

E-FILE

SHORT FORM ORDER

INDEX NO. 16/609510

SUPREME COURT - STATE OF NEW YORK COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
SUPREME COURT JUSTICE

JONATHAN TROFFA, individually and
derivatively on behalf of JOS. M. TROFFA
LANDSCAPE AND MASON SUPPLY, INC. And
JOS. M. TROFFA LANDSCAPE AND MASON
SUPPLY, INC.,

Plaintiffs,

-against-

JOSEPH M. TROFFA, LAURA J. TROFFA, JOS.
M. TROFFA MATERIALS CORPORATION,
NIMT ENTERPRISES, LLC, L.J.T.
DEVELOPMENT ENTERPRISES, INC., and JOS.
M. TROFFA LANDSCAPE AND MASON
SUPPLY, INC.,

Defendants.

ORIG. RETURN DATE: 7/26/17
SUBMISSION DATE: 1/10/18
MOTION SEQ#006
MOTION: 006-MD

PLAINTIFF'S ATTORNEY
MARGOLIN BESUNDER LLP
1050 OLD NICHOLS ROAD, STE 200
ISLANDIA, NEW YORK 11749

DEFENDANT'S ATTORNEY
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NEW YORK, NY 10017

Upon the following e-filed papers numbered 111 to 138 read on this motion for leave to amend first amended complaint ; Notice of Motion/ Order to Show Cause and supporting papers 111 - 118 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 123 - 135 _____; Replying Affidavits and supporting papers 136 - 138 _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the plaintiff's motion (006) seeking leave to amend the first amended complaint is denied; and it is further

ORDERED that the parties are directed to appear in Part 48 on March 12, 2018 at 10:00 a.m.

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In this dissolution and shareholder derivative action, plaintiff moves for leave to amend the first amended complaint. The proposed second amended complaint contains five causes of action, as follows: fraud, compel a conveyance of the compost yard to the corporation, corporate waste and to compel an accounting, equitable accounting, and derivative cause of action.

In support of his motion, plaintiff's counsel affirms that the second amended complaint cures the deficiencies noted by the Court in the first amended complaint.

In opposition, defendants contend that plaintiff is merely using this new motion as a further attempt to reargue the prior motion to dismiss and the motion to reargue. Defendants further state that plaintiff is seeking to utilize the fraud and corporate waste claims in order to bypass the statute of limitations, and that the equitable claims are duplicative of the original derivative fourth cause of action in the first amended complaint. Defendants further state that plaintiff failed to obtain permission from the receiver to litigate the derivative claims, and has also failed to obtain the court's authorization once the receiver was appointed. As to the first cause of action, plaintiff fails to articulate a specific false statement of fact, only bare conclusory allegations, without any supporting detail. At most, it alleges a speculative hope of future performance at some unstated and unknown time - that the Corporation might one day become an owner of the four real properties he admittedly knew were acquired and owned by other entities. Therefore, plaintiff is stating a claim for fraud based upon disappointment that a promised future benefit did not materialize. In addition, defendants contend that plaintiff cannot show justifiable reliance.

Defendants also state that the court already ruled on the allegations in the second cause of action for breach of fiduciary duty for defendant Troffa's acquisition of the compost yard, in that the claim is barred by the three-year statute of limitations. Defendants further argue that the third cause of action for corporate waste is duplicative of the existing fourth cause of action for derivative liability, which encompasses "every form of waste of assets and violation of duty." With regard to the fourth cause of action, defendants state that the court already ruled that plaintiff may not seek an accounting directly, only derivatively as part of his existing fourth cause of action. Finally, defendants state that the fifth cause of action is also duplicative of the existing fourth cause of action.

In reply, plaintiff claims that its motion was served prior to the appointment of a receiver and during a conference with the court on the same day as the preliminary conference, it appeared that the court had no objection to the motion.

Initially, the court notes that, inasmuch as plaintiff served its motion prior to the appointment of the receiver, that there is no prohibition to deciding the instant motion.

It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise (CPLR 3025 [b]; *Thomas Crimmins Contracting Co. v New York*, 74 NY2d 166, 544 NYS2d 580 [1989]); *McCaskey, Davies & Associates, Inc. v New York City Health & Hospitals*

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Corp., 59 NY2d 755, 463 NYS2d 434 [1983]). However, leave to amend will be denied where the proposed pleading is palpably insufficient as a matter of law (*Bankers Trust Co. v Cusumano*, 177 AD2d 450, 576 NYS2d 546 [1st Dept 1991]; *Bencivenga & Co., CPAs, P.C. v Phyfe*, 210 AD2d 22, 619 NYS2d 33 [1st Dept 1994]). The decision whether to grant such leave is within the court's sound discretion, to be determined on a case-by-case basis (*Mayers v D'Agostino*, 58 NY2d 696, 458 NYS2d 904 [1982]); *Pellegrino v New York Transit Authority*, 177 AD2d 554, 576 NYS2d 154 [2d Dept. 1991]).

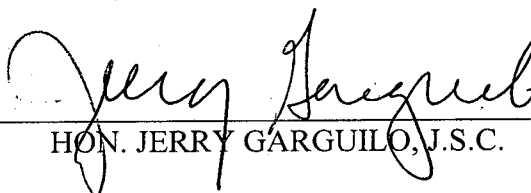
To state a legally cognizable claim of fraudulent misrepresentation, "the complaint must allege that the defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff; that the plaintiff reasonably relied on the misrepresentation; and that the plaintiff suffered damage as a result of its reliance on the defendant's misrepresentations" (*P. T Bank Cent. Asia v ABNAMRO Bank N.V.*, 301 AD2d 373, 376, 754 NYS2d 245 [1st Dept 2003]; see also *Berger v Roosevelt Inv. Group Inc.*, 28 AD3d 345, 346, 813 NYS2d 419 [1st Dept 2006]). Pursuant to CPLR 3016 (b), "where a cause of action or defense is based upon misrepresentation, fraud, * * *, the circumstances constituting the wrong shall be stated in detail.

Plaintiff's motion is denied as the second amended complaint is palpably insufficient as a matter of law (*Bankers Trust Co. v Cusumano*, *supra*). The court finds that the first cause of action alleging fraud fails to state in detail (CPLR 3016 [b]) when the original statement was made and exactly when the second statement was made by defendant Joseph Troffa (CPLR 3016 [b]). Contrary to plaintiff's contentions, the two-year fraud discovery rule pursuant to CPLR 213 (8) is inapplicable.

The second cause of action alleging breach of duty of loyalty and fiduciary duty is duplicative of the third cause of action in the first amended complaint which sought quiet title to the compost yard and was dismissed by order dated January 11, 2017 (Garguilo, J.), and is therefore without merit. The third and fourth causes of action seeking an accounting and an equitable accounting are subsumed in the fifth cause of action which alleges a derivative cause of action pursuant to New York Business and Corporations Law §720 and are dismissed.

Accordingly, under the present circumstances and in the Court's discretion, plaintiff's motion seeking leave to amend the first amended complaint is denied.

DATED: February 7, 2018


HON. JERRY GARGUILO, J.S.C.