SEPTEMBER 12, 2014

Outside Counsel

Expert Analysis

Let Them Plead In the Alternative

By **Joshua S. Bauchner**

The right to plead claims in the alternative is well established in New York state practice and jurisprudence. Yet, courts often seek to "streamline" cases at the very nascent stages of a litigation by dismissing so-called "duplicative" claims seeking alternative forms of relief. This practice defies the permissive pleading standards embodied in the CPLR and often risks imposing unnecessary complexity and prejudice into the litigation.

As declared by the New York Court of Appeals: "Undeniably, a plaintiff is entitled to advance inconsistent theories in alleging a right to recovery." *Cohn v. Lionel Corp.*, 21 N.Y.2d 559, 563, 236 N.E.2d 634, 637, 289 N.Y.S.2d 404, 408 (1968). Indeed, not one but two provisions of the CPLR expressly afford a plaintiff this right:

> **Statements.** Every pleading shall consist of plain and concise statements in consecutively numbered paragraphs. Each paragraph shall contain, as far as practicable, a single allegation. Reference to and incorporation of allegations may subsequently be by number. Prior statements in a pleading shall be deemed repeated or adopted subsequently in the same pleading whenever express repetition or adoption is unnecessary for a clear presentation of the subsequent matters. Separate causes of action or defenses shall be separately stated and numbered and may be stated regardless of consistency. *Causes of action or defenses may be stated alternatively or hypothetically.* A copy of any writing which is attached to a pleading is a part thereof for all purposes.
>
> CPLR §3014 (emphasis added).

CPLR §3017(a) similarly provides:

> **Demand for Relief.** (a) Generally. Except as otherwise provided in subdivision (c) of this section, every complaint, counterclaim, cross-claim, interpleader complaint, and third-party complaint shall contain a demand for the relief to which the pleader deems himself entitled. *Relief in the alternative or of several different types may be demanded.*
>
> CPLR §3017(a) (emphasis added).

Supporting the right to plead in the alternative is the permissive standard of review for a motion to dismiss. Courts universally hold that pre-answer motions to dismiss are viewed with disfavor and rarely should be granted. Under CPLR §3211, the applicable test is whether the pleading states a cause of action, not whether the proponent of the pleading, in fact, has a meritorious cause of action. See generally CPLR 3026 ("Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced."). This liberal standard is necessary at the outset of a case where the record is undeveloped and critical documents and operative facts are in the possession of an adversary.

Finding Claims Duplicative

Courts sometimes conclude that alternatively pleaded claims are "duplicative" and dismiss alternative causes of action believing that the doing so "streamlines" the litigation. For example, in *Canzona v. Atanasio*, 2014 WL 2743397, *2 (2d Dept. June 18, 2014), the plaintiff commenced an action to recover his expenditures on real property and a boat jointly owned with the defendants asserting causes of action sounding in breach of contract, conversion, constructive fraud, breach of fiduciary duty, and unjust enrichment. In reversing the dismissal of certain counts based on an improper finding of res judicata, the Second Department upheld causes of action for breach of contract and even unjust enrichment, but inexplicably dismissed the claim for breach of fiduciary duty finding it was "duplicative of the breach of contract cause of action, since the claims are based on the same facts and seek identical damages" Of course, the unjust enrichment claim too was based on the same facts and sought identical damages, was pleaded as an alternative form of relief, and yet survived dismissal.

> The practice of dismissing so-called "duplicative" claims seeking alternative forms of relief defies the permissive pleading standards embodied in the CPLR.

Similarly, in *Val Tech Holdings v. Wilson Manifolds*, 2014 WL 2978179, *3 (4th Dept. July 3, 2014), the plaintiff sued for breach of contract for the sale of specialty manufactured goods and the defendant counterclaimed for breach of contract and sought to leave to amend to add a claim for breach of the implied covenant. The Fourth Department reversed the grant of leave to appeal finding that the claim was "duplicative" of the breach of contract claim since "[a]llegations that defendant violated the implicit contractual duties of good faith and

JOSHUA S. BAUCHNER *is a member of Ansell, Grimm & Aaron in Clifton, N.J.*

fair dealing are not sufficient to state a violation of a duty independent of the contract." Id. (internal quotation omitted).

This finding risks relegating a claim for breach of the implied covenant out of existence. In fact, as the Court of Appeals has explained, "[t]he very nature of a contractual obligation, and the public interest in seeing it performed with reasonable care, may give rise to a duty of reasonable care in performance of the contract obligations, and the breach of that independent duty will give rise to a tort claim." *New York University v. Continental Ins. Co.*, 87 N.Y.2d 308, 316, 662 N.E.2d 763, 767, 639 N.Y.S.2d 283, 287 (1995). Thus, the implied covenant is, in itself, a duty separate and apart from the contract permitting assertion of the alternative cause of action "where a party engages in conduct outside the contract but intended to defeat the contract." Id. Until the parties have an opportunity to engage in discovery, a plaintiff should be afforded the opportunity to preserve its rights with respect to both causes of action.

Court of Appeals Instruction

Canzona and *Val Tech Holdings* run counter to the clear and simple instruction long ago provided by the Court of Appeals in *Cohn v. Lionel Corp*., 21 N.Y.2d 559, 563, 236 N.E.2d 634, 637, 289 N.Y.S.2d 404, 408 (1968). There, the plaintiff issued a guaranty on behalf of the defendant to further a sale transaction in which the defendant acquired a company in exchange for shares of its stock. When the stock price declined, the seller called on the guaranty, and plaintiff sued seeking indemnification.

The issue on appeal solely concerned the legal sufficiency of the plaintiff's complaint, which alleged a count asserting that the plaintiff acted as an officer of the corporation and an inconsistent count alleging that he acted as an agent of the corporation. The court concluded that this did not provide a basis for dismissal as "[u]ndeniably, a plaintiff is entitled to advance inconsistent theories in alleging a right to recovery." Accordingly, the court reversed the lower court's dismissal, and both counts were permitted to proceed.

Relying on this line of reasoning, the First Department in *Joseph Sternberg, Inc. v. Walber 36th Street Assoc.*, 187 A.D.2d 225, 594 N.Y.S.2d 144 (1st Dept. 1993), upheld the assertion of alternative causes of action sounding in contract and tort. There, the plaintiff sued to collect on a commission from the sale of real estate. After locating the property and negotiating an agreed purchase price, the plaintiff's principal concluded the sale for a lesser price and agreed to pay other brokers. The plaintiff asserted a claim for breach of contract to enforce the original agreement entitling it to a commission, and claims under quasi-contractual theories of recovery to the extent the original agreement was found to be unenforceable. The First Department reversed the lower court's dismissal of the "duplicative" claim finding that alternative causes of action are permitted, for example, "where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue."

> There is no prejudice to any party arising from pleading in the alternative or "duplicative" claims but great prejudice in denying a plaintiff this statutory right.

Consequences

As evidenced by these cases, a motion to dismiss so-called "duplicative" claims only serves to promote delay and increase expense. While the motion is pending the parties are unlikely to engage in any discovery—a delay of up to six months in some courts. The litigants also will have to bear the expense of motion practice which, in effect, achieves nothing except the likelihood of additional motion practice; motions to compel with respect to the scope of discovery and to amend, for example. Of course, this also increases the burden on the court's docket and violates principles of judicial economy.

Additionally, the claims in a pleading dictate the permissible scope and extent of discovery conducted between the parties. See generally CPLR 3101 ("There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof."). A narrowed pleading risks unnecessarily circumscribing discovery at the outset, only to have to extend or re-open discovery in the event a plaintiff has to amend its complaint to add new or alternative causes of action. This often leads to a motion to amend late in the litigation, which is then denied on the basis that it will prejudice the defendant. See *McCaskey, Davies and Assocs. v. New York City Health & Hosps. Corp.*, 59 N.Y.2d 755, 757, 463 N.Y.S.2d 434, 434 (1983) ("The policy is to permit amendment, for almost any purpose, as long as the adverse party cannot claim prejudice.").

Thus emerges a Catch-22: A plaintiff that is denied the right to plead in the alternative at the beginning of the litigation is subsequently denied the right to amend its pleading toward the end to assert claims to conform to the evidence because doing so putatively risks prejudice to the defendant. See generally CPLR §3025(c) ("Amendment to conform to the evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances."). Plainly, this does not conform to the dictates of the CPLR and risks severe prejudice in the form of an injury without a remedy in violation of a plaintiff's constitutional right to due process.

The better practice is simply to adhere to the CPLR, which smartly permits liberal pleading, pleading in the alternative, and an election of remedies toward the end of the litigation to resolve duplicative claims. Indeed, it is the "clear mandate of CPLR §§3014 and 3017 which permit, and in fact, encourage pleading of claims and remedies in the alternative, as well as New York practice which provides that the election of remedies, if any, 'need not be made until all the proof has been presented.'" *Volt Systems Development Corp. v. Raytheon Co*., 155 A.D.2d 309, 309, 547 N.Y.S.2d 280, 281 (1st Dept. 1989) (quoting 3 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 3002.04 at 30–122 (1988)).

Consequently, there is no prejudice to any party arising from pleading in the alternative or "duplicative" claims but great prejudice in denying a plaintiff this statutory right. Courts should adhere to the CPLR which governs practice in the state and not unilaterally seek to somehow improve upon its mandates.