

**Supreme Court of the State of New York  
County of Suffolk  
Commercial Division Part XLVI  
Memorandum Decision**

**PRESENT:**

**HON. JAMES HUDSON**

*Acting Justice of the Supreme Court*

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CHARLES BILLINGS,

Plaintiff,

-against-

BILLINGS PROPERTIES INC. and PATRICIA  
BILLINGS,

Defendants.

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**INDEX NO.: 619098/2020**

**MOT. SEQ. NO.: 002 – Mot D**

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In this matter grounded in the ownership, receipt and distribution of business assets, Plaintiff, Charles Billings (“Plaintiff”) requests an Order pursuant to **CPLR 3025 (b)**, for leave to amend the complaint; restraining Defendant Patricia Billings from using the funds of Defendant Billings Properties, Inc. (“Business”, collectively “Defendants”) to pay her legal fees in this action; directing Patricia Billings to return to Billings Properties Inc. all of its funds already used to pay her legal fees herein; and directing Patricia Billings to make additional distributions to the shareholders of Billings Properties Inc. from the funds received from the satisfaction of a mortgage.

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Billings Properties, Inc., a domestic real estate management corporation, is a closely held family business which owned two (2) commercial properties from which it derived rental income. On or about July 7<sup>th</sup>, 2017, the Business sold the property which address is 130 Sunrise Highway, West Islip, NY (“West Islip Property”). That West Islip Property was sold subject to a private mortgage of which the Business was the maker and mortgagee. In or around December 2021 the mortgage was satisfied, and the sale proceeds were partially distributed. The second property, which address is 2937 Sunrise Highway, Islip Terrace, NY (“Islip Terrace Property”) is leased to a boat dealership. The Business was partially owned by the senior Charles Billings, the father of the other two owners, Plaintiff Charles Billings, and non-party Barbara [Billings] Reilly. On January 23<sup>rd</sup>, 2017, the senior Charles Billing died. His death led to the creation of a Trust by which his share of the Business passed to his wife, Patricia and his four (4) grandchildren [Last Will & Testament of George Billings, Doc. 41]. The distribution of Business assets is the basis for the instant matter.

The Plaintiff, as part of his instant motion, has requested leave to amend the complaint (Docs. 1, 36).

“Whether to grant such leave is within the motion court’s discretion, the exercise of which will not be lightly disturbed” (*Hofstra Univ. v. Nassau County, N.Y.*, 166 AD3d 861, 863, 89 NYS3d 1 [2d Dept 2018]; see *Kimso Apts., LLC v. Gandhi*, 24 NY3d 403, 411, 998 NYS2d 740, 23 NE3d 1008 [2014]). “In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered [citations omitted]” (*Castaldi v. Castle Restoration, LLC*, 207 AD3d

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618, 620, 170 NYS3d 488 [2d Dept July 20, 2022]). The proposed amendments must fit within a cognizable legal theory (*Gotlin v. City of New York*, 35 Misc3d 1236[A], 953 NYS2d 549 [Sup Ct Kings County 2010]).

Leave to amend pleadings should be freely granted by the court in the absence of prejudice to the opposing party (*Bleakley Platt & Schmidt, LLP v. Barbera*, 136 AD3d 725, 24 NYS3d 740 [2d Dept 2016]). A proposed amendment must neither be “palpably insufficient” nor “devoid of merit” and must not result in prejudice or surprise to an adversary (*R. Vig Properties, LLC v. Cohen*, 153 AD3d 565, 566, 60 NYS3d 97 [2d Dept 2017]; see *Edwards v. 1234 Pac. Mgt., LLC*, 139 AD3d 658, 30 NYS3d 675 [2d Dept 2016]; *Maldonado v. Newport Gardens, Inc.*, 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]).

“Additionally, the legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt” (*Lucido v. Mancuso*, 49 AD3d 220, 227, 851 NYS2d 238 [2d Dept 2008]). “If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing” (*Id.* at 229; see *Cirillo v. Lang*, 206 AD3d 611, 612, 169 NYS3d 651 [2d Dept June 1, 2022]). “Defendants’ arguments that they would be prejudiced because the proposed amendments would subject them to increased liability is unavailing, as ‘prejudice is more than the mere exposure of the [opposing parties] to greater liability’ [*Kimso Apts., LLC, supra.* at 411].

In this context, a party’s burden of showing prejudice requires ‘some indication that the party has been hindered in the preparation of the party’s case or has been prevented from

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taking some measure in support of its position' [*Id.*]" (*Nyahsa Services, Inc., Self-Ins. Trust v. People Care Inc.*, 156 AD3d 99, 103, 64 NYS3d 730 [3d Dept 2017]).

The Plaintiff has attached his proposed amended complaint as motion Exhibit "G" (Doc. 45). Plaintiff's counsel, in his legal memorandum, states that, based upon the testimony of Patricia Billings at her 6/8/2022 deposition of Patricia Billings, he determined:

"...that Plaintiff's claims concerning the repayment of the alleged loans are actually derivative claims, not individual claims, as the alleged loan was between George [deceased] and the Company [Business]. While [the] Plaintiff was injured by the improper loan re-payment his injury is derivative to the direct injury incurred by the Company. Accordingly, in the proposed amended complaint, Plaintiff's third and fourth causes of action assert derivative claims for breach of fiduciary duty and unjust enrichment against [Defendant] Patricia [Billings] with respect to the loan repayment" (Doc. 48, page 13, referencing Doc. 45, para. 28-35).

The Plaintiff filed his motion to amend the complaint to reflect what was learned at Patricia Billings' EBT, within sixty (60) days of her deposition.

Defendants' counsel, in his legal memorandum in opposition, alleges that the Plaintiff was aware of the contents of the deceased George Billings' Last Will & Testament from its 2017 probate filing; including Patricia Billings' being named the residuary beneficiary (Doc. 51, p. 2). Counsel further argues that the Plaintiff was aware for many years that the decedent had made a loan to the Business which it carried on its books; yet took no action and should not now be granted leave to amend to include that debt (p. 3).

The Plaintiff's request is alleged to be based upon information recently gleaned from the deposition of Patricia Billings. The Defendants do not allege surprise nor that the

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request is palpably insufficient, nor that it is devoid of merit. Although the Defendants assert prejudice, the case is in its discovery stage. The Defendants oppose the request to amend the complaint; arguing that amendment will result in the Defendants facing potentially increased liability. That argument is insufficient reason to deny the request. The Defendants have not filed for summary judgment. The Court is guided by legislative and judicial mandate that Plaintiff's request must receive liberal consideration.

Plaintiff also requests that Defendant Patricia Billings be restrained from utilizing Business proceeds to pay her legal fees in this action, and that she be directed to return all such funds spent to date for that purpose. In answer to this aspect of the Plaintiff's motion, Ms. Billings points out that she has inserted a defense in this case, both as the President of Billings Properties, Inc., as well as the Trustee of the family trust. That Trust was established by her now-deceased husband and Business founder. The legal fees already incurred by Patricia Billings, she contends, were within the scope of duties as a corporate officer.

Although not specifically articulated as such, the motion to restrain and compel Ms. Billings' action vis-à-vis the use of company funds is the equivalent of an application for injunctive relief (CPLR § 6301). Accordingly, the movant must demonstrate their entitlement to same by clear and convincing evidence (*Keneally, Lynch & Bak, LLP v. Salvi*, 190 A.D.3d 961, 141 N.Y.S.3d 69, 72 [2<sup>nd</sup> Dept. 2021])

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As discussed below, Plaintiff's request to enjoin Ms. Billings has both a statutory and common law impediment.

**BCL 722 (a)** states, in pertinent part, that:

“ A corporation may indemnify any person made...a party to an action...whether civil or criminal...which any director or officer of the corporation served in any capacity at the request of the corporation, by reason of the fact that he...was a director or officer of the corporation, or served such other...trust...or other enterprise...including attorneys' fees actually and necessarily incurred, as a result of such action or proceeding...if such director acted, in good faith, for a purpose which he reasonably believed to be in, or, in the case of service for any other...trust...or other enterprise, not opposed to, the best interests of the corporation...”

Moreover, **BCL 715 (h)** relates that: “An officer shall perform his duties as an officer in good faith...In performing his duties, an officer shall be entitled to rely on information, opinions...in each case prepared or presented by: (2) counsel...or other persons as to matters which the officer believes to be within such person's professional or expert competence...A person who so performs his duties shall have no liability by reason of having been an officer of the corporation.” A fair reading of these two statutes demonstrates that Ms. Billing's retention of legal counsel is permissible behavior. At the very least, Plaintiff has failed to show his right to the relief sought by clear and convincing evidence.

Assuming, *arguendo*, that the Business Corporation law was silent on this subject, the Court finds that common law favors the respondent as well.

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The business judgment doctrine "... bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of the honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Auerbach v. Bennett*, 47 NY2d 619, 629, 419 NYS2d 920, 393 NE2d 994 [1979]).

As in the case of *Goldston v. Bandwidth Tech. Corp.*, 52 AD3d 360, 859 NYS2d 651 (1st Dept 2008), the Defendant in the matter at hand can claim that she "...was acting with apparent authority to engage the services of counsel" (Id. at 362-363 citing *A&M Wallboard v. Marina Towers Assoc.*, 169 AD2d 751, 752, 565 NYS2d 118 (2d Dept 1991). Since, as President of Billings Properties Inc. Ms. Billings had apparent authority to retain an attorney, her actual authority is not subject to review at this juncture (*Goldston*, supra. at 363-364)

Finally, the Court addresses that portion of Plaintiff's application which requests that Patricia Billings be directed to make distribution of that portion of the sale proceeds which were withheld at the closing of the West Islip Property.

A disputed material question of fact exists whether Charles Billings, deceased, made a personal loan to the Business; which, if true, arguably must be settled as part of his Estate. Motion Exhibits B and C record that debt upon the Business books and records and thirteen (13) years of Business tax returns (Docs. 54, 55). That loan balance is stated as \$326,700.00. No promissory note has been made part of the filed record. The amount retained from the sale of the West Islip Property is expressed as "25%" (affidavit of Charles Billings, Doc. 38, para. 24). Plaintiff's counsel, in his Reply Memorandum of Law declares

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the amount in controversy as "...more than \$200,000.00 of said proceeds [were] withheld from Plaintiff (*see* P[laintiff] Billings Aff., at para. 13). Patricia initially stated that the reasons for withholding such a large percentage of the mortgage payoff proceeds was for future legal fees and expenses relating to the management of the remaining rental property owned by the Company (the 'Islip Terrace Property')" (Doc. 67, p. 15). The affirmation of Ernest R. Wruck, Esq., counsel to the Estate of George H. Billings, deceased, is filed as Document 57. Attorney Wruck states: "Patricia Billings consulted James Dunne [CPA for Billings Properties, Inc.] and myself about the distribution of proceeds [from the sale of the West Islip Property] and we collectively determined that 75% of the funds should be distributed to the shareholders and that it was prudent that 25% be retained by the Company for the time being" (para. 11). Arguably this "hold back" of assets was to resolve the alleged Business debt to the Estate. Plaintiff's counsel, in his supporting memorandum of law states: "In addition to the foregoing, Patricia withheld what is believed to be 25% from Plaintiff's share of the mortgage payoff proceeds, which totals more than \$200,000.00" (Doc. 48, p. 16). The amount in controversy is not specified. The Parties disagree as to the purpose for the retention of sale proceeds. The instant motion does not request that the contested monies be escrowed pending resolution; nor that an undertaking bond be filed. In short, the Plaintiff has not met the quantum of proof required for the issuance of preliminary injunctive relief (*Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 NY3d 839, 800 N.Y.S.2d 48 [2008]; *Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*, 65 AD3d 1051, 886 N.Y.S.2d 41 [2d Dept 2009])



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Accordingly, it is

**ORDERED**, that the motion (seq. no. 002) by the Plaintiff, Charles Billings which requests, pursuant to **CPLR 3025 (b)** for leave to amend his complaint and file in its place and stead the Amended complaint (Document 45) is granted; and it is further


**ORDERED**, that the request that the Defendant Patricia Billings be restrained from using the funds of Defendant Billings Properties, Inc. to pay her legal fees to date in this action, is denied; and it is further

**ORDERED**, that the request that Patricia Billings be directed to return to Billings Properties, Inc. all funds already used to pay her legal fees associated with this case, is denied; and it is further

**ORDERED**, that the request that Patricia Billings be directed to make additional distributions to the shareholders of Billings Properties, Inc. from the funds received from the satisfaction of a mortgage against 130 Sunrise Highway, West Islip, NY, is denied.

This memorandum also constitutes the Order of the Court.

Dated: December 21<sup>st</sup>, 2022  
Riverhead, NY



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**HON. JAMES HUDSON**  
*Acting Justice of the Supreme Court*