

**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

-----X
CHARLES BILLINGS, individually and
derivatively on behalf of BILLINGS
PROPERTIES, INC.,

INDEX NO.: 619098/2020
MOT. SEQ. NO.: 003 – MotD
004 - MG

Plaintiffs,

VISHNICK, McGOVERN, MILIZIO, LLP
Attorneys for the Plaintiff
3000 Marcus Avenue, Suite 1E9
Lake Success, NY 11042

-against-

PATRICIA BILLINGS,
Defendant.

TAROFF & TAITZ, LLP
Attorneys for the Defendants
630 Johnson Avenue, Suite 105
Bohemia, NY 11716

-----X

The Plaintiffs, Charles Billings, individually and derivatively on behalf of Billings Properties, Inc. (“Plaintiffs”) request an Order pursuant to **CPLR 2221 (d)** granting partial reargument of the December 21st, 2022 Decision and Order, and, upon reargument: 1) restraining Patricia Billings from using the funds of Billings Properties, Inc. to pay her legal fees going forward in this action; and 2) directing Patricia Billings to return to Billings Properties, Inc. all of its funds which she has previously used to pay her legal fees in this action.

The Defendant, Patricia Billings (“Defendant”) requests an Order pursuant to **CPLR 3025 (b)** for leave to file an Amended Verified Answer.

The Court will first consider the Plaintiffs’ motion (seq. no. 003) which requests limited reargument of the December 21st, 2022 Decision and Order (“Order”).

Billings v Billings

619098/2020

A motion for leave to reargue allows the Court, in its sound discretion, to examine a prior determination and ascertain whether it “overlooked or misapprehended” controlling “fact or law” (*A.R. Conelly, Inc. v. New York City Charter High Sch. For Architecture, Eng’g & Constr. Indus.*, 206 AD3d 787, 788-789, 170 NYS3d 571 [2d Dept 2022]).

CPLR 2221 (d) (2) specifically prohibits the Plaintiffs from including any matters of fact or law not offered on the prior motion (*see Castillo v. Motor Vehicle Accident Indemnification Corporation*, 161 AD3d 937, 938, 78 NYS3d 162 [2d Dept 2018]).

The Plaintiffs assert that the Court overlooked, misapplied and/or misapprehended the relevant law and facts with regard to a portion of their prior motion (seq. no. 002). The Plaintiffs aver that the Court was incorrect in denying their request to restrain Patricia Billings from using corporate funds to pay her legal fees going forward in the action, and in not directing Patricia Billings to return to Billings Properties, Inc. (“Corporation”) all corporate funds already used to pay her legal fees in this action.

The Plaintiffs argue that the Court misunderstood and misapplied **BCL 715, 722** in its consideration of the motion requests. The Court does not agree.

In the Order, the court stated:

“Although not specifically articulated as such, the motion to restrain and compel Ms. Billings’ actions 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 AD3d 961, 141 NYS3d 69, 72 [2d Dept 2021]).”

The Court continued:

Billings v Billings

619098/2020

“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...which any director or officer of the corporation served...by reason of the fact that he...was a director or officer of the corporation, or served such other...trust...including attorneys’ fees actually and necessarily uncured, 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...the best interests of the corporation...’

Moreover, **BCL 715 (h)** relates that: ‘An officer shall perform his duties...In performing his duties an officer shall be entitled to rely on information, opinions...in each case prepared or presented by (2) counsel...A person who so performs his duties shall have no liability by reason of having been an officer of that corporation.’

A fair reading of these two statutes demonstrates that Ms. Billings’ retention of legal counsel is permissible behavior. At the very least the Plaintiff has failed to show his right to the relief sought by clear and convincing evidence.”

The Court concluded:

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

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, 742, 565 NYS2d 118 (2d Dept 1991). Since, as President of Billings Properties, Inc., Ms. Billings had the apparent authority to retain an attorney, her actual authority is not subject to review at this juncture (*Goldston, supra.* at 363-364).”

Billings v Billings

619098/2020

The Plaintiffs also allege that the Court overlooked matters of fact in deciding the previous motion. In his affirmation, Plaintiffs' counsel states that "the Court overlooked the *absence of claims against BPI* [Billings Properties, Inc.]." (Doc. 73, paras. 30-35).

The first complaint alleged unjust enrichment against Billings Properties, Inc.; which noted that Patricia Billings is "the majority shareholder and controlling officer and director of the Company [Corporation]" (Doc. 1, Third Cause of Action, paras. 25-28).

The amended complaint alleges, as the second cause of action, unjust enrichment against Patricia Billings. It also alleges, as a derivative claim, a fourth cause of action, unjust enrichment of the Estate of George Billings (Doc. 66, paras. 25-28, 33-36).

The amended complaint includes allegations not offered on the prior motion. It does not include the cause of action against Billings Properties, Inc. [BPI] which had been alleged in the first complaint and was considered in the prior Decision and Order (**CPLR 2221 [d] [2]**).

The Court, upon reargument, does not find cause to grant the relief requested by the Plaintiffs.

The Court will next consider the Defendant's cross-motion (seq. no. 004) which requests leave to file an amended verified answer. It is noted that the Defendant previously filed a verified answer to the amended complaint (Doc. 68). The Defendant has filed its proposed amended verified answer as part of the cross-motion (Doc. 90).

Whether to grant a request to file an amended pleading is a matter within the court's discretion (*Hofstra Univ. v. Nassau County, N.Y.*, 166 AD3d 861, 863, 89 NYS3d 1 [2d Dept 2018]; *Kimso Apts., LLC v. Gandhi*, 24 NY3d 403, 411, 998 NYS2d 740, 23 NE3d 1008 [2014]).

Billings v Billings

619098/2020

Leave to amend pleadings should be freely granted in the absence of prejudice to the Plaintiffs (*see Bleakley Platt & Schmidt, LLP v. Barbera*, 136 AD3d 725, 24 NYS3d 740 [2d Dept 2014]). The proposed amended answer must not be palpably insufficient or devoid of merit and must not surprise the adversary (*R. Vig Properties, LLC v. Cohen*, 153 AD3d 565, 566, 60 NYS3d 97 [2d Dept 2017]). The legal sufficiency or merits of the proposed amendment will not be examined unless that insufficiency or lack of merit is “clear and free from doubt” (*Lucido v. Mancuso*, 49 AD3d 220, 227, 851 NYS2d 238 [2d Dept 2008]). The Plaintiffs’ burden in demonstrating prejudice requires some indication that they have been hindered in the preparation of their case or have been prevented from taking some measure in support of their position (*Id.*; *Nyahsa Services, Inc., Self-Ins. Trust v. People Care Inc.*, 156 AD3d 99, 103, 64 NYS3d 730 [3d Dept 2017]).

The Defendant argues that the Plaintiffs will suffer no prejudice should the Court grant her the requested leave to file her amended verified answer (Doc. 87) as the answer to the amended complaint was filed nine (9) weeks prior to the instant cross-motion, and no substantive case activity has followed (Doc. 91). The Defendant has included a statute of limitations defense asserting its pertinence as the Plaintiff’s non-derivative claims are subject to a three (3) year limitation. The Defendant has also included a counterclaim for indemnification of her legal fees. Counsel contends that counterclaim does not cause surprise to the Plaintiffs because they have been aware that the Corporation has been funding the case defense for over one (1) year.

In opposition, the Plaintiffs argue that they will be prejudiced should the relief requested in the cross-motion be granted. They further assert that relief is devoid of merit (Doc. 96). Counsel states that the Plaintiffs will suffer prejudice due to the costs which were incurred in their case

Billings v Billings

619098/2020

prosecution which did not consider a statute of limitations defense. The Court finds that argument to be less than persuasive. Statutes of limitations are fundamental considerations in all litigation and determined by statute. The Court charges counsel with that knowledge and does not consider that such a defense constitutes surprise.

The Plaintiffs further argue that the proposed statute of limitations defense lacks merit because their derivative claims are timely. The Court at this juncture is not considering the ultimate viability of a defense; only whether the proposed pleading is palpably insufficient, devoid of merit, and will result in surprise.

Should the Plaintiffs wish to test the merit of the proposed added defense, they may later move for summary judgment (*Cirillo v. Lang*, 206 AD3d 611, 612, 169 NYS3d 651 [2d Dept 2022]).

The Plaintiffs argue that the proposed counterclaim which seeks indemnification of Ms. Billings' legal fees should be denied because "she was sued individually and not because she was a director of BPI...Patricia is not entitled to the indemnification of legal fees" (Doc. 96, para. 97). Counsel is reminded that this cross-motion is not the proper forum for the ultimate resolution of the issues. Counsel has not stated that the counterclaim will prejudice the Plaintiffs.

The Court has considered how long the Defendant was aware of the facts which it seeks to address and whether a reasonable excuse for any delay has been offered (*Castaldi v. Castle Restoration, LLC*, 207 AD3d 618, 620, 170 NYS3d 488 [2d Dept 2022]).

The Court, in its discretion, accepts the excuse by Defendant's counsel that its not having previously filed a statute of limitations defense was an oversight; and does not find that its inclusion

Billings v Billings

619098/2020

as part of the proposed amended verified answer will cause prejudice or surprise to the Plaintiffs (*Aurora Loan Services, LLC v. Dimura*, 104 AD3d 796, 962 NYS2d 304 [2d Dept 2013]).

The Court will grant the Defendant's request to file the proposed amended verified answer.

Accordingly, it is

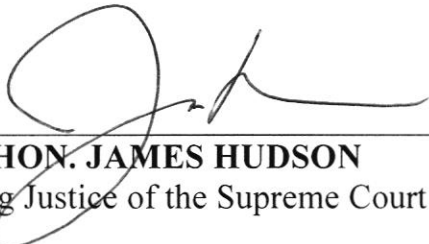
ORDERED, that the motion (seq. no. 003) by the Plaintiff, Charles Billings, individually and derivatively on behalf of Billings Properties, Inc., which requests, pursuant to **CPLR 2221 (d)**, reargument of the December 21st, 2022 Decision and Order is granted; and it is further

ORDERED, that upon consideration the Court adheres to its previous determination; and it is further

ORDERED, that the cross-motion (seq. no. 004) by the Defendant, Patricia Billings which requests, pursuant to **CPLR 3025 (b)** leave to file an Amended Verified Answer, is granted.

This memorandum also constitutes the Order of the Court.

Dated: July 10th, 2023
Riverhead, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court