

**Mishkin v The Board of Managers of the 155  
Condominium**

2004 NY Slip Op 30159(U)

June 17, 2004

Supreme Court, New York County

Docket Number:

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: WALTER B. TOLUB  
*Justice*

PART 15

RUTH MISHKIN, individually and on behalf of  
THE 155 CONDOMINIUM,

INDEX NO. 106769/2003

Plaintiffs.

MOTION DATE 02/20/2004

- v -

MOTION SEQ. NO. 003

THE BOARD OF MANAGERS OF THE 155 CONDOMINIUM,  
QARY DONG, ARNOLD OITOMER, NEW BEDFORD  
MANAGEMENT CORP., MICHAEL WECHSLER and  
THE 155 CONDOMINIUM,

MOTION CAL. NO. \_\_\_\_\_

Defendants.

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

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibit \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, the following motion is disposed of in the accompanying memorandum decision.

PAPERS NUMBERED  
**FILED**  
JUN 21 2004  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/17/04

WALTER B. TOLUB  
WALTER B. TOLUB

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DONOTPOST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
RUTH MISHKIN, individually and on behalf  
of THE 155 CONDOMINIUM,

Plaintiffs,

Index No. 106769/03  
Mtn Ssq. 003

-against-

THE BOARD OF MANAGERS OF THE 155  
CONDOMINIUM, GARY DONG, ARNOLD GITOMER,  
NEW BEDFORD MANAGEMENT CORP., MICHAEL  
WECHSLER and THE 155 CONDOMINIUM,

Defendants.

**FILED**  
JUN 21 2004  
NEW YORK  
COUNTY CLERK'S  
OFFICE

-----x  
WALTER B. TOLUB, J.:

By this motion, plaintiff **seeks** to amend her complaint pursuant to CPLR 3025(b) to add a cause of action concerning the alleged misuse of funds of the 155 Condominium by defendant North Bedford Management Corp. and to join Allan A. Ash as a co-plaintiff to this action pursuant to CPLR 1002(a).

Facts

Plaintiff is the unit owner of an apartment located at 155 East 38<sup>th</sup> Street ("The 155 Condominium" or, "the Condominium"). On April 10, 2003, plaintiff commenced an action against the above named defendants alleging breach of fiduciary duty and seeking an accounting in connection with the improper withdrawal of \$150,000.00 from the Condominium's operating account in June, 2000 by defendants New Bedford Management Corp. (New Bedford) and Michael Wechsler (Wechsler). In addition to plaintiff's claim for breach of fiduciary duty, plaintiff also asserted causes of action

seeking an **award** of *costs*, attorneys' fees, and **expenses** (the second cause of action) and an order discharging defendants New **Bedford** and Wechsler from their duties as managing agents (the third cause of action).

In response to the commencement of this action, defendants sought to **dismiss the** instant complaint. By decision dated October, 2003, this court **denied** dismissal of the cause of action grounded in theories of breach of **fiduciary** duty, **dismissed** the **second cause of action** for attorney's fees and expenses, and denied dismissal of the third cause of action, as it was now moot.

In January, 2004, plaintiff made the instant application seeking to **permit** the joinder of **Allan A. Ash** as a Plaintiff pursuant to CPLR 1002(a) and to add a cause of action regarding the **misuse** of funds of the 155 Condominium by defendants New Bedford Management Corp. and Michael Weschler. The court notes that **while plaintiff** did not include a copy of the original complaint, the attached **proposed** amended **verified** complaint is comprised of three causes of action. The first cause of action alleges breach of **fiduciary** duty and **seeks** attorney's fees, costs and expenses associated with the litigation. The second cause of action **requests** for a full **and complete** accounting by defendants New Bedford and **Wechsler**. The third cause of action contains allegations of breach of fiduciary duty as to **defendants** New Bedford and Weschler, and for an accounting in **connection with** the

alleged misuse of Condominium funds in 2001.

### ***Discussion***

#### ***Amendment of Plaintiff's Complaint***

Although **leave to amend pleadings is freely given** (CPLR 3025(b)), the trial **court's decision** of whether to grant or deny leave to amend **is discretionary** (Mathisen v. Mead, 168 A.D.2d 736, 737 [3<sup>rd</sup> Dept. 1990]). Several factors **are** therefore considered when leave *to amend pleadings* is sought, including whether the nonmoving **party** would be prejudiced by the proposed amendment, and whether the **proposed amendment is** without merit or legally insufficient (Mathisen, 168 A.D.2d 736, 737; Duffy v. Wetzler, et al., 260 A.D.2d 596, 597 [2<sup>nd</sup> Dept. 1999]).

The underlying facts of an amended cause of action need not **be** proven at **this juncture**. However, "a motion **seeking** leave to amend pleadings **requires** the proponent to **allege** facts **legally** sufficient to **support** its **proposed** pleading" (Non-Linear Trading Company, Inc. v. Braddis Associates, Inc., 243, A.D.2d 107, 117 [1<sup>st</sup> Dept. 1998]). The **opposing party bears** the **burden** of demonstrating that **the** facts **alleged** or **relied upon** in the moving papers **lack** reliability or are insufficient (Daniels v. Empire-Orr, Inc., 151 A.D.2d 370, 371 [1<sup>st</sup> Dept. 1989]).

In the instant application, neither defendant **New Bedford** nor defendant **Wechsler** **oppose** plaintiff's proposed **second** cause of action for an accounting or the third cause of action **seeking** to

pursue a claim of **improper** use of Condominium funds for another building. **Accordingly**, that portion of the motion seeking to add the **proposed** second and third **causes** of action **are** granted.

Turning to the **proposed** amended first cause of action, the court notes that plaintiff **has** attempted to include a provision that would allow for the collection of attorney's **fees** and costs **associated** with this litigation, **That** portion of plaintiff's **proposed** amended first cause of action is **denied**.

In October, 2003, this court dismissed the second cause of action of **plaintiff's** complaint that sought an award of costs, attorney's **fees** and **expenses associated** with this litigation. Contrary to plaintiff's interpretation, that dismissal was not exclusive to the **second** cause of action - it was **applicable** to the entire litigation. As stated **previously** by this court,

Condominium associations **are** not governed by the **Business** Corporation Law but **by Real Property Law** article 9-B(4260 Broadway Realty Ca. v. Assimakopoulos, 264 A.D.2d 626 [1<sup>st</sup> Dept. 1999]) and **absent** specific statutory or contractual authority, attorney's **fees** are not **recoverable** (Devlin v. 645 First Avenue Manhattan Company, 229 A.D.2d 343 [1<sup>st</sup> Dept. 1996])" (Order to Show Cause Exhibit B, Decision, 10/30/2003).

Plaintiff **has** not **demonstrated** any statutory or contractual authority that entitles her to recovery of attorney fees or costs expended in connection **with** this litigation. As such, this court will not **allow** amendment of **the** complaint to **seek** this relief.

*Joinder of Party*

The remaining component of the instant motion **seeks** the amendment of the complaint to allow for **the** addition of Mr. Allan A. Ash **as a co-plaintiff** in **this** action. Although a person who asserts "any **right** to relief jointly, **severally**, or in the alternative **arising** out of **the** same transaction, occurrence, or series of transactions or **occurrences** may join in one action as plaintiffs if any common **question** of law or fact would **arise**" (CPLR 1002(a)), **based** on the facts of this case, this court is not inclined to **allow** the inclusion of Mr. Ash as a plaintiff in this matter.

Mr. Ash and Ms. Mishkin worked together at the accounting firm of Ash & Parsont from 1942 until 1990 when Ms. Mishkin retired. Mr. Ash, a CPA, additionally claims responsibility for the primary **investigation** of the **misuse** of the 155 Condominium's funds, and the firm that **he is employed by** has billed a **substantial** amount for those services to date. Most significant, however, **is** that Mr. Ash, who is **also** Ms. **Mishkin's** attorney-in-fact pursuant to a Durable Power of Attorney<sup>1</sup>, acquired a 5% interest **by gift** to Ms. Mishkin's condominium **unit twelve** days before the commencement of the instant action.

Although Mr. Ash claims in his affidavit that **he** has **lived**

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<sup>1</sup> The Durable **General Power of Attorney** was **executed** on December 12, 2002 (Order to Show Cause Exhibit F)

with Ms. **Mishkin** for the past three years, **the** fact remains that Mr. Ash held no interest in the Condominium contemporaneously with any of the alleged incidents of **misuse** of Condominium funds, both of which occurred in 2000 and 2001. Mr. Ash **did** not acquire any interest in the Condominium until 2003, and consequently, **was** not harmed **by** any actions the **Condominium** did or did not **take** prior to that acquisition. Inasmuch as Mr. Ash has **not demonstrated** that he has standing to maintain **this** action, **the portion** of the motion seeking to add Mr. Ash as a co-plaintiff is **denied**.

Accordingly, it is

ORDERED **that** plaintiff's motion **seeking** the addition of Allan **A. Ash** as a co-plaintiff **in** the instant action is denied; and it is further

ORDERED that plaintiff's motion to amend the second and third causes of action **as set forth** in the proposed **amended** verified complaint is granted; and it is further

ORDERED that plaintiff's motion to amend the **first cause** of action as set forth in the **proposed** amended verified complaint is denied.

This memorandum opinion constitutes the decision and order of **the** Court.

Dated: *c/17/04*

**FILED**  
JUN 21 2004  
COUNTY CLERK'S OFFICE  
*U*

HON. WALTER B. TOLUB, J.S.C.