

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

D33705
C/prt

_____AD3d_____

Argued - October 17, 2011

PETER B. SKELOS, J.P.
L. PRISCILLA HALL
PLUMMER E. LOTT
SHERI S. ROMAN, JJ.

2010-03177

DECISION & ORDER

Putnam County Savings Bank, plaintiff-respondent, v
Kamal K. Aditya, et al., defendants third-party
plaintiffs-appellants; Robert J. Hentschel, defendant-
respondent, et al., defendants; Aditya Family Dynasty
Trust of 2002, third-party plaintiff-appellant; Dean
Marino, et al., third-party defendants; Contemporary
Environmental Management, et al., third-party
defendants-respondents.
(Action No. 1)

Putnam County Savings Bank, plaintiff-respondent, v
Kamal K. Aditya, et al., defendants third-party
plaintiffs-appellants; Robert J. Hentschel, defendant-
respondent, et al., defendant; Dean Marino, et al.,
third-party defendants; Contemporary Environmental
Management, et al., third-party defendants-respondents.
(Action No. 2)

Putnam County Savings Bank, plaintiff-respondent, v
Kamal K. Aditya, et al., defendants third-party plaintiffs-
appellants; Robert J. Hentschel, defendant-respondent,
et al., defendants; Dean Marino, et al., third-party
defendants; Contemporary Environmental Management,
et al., third-party defendants-respondent.
(Action No. 3)

(Index Nos. 2323/09, 2324/09, and 2325/09)

Barton Barton & Plotkin, LLP, New York, N.Y. (Maurice N. Ross, of counsel), for third-party plaintiff-appellant in Action No. 1 and defendant third-party plaintiff-appellant in Action Nos. 2 and 3, and Fox Rothschild LLP, New York, N.Y. (John A. Wait of counsel), for defendants third-party plaintiffs-appellants in Action Nos. 1, 2, and 3 (one brief filed).

Daniels and Porco, LLP, Carmel, N.Y. (Robert C. Lusardi of counsel), for plaintiff-respondent in Action Nos. 1, 2, and 3.

Perry Dean Freedman, White Plains, N.Y., for defendant-respondent in Action Nos. 1, 2, and 3, and third-party defendants-respondents in Action Nos. 1, 2, and 3.

In three related actions to recover on guarantees, Kamal K. Aditya and Rajib K. Aditya, defendants third-party plaintiffs in Action Nos. 1, 2, and 3, and the Aditya Family Dynasty Trust of 2002, a defendant third-party plaintiff in Action Nos. 2 and 3, and a third-party plaintiff in Action No. 1, appeal, as limited by their brief, from so much of an order of the Supreme Court, Putnam County (Nicolai, J.), dated March 15, 2010, as denied their joint cross motion, made with nonparties 40 Glastonbury, LLC, HS Eagle Road Associates, LLC, 33 Broad Street Restaurant Group, LLC, and Route 9 Poughkeepsie, LLC, for leave to amend the pleadings in all three actions to add those nonparties as third-party plaintiffs, and granted those branches of the motion of Robert J. Hentschel, a defendant in Action Nos. 1, 2, and 3, and Contemporary Environmental Management, Inc., and Bedford Professional Associates, LLC, third-party defendants in Action Nos. 1, 2, and 3, which were pursuant to CPLR 3211(a)(5) and (7) to dismiss the cross claims alleging breach of contract and fraud insofar as asserted against Robert J. Hentschel in all three actions, and the third-party causes of action alleging breach of contract and fraud insofar as asserted against Contemporary Environmental Management, Inc., and Bedford Professional Associates, LLC, in all three actions.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting those branches of the motion of Robert J. Hentschel, a defendant in Action Nos. 1, 2, and 3, and Contemporary Environmental Management, Inc., and Bedford Professional Associates, LLC, third-party defendants in Action Nos. 1, 2, and 3, which were pursuant to CPLR 3211(a)(5) to dismiss the cross claim alleging breach of contract insofar as asserted against Robert J. Hentschel in all three actions, and the third-party cause of action alleging breach of contract insofar as asserted against Contemporary Environmental Management, Inc., and Bedford Professional Associates, LLC, in all three actions, and substituting therefor a provision denying those branches of the motion; as so modified, the order is affirmed insofar as appealed from, with one bill of costs to the respondents appearing separately and filing separate briefs.

The Supreme Court providently exercised its discretion in denying the appellants' joint cross motion, made with nonparties 40 Glastonbury, LLC, HS Eagle Road Associates, LLC, 33 Broad Street Restaurant Group, LLC, and Route 9 Poughkeepsie, LLC, for leave to amend their pleadings in these three related actions to add the nonparties as third-party plaintiffs. "Where the proposed amended pleading is palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise, the motion for leave to amend should be denied" (*Lucido v Mancuso*, 49 AD3d 220, 229; *see Scofield v DeGroot*, 54 AD3d 1017, 1018).

Here, the proposed amendment is palpably insufficient, as the appellants lack standing to assert derivative claims on behalf of the nonparty limited liability companies (*cf. Clark v Trois*, 21 AD3d 439, 440; *Tal v Malekan*, 305 AD2d 281, 281).

The Supreme Court also properly granted those branches of the motion of Robert J. Hentschel, a defendant in Action Nos. 1, 2, and 3, and Contemporary Environmental Management, Inc. (hereinafter CEM), and Bedford Professional Associates, LLC (hereinafter Bedford), third-party defendants in Action Nos. 1, 2, and 3 (hereinafter collectively the respondents), which were pursuant to CPLR 3211(a)(7) to dismiss the cross claim alleging fraud insofar as asserted against Hentschel in all three actions, and the third-party cause of action alleging fraud insofar as asserted against CEM and Bedford in all three actions. “A cause of action alleging fraud will not lie where the only claim of fraud relates to a breach of contract, and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud” (*Mendelovitz v Cohen*, 37 AD3d 670, 671 [citations omitted]; *see Ross v DeLorenzo*, 28 AD3d 631, 636; *WIT Holding Corp. v Klein*, 282 AD2d 527, 528). Here, the appellants failed to sufficiently allege that they were induced to enter into the alleged agreement by a misrepresentation of any material fact collateral to the contract.

However, the Supreme Court erred in granting that branch of the motion of Hentschel, CEM, and Bedford which was pursuant to CPLR 3211(a)(5) to dismiss the cross claim alleging breach of contract insofar as asserted against Hentschel in all three actions, and the third-party cause of action alleging breach of contract insofar as asserted against CEM and Bedford in all three actions. The appellants’ breach of contract cause of action does not allege a promise to answer for the debt of another, and is not barred by the statute of frauds (*see General Obligations Law* § 5-701[a][2]; *Paribas Prop. v Benson*, 146 AD2d 522, 525).

SKELOS, J.P., HALL, LOTT and ROMAN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court