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

PRESENT: O. PETER SHERWOOD Justice PART 49

YOON JUNG KIM, *et al*,

Plaintiffs,

-against-

GAHEE AN, *et al.*,

Defendants.

INDEX NO. 652757/2012

MOTION DATE June 25, 2013

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for leave to renew.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion for leave to renew is decided in accordance with the accompanying memorandum decision and order.

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

Dated: August 26, 2013

O. PETER SHERWOOD, *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

YOON JUNG KIM, HAE WON BANG, OLYMPIAD SCHOOL, INC., SCTA LIMITED LIABILITY COMPANY, SSOA LIMITED LIABILITY COMPANY and OA CONSULTING GROUP CORP.,

Plaintiffs,

-against-

GAHEE AN, CHANGTAE SEO, ASIA CULTURE EXCHANGE ORGANIZATION, INC. and SG INTERNATIONAL, INC.,

Defendants.

----------X

DECISION AND ORDER

Index No.: 652757/2012
Motion Sequence No.: 003

O. PETER SHERWOOD, J.:

Defendants move pursuant to CPLR 2221 (e) and 3025 (b) for leave to renew their prior motion for leave to amend their answer and counterclaims. In a decision and order dated May 16, 2013, the Court denied without prejudice defendants' prior motion for leave to amend for failure to comply with CPLR 3025 (b)'s requirement that "[a]ny motion to amend . . . pleadings shall be accompanied by the proposed amended . . . pleading clearly showing the changes or additions to be made to the pleading" (CPLR 3025 [b]). Defendants have now complied with that requirement. For the reasons that follow, the motion for leave to renew is granted, and upon renewal, the Court adheres to its May 16, 2013 decision and order denying the motion for leave to amend the answer with counterclaims.

BACKGROUND

Defendants' verified answer, filed with the Court on October 3, 2012, contains six counterclaims: (1) rescission of mortgage and mortgage note on grounds of unconscionability; (2) rescission of mortgage note on grounds of usury; (3) defamation against plaintiffs Yoon Jung Kim and Hae Won Bang; (4) intentional infliction of emotional distress against plaintiff Yoon Jung Kim; (5) attorney's fees; and (6) punitive damages.[1] In their proposed amended answer, defendants make

[1]The fifth and sixth "counterclaims" for attorney's fees and punitive damages are not counterclaims, although they are designated as such. Rather, they are merely remedies.

several changes including, *inter alia*, adding new factual allegations to their counterclaims and adding a counterclaim for rescission of mortgage, mortgage note and interest agreement on grounds of duress.

DISCUSSION

I. CPLR 3025 (b) Standard

"Motions for leave to amend pleadings should be freely granted . . . absent prejudice or surprise resulting therefrom . . ., unless the proposed amendment is palpably insufficient or patently devoid of merit. . . . [Defendants] need not establish the merit of [their] proposed new allegations . . ., but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499-500 [1st Dept 2010]; CPLR 3025 [b]). Prejudice in this context is shown where the nonmoving party is "hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]). A delay in seeking leave to amend is not grounds for denial of the motion except where the delay would cause prejudice or surprise (*see Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). Although leave to amend should be freely granted, an examination of the underlying merits of the proposed causes of action is warranted in order to conserve judicial resources (*see Eighth Ave. Garage Corp. v H.K.L. Rlty, Corp.*, 60 AD3d 404, 405 [1st Dept 2009]). Whether to permit amendment is within the sound discretion of the court (*see Pellegrino v NYC Transit Auth.*, 177 AD2d 554, 557 [2d Dept 1991]).

II. Affidavit of Merit

Plaintiffs contend that the motion must be denied because defendants have not provided an affidavit of merit with their motion papers. CPLR 3025 (b) does not explicitly require an affidavit of merit, but the Appellate Division, First Department has held that "a motion for leave to amend a pleading '*must be supported by an affidavit of merits* and evidentiary proof that could be considered upon a motion for summary judgment'" (*Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 116 [1st Dept 1998], citing *Nab-Tern Constructors v City of New York*, 123 AD2d 571 [1st Dept 1986] [emphasis added]). It appears, however, that this standard no longer controls. The Appellate Division, Second Department recently examined the history of CPLR 3025 (b) jurisprudence, and found that courts were requiring too much proof on the merits (*see Lucido v*

Mancuso, 49 AD3d 220 [2d Dept 2008]). In *Lucido*, the court noted that for years, many courts, including the Second Department itself, were "mentioning the absence of an affidavit of merit as a factor to be considered in support of denying a motion pursuant to CPLR 3025 (b) for leave to amend a complaint" (*id.* at 229). The court then rejected this standard, holding that "[c]ases involving CPLR 3025(b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed. No evidentiary showing of merit is required under CPLR 3025(b)" (*id.*)

As this Court recognized in *Schron v Grunstein* (39 Misc 3d 1213(A), 2013 WL 1688929, *4 [Sup Ct, NY County, Apr. 9, 2013, Sherwood, J.]), the First Department appears to have impliedly adopted the thrust of *Lucido* in *MBIA Ins. Corp.* (74 AD3d at 499), at least to the extent that an affidavit of merit is no longer required. Citing *Lucido*, the *MBIA Ins. Corp.* court held that "[o]n a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations . . . but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*id.* at 500). Indeed, the defendant in that case raised and the court rejected the same argument plaintiffs raise here regarding an affidavit of merit. The court held that "the proposed amendment was supported by a sufficient showing of merit through the submission of an affirmation by counsel, along with a transcript of relevant deposition testimony" (*id.*)

Although an affidavit of merit is no longer required, unlike the Second Department's standard as articulated in *Lucido*, *MBIA Ins. Corp.* indicates that the First Department continues to require some minimal "show[ing] that the proffered amendment is not palpably insufficient or clearly devoid of merit," beyond a bare bones attorney's affirmation (*MBIA Ins. Corp.*, 74 AD3d at 500). Thus, in *Schron*, this Court granted the plaintiffs' motion for leave to amend their complaint despite the lack of an affidavit of merit, because plaintiffs provided an affirmation of counsel along with exhibits containing relevant documents supporting their new allegations (*Schron*, 2013 WL 1688929 at *4).

Here, however, defendants have submitted only a bare bones affirmation of counsel, stating that "[t]he amendments to the Answer and Counterclaim have all been verified by defendant, An and there exists sufficient documentary and testamentary evidence to be produced throughout the course of discovery to support such claims" (Churgin Affirm. ¶ 11). Contrary to this statement, the proposed

amended answer has not been verified. Beyond this singular statement in the attorney's affirmation, defendants have made no "show[ing] that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp.*, 74 AD3d at 500). Indeed, the affirmation does not even attempt to explain the changes and additions made to the answer. The Court must therefore adhere to its original decision and order.

III. Prejudice

Plaintiffs also argue that the motion must be denied, because they would be prejudiced by the amendment. The Court need not decide this issue, because it has already held that defendants failed to "show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*id.*) If the Court were to reach the issue, it would find that plaintiffs would not be prejudiced by the amendment, as discovery is ongoing.

Based on the foregoing discussion, it is

ORDERED that the motion of defendants for leave to renew their motion for leave to amend their answer is granted; and it is further

ORDERED that, upon renewal, the Court adheres to its decision and order, dated May 16, 2013, denying said motion for leave to amend.

This constitutes the decision and order of the Court.

DATED: August 26, 2013

E N T E R,

O. PETER SHERWOOD

J.S.C.