

**Lohmann v Miller**

2011 NY Slip Op 32646(U)

July 22, 2011

Supreme Court, Nassau County

Docket Number: 11624/09

Judge: F. Dana Winslow

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 4  
NASSAU COUNTY**

**KEVIN LOHMANN,**

**Plaintiff,**

**MOTION DATE: 5-17-11**

**-against-**

**MOTION SEQ. NO.: 001  
INDEX NO.: 11624/09**

**DINA MILLER,**

**Defendant.**

**The following papers read on this motion (numbered 1-4):**

**Notice of Motion.....1**  
**Notice of Cross-Motion and Affirmation in Opposition.....2**  
**Reply and Affirmation in Opposition.....3**  
**Reply Affirmation in Support of Cross-Motion.....4**

Plaintiff moves pursuant to **CPLR §3025(b)** for leave to file a second amended complaint adding four new causes of action and deleting four others. Defendant opposes the motion and, in the alternative, cross-moves pursuant to **CPLR §3025(b)** for costs and a continuance to permit discovery on the new causes of action.

**BACKGROUND**

This action arises out of the personal and financial relationship between plaintiff and defendant, which commenced in or about 1994. The undisputed facts are as follows. Some time in 1994, a home was purchased in the state of Florida in defendant's name (the "Florida Property"). Plaintiff and defendant set up housekeeping in the Florida Property and had two children together. The Florida Property was sold on or about March 5, 2004. In or about March of 2004, a residence located at 23 Arrandale Avenue, Great Neck, NY (the "23 Arrandale Avenue Property"), was purchased in defendant's name. The parties resided together in the 23 Arrandale Avenue Property until June of 2008, when the parties' personal relationship terminated and plaintiff moved out. In or about July of 2007, real property located at 21 Arrandale Avenue, Great Neck, NY (the "21 Arrandale Avenue Property") was purchased in defendant's name. Defendant continues to reside at

the 23 Arrandale Avenue Property. The 21 Arrandale Avenue Property is maintained as a rental property.

The dispute between the parties centers on the financial arrangements relating to the purchase, improvement and sale of the subject properties; particularly the parties' respective contributions to the costs and expenses thereof, and their respective rights with respect to the value, income or proceeds of sale. Essentially, plaintiff seeks to recover a money judgment from defendant, ostensibly representing his uncompensated contribution to, or his share of, the value derived from the subject properties. Plaintiff has changed counsel twice since the commencement of the action, however, and each incoming counsel has sought to amend the complaint to change, in part, the theories of recovery.

Plaintiff commenced this action on June 16, 2009, with the filing of a Summons and Verified Complaint by the Law Firm of Elias C. Schwartz, Esq. (the "Verified Complaint") [Mot. Exh. A]. The Verified Complaint contained five causes of action: three sounding in unjust enrichment and quantum meruit with respect to each of the three subject properties, respectively, and two seeking to impose a constructive trust on the 23 Arrandale Avenue Property and the 21 Arrandale Avenue Property, respectively.

On or about October 16, 2009, without leave of the Court, plaintiff filed an Amended Complaint (the "Amended Complaint") through incoming attorneys, the Law Office of Elliot S. Schlissel. The Amended Complaint continued the original causes of action and added four matrimonial causes of action, including three causes of action demanding recognition of a common law marriage between the parties pursuant to the laws of three different States, and the fourth demanding a divorce and related relief pursuant to the Domestic Relations Law.

In the instant motion, plaintiff, now represented by attorneys Tilem & Campbell, P.C., seeks leave to amend the complaint a second time, to delete the four matrimonial causes of action, and to add four new causes of action; namely, for breach of partnership agreement, breach of contract, fraud and accounting. The original causes of action for unjust enrichment and constructive trust are continued. The proposed Second Amended Verified Complaint is attached to the Motion as Exhibit E.

Defendant opposes the motion on grounds that (i) the proposed amendments lack merit, (ii) the application for leave to amend is late, and (iii) the amendment will result in prejudice to the defendant.

## DISCUSSION

### Merits of the Amendment

On a motion to amend a pleading pursuant to **CPLR §3025**, the merits of the proposed pleading are not evaluated in the same manner and by the same standard as on a motion to dismiss pursuant to **CPLR §3211(a)(7)**. The party seeking to amend the pleading is not required to establish the legal sufficiency or merit of a proposed pleading in the first instance. **Lucido v. Mancuso**, 49 AD3d 220, 227. The merits of the proposed pleading are only examined when the insufficiency or lack of merit is clear and free from doubt. **Id.** Leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit. **MBIA Ins. Corp. v. Greystone & Co., Inc.**, 74 A.D.3d 499, 500; **G.K. Alan Assoc., Inc. v. Lazzari**, 44 AD3d 95, 99; **Trataros Const., Inc. v. New York City Housing Authority**, 34 AD3d 451, 452-453. The standard is particularly liberal where, as here, the plaintiff seeks to add a new theory of recovery, without alleging new or different transactions. **Sample v. Levada**, 8 AD3d 465, 468.

In the case at bar, the allegations of the proposed Second Amended Verified Complaint mirror those set forth in the original Verified Complaint. Both the Second Amended Verified Complaint and the original Verified Complaint are predicated upon the existence of an "oral agreement and joint venture" between the parties "to share their lives and financial affairs." Both allege that the parties entered into an oral joint venture agreement to purchase, manage and improve real property for investment purposes with the intent to share in the profits and/or losses. The Second Amended Verified Complaint and the original Verified Complaint allege the same essential transactions and occurrences relating to the Florida Property, the 23 Arrandale Avenue Property and the 21 Arrandale Avenue Property. The only real difference between the Second Amended Verified Complaint and the original Verified Complaint, is the addition of new theories of recovery, and the manner in which the allegations are framed to support those theories of recovery.

The Court does not find that the breach of partnership cause of action is wholly lacking in merit. The absence of a written agreement is not conclusive. "When there is no written partnership agreement between the parties, the court must determine whether a partnership in fact existed from the conduct, intention, and relationship between the parties." **Czernicki v. Lawniczak**, 74 A.D.3d 1121. "Factors to be considered in determining the existence of a partnership include (1) sharing of profits, (2) sharing of losses, (3) ownership of partnership assets, (4) joint management and control, (5) joint liability to creditors, (6) intention of the parties, (7) compensation, (8) contribution of

capital, and (9) loans to the organization." *Id.* Although disputed by the defendant, the allegations contained in the Verified Complaint and the proposed Second Amended Verified Complaint regarding the oral joint venture agreement to purchase, improve and sell real estate and to share in the profits or losses, are not palpably insufficient to support the breach of partnership theory of recovery.

Similarly, such allegations are not palpably insufficient to support a cause of action sounding in breach of contract. Defendant asserts that there was no "meeting of the minds," and thus neither the breach of partnership nor breach of contract cause of action can be sustained. The existence of an agreement between the parties is a question of fact which cannot be determined on a motion to amend the pleading, particularly where, as here, the proposed allegations are not facially incredible and there are no established facts in the record which clearly negate the truth of the proposed allegations.

The proposed fraud cause of action is based upon allegations (i) that defendant fraudulently induced plaintiff to enter into the joint business venture, (ii) that, in reliance upon defendant's promise to share in the financial gain, plaintiff invested his money, time and labor to purchase and improve the properties; and (iii) that defendant had no intention of sharing in the profits of the venture. Plaintiff claims, among other things, that defendant "continuously assured" plaintiff that she would add his name to the deeds of the 23 Arrandale Avenue Property and the 21 Arrandale Avenue Property, and that she repeatedly "held Plaintiff out in public as an owner of the properties" in order to induce his continued investment. Proposed Second Amended Verified Complaint ¶¶ 29, 30.

The transactions and occurrences underlying the proposed fraud cause of action are substantially the same as those underlying the original Verified Complaint. The claims are not inherently incredible, nor patently insufficient with respect to the elements of a cause of action for fraudulent inducement. *See Perrotti v. Becker, Glynn, Melamed & Muffly LLP*, 82 A.D.3d 495.

The Court notes that plaintiff cannot sustain a fraud cause of action if the only fraud alleged relates to a breach of contract. *See Clark-Fitzpatrick, Inc. v. Long Island Railroad Co.*, 70 NY2d 382; *Page v. Muze, Inc.*, 270 AD2d 401. To maintain a fraud action in a contractual setting, the plaintiff must allege: "(1) a legal duty separate and apart from the contractual duty to perform; (2) a fraudulent representation collateral or extraneous to the contract; *or* (3) special damages proximately caused by the fraudulent representation that are not recoverable under the contract measure of damages." *Bell Sports, Inc. v. System Software Associates, Inc.*, 45 F.Supp.2d 220 (emphasis supplied), *rev'd* on other grounds.

In the case at bar, plaintiff alleges a “contract” to share in the profits or losses derived from the investment in real property. Insofar as the terms of such agreement are not clear on the record of this motion, certain statements or conduct attributed to defendant (the assurance that plaintiff’s name would be added to the deeds, or the “holding out” of plaintiff as a co-owner of the subject properties), might ultimately be deemed collateral to the contract. In any event, the fraudulent inducement claim may be plead in the alternative. *See Bell Sports, Inc. v. System Software Associates*, 71 F.Supp.2d 121. Thus, even though the fraud claim appears to arise in a contractual setting, the Court does not, at this time, find that it is patently and unequivocally devoid of merit so as to preclude an amendment to the pleadings. Such considerations may be addressed, upon an evidentiary record, in the context of a summary judgment motion.

The proposed cause of action for an accounting piggybacks onto the other causes of action. To the extent that plaintiff is entitled to a share of the value derived from the investment in the subject properties, on any theory of recovery, an accounting is necessary to determine the amount.

#### Lateness and Prejudice

Defendant asserts that this application was late insofar as it was made two weeks prior to the scheduled certification conference when all discovery (based upon the existing pleadings) was complete. Defendant asserts that she will be prejudiced by the late filing because she did not have the opportunity to “explore” these new theories of recovery in discovery or at the deposition of plaintiff. [Affirmation in Support of Cross-Motion ¶20]

Plaintiff claims that the delay was reasonable inasmuch as the factual basis for the amendment was discovered at the parties’ depositions, and plaintiff moved to amend shortly thereafter. Further, plaintiff argues that there is no prejudice or surprise to the defendant, because the elements of the first four causes of action were present in the original complaint, and the fraud cause of action is based upon evidence adduced at the depositions. According to plaintiff, the purpose of the amendment was to conform to the evidence. [Reply and Affirmation in Opposition, ¶¶ 4-5.]

The motion to amend the pleadings is addressed to the discretion of the Court. Lateness, in itself, is not a barrier. Rather, it is “lateness coupled with significant prejudice to the other side” that warrants a denial of the application. *Rutz v Kellum* 144 A.D.2d 1017, 1018. “Prejudice in this context means that the party opposing the amendment has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position.” *Garrison v. Clark Mun. Equip.*, 239

AD2d 742 (internal quotation omitted). The fact that a proposed amendment would require the parties to conduct additional discovery does not, in itself, constitute sufficient grounds to deny the motion. *Id.* at 743. The cases cited by defendant are inapposite insofar as they concern applications made close to or at the time of trial. *See Samson v. Contillo*, 55 AD3d 592; *Cohen v. Ho*, 38 AD3d 705.

In the case at bar, the proposed amendment is based upon substantially the same transactions and occurrences as alleged in the original complaint. Although new legal theories are asserted, the proof supporting the new causes of action is intertwined with the proof supporting the existing causes of action. *See Garrison*, 239 AD2d at 743. The Court finds that the proposed amendment poses no significant prejudice to defendant that could not be averted by additional discovery, if necessary.

#### Defendant's Cross-Motion

Although CPLR §3025(b) authorizes the Court to grant costs and continuances to the party opposing the amendment, the Court finds that defendant's argument for same on the basis of a need for further discovery is both vague and conclusory. In the absence of deposition transcripts, the Court is unable to determine the extent to which defendant has been able or unable to "explore" the facts underlying the new theories of the case. The Court requires a specific showing regarding the proposed subject matter of any further discovery sought, which shall be limited to subject matter that was not, or could not have been, elicited in prior demands or proceedings.

The Court notes that, according to the Unified Court System's Case Management database, a Note of Issue was filed in this action on July 29, 2011, while the instant motion was pending. In the interest of justice, the Court will consider an application to vacate the Note of Issue, upon notice and upon proof that further discovery is warranted in accordance with the foregoing. The Court will consider awarding costs upon determination of the subsequent application, if any: (i) to defendant, in the event that she shows that further discovery was necessitated by the amendment of the complaint, or (ii) to plaintiff, in the event that the subsequent application to vacate the Note of Issue is deemed frivolous.

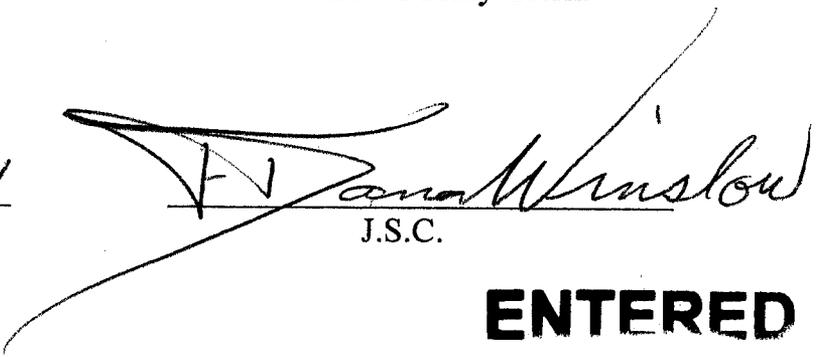
#### CONCLUSION

The Court has considered the remaining contentions of the parties and finds them to be without merit. Based upon the foregoing, it is

ORDERED, that plaintiff's motion to amend the complaint pursuant to CPLR §3025(b) is **granted**. Plaintiff is shall file and serve an amended complaint in the form of the proposed Second Amended Verified Complaint, together with a copy of this Order, within 20 business days of entry of this Order in the records of the Nassau County Clerk; and it is further

ORDERED, that defendant's cross-motion for costs and a continuance pursuant to CPLR §3025(b) is **denied**, without prejudice to renewal upon proper proof or to the filing of a motion to vacate the Note of Issue in accordance with the foregoing, within 20 business days of entry of this Order in the records of the Nassau County Clerk.

Dated: July 22, 2011

  
J.S.C.

**ENTERED**  
OCT 06 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE