ORIGINAL

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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EDWARD MERMELSTEIN, individually and in the right and on behalf of DDH PROPERTY HOLDINGS, LLC,

Plaintiff,

- against -

HERTZL MOEZINIA,

Defendant.

TRIAL/IAS PART: 14
NASSAU COUNTY

Index No: 601493-13
Submission Date: 8/26/15
Motion Seq. No. 4

First Action

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EDWARD MERMELSTEIN,

Plaintiff,

-against-

DANIEL MOEZINIA,

Defendant.

Index No. 601021-13

Second Action

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EDWARD MERMELSTEIN, individually and in the right and on behalf of DDH PROPERTY HOLDINGS, LLC,

Plaintiff,

-against

ROBERT MALEWSKI,

Defendant.

Index No. 604884-14
(formerly New York County Index No. 151882-13)

Third Action

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The following papers have been read on this motion:

Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affirmation in Opposition and Exhibits.....x
Affirmation in Reply, Affidavit in Reply and Exhibits.....x

This matter is before the Court for decision on the motion filed by Defendant Hertzl Moezinia ("Hertzl" or "Moving Defendant") on July 2, 2015 and submitted on August 26, 2015. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Hertzl moves for an Order 1) pursuant to CPLR § 3025(b), permitting Hertzl to file and serve an amended answer ("Proposed Amended Answer") (Ex. F to Zelenitz Aff. in Supp.) to Plaintiff's Summons and Complaint and compelling Plaintiff's acceptance of same; 2) deeming the Proposed Amended Answer served on Plaintiff; and 3) pursuant to CPLR §§ 3211(a)(10) and 1003, dismissing the Complaint for failure to add a necessary party.

Edward Mermelstein ("Mermelstein" or "Plaintiff"), individually and in the right and on behalf of DDH Property Holdings, LLC ("Company" or "DDH") opposes the motion.

B. The Parties' History

The parties' history is outlined in detail in prior decisions ("Prior Decisions") of the Court and the Court incorporates those Prior Decisions by reference as if set forth in full herein. As noted in those Prior Decisions, the central dispute in these actions is whether Mermelstein has an ownership interest in the Company which was formed to acquire property ("Property") located at 175 Roslyn Road, Roslyn Heights, New York, and subsequently purchased that Property. Defendant Daniel Moezinia ("Daniel") and/or Hertzl, who assert an interest in the Company, dispute that Mermelstein has any such interest. That Property was subsequently sold and it is Mermelstein's contention that the sale improperly proceeded without his consent, and that money is due to him from that sale. The Company retained Malewski, an attorney, to represent the Company in the sale transaction. In the complaint filed by Plaintiff against Malewski

("Malpractice Action"),[1] Mermelstein asserts a cause of action for legal malpractice based on the allegation that, as the attorney for the Company, Malewski owed a duty of care which he breached.

In support of the motion now before the Court, counsel for Hertzl ("Hertzl Counsel") affirms that Hertzl interposed a Verified Answer dated May 23, 2013 ("Initial Answer") (Ex. B to Zelenitz Aff. in Supp.). Hertzl Counsel affirms that, since the filing of that Answer, counsel have conducted depositions of Plaintiff and Hertzl, as well as non-party witnesses Uri Mermelstin ("Uri"), the brother of Plaintiff, and Sibel Mermelstein ("Sibel"), Uri's wife. Hertzl Counsel affirms that the depositions of the non-parties "brought to light various circumstances of the underlying real estate transaction" of which Plaintiff has always been aware (Zelenitz Aff. in Supp. at ¶ 6), specifically that the funds allegedly invested to purchase the Property came from the bank account of Sibel, not Plaintiff. Those funds were transferred to Sibel from the personal bank account of Uri. Sibel's deposition testimony includes the following (Ex. D to Zelenitz Aff. in Supp. at p. 84):

> Q: Does DDH owe you back that money?
>
> A: I think so.
>
> Q: Whether or not you will file a claim against DDH, do you feel like you have the right to file a claim against DDH for that $390,000?
>
> A: No.
>
> Q: Are you sure of that, have you talked to a lawyer about it?
>
> A: I have not spoken to a lawyer.
>
> Q: So you don't know what your legal rights are with respect to that money that was wired from your account to DDH; is that right?
>
> A: I don't know.

In addition, Uri testified that he and his company, Juscor, made significant contributions with regard to the Property, purportedly on behalf of Plaintiff. Hertz submits that the deposition testimony of Uri and Sibel (Exs. C and D to Zelenitz Aff. in Supp.), together with documentary

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[1] As noted in Prior Decisions, the Malpractice Action was initially filed in the Supreme Court of New York County under Index Number 151882-13 and was subsequently transferred to the Supreme Court of Nassau County where it has been assigned Index Number 604884/14.

evidence that has been exchanged (*see* Ex. E to Zelenitz Aff. in Supp.), demonstrates that there are individuals and entities who are interested, necessary and indispensable to this action. Accordingly, Hertzl seeks to amend his answer to add the affirmative defense that Plaintiff has failed to add necessary and indispensable parties to the action.

With respect to the branch of Hertzl's motion that seeks to dismiss the Complaint for failure to name a necessary party, Hertzl Counsel affirms that on February 9, 2015, Malewski, in the Malpractice Action, filed a cross motion to amend his answer to assert an affirmative defense that certain individuals and entities are indispensable parties to this lawsuit and the Court, in its May 18, 2015 decision in the Malpractice Action (Ex. H to Zelenitz Aff. in Supp.) granted that application. [2] Hertzl Counsel affirms that, notwithstanding the May 18, 2015 Decision, Plaintiff has not moved to amend the Complaint. Hertzl Counsel submits that, if Sibel and Uri are not brought into these actions, Hertzl "could have to pay Plaintiff, and then possibly have to turn around and pay the non-parties for the same duplicating claim" (Zelenitz Aff. in Supp. at ¶ 17).

In further support of the motion, Hertzl affirms that Uri testified that at his deposition that he transferred funds from his personal bank account to Sibel's bank account, and those funds were then transferred from Sibel's account to the Company for the purchase of the Property. In addition, Uri testified that Juscor made payments towards the Property, and Sibel testified that she "believes" that the Company owes her money (Hertzl Aff. in Supp. at ¶ 8; *see also* Zelenitz Aff. in Supp. at ¶ 8). Hertzl affirms that Uri and Sibel are in the process of a divorce and suggests that they "may be having a dispute over marital property and monies, including the money which was allegedly transferred" to the Company's account (Hertzl Aff. in Supp. at ¶ 8). Thus, Hertzl submits, Uri and Sibel, as well as Uri's company, are interested parties in this action.

Mermelstein opposes the motion submitting that Hertzl has failed to offer a reasonable

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[2] A review of the Court's May 18, 2015 decision reveals that Malewski moved to amend his answer to assert cross claims against Hertzl and Daniel for indemnification and contribution in the event that Plaintiff obtains a judgment against him. In addition, because certain documents produced by Plaintiff in response to Malewski's discovery demands supported the conclusion that specific individuals and entities made payments which Plaintiff is seeking to recover as damages in his lawsuit, Malewski also sought to amend his answer to assert an affirmative defense that these individuals and entities are indispensable parties to the lawsuit.

excuse for his delay in making the instant motion. Counsel for Mermelstein ("Mermelstein Counsel") affirms that Hertzl now, for the first time, claims that Uri and/or Sibel are proper plaintiffs in the instant action and the parties to which half of the proceeds of the sale of the Property should be distributed. Mermelstein Counsel provides the transcript of Hertzl's June 9, 2015 deposition testimony (Ex. A to Vigliarolo Aff. in Opp.) and sets forth relevant portions of that testimony (*see* Vigiliaro Aff. in Opp. at ¶ 11) which includes Hertzl's testimony that 1) it was his understanding that the proceeds from the sale would be shared equally between Hertzl, Daniel and either Sibel or Uri; and 2) Hertzl did not distribute the proceeds of the sale of the Property "due to the fact that I didn't know who to give it to." Mermelstein Counsel disputes Hertzl's contention that he only became aware of these issues as a result of Uri and Sibel's depositions. Mermelstein Counsel submits that Hertzl's deposition testimony demonstrates that Hertzl always knew where the capital contribution came from, and believed that Uri and/or Sibel were passive investors in the Company. Mermelstein submits that, if Hertzl truly believed that Uri and/or Sibel were the proper parties to whom to pay the proceeds from the sale, "there is no conceivable reason as to why he would not have included this in his original answer which was filed nearly two and a half years ago" (Vigliarolo Aff. in Opp. at ¶ 13). Mermelstein notes, further, that Hertzl has never advanced this position in any of his prior affidavits submitted in support of the numerous prior motions filed in these actions. Thus, Mermelstein contends, Hertzl's claim that Uri and Sibel are necessary parties has been concocted in an effort to delay the resolution of these actions.

Mermelstein submits that Hertzl's proposed amendment, in addition to being unduly delayed, is without merit. Mermelstein Counsel affirms that Uri and Sibel repeatedly testified that they are not making a claim for the proceeds from the sale, and are not proper parties in this action. That testimony includes the following testimony from Sibel's deposition (*see* Ex. D to Zelenitz Aff. in Supp. at pp. 82-83):

> Q: Ms. Mermelstein, do you feel as though you have any claim against [Hertzl]?
>
> A. Me personally?
>
> Q: You personally?
>
> A: No.
>
> Q: Do you intend to bring any lawsuits or file any claim or lawsuit against [Hertzl]?
>
> A: No.

Q: Do you feel as though [Hertzl] has a personal debt to you?

A: No.

In addition, Uri's deposition testimony includes the following (*see* Ex. C to Zelenitz Aff. in Supp. at p. 13 and 35):

Q: Are you a member of [the Company]?

A: No.

Q: Were you ever a member?

A: No.

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Q: Then the paragraph 4 goes on to say that on October 26th, 2009, $390,000 of that money was transferred from your wife's account to DDH's account. Correct?

A: Correct.

Q: Why was that money transferred?

A: That was 50 percent of Edward's share towards the purchase of [the Property].

Mermelstein submits, further, that Hertzl's claims are refuted by the August 3, 2015 affidavit of Uri (Ex. B to Vigliarolo Aff. in Opp.). In that affidavit, Uri affirms *inter alia* that 1) as he testified at his deposition, he is not making a claim for any of the sums that are in dispute between Mermelstin, Hertzl, Daniel or the Company; and 2) he is not making a claim to the proceeds realized from the Company's sale of the Property.

Merlmelstein also contends that Hertzl reached out to Sibel's divorce counsel "in a clear effort to coax her into interposing herself as a party to the case" (Vigliarolo Aff. in Opp. at ¶ 26). In support, Mermelstein provides a copy of June 23, 2015 correspondence from Hertzl Counsel to Sibel's attorney (Ex. C to Vigliarolo Aff. in Opp.) which includes the following:

> Please be advised that my firm intends on imminently moving to amend [Hertzl's] answer to include a defense that Mr. Mermelstein failed to name your client as a necessary party and to dismiss for that same reason, as Mrs. Mermelstein clearly claims an ownership interest in said entity and or money due her from that entity. Moreover, money clearly was transferred from her individual bank account to said entity. Absent Mrs. Mermelstein becoming a party to said law suit, Mr. Moezinia could be forced to pay Edward Mermelstein, who claims to be a fifty (50%) percent owner, and still be subject to an action commenced against him for identical relief by Mrs. Mermelstein.

Mermelstein also notes that in connection with a prior motion filed in this action, numerous emails among Hertzl, Malewski and Mermelstein were submitted. One such email was an email dated July 21, 2011 from Hertzl to a real estate agent (Ex. E to Vigliarolo Aff. in Opp.) in which Hertzl stated that "Just to make a correction Uri Mermelstein is not involved in DDH Property Holdings LLC, it is Edward Mermelstein." In light of the foregoing, Mermelstein contends, it is clear that neither Uri nor Sibel is making a claim to monies at issue in this action, or seeking an ownership interest in the Company. Accordingly, they are not necessary parties to the action.

In reply, Hertzl affirms that it was at Sibel's deposition that he first learned that the money that came into the Company came from Sibel's account. Hertzl affirms that Uri had advised him that the money came from Uri, and Hertzl was "shocked to learn" that the money came from the account of Uri's wife (Hertzl Reply Aff. at ¶ 3). Hertzl submits that, in light of Sibel's testimony that she thinks that the Company owes her money, Sibel should be a party in this action.

Hertzl also affirms that he was involved in litigation against Uri related to property located in New York City. Hertzl affirms that, as a result of the resolution of that litigation, his relationship with Uri soured and Hertzl chose, instead, to do business with Edward Mermelstein, Uri's brother. Hertzl explains that his July 21, 2011 email to the real estate broker, to which Plaintiff makes reference in his opposition to this motion, is attributable to Hertzl's decision to stop doing business with Uri and begin doing business with Plaintiff.

In further reply, Hertzl Counsel makes reference to an April 2, 2015 affidavit of Sibel (Ex. C to Zelenitz Reply Aff.) in which she affirms that in 2009, without her knowledge, Uri transferred certain funds into Sibel's account and then transferred those funds into the Company's account. Sibel affirms that, according to information she recently obtained from Uri, those funds were transferred to the Company as an advance on behalf of Mermelstein, representing the funds required to invest in the purchase of the Property by the Company. Hertzl submits that this information has been available to Plaintiff for years but Plaintiff chose not to reveal the information in an effort to assist his brother Uri in connection with his divorce action against Sibel. Hertzl also notes that Plaintiff, in his opposition to the motion now before the Court, did not include the portion of Sibel's deposition testimony in which she testified that the Company may owe her money.

Hertzl also provides an April 2010 stipulation of settlement of a foreclosure action relating to the Property (Ex. F to Zelenitz Reply Aff.) which is signed by Uri on behalf of the Company. Hertzl submits that this documentation demonstrates that it was Uri, not Plaintiff, who took an active role in the acquisition, management and sale of the Property. Hertzl submits that, until Sibel's execution of her April 2015 affidavit, Hertzl was unaware of the source of the funds that went into the Company. Hertzl submits that Plaintiff should not be permitted to benefit from his decision to conceal the source of the funds on which he bases his alleged ownership interest in the Company. Moreover, Hertzl contends, Plaintiff cannot be certain that Sibel will not assert a claim in connection with this action, and Plaintiff has not provided an affidavit of Sibel attesting to that fact. Similarly, Uri may decide to seek money related to this action or assert an ownership in the Company.

C. The Parties' Positions

Hertzl submits that Plaintiff has been unable to provide documentary evidence supporting his contention that he was a member of Company and is entitled to proceeds from the sale of the Property. Plaintiff did provide documentation (Ex. E to Zelenitz Aff. in Supp.) reflecting payments made by Uri and Sibel into the Company account. Hertzl contends that the deposition testimony of non-parties Sibel and Uri confirms that money was transferred from Uri to Sibel to the Company, and Sibel contends that DDH owes her half of the money back. Under these circumstances, Hertzl submits, Uri and Sibel are indispensable parties to this action, and Hertzl should be granted leave to serve the Proposed Amended Answer to assert the affirmative defense that Plaintiff has failed to add necessary and indispensable parties to the action. Hertzl contends that, in consideration of the liberal amendment principle and the fact that Plaintiff cannot claim prejudice because he has always been aware that Uri and Sibel are interested parties, the Court should permit the amendment.

Hertzl contends, further, that the Court should dismiss the Complaint, pursuant to CPLR § 3211(a)(10), due to Plaintiff's failure to name necessary and indispensable parties, specifically Uri and Sibel. Hertzl submits that he has been prejudiced by that failure which has unduly delayed this litigation and prejudiced Hertzl in the preparation of his defense.

Plaintiff opposes the motion, disputing Hertzl's contention that he first learned of the source of the funds at the depositions of Sibel and Uri. Plaintiff submits that Hertzl's deposition testimony demonstrates that Hertzl has always known where the capital contributions came from

and believed that Uri and/or Sibel "were passive investors in DDH" (Vigliarolo Aff. in Opp. at ¶ 12). Notwithstanding that knowledge, however, Hertzl did not address Sibel and/or Uri's potential claim in his initial answer served in 2013, or make reference to that claim in any of his affidavits submitted in connection with prior motions in these actions. In addition, both Uri and Sibel testified at their depositions that they are not making a claim for the proceeds from the sale of the Property. And Sibel, who is represented by counsel in her divorce action who was made aware of her potential claims in the June 23, 2015 correspondence from Hertzl Counsel, has not made a motion to intervene in this action. Moreover, Plaintiff submits, Plaintiff will be prejudiced by the delay that would result from the proposed amendment

RULING OF THE COURT

A. Leave to Amend

Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. *Aurora Loan Services, LLC v. Thomas*, 70 A.D.3d 986, 987 (2d Dept. 2010), citing CPLR § 3025(b); *Lucido v. Mancuso*, 49 A.D.3d 220, 222 (2d Dept. 2008).

Where the application for leave to amend is made long after the action has been certified for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious. *Alrose Oceanside, LLV v. Mueller*, 81 A.D.3d 574, 575 (2d Dept. 2011), citing *Morris v. Queens Long Is. Med. Group, P.C.*, 49 A.D.3d 827, 828 (2d Dept. 2008), quoting *Clarkin v. Staten Is. Univ. Hosp.*, 242 A.D.2d 552 (2d Dept. 1997). Moreover, when leave is sought on the eve of trial, judicial discretion should be exercised sparingly. *Alrose Oceanside, LLV v. Mueller*, 81 A.D.3d at 575, quoting *Morris v. Queens Long Is. Med. Group, P.C.*, 49 A.D.3d at 828.

B. Necessary Party

CPLR § 3211(a)(10) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the court should not proceed in the absence of a person who should be a party. In turn, CPLR § 1001(a) provides as follows:

> Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.

The definition of a necessary party has been strictly construed and is limited to those cases where the determination of the court will adversely affect the rights of the nonparties. *Matter of Schulz v. De Santis*, 218 A.D.2d 256, 259-260 (3d Dept. 1996), quoting *Matter of Castaways Motel v. Schuyler*, 24 N.Y.2d 120, 125 (1969). The question is whether the nonparty may be inequitably affected by a judgment rendered in its absence, *Matter of Schulz v. De Santis*, 218 A.D.2d at 260, citing CPLR § 1001(a) and *Town of Brookhaven v. Chun Enters.*, 71 N.Y.2d 953 (1988), or the nonparty is one whose presence is necessary if complete relief is to be accorded to the parties in the action, *Matter of Schulz v. De Santis*, 218 A.D.2d at 260, citing *Joanne S. v. Carey*, 115 A.D.2d 4, 7 (1st Dept. 1986). The absence of a necessary party may be raised at any stage of the proceedings, by any party or by the court on its own motion. *Nowitz v. Nowitz*, 37 A.D.3d 788 (2d Dept. 2007) quoting *Migliore v. Manzo*, 28 A.D.3d 620, 621 (2d Dept. 2006).

C. Application of these Principles to the Instant Action

Preliminarily, the Court notes that on May 6, 2015, it issued an Order directing that Plaintiff serve and file a Note of Issue by August 6, 2015 and that motions for summary judgment be made returnable by September 8, 2015. On September 3, 2015, in response to a joint request by counsel, the Court extended the return date for summary judgment motions to October 23, 2015. A review of the clerk's records regarding this action reflects that, consistent with the Court's directives, a Note of Issue was filed on September 4, 2015.

The Court denies the motion. Even assuming *arguendo* that Hertzl first learned at the depositions of non-parties Uri and Sibel that funds intended for the Company initiated from Sibel's account, Hertzl has not demonstrated that Uri and Sibel are necessary parties who may be inequitably affected by a judgment rendered in their absence or whose presence is necessary if complete relief is to be accorded to the parties in the action. The central issue in these actions is whether Mermelstein has an interest in the Company and, correspondingly, an interest in the proceeds from the sale of the Property. That issue can be resolved without adding Uri and Sibel as parties. Although that determination may prompt Uri and/or Sibel to assert a claim to the

funds purporting to represent Plaintiff's contribution to the Company and/or to the Company itself, notwithstanding their sworn statements that they do not intend to assert such an interest, that fact does not make them necessary parties for the purpose of this litigation. Accordingly, the Court denies the motion.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Pre-Trial Conference on December 3, 2015 at 9:30 a.m.

ENTER

DATED: Mineola, NY
October 7, 2015

HON. TIMOTHY S. DRISCOLL
J.S.C.