

**Felsher v Felsher**

2014 NY Slip Op 31610(U)

June 20, 2014

Supreme Court, New York County

Docket Number: 159124/2012

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 45

-----X		
MICHAEL FELSHER,	:	
	:	
Plaintiff,	:	Index No. 159124/2012
	:	
-against-	:	DECISION AND ORDER
	:	
GARY FELSHER, individually and as the Trustee of	:	Motion Sequence No. 004
Gary Felsher Trust No. 2, IHOR G. KUPCHYNSKY,	:	
individually and the successor Trustee to HERMAN and	:	
BERTHA FELSHER, as Trustee of the Gary Felsher Trust	:	
No. 2, FGHP Capital Limited Partnership, a Delaware	:	
limited partnership, GARMONT CAPITAL, INC., a	:	
Delaware corporation, and W. MONSEES STUBBS, JR.,	:	
individually,	:	
	:	
Defendants.	:	
-----X		

**MELVIN L. SCHWEITZER, J.:**

Mr. Gary Felsher moves for leave to supplement and amend his answer to add additional affirmative defenses and counterclaims pursuant to CPLR 3025(b). Mr. Michael Felsher opposes Mr. Gary Felsher's motion on the grounds that granting leave to amend would prejudice Mr. Michael Felsher and that each of the newly asserted affirmative defenses and counterclaims are devoid of merit. Mr. Gary Felsher's motion is granted with respect to all additional affirmative defenses and counterclaims.

**Background**

Mr. Gary Felsher is a real estate developer who over twenty years ago created a discretionary spendthrift trust (Trust) for his son, Mr. Michael Felsher. The Trust is set up in such a way that only the Trustees have discretion to make or withhold distributions to Mr. Michael Felsher. In 1992 Mr. Michael Felsher began working with his father at FGHP

Capital Limited Partnership (FGHP). Mr. Michael Felsher and Mr. Gary Felsher, among others, entered into a Partnership Agreement in 1993 providing Mr. Michael Felsher with Class B interests of 30% in FGHP. In or around 1994 Mr. Michael Felsher began to receive K-1's indicating that the Trust was the holder of the Class B interest formerly held personally by Mr. Michael Felsher. While Mr. Gary Felsher asserts Mr. Michael Felsher assigned his Class B interest to the Trust, Mr. Michael Felsher denies this and claims he, not his Trust, is a limited partner in FGHP and is personally owed FGHP distributions that have been directed into the Trust.

Prior to 2006 Mr. Michael Felsher never asserted he personally owned the Class B interest. Mr. Michael Felsher's 1995 Prenuptial Agreement does not disclose any personal partnership interest in FGHP and a 2001 Financial Affidavit in connection with a case relating to his marriage in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, states that his Class B interest in FGHP was held in the Trust. In his 2003 Deposition and a Second Family Law Affidavit, Mr. Michael Felsher stated the Trust was the true owner of the Class B partnership interest in FGHP.

Mr. Michael Felsher filed four separate lawsuits against Mr. Gary Felsher beginning in 2006. In each of the four Actions, Mr. Michael Felsher alleged, among other things, that Mr. Gary Felsher, as Trustee, wrongfully refused to return FGHP distributions that were made to the Trust instead of Mr. Michael Felsher. The first Action, the 2006 Trustee Action, was filed by Mr. Michael Felsher in Palm Beach County, Florida against Mr. Gary Felsher and the other Trustees. The 2006 Trustee Action was dismissed by Order in September 2010. The court in the 2006 Trustee Action made factual findings and concluded that while the Trustees offered to make payments to satisfy Mr. Michael Felsher's tax liens if he would negotiate with the IRS,

Mr. Michael Felsher failed to do so. The second Action, the 2010 FGHP Action, was filed by Mr. Michael Felsher in 2010 in Palm Beach County, Florida. In the complaint in the 2010 FGHP Action Mr. Michael Felsher asserted that Mr. Gary Felsher, as Trustee, wrongfully refused to return FGHP Class B distributions that were made to the Trust as opposed to Mr. Michael Felsher. Mr. Michael Felsher voluntarily discontinued the 2010 FGHP Action in 2013 “with prejudice.” The third Action, the 2011 Action, was filed by Mr. Michael Felsher in New York against Mr. Gary Felsher and another Trustee. Mr. Michael Felsher asserted largely the same claims in the 2011 Action as in the 2006 Trustee Action. Mr. Michael Felsher voluntarily discontinued the 2011 Action in 2012. Mr. Michael Felsher filed the fourth, and present, Action on December 21, 2012 in New York.

Over the course of several years Mr. Michael Felsher has sent threatening emails to Mr. Gary Felsher, sought assistance from the Manhattan District Attorney’s Office, and contacted reporters in an effort to expose his father’s alleged wrongdoing. Mr. Michael Felsher has also allegedly defamed Mr. Gary Felsher on multiple websites.

### **Discussion**

An application for leave to amend a pleading pursuant to CPLR 3025 (b) is governed by a permissive standard. “In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit.” *Lucido v Mancuso*, 49 AD3d 220, 222 (2d Dept 2008). Mr. Michael Felsher has failed to establish either prejudice due to the amendment or that Mr. Gary Felsher’s new allegations are palpably insufficient or patently devoid of merit.

#### **I. Prejudice**

The burden of demonstrating prejudice sufficient to defeat a motion for leave to amend a pleading is on the opposing party. *Leslie v Hymes*, 60 AD2d 564, 564 (1st Dept 1977). The non-movant must demonstrate prejudice that is “significant.” *Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 959 (1983). Mere delay does not constitute prejudice sufficient to defeat a motion for leave to amend. *Sheppard v Blitman/Atlas Bldg. Corp.*, 288 AD2d 33, 34 (2001). “Prejudice 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.’” *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 (1st Dept 2011), quoting *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 (1981).

Mr. Michael Felsher has failed to demonstrate that permitting the amendment will result in significant prejudice. Although Mr. Michael Felsher contends that granting leave to amend will delay and prolong discovery, delay alone is irrelevant unless coupled with significant prejudice. *Hanchett v Graphic Techniques*, 243 AD2d 942, 943 (3d Dept 1997). While Mr. Michael Felsher claims that a delay will cause him harm since he needs money from FGHP and the Trust to live and support his children, these considerations fall outside the scope of our inquiry. The court is only concerned with prejudice that hinders a party in preparing its case. *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d at 504. Mr. Michael Felsher is not so affected here. The court also finds Mr. Michael Felsher’s arguments regarding the timeliness of Mr. Gary Felsher’s additional defenses and counterclaims to be without merit.

II. “Palpably Insufficient or Patently Devoid of Merit”

The party moving for leave to amend a pleading need not make an evidentiary showing of merit, but merely show that the proffered amendments are not palpably insufficient or clearly

devoid of merit. *Lucido*, 49 A.D.3d at 229. Each of Mr. Gary Felsher's additional affirmative defenses and counterclaims meet this standard.

A. Eighth Affirmative Defense (*Res Judicata*/Collateral Estoppel/Claim Preclusion/Issue Preclusion) and Twelfth Affirmative Defense (Prior Adjudication on the Merits of Claims Involving the FGHP Class B Interest)

Mr. Gary Felsher's Eighth Affirmative Defense of *res judicata*/collateral estoppel and issue preclusion, and his Twelfth Affirmative Defense of prior adjudication on the merits are not palpably insufficient or patently devoid of merit. While Mr. Michael Felsher's dismissal of the 2010 FGHP Action may raise valid questions as to whether or not there has been adjudication on the merits, the circumstances surrounding Mr. Michael Felsher's 2013 dismissal of the 2010 Action, namely Mr. Michael Felsher's inter-reaction with this court, makes it impossible to dismiss the Eighth and Twelfth Affirmative Defenses as being patently devoid of merit. This issue will need to be fully fleshed out at a later stage in this proceeding before any decision can be made with respect to the validity of such affirmative defenses.

B. Ninth Affirmative Defense (Exculpation and Indemnification)

Mr. Gary Felsher's Ninth Affirmative Defense of Exculpation and Indemnification is not patently devoid of merit because the FGHP Partnership Agreement expressly provides for Mr. Gary Felsher's exculpation from and indemnification for certain liability in Section 6.6.

C. Tenth Affirmative Defense (Transfer, Assignment, or Conveyance) and Eleventh Affirmative Defense (Novation, Modification, or Discharge)

Mr. Gary Felsher's Tenth Affirmative Defense (the Transfer, Assignment or Conveyance of the Class B Interest by Michael to the Trust) and Eleventh Affirmative Defense (Novation, Modification or Discharge) are not palpably insufficient or patently devoid of merit. Although Mr. Michael Felsher contends there is no written evidence showing that he agreed to transfer and

assign his Class B interest to the Trust, Mr. Michael Felsher's sworn testimony in connection with his Florida divorce proceeding, as well as his admission concerning his knowledge of the FGHP K-1's issued to the Trust, demonstrate the Tenth and Eleventh Affirmative Defenses are not patently devoid of merit.

- D. Thirteenth Affirmative Defense (Set-Off for Abuse of Process) and First Counterclaim (Abuse of Process); Fourteenth Affirmative Defense (Set-Off for *Prima Facie* Tort) and Second Counterclaim (*Prima Facie* Tort); Fifteenth Affirmative Defense (Set-Off for Defamation) and Third Counterclaim (Defamation)
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The Thirteenth Affirmative Defense and First Counterclaim for Abuse of Process, the Fourteenth Affirmative Defense and Second Counterclaim for *Prima Facie* Tort, and the Fifteenth Affirmative Defense and Third Counterclaim for Defamation are not palpably insufficient or clearly devoid of merit. Although Mr. Michael Felsher raises valid questions as to whether or not these counterclaims are time barred, these issues, which include questions of fact and law, would be better decided at a later stage in the proceeding. "If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment on a proper showing." *Lucido*, 49 AD3d at 229.

- E. Sixteenth Affirmative Defense (Failure to Mitigate) and Seventeenth Affirmative Defense (Relief Prohibited by Law)

The Sixteenth Affirmative Defense (Failure to Mitigate) and Seventeenth Affirmative Defense (Relief Prohibited by Law) are not palpably insufficient or patently devoid of merit because the Trustees are precluded from distributing assets of the Trust or FGHP to Mr. Michael Felsher without first resolving the Tax Levies against him. While Mr. Michael Felsher claims he attempted to mitigate his damages in 2006 by seeking funds from the Trust to pay off his debt to the IRS, the Florida Court in the 2006 Action found that the Trustees offered to pay off the IRS

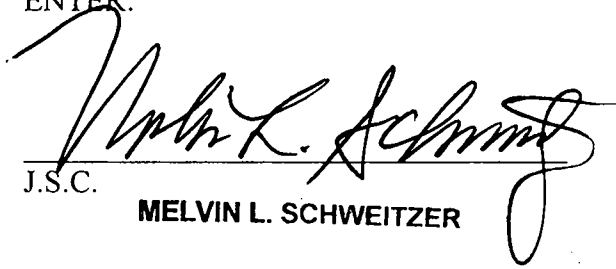
for Mr. Michael Felsher, but he refused to resolve the amount with the IRS. Therefore, Mr. Gary Felsher's Sixteenth and Seventeenth Affirmative Defenses are not patently devoid of merit.

Accordingly, it is

ORDERED that Mr. Gary Felsher's motion for leave to supplement and amend his answer and add additional affirmative defenses and counterclaims is granted.

Dated: June 20, 2014

ENTER:



J.S.C.  
MELVIN L. SCHWEITZER