

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

EDUARD GITLIN individually,

Plaintiff,

INDEX No. 012131/07

MOTION DATE: Aug. 7, 2008
Motion Sequence # 002

-against-

ALEX CHIRINKIN, NELLIE CHIRINKIN,
ARKADY PAVLOV, ALEX CHIRINKIN, LLC,
ALEX CHIRINKIN ENTERPRISES, LLC,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X
Reply Affirmation X

This motion, by plaintiffs, for an order: (a) granting the plaintiff leave to amend the Amended Verified Complaint pursuant to CPLR §3025(b), and (b) granting the plaintiff renewal pursuant to CPLR §2221 based upon a change in the law, and upon renewal, order the reinstatement of the derivative claims of Kew Apartment Holdings, LLC, and direct service of a Verified Complaint upon the defendants reflecting the claims of Kew Apartment Holdings, LLC, together with such other and further relief as this Court deems just and proper, is determined as hereinafter set forth.

Procedurally, this Court, in an order dated November 21, 2007, dismissed the first cause of action for conversion as to all defendants, dismissed the fraud cause of action as against all defendants except for the individual Alex Chirinkin, dismissed the fifth cause of action, for aiding and abetting a breach of fiduciary duty as to the defendant Pavlov only. This Court also dismissed all causes of action against Kew Apartment Holdings, LLC (hereinafter "Kew") based upon then-controlling case law which did not permit a derivative action against an LLC.

Plaintiff's counsel, pursuant to the discovery process, now seeks to amend the complaint by adding several causes of action. Counsel avers that documentary evidence demonstrates that Kew's assets were transferred without remuneration to the plaintiff, i.e., the "Pahrump" property and the "Lucky Bucks" property. Counsel contends that previously undiscovered facts now justify amendment inasmuch as these causes of action are compatible with the plaintiff's extant theories. Also sought is a Breach of Contract cause of action against the defendant Alex Chirinkin. Counsel argues that subsequent to this Court's order of November 21, 2007, the Court of Appeals has established a derivative action on behalf of an LLC, and this warrants renewal.

In opposition, the defendants' counsel argues that the cause of action relative to the Lucky Bucks property is time barred and is meritless. He asserts that the application to amend is insufficient because the pleading does not specify a particular misrepresentation. He contends that the plaintiff's information was obtained from public records and there is no allegation that the defendants affirmatively prevented the plaintiff from discovery of the 2001 transaction.

In reply, the plaintiff's attorney notes the absence of any opposition to the renewal portion of the motion or to the additional cause of action for Breach of Contract, and that there is no opposition from the defendant Pavlov. Counsel asserts that there is merit to the proposed amendment, as supported by applicable case law. Counsel further asserts that the predicate facts form a basis for that part of the amendment which adds the "Lucky Bucks" property, and that such allegations form the basis for the breach of fiduciary duty claim against Chirinkin, as well as the fraud regarding the misappropriation of Kew funds. Plaintiff's attorney argues that the additional fraudulent actions allegations are timely in that the statutory law measures the time from the discovery of the facts, and that is based upon the plaintiff's trust in the defendants, which later proved to be unfounded. Counsel further argues that applicable case law supports the plaintiff's position that the claims under the Debtor-Creditor Law should be permitted to be amended to include the fraudulent conduct and are not time-barred.

DECISION

“Leave to amend a pleading should be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit and will not prejudice or surprise the opposing party (see CPLR 3025[b]); **Bolanowski v Trustees of Columbia Univ. in City of N.Y.**, 21 AD3d 340, 341, 800 NYS2d 560; **Crespo v Pucciarelli**, 21 AD3d 1048, 1049, 803 NYS2d 586). The determination whether to grant such leave is within the court’s discretion, and the exercise of that discretion will not be lightly disturbed (see **Voyticky v Duffy**, 19 AD3d 685, 798 NYS2d 494, *lv. dismissed in part, denied in part* 6 NY3d 800, 812 NYS2d 33, 845 NE2d 465; **Sewkarran v DeBellis**, 11 AD3d 445, 782 NYS2d 758; **Travelers Prop. Cas. v Powell**, 289 AD2d 564, 565, 735 NYS2d 208)”.

(**Surgical Design Corp. v Correa**, 31 AD3d 744, 819 NYS2d 542, 543, 2nd Dept., 2006).

The measure of the sufficiency and merit of the proposed amendment, and whether prejudice and surprise arises directly from the delay in the application for the amendment. The instant motion is sufficiently supported by a detailed affidavit, which describes not only the apparent merits of the Lucky Breaks property and the Pahrump property transactions, but the factual background for the delay and ultimate discovery of the documentation. The delay, consistent with the allegations of the complaint, is alleged to have been occasioned by the purportedly-misplaced trust that the plaintiff had in the defendant Alex Chirinkin and the purported fraud and coverup generated by that defendant. Additionally, prejudice or surprise

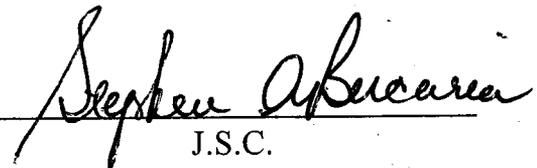
has not been sufficiently demonstrated herein, as the allegations arise out of the same basic facts and allegations within the original complaint; nor has disclosure been completed (see, Maloney Carpentry, Inc. v Budnik, 37 AD3d 558, 830 NYS2d 262, 2nd Dept., 2007).

With respect to that portion of the motion which seeks renewal based upon the decision of the Court of Appeals in Tzolis v Wolff (10 NY3d 100, 855 NYS2d 6, 2008), as plaintiff's counsel has noted, no opposition has surfaced, and, in fact, would be meritless.

Similarly, with respect to the amendment which seeks the addition of a Breach of Contract cause of action, that is unopposed.

Accordingly, the plaintiff's motion is granted in its entirety, and service of the second amended complaint is deemed complete upon service of a copy of this order upon all defendants' counsel.

Dated OCT 17 2008


J.S.C.

ENTERED
OCT 22 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE