

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

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_____AD3d_____

Argued - January 25, 2008

WILLIAM F. MASTRO, J.P.
REINALDO E. RIVERA
JOSEPH COVELLO
THOMAS A. DICKERSON, JJ.

2006-10191

DECISION & ORDER

Shefa Unlimited, Inc., et al. respondents,
v Amsterdam & Lewinter, et al., appellants,
et al., defendants.

(Index No. 11407/02)

Milber, Makris, Plousadis & Seiden, LLP, Woodbury, N.Y. (Lorin A. Donnelly of counsel), for appellant Amsterdam & Lewinter.

Ackerman, Levine, Cullen, Rickman & Limmer, LLP, Great Neck, N.Y. (James M. Meaney and John M. Brickman of counsel), for appellant Valerie S. Amsterdam.

William D. Fireman, P.C., New York, N.Y., for respondents.

In an action, inter alia, to recover damages for legal malpractice, the defendants Amsterdam & Lewinter and Valerie S. Amsterdam separately appeal, as limited by their respective briefs, from so much of an order of the Supreme Court, Kings County (Jackson, J.), dated August 31, 2006, as granted that branch of the plaintiffs' motion which was for leave to serve a second amended complaint and denied their cross motion for leave to file a motion for summary judgment dismissing the amended complaint before the continuation of discovery.

ORDERED that the order is modified, on the facts and in the exercise of discretion, by deleting the provision thereof granting that branch of the plaintiffs' motion which was for leave to serve a second amended complaint, and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed insofar as appealed from, with one bill of costs payable to the appellants.

March 4, 2008

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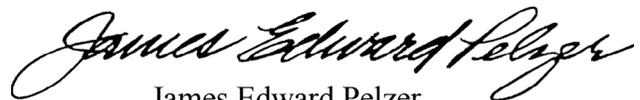
SHEFA UNLIMITED, INC. v AMSTERDAM & LEWINTER

In the proposed second amended complaint, the plaintiffs sought, in effect, to assert a new cause of action to recover damages for legal malpractice. However, that cause of action was time-barred (*see* CPLR 214[6]). Moreover, the original complaint did not give the appellants notice of the alleged transactions, occurrences, or series of transactions and occurrences that formed the basis for the new cause of action (*see* CPLR 203[f]). Under these circumstances, where the proposed pleading was not a “mere extension” of the allegations in the original complaint, and thus, did not “relate back” to that pleading, the Supreme Court improvidently exercised its discretion in permitting the amendment (*Krioutchkova v Gaad Realty Corp.*, 28 AD3d 427, 428). Indeed, although leave to amend a pleading is to be freely granted, leave should be denied where, as here, the opponent would suffer prejudice or surprise resulting directly from the delay in seeking leave, or the proposed amendment is palpably insufficient or patently devoid of merit (*see* CPLR 3025[b]; *Nissenbaum v Ferazzoli*, 171 AD2d 654, 655; *Barnes v County of Nassau*, 108 AD2d 50, 52).

The appellants’ remaining contention is without merit.

MASTRO, J.P., RIVERA, COVELLO and DICKERSON, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court