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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Madden PART 11
Justice

Index Number : 105584/2006
DON, GARY
VS.
SINGER, BARUCH
SEQUENCE NUMBER : 027
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

Dated: October 3, 2011

HON. JOAN A. MADDEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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GARY DON, LAWRENCE GERSTEIN and
NEW YORK DEVELOPERS COLLABORATIVE, LLC,

Plaintiffs,

-against-

Index No. 105584/06

BARUCH SINGER, MARK JUNGER, MOSES ROSNER, HERALD SQUARE DEVELOPMENT LLC, ROSMA DEVELOPMENT LLC, and MNM INVESTORS GROUP INC.,

Defendants,

855 REALTY OWNERS, LLC and ISTAR FM LOANS, LLC,

Intervenor-Defendants.

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MADDEN, J.:

. Plaintiffs Gary Don (Don), Lawrence Gerstein (Gerstein) and New York Developers Collaborative, LLC (NYDC) move, pursuant to CPLR 3025(b), to amend the complaint to add causes of action for (1) breach of a non-circumvention agreement, (2) tortious interference with business relations, and (3) unfair competition. Plaintiffs also seek to include an additional damage claim of disgorgement of damages, an alternative lost profits damage amount, and to add certain other allegations in the complaint based on information obtained in discovery. Defendants Baruch Singer (Singer) and Herald Square Development LLC (HS Development) oppose the motion, and defendants Mark Junger (Junger), Moses Rosner (Rosner), who are *pro se*, join in this opposition. For the reasons below, the motion to amend is granted in part and

denied in part.[1]

BACKGROUND

This action arises out of a multi-million dollar development project involving parcels of real property located at 855 Avenue of the Americas, New York, N.Y. (the Property). In 2004 and 2005, plaintiffs Don and Gerstein were partners in the business of locating and initiating commercial and residential real estate developments, and in furtherance of that business, used plaintiff NYDC as their corporate vehicle. In 2005, Don and Gerstein contacted the real estate office of Massey Knakal Realty Services (Massey Knakal) for the purposes of locating available real estate in Manhattan to be purchased and developed for commercial and residential use. Massey Knakal informed plaintiffs that it was acting as the broker for Habern Realty and the Lavin Group (collectively, the Sellers) with respect to certain plots of land located on the Avenue of the Americas between 30th and 31th Streets in Manhattan, consisting of (1) 867-873 Avenue of the Americas (Plot 1); (2) 106-108 West 31st Street (Plot 2); and (3) 855-875 Avenue of the Americas (Plot 3) (collectively, the Project). The original concept of the Project included only the air rights to Plot 3.

To develop a viable business plan to attract investors and financial institutions to fund the Project, plaintiffs, at their sole expense, employed professional consultants to prepare a comprehensive acquisition and development plan, which included zoning review, air rights

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[1]Intervenor defendant i-Star FM Loans LLC ("iStar"), and Cipe Realty Associates, i-Star's successor-in-interest as the holder of the mortgage on the properties at issue, opposed the motion to the extent of requesting that the court not issue a decision on the motion to amend until after it determined i-Star's summary judgment motion. By decision and order dated July 13, 2011, the court decided that motion by dismissing the action against iStar, so that iStar's opposition is now moot.

review, architectural studies and development plans, financial analysis, engineering feasibility studies, and a marketing review. Plaintiffs then developed a detailed project plan for the Project, which eventually became a 22-page confidential memorandum (the Confidential Memorandum compiled from both original and third-party sources. The Confidential Memorandum included, inter alia, (1) an executive summary of the Project; (2) property information; (3) a tax map; (4) sales and rental data; (5) acquisition and development costs; and (6) an estimated net profit of $75 million on the Project.

Massey Knakal informed plaintiffs that the Sellers were seeking $75 million for the Property. By letter dated March 16, 2005, plaintiffs offered $68,500,000 to the Sellers for the purchase of the Property. This offer was not accepted by the Sellers.

On April 14, 2005, plaintiff Don and defendant Junger, on behalf of defendant Rosma, entered into a Confidentiality and Non-Circumvent Agreement ("the CNC Agreement"). Under the CNC Agreement, defendants Junger and Rosma Development, LLC ("Rosma"), and their affiliates or persons to whom they make disclosures, agreed to (1) "hold Confidential Information [regarding the Project] in the strictest confidence"; (2) "not contact the owner of the Property or promote, participate or engage in any business which is or may be competitive with the business of NYDC at the Property, including, without limitation any acquisition, financing, purchase or other transaction involving the Property (other than through NYDC)"; and (3) "not act or cause or permit any third party to act in any way to circumvent the intent of this Agreement, including without limitation any action that may jeopardize [plaintiffs'] economic expectations" (CNC Agreement, at 1-2).

Following the signing of the CNC Agreement, plaintiffs provided Junger and

Rosner with a Confidential Memorandum, which contained the following confidentiality statement:

> By acknowledgment of your receipt of the Confidential Memorandum, you agree that the memorandum and its contents are confidential, that you will hold and treat it in the strictest of confidence, that you will not, directly or indirectly, disclose or permit anyone else to disclose this memorandum or its contents to any person, firm or entity without prior written authorization of NYDC, and that you will not use, or permit to be used, this memorandum or its contents in any fashion or manner detrimental to the interest of NYDC

(Confidential Memorandum, at 1).

In May 2005, plaintiffs Don and Gerstein and defendants Junger and Rosner signed a joint venture agreement (the JV Agreement), which provided, *inter alia*, that Junger, Rosner, and defendant MNM Investors Group (MNM), at their sole option, would decide whether plaintiffs would make a $500,000 capital contribution and receive an 18% ownership interest, or not make a capital contribution and receive a 12% ownership interest. It was also agreed that neither party would circumvent the other.

Plaintiffs maintain that, during the week that the JV Agreement was signed, Junger informed plaintiffs that Singer was his and Rosner's partner on other real estate projects, and would be participating as an equity partner in the JV Agreement to purchase the Property, and to develop the Project. Plaintiffs also maintain Junger informed them that he showed Singer the JV Agreement and the Confidential Memorandum after Singer signed off on a confidential and non-circumvent agreement similar to the CNC Agreement (the Singer CNC Agreement), and that Singer liked the deal and wanted to go forward with plaintiffs as partners to purchase and develop the Property.

Subsequently, plaintiffs submitted a second written offer to Massey Knakal on behalf of the joint venture to purchase the Property for $72 million. Gerstein then set up an initial meeting on May 24, 2005, which was to be attended by the Sellers and their attorneys, plaintiffs Gerstein and Don, defendants Singer, Junger and Rosner, and Singer's attorneys on behalf of the joint venture. During May and June of 2005, there were at least two other meetings regarding the Project which were attended by Don, Gerstein, Junger, Rosner, and Singer, and numerous correspondences and telephone conversations took place between Don, Gerstein, Junger, Rosner, and Singer regarding the Project.

During a meeting in June 2005, Singer, Junger and Rosner informed plaintiffs that they were exercising their option under the JV Agreement for plaintiffs not to make an equity contribution of $500,000 towards the purchase and development of the Property, thereby reducing plaintiffs' ownership interest and profit sharing to 12%, as opposed to 18% if they contributed the $500,000.

After further negotiations, plaintiffs decided, in consultation with their development team, that it would be in the best interest of the joint venture to include the entirety of Plot 3, and the parties agreed to an increased price of $115 million. Subsequently, in mid-June 2005, defendants tried to renegotiate the financial terms of the JV Agreement with plaintiffs in order to substantially reduce plaintiffs' ownership interest in the Property. After plaintiffs refused to accept the changes to the JV Agreement or a $3.5 million offer to withdraw from the joint venture, plaintiffs maintain that defendants engaged in a course of conduct to circumvent and exclude plaintiffs from the joint venture, and eventually purchased the Property without not notifying plaintiffs or obtaining their consent.

On August 29, 2005, defendants Singer, Junger and Rosner, using an entity called Refsnart Corp., entered into two contracts with the Sellers for the purchase of the Property, for $117,500,000. In October 2005, defendant HS Development was established by defendants Singer, Junger, Rosner, Rosma and MNM for the purpose of purchasing the Property from the Sellers. Prior to the closing, defendants assigned the rights to the contracts to HS Development, and in February 2006, defendants completed the purchase of the Property.

In March 2007, Singer, Junger and Rosner sold the Property to 855 Realty Owner LLC (855 Realty) for $140,000,000. Plaintiffs contend that defendants realized gross profits of $22,500,000 (the difference between the purchase price and the sales price).

Plaintiffs commenced this action by filing a complaint on April 25, 2006. The complaint contains the following causes of action: (1) breach of the CNC Agreement by defendants Singer, Junger, Rosner and Rosma; (2) breach of the Singer CNC Agreement by Singer; (3) breach of the Confidentiality Memorandum by defendants Singer, Junger, Rosner, and MNM; (4) breach of the JV Agreement and the joint venture relationship by defendants Singer, Junger, Rosner, and MNM; (5) breach of fiduciary duties owed to plaintiffs by defendants Singer, Junger, Rosner, and MNM; (6) inducement and participation by Singer in Junger's, Rosner's, and MNM's breach of fiduciary duties to plaintiffs; (7) breach of the implied duty of good faith and fair dealing by defendants Singer, Junger, Rosner, and MNM; (8) misappropriation of confidential information and business opportunities by defendants Singer, Junger, Rosner, MNM, and HS Development; (9) tortious interference with the CNC Agreement, by defendants Singer, Junger, Rosner, MNM, and HS Development; (10) tortious interference with the JV Agreement, by defendants Singer, Rosner and HS Development; and (11) constructive trust and accounting against all defendants.

Upon completion of discovery, Singer and HS Development moved, and Rosner and Junger cross moved, for summary judgment dismissing the first ten causes of action in complaint. By decision and order dated July 13, 2011, the court denied the motion and cross motion. In a separate motion, intervenor defendant i-Star FM Loans LLC ("iStar") moved, and intervenor defendant 855 Realty and Singer and HS Development each cross moved, for summary judgment dismissing the eleventh cause of action. By decision and order dated July 13, 2011, the court granted summary judgment dismissing the eleventh cause of action.

While the summary judgment motions were pending, plaintiffs made this motion to amend the complaint to add causes of action for (i) breach of an oral non-circumvention agreement made by Singer, (ii) tortious interference with business relations between plaintiffs and the Seller, and (iii) unfair competition. Plaintiffs also seek to include a disgorgement of damages claim, an alternative lost profits damage amount based on the formula in the Joint Venture Agreement, and to add various other allegations in the complaint based on information obtained in discovery.

Singer and HS Development oppose the motion, asserting that plaintiffs have not sufficiently explained the delay in seeking to add the new claims, as the facts underlying such claims should have been known to them approximately four and a half years ago. They also assert that the motion is defective since it is not supported by an affidavit of merit. They also argue that the proposed tortious interference claim would require further discovery and that, in any event, the claim is without merit as plaintiffs have not plead that "but for" the alleged interference there would have been no breach of contract, and that the wrongful means requirement has not been met.

Singer and HS Development also assert that the damages sought in connection with the

alternative lost profits claim are speculative and that, in any event, these damages are based on the unenforceable JV Agreement. Furthermore, they assert that proposed disgorgement of damages claim is without support in the record or in the law. Singer and HS Development also contend that the non-circumvention claim is duplicative of a previously pleaded claim regarding Singer's alleged breach of the Singer CNC Agreement, and that the Unfair Competition claim is based on unenforceable agreements.

"Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise." Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-356 (1st Dept 2005)(internal citations and quotations omitted). That being said, however, "in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted." Eighth Ave. Garage Corp. v. H.K.L Realty Corp., 60 AD3d 404, 405 (1st Dept), lv dismissed, 12 NY3d 880 (2009). At the same time, leave to amend will be granted as long as the proponent submits sufficient support to show that proposed amendment is not "palpably insufficient or clearly devoid of merit." MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1st Dept 2010)(citation omitted). In addition, "[o]nce a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide a subsequent basis for a motion for summary judgment" Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 AD3d 363, 365 (1st Dept 2007).

Under this standard, the motion to amend is granted in part and denied in part. As a preliminary matter, there is no basis for denying the motion to amend on the grounds of delay.[2]

[2]There is no dispute that the original complaint gave notice of the transactions and occurrences underlying the amended pleading, such that the proposed claims relate back to the time that claims in the original complaint were interposed. See CPLR 203(f).

Mere lateness does not establish grounds to reject a proposed amendment. Instead, a delayed request must be accompanied by extreme prejudice as well. Edenwald Contracting Co. Inc. v. City of New York, 60 N.Y.2d 957, 959 (1983). In this context, the courts define prejudice as a "some special right lost in the interim, some change of position, or some significant trouble or expense which could have been avoided had the original pleading contained what the amended one wants to add." Barbour v. Hospital for Special Surgery, 169 A.D.2d 385, 386 (1st Dept. 1991)(citations omitted). Here, defendants do not point to any prejudice of this nature.

The court also finds that the motion to amend is adequately supported by evidence, including affidavits from each of the plaintiffs, excerpts from depositions, and various documents produced in discovery.

Accordingly, the remaining issues concern whether the proposed amendments are of sufficient merit. First, to the extent Singer and HS Development challenge the merits of the proposed claims on the same grounds raised in support of their summary judgment motion, including that the JV Agreement and CNC Agreements are unenforceable, these grounds are unavailing as they have already been rejected by the court in denying the summary judgment motion.

The proposed third cause of action is based on allegations that Singer breached an oral agreement that he would not deprive plaintiffs of an opportunity to participant in the purchase and development of the property by negotiating directly with the Sellers and purchasing the Property without notice to the plaintiffs. The claim is based on plaintiffs' deposition testimony that during the time that plaintiffs and Singer were attempting renegotiate the JV Agreement, that Singer stated that "'I am not going to take your deal'" and that "'If we don't do it together, I'm not going

interference a contract would have been entered into, and (3) defendant's conduct involved wrongful means, significantly higher culpable conduct than necessary for interference with existing contracts, damaging plaintiff. See NBT Bancorp, Inc. v. Fleet/Norstar Finance Group, 87 NY2d 614 (1996); Guard-Life Corp. v. S. Parker Hardware Manufacturing Corp., 50 NY2d 183.

Under this standard, plaintiffs have not established a sufficient basis for the proposed tortious interference with business relations claim as they cannot show that "but for" defendants' conduct they would have entered into the contract with the Sellers since the evidence shows that plaintiffs' offer was rejected not only as it was the second highest bid but also because their offer was contingent on Sellers delivering the property vacant (Don Dep, at 587-592). Moreover, while the evidence suggests that Plaintiffs may have been willing to purchase the Property with only one side vacant (Don Dep., at 591-592), such evidence is too speculative to establish the "but for" requirement. In any event, the proposed claim is based on the plaintiffs' $110,000,000 offer that the record shows was rejected not only as result of defendants' higher offer but also because it was conditioned on the Property being vacant.

Accordingly, the proposed tortious interference claim is not of sufficient merit as it cannot be shown that "but for" the defendants' wrongful conduct plaintiffs' offer to purchase the Property would have been accepted. See Buechner v. Avery, 38 AD3d 443, 444 (1st Dept 2007)(holding that "claim for tortious interference with prospective business relations based on the anticipated benefits from a proposed merger that did not take place was not viable because the letter of intent set forth several conditions precedent which plaintiffs failed to alleged would have been satisfied 'but for' defendants' wrongful conduct."). Under these circumstances, the court need not reach the issue of whether the defendants' conduct satisfied the wrongful means requirement.

The proposed fourteenth cause of action is for unfair competition. The gravamen of this proposed claim is that defendants "engaged in unfair competition by acting in based faith by exploiting the Joint Venture, including using Plaintiffs' labor, skills, expenditures, proprietary information and/or goodwill...for their own commercial advantage to purchase [the Property]... to the wrongful exclusion of Plaintiffs and to the detriment of Plaintiffs" (Proposed Amended Complaint ¶ 239).

These allegations are sufficient to support a claim of unfair competition based on the taking and using Plaintiffs' property and/or goodwill to compete against plaintiff in connection with the purchase of the Property. See ITC Ltd. v. Punchgini, Inc., 9 N.Y.3d 467, 468, 476 (2007). Moreover, defendants' arguments to the contrary were rejected by the court in denying their summary judgment motion.

The proposed amended complaint also includes an alternative lost profit damage amount based on a provision in the JV Agreement providing that defendants, at their sole option, would decide whether plaintiffs would make a $500,000 capital contribution and receive an 18% ownership interest, or not make a capital contribution and receive a 12% ownership interest. The defendants elected the latter option, and the original complaint based the lost profits claim on the 12% ownership interest. The proposed amended pleading seeks to add an alternative lost profits damage amount based on the 18% ownership interest, alleging that since defendants breached their fiduciary duties and contractual obligations to plaintiffs, and that, at the relevant time, plaintiffs possessed the $500,000 needed to make the capital contribution required by the first option, they are entitled to damages based on the 18% interest.

Defendants' only argument in opposition is that plaintiffs' claim for lost profits is too speculative to be permitted. The court rejects this argument since the JV Agreement made detailed projections about net profits to be realized from the development and purchase of the Property, and fixed plaintiffs' percentage interests at 18% or 12% . In fact, a similar argument was rejected by the court in denying the summary judgment motion. Moreover, the court notes that although defendants opted for plaintiffs not to make a capital contribution and to obtain a 12% interest, given the alleged nature of defendants' scheme to oust plaintiffs from the project and that plaintiffs have shown they had the funds to make the capital contribution at the relevant time, there is a potential basis for the plaintiffs' recovery based on an 18% interest. Accordingly, the alternative lost profits amount will be permitted to be added.

The amended complaint includes additional claim of disgorgement damages consisting of (i) $22,500,000 (gross profits realized by defendants from the sale of the Herald Square Property) less reasonable costs incurred by defendants, and (ii) the amount of 1031 Exchange Benefits realized by defendants from the capital contribution made by defendants to purchase the Herald Square Property.

A plaintiff may seek disgorgement damages in connection with claims of self-dealing and divided loyalty to deprive a defendant of ill-gotten gains even in instances where a plaintiff sustains no direct economic loss. See Excelsior 57th Corp. v. Lerner, 160 AD2d 407, 408-409 (1st Dept 1990). Disgorgement damages consist of profits and other benefits realized by a defendant with the goal of deterring improper conduct. Vigilant Ins. Co. v. Credit Suisse First Boston Corp., 6 Misc3d 1020(a) (Sup Ct NY Co. 2003), aff'd as modified, 10 AD3d 528 (1st Dept 2004)

The Court of Appeals has written that disgorgement damages may be awarded even in the absence of "any allegations of damages to [the plaintiff as] this has never been considered an essential requirement of a cause of action founded on a breach of fiduciary duty....This is because the function of such an action, unlike an ordinary tort or contract case is not merely to *compensate* the plaintiff for wrongs committed by the defendant but...to prevent [these wrongs], by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates." Diamond v. Oreamuno, 24 NY2d 494, 498 (1969) (emphasis in original)(internal citations and quotations omitted). In keeping with these principles, "the primary concern" when determining whether to award disgorgement damages is not whether a plaintiff has been damaged but between the plaintiff and defendant which party "has a higher claim to the proceeds derived from [the wrongdoing]." Id.

The first aspect of the disgorgement damage claim is based on closing statements that defendants purchased the Property in February 2006 for $117,500,000, and sold the Property in March 2007 for $140,000,000, thus realizing a profit of $22,500,000. While the defendants dispute the amount of net profit realized,[3] they provide no basis for denying the motion to amend to include this aspect of the disgorgement of damages claim.

The second aspect of the disgorgement damages claim involves so-called 1031 Exchange Benefits allegedly realized by Singer in connection with the purchase of the Property. According to Singer, "I had sold a large portfolio of my real estate holdings and I was looking for investment

[3]Singer initially asserted that he realized net profits of $4,114,139, but subsequently contended that he realized $157,480 out of the gross profits of $22,500,000 and Junger and Rosner maintain that they realized approximately $2,000,000 in gross profits.

properties to utilize for '1031 exchange' whereby taxes on the consideration received from the portfolio would be avoided. The acquisition of the subject properties was tailor made for use as 1031 exchange properties..." (Singer Aff., ¶ 8).

Subsequent to the submission of this motion, in connection with the court's in-camera inspection of certain of Singer's tax documents, the parties submitted letters regarding whether the1031 Exchange Benefits provided a basis for disgorgement damages. Defendants argued, inter alia, that the benefits merely permitted Singer to defer payment of taxes, and therefore such benefits did not provide a basis for disgorgement damages. On October 3, 2011, following the in-camera inspection, this court directed that the parties submit papers, including expert affidavits, relevant to the issue of the 1031 Exchange Benefits in accordance with the schedule indicated below. Accordingly, pending the receipt of such submissions, the issue of whether to permit the complaint to be amended to seek disgorgement damages based on any 1031 Exchange Benefits realized by Singer is held in abeyance.

Finally, as there is no objection or basis for denying plaintiffs leave to amend with respect to adding certain other allegations in the complaint based on information obtained in discovery, this aspect of the motion is also granted.

In view of the above, it is

ORDERED that the plaintiffs' motion to amend is granted except insofar as it seeks to add the proposed twelfth cause of action for tortious interference with prospective business relations, and except to the extent that the determination as to whether to permit disgorgement damages based on the 1031 Exchange Benefits is held in abeyance; and it is further

ORDERED that plaintiffs shall submit and serve papers, including an expert affidavit, regarding the 1031 Exchange Benefits on or before October 31, 2011; defendants shall submit and serve their response, including an expert affidavit, on or before November 7, 2011; and plaintiffs shall submit and serve any reply on or before November 11, 2011; and it is further

ORDERED that within fifteen days of the date of this decision and order plaintiffs shall file and serve an amended complaint consistent with this decision and order; and it is further

ORDERED that defendants shall answer the amended complaint within 20 days of its service; and it is further

ORDERED that a pre-trial conference shall be held in Part 11, room 351, 60 Centre Street on November 17, 2011 at 9:30 am.

DATED: October 3, 2011

J.S.C.

HON. JOAN A. MADDEN
J.S.C.