

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

D31346
C/nl

_____AD3d_____

Submitted - April 26, 2011

JOSEPH COVELLO, J.P.
RANDALL T. ENG
CHERYL E. CHAMBERS
ROBERT J. MILLER, JJ.

2010-10486

DECISION & ORDER

Truebright Co., Ltd., et al., appellants,
v Roy Lester, respondent.

(Index No. 4409/04)

Werner, Zaroff, Slotnick, Stern & Ashkenazy LLP, Lynbrook, N.Y. (Howard J. Stern of counsel), and Harris D. Leinwand, New York, N.Y., for appellants (one brief filed).

Catalano Gallardo & Petropoulos, LLP, Jericho, N.Y. (Matthew K. Flanagan of counsel), for respondent.

In an action, inter alia, to recover damages for legal malpractice, the plaintiffs appeal from an order of the Supreme Court, Nassau County (Cozzens, Jr., J.), entered September 29, 2010, which, in effect, granted the defendant's motion for leave to amend his answer to assert the affirmative defense of lack of legal capacity to sue.

ORDERED that the order is affirmed, with costs.

Under the circumstances, the Supreme Court did not improvidently exercise its discretion when it, in effect, granted the defendant's motion for leave to amend his answer, as the proposed amendment was neither palpably insufficient nor patently devoid of merit, and there was no evidence that it would prejudice or surprise the plaintiffs (*see* CPLR 3025 [b]; *Matter of Roberts v Borg*, 35 AD3d 617, 618; *Public Adm'r of Kings County v Hossain Constr. Corp.*, 27 AD3d 714, 716). To the extent that the plaintiffs "wish[] to test the merits of the proposed added . . . defense,

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[they] may . . . move for summary judgment upon a proper showing” (*Lucido v Mancuso*, 49 AD3d 220, 229).

COVELLO, J.P., ENG, CHAMBERS and MILLER, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court