

**Anderson & Anderson, LLP v North American  
Foreign Trading Corp.**

2013 NY Slip Op 32902(U)

November 12, 2013

Sup Ct, NY County

Docket Number: 651010/2011

Judge: Eileen Bransten

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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY  
PRESENT: Hon. Eileen Bransten, Justice** **PART 3**

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**ANDERSON & ANDERSON, LLP – GUANGZHOU,  
BEIJING KAIMING LAW OFFICE, and  
GUANGDONG HUATU LAW FIRM,**

**Plaintiffs,**

**Index No.: 651010/2011  
Motion Date: 7/23/2013  
Motion Seq. No.: 004**

**-against-**

**NORTH AMERICAN FOREIGN TRADING CORP.,**

**Defendant.**  
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The following papers, numbered 1 to 5, were read on this motion for leave to file a second amended complaint.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits **No(s).** 1,4

Answering Affidavits - Exhibits **No(s).** 2,5

Replying Affidavits **No(s).** 3

Cross-Motion:  Yes  No

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

**This matter comes before the Court on Plaintiffs' motion for leave to file a Second Amended Complaint. Plaintiffs seek to amend their pleading to: (1) add a claim for implied contract in fact; (2) assert their right to an attorneys' charging lien; (3) add Huatu as a party in the body of the Complaint; (4) state that Chinese law governs their claim; and, (5) state the time period during which Plaintiffs claim to have provided legal services. Defendant North American Foreign Trading Corp. ("NAFT") opposes only the last two amendments. See Def.'s Supp. Memo. of Law at 1. Each of the contested amendments will be examined in turn.**

**A. Motion to Amend Standard**

Leave to amend a pleading should be freely granted so long as the amendment will not cause surprise or prejudice to the opposing party. See CPLR 3025(b); *see also Solomon Holding Corp. v. Golia*, 55 A.D.3d 507, 507 (1st Dep't 2008) (granting motion to amend absent showing of surprise or prejudice). A showing of "[p]rejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.'" *Cherebin v. Empress Ambulance Serv., Inc.*, 43 A.D.3d 364, 365 (1st Dep't 2007) (quoting *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981)).

Here, Defendant makes no arguments regarding prejudice; instead, NAFTA's opposition centers solely on the insufficiency of Plaintiff's amendment.

**B. Application of Chinese Law**

Plaintiffs seek to amend its Complaint to assert that Chinese law governs its claims. Under CPLR 3016(e), where a party seeks to base a cause of action on the law of a foreign country, the "substance of the foreign law relied upon shall be stated." Plaintiffs' amendment here states that it intends for Chinese law to apply. While Plaintiffs can amend their Complaint to make this assertion, the statement and its inclusion in the Complaint does not mean that the Court adopts Plaintiffs' choice of law designation. The Complaint is merely a list of Plaintiffs' allegations. The substance of Plaintiffs' legal choice of law argument will be

vett<sup>1</sup>ed on subsequent motions, after full and proper briefing to the Court.<sup>1</sup>  
Accordingly, in light of New York's policy of freely granting leave to amend,  
Plaintiffs' motion to amend the Complaint to include reference to Plaintiffs'  
Chinese choice of law argument is granted.

**C. Allegations Supporting Implied Contract in Fact Claim**

Plaintiffs next seek to add allegations stating the length of time that  
Plaintiffs provided legal services to NAFTA. Plaintiffs allege that they "provided  
legal services to Defendant for well over four years, including the services  
provided pursuant to the Agreement that commenced in 2005 and continuing  
through [NAFT]'s settlement." See Affirmation of David C. Buxbaum Ex. A ¶ 46  
(Proposed Second Amended Complaint). Defendant opposes, stating that the  
Plaintiffs' allegation contradicts facts pleaded in the First Amended Complaint,  
specifically that "Plaintiffs provided ... legal services to [NAFT] between June and  
December 2009." *Id.* Ex. B ¶ 33 (First Amended Complaint).

Although Plaintiffs stated at paragraph 33 of their First Amended Complaint  
that they provided legal services in 2009, elsewhere in the same pleading they  
asserted that they began representing NAFTA in December 2005. See *id.* Ex. B ¶¶  
10, 11 ("On or about December 29, 2005, NAFTA entered into an agreement ... with  
Huatu, whereby Huatu agreed to represent NAFTA in enforcement proceedings in

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<sup>1</sup> The Court notes for the benefit of Plaintiffs that citation to and quotes from untranslated Chinese texts do not provide the Court with the requisite information to assess the merits of Plaintiffs' Chinese law arguments. In the future, all citations to Chinese law materials shall be supported by citation to English-language texts or texts translated to English that are presented to the Court in hard-copy form through an attorney affirmation or other affidavit.

China. ... Under the Agreement, David Buxbaum of Anderson was appointed as one of the agents to handle the case.”). Plaintiffs’ representation in their Proposed Second Amended Complaint, while inconsistent with one sentence in the earlier pleading, is consistent with other allegations in that complaint. Therefore, the inconsistency appears to the Court to be akin to a scrivener’s error and not a fundamental change in the facts supporting their claims, as argued by Defendant. NAFTA’s citation to *Morgenthau & Latham v. Bank of N.Y. Co.*, 305 A.D.2d 74 (1st Dep’t 2003), where the Appellate Division found that entirely contradictory allegations in a previously filed complaint were documentary evidence supporting dismissal of a later action, is therefore inapt.

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For the foregoing reasons, and because NAFTA failed to make any demonstration of prejudice, it is

ORDERED that Plaintiffs’ motion for leave to amend the First Amended Complaint herein is GRANTED, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that Defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

