

**Fundamental Long Term Care Holdings, LLC v
Cammeby's Funding, LLC**

2013 NY Slip Op 32113(U)

August 30, 2013

Sup Ct, New York County

Docket Number: 650332/2011

Judge: O Sherwood

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC, *et al.*,

Plaintiffs,

-against-

CAMMEBY'S FUNDING, LLC, *et al.*,

Defendants.

INDEX NO. 650332/2011

MOTION DATE April 12, 2013

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to amend.

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

Answering Affidavits — Exhibits _____

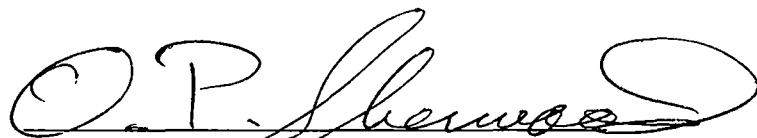
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

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

Dated: August 30, 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.

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

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

-----X
**FUNDAMENTAL LONG TERM CARE HOLDINGS,
LLC, LEONARD GRUNSTEIN, and MURRAY
FORMAN,**

Plaintiffs,

-against-

**CAMMEBY’S FUNDING, LLC, QUALITY HEALTH
CARE SERVICES, LLC, d/b/a QUALITY HEALTH
SERVICES, LLC, and RUBIN SCHRON,**

Defendants.

-----X
**CAMMEBY’S FUNDING, LLC, QUALITY HEALTH
CARE SERVICES, LLC, d/b/a QUALITY HEALTH
SERVICES, LLC,**

Counterclaim-Plaintiffs,

-against-

**FUNDAMENTAL LONG TERM CARE HOLDINGS,
LLC, LEONARD GRUNSTEIN, and MURRAY
FORMAN,**

Counterclaim-Defendants.

-----X
O. PETER SHERWOOD, J.:

Defendants and counterclaim-plaintiffs Cammeby’s Funding LLC (“Cam Funding”) and Quality Health Care Services LLC d/b/a Quality Health Services LLC (“QHS”) (collectively, “Defendants”) move, pursuant to CPLR 3025 (b), for leave to file an amended counterclaim. For the reasons that follow, the motion is granted.

BACKGROUND

The background of this case is set forth in the Court of Appeals’ February 14, 2013 decision and will not be repeated here (*see Fundamental Long Term Care Holdings, LLC v Cammeby’s Funding LLC*, 20 NY3d 438 [2013]). On this motion sequence number 003, Defendants move, pursuant to CPLR 3025 (b), for leave to file an amended counterclaim which seeks monetary

DECISION AND ORDER

**Index No. 650332/2011
Mot. Seq. 003**

damages in the event that the assets of plaintiff Fundamental Long Term Care Holdings, LLC (“Fundamental”) have been materially dissipated following the exercise of the option. Specifically, Defendants have amended their counterclaim to assert additional factual allegations concerning plaintiffs’ purported dissipation of assets, and seek relief in the form of damages equal to one-third of the value of the money or other assets that plaintiffs Leonard Grunstein (“Grunstein”) and Murray Forman (“Forman”) have allegedly taken out of Fundamental since they received the Notice of the Exercise of the option, including, but not limited to, one-third of the amount of cash distributions they have made since that time.

In a decision and order entered June 18, 2012, the Court granted, in part, Defendants’ request for financial disclosure concerning the alleged dissipation of assets. The Court held, “[t]hat defendants sought specific performance and in the alternative damages, does not bar them from continuing to seek damages in addition to injunctive relief.” The Appellate Division, First Department reversed this Court’s order on January 8, 2013, and denied Defendants’ request for disclosure (*Fundamental Long Term Care Holdings, LLC v Cammeby’s Funding LLC*, 102 AD3d 440, 441 [1st Dept 2013]). The First Department held that the Defendants “failed to establish that the disclosure sought was ‘material and necessary in the prosecution or defense of’ this action or the counterclaim (CPLR 3101 [a])” because Defendants did not specifically plead a request for relief in the form of “monetary damages in the event that Fundamental’s assets had been materially dissipated following the exercise of the option” (*Fundamental Long Term Care Holdings, LLC*, 102 AD3d at 441). Defendants now seek to amend their counterclaim to plead a request for that relief.

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. Merits

Plaintiffs argue that the motion must be denied because Defendants have not provided an affidavit of merit with their motion papers. The Court recently addressed this issue in the related matter, *Schron v Grunstein* (39 Misc 3d 1213(A), 2013 WL 1688929, *3-4 [Sup Ct, NY County, Apr. 9, 2013, Sherwood, J.]), and will not repeat its discussion here. An affidavit of merit is not required to succeed on a motion for leave to amend a pleading (*id.* at *4; *see MBIA Ins. Corp.*, 74 AD3d at 500).

In making the required “show[ing] that the proffered amendment is not palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp.*, 74 AD3d at 500), Defendants submit two affirmations of counsel with relevant exhibits. Specifically, Defendants submit Fundamental’s 2008 and 2009 Consolidated Financial Statements (Engel Affirmation Ex. H), and 2010 and 2011 Consolidated Financial Statements (Engel Reply Affirmation Ex. A).¹ Defendants aver that the 2008 and 2009 Consolidated Financial Statements reveal that Grunstein and Forman distributed more than \$16.5 million to themselves from Fundamental in 2008 and 2009. Defendants contend “[t]here is no reason

¹ Fundamental’s 2010 and 2011 Consolidated Financial Statements were not produced to Defendants until March 15, 2013, after Defendants filed their initial papers in support of the motion (Defendants’ Reply Mem of Law at 4). Accordingly, the Court may properly consider the exhibit even though it was filed with the reply papers.

to believe that [Grunstein and Forman] stopped making distributions once [Defendants] exercised their option” (Defendants’ Mem of Law at 6). Defendants argue that their fears have been confirmed, contending that Fundamental’s 2010 and 2011 Consolidated Financial Statements reveal that Grunstein and Forman have taken at least \$5.463 million in cash distributions out of Fundamental during 2011, since the exercise of the option (Engel Reply Affirmation Ex. A at FT0042505; Defendants’ Reply Mem of Law at 4-5). These exhibits, especially the 2010 and 2011 Consolidated Financial Statements, sufficiently demonstrate that there is a potential dissipation of Fundamental’s assets, and accordingly, “that the proffered amendment is not palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp.*, 74 AD3d at 500; *see Schron*, 2013 WL 1688929, *4 [“[P]laintiffs have provided an affirmation of counsel along with exhibits containing relevant documents Accordingly, the affirmation is enough and defendants’ argument that plaintiffs must provide and affidavit of merit must be rejected.”]).

III. Prejudice and Delay

In opposing the motion for leave to amend on the basis of prejudice, plaintiffs focus much of their attention on the issue of delay. But delay alone in seeking leave to amend is not grounds for denial of the motion; delay coupled with prejudice or surprise is required (*see Lucido*, 49 AD3d at 229). Plaintiffs can claim prejudice only if they are “hindered in the preparation of [their] case or ha[ve] been prevented from taking some measure in support of [their] position” (*Loomis*, 54 NY2d at 23). No such showing has been made here.

Defendants first sought discovery into the alleged dissipation of assets in March 2012, thirteen months after this case was filed. The Court granted, in part, Defendants’ application in an order entered June 18, 2012, but the First Department reversed that order on January 8, 2013. One month later, on February 19, 2013, Defendants filed the instant motion. Under these circumstances, it cannot be said that Defendants acted with unreasonable delay.

Plaintiffs argue that they would be prejudiced by the amendment, because they “will be forced to engage in invasive discovery based entirely on speculative allegations” (Plaintiff’s Mem

off Law in Opp at 10). It is well established that “[f]urther discovery, without more, does not justify denial of” a motion to amend the pleadings (*Carp v Marcus*, 138 AD2d 775, 777 [3d Dept 1988]). Importantly, there is no prejudice where, as here, “[plaintiffs] ha[ve] long been aware of [defendants’] concern[s] . . . and any discovery relevant to the supposedly new theor[ies] remained entirely in [plaintiffs’] hands” (*Aetna Cas. & Sur. Co. v LFO Constr. Corp.*, 207 AD2d 274 [1st Dept 1994]). Plaintiffs have been aware of Defendants’ concern regarding dissipation of assets since at least March 2012 and will suffer no prejudice from the amendment of the counterclaim.

IV. Finality

Finally, plaintiffs argue that since the Court of Appeals has rendered its decision, this case is final and “[a]s a result, the case is over. No other substantive issues remain to be – or can be – resolved” (Mem of Law in Opp at 4, 11-12). This argument is without merit and finds no support in the law. No final judgment has been entered in this case, and the Court continues to exercise its “supervisory control over all phases” of the action (*Teitelbaum Holdings v Gold*, 48 NY2d 51, 54 [1979]).

The Court has considered plaintiffs’ remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that the motion of defendants Cammeby’s Funding LLC and Quality Health Care Services LLC d/b/a Quality Health Services LLC for leave to file an amended counterclaim is GRANTED. Defendants shall serve and file their amended answer within ten (10) days of service of this Decision and Order with notice of entry. Plaintiffs shall serve a reply to the amended counterclaim or otherwise respond thereto within twenty (20) days thereafter.

This constitutes the decision and order of the court.

DATED: August 30, 2013

ENTER,


O. PETER SHERWOOD
J.S.C.