| **Matter of Freidus v Gero** |
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| 2016 NY Slip Op 30971(U) |
| May 24, 2016 |
| Supreme Court, New York County |
| Docket Number: 653896/2014 |
| Judge: Cynthia S. Kern |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

STEPHEN FREIDUS, individually and derivatively as a General Partner on behalf of 62 West 45th Street Associates,

Plaintiff,

Index No. 653896/2014

-against-

**DECISION/ORDER**

LEONARD GERO and 62 WEST 45TH STREET ASSOCIATES,

Defendants.

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**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

| Papers | Numbered |
|---|---|
| Notice of Motion and Affidavits Annexed..... | 1 |
| Affirmations in Opposition..... | 2 |
| Replying Affidavits..... | 3 |
| Exhibits..... | 4 |

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Plaintiff commenced the instant action against defendants seeking to dissolve 62 West 45th Street (the "Partnership"). Defendants now move pursuant to Civil Practice Law and Rules ("CPLR") § 3025(b) for leave to amend their answer to assert three new counterclaims for breach of fiduciary duty. For the reasons set forth below, defendants' motion is granted.

The relevant facts are as follows. Plaintiff commenced the instant action to dissolve the Partnership, which owns a building located at 62 West 45th Street, New York, New York (the "property"). The Partnership is composed of plaintiff and defendant Leonard Gero ("Gero"), the general partners, and more than twenty limited partners. Defendants allege in their

counterclaims that, from 2013 to 2015, plaintiff failed to respond to Gero's requests to change the method the Partnership used to distribute proceeds to the general and limited partners to reduce the limited partners' tax burden at no cost to the Partnership or the general partners. Further, defendants allege that plaintiff refused to refinance the property at a "historically low rate," which would have yielded significant savings to the Partnership. Defendants also allege that plaintiff unilaterally negotiated the sale of the property's air rights, which caused delays and additional costs with regard to the construction of the property's chimney, and that plaintiff failed to review an agreement related to the chimney for nearly six months. According to defendants' proposed amended answer, these actions were taken by plaintiff in bad faith.

Pursuant to CPLR § 3025(b), "[m]otions 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. On a motion for leave to amend, [the party] need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted).

Defendants' motion to amend their answer to add counterclaims for breach of fiduciary duty is granted as defendants have shown that no prejudice or surprise would result from the proposed amendment and that the proposed amendment is not palpably insufficient or clearly devoid of merit. To state a claim for breach of fiduciary duty, a defendant must allege (1) the existence of a fiduciary relationship; (2) misconduct by the plaintiff; and (3) damages that were directly caused by the plaintiff's misconduct. *See Kurtzman v. Bergstol*, 40 A.D.3d 588 (2nd Dept 2007). Defendants have alleged the existence of a fiduciary relationship, misconduct by

plaintiff, including plaintiff's failure to respond to proposals that were beneficial to the Partnership, and damages that were directly caused by plaintiff's misconduct. On this motion, such allegations are sufficient to show that the proposed amendment is not clearly devoid of merit.

Plaintiff's argument that defendants' proposed amendment is clearly devoid of merit because plaintiff cannot be held liable for the reasonable exercise of his business judgment is unavailing. The business judgment rule prohibits judicial inquiry into the "actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." *Auerbach v. Bennett*, 47 N.Y.2d 619, 629 (1979). *See also Levine v. Levine*, 184 A.D.2d 53, 50 (1st Dept 1992) (applying the business judgment rule to partners acting as fiduciaries for the partnership and other partners). Thus, such actions taken in good faith and in the exercise of honest judgment cannot constitute a breach of fiduciary duty. *See Auerbach*, 47 N.Y.2d at 629. However, corporate directors or partners are not protected by the business judgment rule if they "acted (1) outside the scope of [their] authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith." *See Aguilera del Puerto v. Port Royal Owner's Corp.*, 54 A.D.3d 977, 978 (2nd Dept 2008) (internal citations omitted).

In the present case, plaintiff has failed to establish that defendants' proposed amendment is clearly devoid of merit on the ground that plaintiff cannot be held liable for the reasonable exercise of his business judgment. Defendants sufficiently allege that plaintiff's actions constituting a breach of fiduciary duty were taken in bad faith and did not legitimately further the purpose of the Partnership.

Plaintiff's argument that he would be prejudiced based on plaintiffs' delay of approximately a year in filing the instant motion to amend is also without merit. "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine." *Edenwald Contracting Co. v. City of New York*, 60 N.Y.2d 957, 959 (1983). Indeed, "[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.'" *Kocourek v. Booz Allen Hamilton, Inc.*, 85 A.D.3d 502 (1st Dept 2011) (*citing Cherebin v. Empress Ambulance Serv., Inc.*, 43 A.D.3d 364, 365 (1st Dept 2007)). Here, plaintiff fails to identify any prejudice he would face separate from the delay itself. Discovery has yet to occur and the note of issue has not been filed.

Accordingly, it is hereby

ORDERED that the Amended Answer, in the form annexed to defendants' motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action. This constitutes the decision and order of the court.

Dated: 5/24/16

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.