

<b>Mais v Bam Sales, Inc.</b>
2013 NY Slip Op 32512(U)
October 10, 2013
Supreme Court, New York County
Docket Number: 154177/12
Judge: Joan A. Madden
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: HON. JOAN A. MADDEN**  
*Justice*

**PART 11**

\_\_\_\_\_  
HOWARD MAIS,

**Plaintiff,**

**- v -**

INDEX NO. : 154177/12

MOTION DATE:

MOTION SEQ. NO.: ~~002~~ 002  
MOTION CAL. NO.:

BAM SALES, INC., ROBERT  
KLEIN, ALAN COHEN, SCOTT  
DANZIGER, and MARK MOYAL,  
**Defendants.**

\_\_\_\_\_  
The following papers, numbered 1 to \_\_\_\_\_ were read on this motion \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

PAPERS NUMBERED

—  
Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**Cross-Motion:     Yes     No**

Plaintiff moves pursuant to CPLR 3025(b) to amend the complaint (a) to change the name of the party “BAM Sales, Inc.” to “BAM Sales, LLC” and (b) to add the business entity AMMC, Ltd. as a defendant, and (c) to add causes of action for breach of fiduciary duty, conversion, fraudulent transfer and successor liability/ alter ego. Defendants oppose the motion except insofar as plaintiff seeks to change the name of BAM Sales, Inc. to BAM Sales, LLC.

This action arises out of plaintiff’s purchase of a 25 percent membership interest in defendant BAM Sales, Inc. for \$250,000 and defendants’ alleged failure to comply with two memoranda of understanding entitling plaintiff to certain benefits in exchange for his purchase.

By decision and order dated May 29, 2013, this court granted, without opposition, plaintiff's motion for summary judgment on its breach of contract claims (first and fifth causes of action) against BMC Sales, Inc., based on plaintiff's affidavit and various documentary evidence, including the memoranda of understanding.

Plaintiff now seeks to amend his complaint to change the name of the party BAM Sales, Inc. to BAM Sales, LLC and (b) to add the business entity AMMC, Ltd. as a defendant, and (c) to add causes of action for breach of fiduciary duty, conversion, fraudulent transfer and successor liability/ alter ego. As defendant has no opposition to the changing of the name of the party BAM Sales, Inc. to BAM Sales, LLC this aspect of the motion is granted.

With respect to the balance of the motion, the court must consider it in light of the standard for a motion for leave to amend. "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 (1<sup>st</sup> Dept 2005)(internal citations and quotations omitted). As a preliminary matter, the court finds that contrary to defendants' position, they will not be prejudiced by the proposed amendments. "Mere lateness" alone is not a barrier to an amendment (Norwood v. City of New York, 203 A.D.2d 147 (1st Dept. 1994) rather, to warrant the denial of the amendment the 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 (1<sup>st</sup> Dept. 1991)(citations omitted); See also Siegel, New York Practice, § 237, at 379 (3d ed. 1999). Here, defendants do not point to any

prejudice of this nature.

Next, it is well established that “in order to conserve judicial resources, an examination of the underlying merits of the proposed [amendment] is warranted.” Eighth Ave. Garage Corp. v. H.K.L Realty Corp., 60 AD3d 404, 405 (1<sup>st</sup> 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 (1<sup>st</sup> 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 (1<sup>st</sup> Dept 2007).

Here, the court finds that the proposed amendments are sufficiently meritorious to permit their addition. First, the court finds that the addition of AMMC as a defendant is warranted based on allegations that BAM exercised domination and control over BAM and transferred business operations and other assets to AMMC to frustrates plaintiff’s efforts to collect on its debt and that the individual defendants removed tools, materials and inventory, personnel and other assets to an office space operated by BAM for the benefit of and to continue operations as AMMC. Furthermore, while defendants submit evidence to the contrary, on a motion to amend once a prima facie basis is established for the amendment, the amended should be permitted. Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 AD3d at 365.

The court will next considered whether the proposed additional claims are of sufficient merit to permit their addition. To prevail on a claim of breach of fiduciary duty, the plaintiff must establish (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct. Rut v. Young Adult Inst., Inc., 74

AD3d 776, 777 (2010). Here, the proposed amended complaint adequately alleges such a claim. A fiduciary duty exists between plaintiff, as a member of the LLC, and the other members of the LLC (McGuire Children, LLC v. Huntress, 24 Misc3d 1202(A) (NY Sup Ct. 2009) aff'd sub nom, McGuire v. Hunter, 83 AD3d 1418 (2d Dept 2011), and the complaint sufficiently alleges misconduct by defendants and damages from such misconduct. Moreover, contrary to defendants' position, it is premature on a motion to amend to consider whether the business judgment rule would bar this claim.

Next, to properly plead a cause of action for conversion, it is incumbent upon plaintiff to allege facts establishing that she owned or had a superior right to the property in question, that plaintiff demanded its return, and that defendant refused to deliver it. See Weider v Chemical Bank, 202 AD2d 168 (1st Dept), lv denied 83 NY2d 759 (1994). Moreover, when the property allegedly converted is money, it must be specifically identifiable and segregated, and be subject to an obligation to be returned or to be otherwise treated in a particular manner. Manufacturers Hanover Trust Co. v Chemical Bank, 160 AD2d 113, 124 (1st Dept 1990), lv denied 77 NY2d 803 (1991). In addition, "[a] conversion action cannot predicated on an equitable interest or a mere breach of a contractual obligation." Traffix Inc. v. Herold, 269 FSupp2d 223 (SD NY 2003); Preil v. Heby, 4 Misc3d 1011(A)(Sup Ct NY Co. 2004). Here, as plaintiff transferred the money at issue in accordance with the memoranda of understanding, it cannot be said that the funds were converted. Accordingly, the proposed conversion claim may not be added.

The remaining claim for fraudulent transfer is based on allegations that BAM's assets were transferred to AMMC for the benefit of defendants and to defraud plaintiff, leaving BAM with an unreasonably small amount of capital. Under DCL § 273, "a conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent

as to creditors without regard to his actual intent if the conveyance is made without fair consideration.” Also fraudulent are transfers made without fair consideration which would leave the transferor with an unreasonably small amount of capital with which to operate the business (DCL § 274); see generally, CIT Group/ Commercial Services, Inc. Vv. 160-09 Jamaica Ave. Ltd. Partnership, 25 AD3d 301, 303 (1<sup>st</sup> Dept 2006). Here, the allegations in the complaint are sufficient to plead a prima facie claim for fraudulent transfer and defendants’ evidence rebutting the claim does not preclude the amendment. Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 AD3d at 365.

In view of the above, it is

ORDERED that the plaintiff’s motion to amend is granted except insofar as it seeks to add the proposed claim for conversion; and it is further

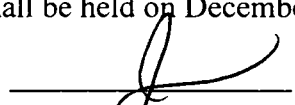
ORDERED that within fifteen days of the date of this decision and order plaintiff shall file and serve an amended complaint consistent with this decision and order; and it is further

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

ORDERED that within 30 days of the date of this decision and order plaintiff shall serve AMMC, Ltd. with a supplemental summons and amended complaint consistent with this decision and order; and it is further

ORDERED that a compliance conference shall be held on December 19, 2013 at 9:30 am.

DATED: October 10, 2013

  
J.S.C.

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