

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D17326
C/cb

_____AD3d_____

Argued - November 19, 2007

GABRIEL M. KRAUSMAN, J.P.
STEVEN W. FISHER
DANIEL D. ANGIOLILLO
RUTH C. BALKIN, JJ.

2006-11358

DECISION & ORDER

Ari Yemini, etc., et al., appellants, v Oded Goldberg,
et al., respondents; ANO, Inc., et al., additional
counterclaim-defendants (and another title).

(Index No. 12402/05)

Steven Cohn, P.C., Carle Place, N.Y. (Susan E. Dantzig of counsel), for appellants.

Ruskin Moscou Faltischek, P.C., Uniondale, N.Y. (Douglas J. Good and Adam L.
Browser of counsel), for respondents.

In an action, inter alia, to recover damages for breach of contract, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Austin, J.), entered November 2, 2006, as granted those branches of the defendants' motion which were for leave to serve an amended answer and counterclaim.

ORDERED that the order is affirmed insofar as appealed from, with costs.

“Leave to amend or supplement pleadings should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment” (*Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558, 558; see *Alatorre v Hee Ju Chun*, 44 AD3d 596; *Bajanov v Grossman*, 36 AD3d 572, 573; *Leibel v Flynn Hill El. Co.*, 25 AD3d 768; *Sample v Levada*, 8 AD3d 465, 467-468). Here, the plaintiffs did not establish that the counterclaims sought to be asserted in the defendants' proposed amended answer are palpably improper or insufficient as a matter of law (see *Maloney Carpentry, Inc. v Budnik*, 37 AD3d at 558). Nor did the plaintiffs establish that the defendants' delay in seeking

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leave to amend prejudiced or surprised them. The defendants sought leave to serve the amended answer and counterclaims only one year after the action was commenced, after limited discovery had been conducted. The plaintiffs did not establish that they “incurred some change in position or hindrance in the preparation of [their] case which could have been avoided had the original pleading contained the proposed amendment” (*Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 293).

KRAUSMAN, J.P., FISHER, ANGIOLILLO and BALKIN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court