

**Meza v Cascio**

2019 NY Slip Op 30995(U)

April 15, 2019

Supreme Court, New York County

Docket Number: 158431/2017

Judge: Barbara Jaffe

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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**

<p><b>PRESENT:</b>    <u>HON. BARBARA JAFFE</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>DEOGENE MEZA,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p>	<p><b>PART</b>            <b>IAS MOTION 12EFM</b></p> <p><b>INDEX NO.</b>        <u>158431/2017</u></p> <p><b>MOTION DATE</b>    _____</p> <p><b>MOTION SEQ. NO.</b> <u>002</u></p>
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NICHOLAS CASCIO and ERIC ROSENTHAL,

Defendants.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46 were read on this motion to \_\_\_\_\_ amend \_\_\_\_\_.

Plaintiff moves pursuant to CPLR 3025(b) for an order granting him leave to file an amended complaint to add his wife, Melody Meza, as an additional plaintiff. Plaintiff also moves pursuant to CPLR 2004 for an order extending the deadlines set forth in the preliminary conference order. Defendants oppose.

By so-ordered stipulations dated November 7, 2018 (NYSCEF 45), and January 23, 2019 (NYSCEF 47), the parties resolved the issue of extending discovery deadlines. Thus, only plaintiff's motion to amend is addressed.

**I. RELEVANT BACKGROUND**

On September 20, 2017, plaintiff filed his verified complaint, whereby he seeks a judgment declaring that he is an owner of two real estate properties and that he is entitled to receive a share of the profits therefrom, an equitable accounting of the properties' income,

expenses, and distributions, the imposition on them of a constructive trust, and a money judgment for breach of fiduciary duty and unjust enrichment. (NYSCEF 2).

## II. CONTENTIONS

Plaintiff asserts that leave to amend should be granted given new counsel's determination that plaintiff's wife has an interest in both properties. He observes that the amended complaint relies on the same transactions as the original complaint and that defendants suffer no prejudice. He submits a proposed amended complaint (NYSCEF 32). (NYSCEF 34).

In opposition, defendants argue that as plaintiff's proposed amendment is not supported by affidavits or evidence, leave should be denied, and that the affirmation submitted by counsel provides no evidentiary support for his claims. They observe that the proposed amended complaint is not verified, and that in any event, the proposed amendments are not meritorious as defendant Cascio is the sole owner of one of the properties, defendant Rosenthal is sole owner of the other, and neither plaintiff nor his wife possesses title to either property. In support, they submit the deeds for each property (NYSCEF 39 and 40), and affidavits from each defendant (NYSCEF 35 and 36). (NYSCEF 41).

In reply, plaintiff submits an affidavit in which he reiterates that he seeks only to add his wife as a party and that the facts set forth in the proposed amended complaint are the same as those in the original. (NYSCEF 42). In addition, plaintiff argues that defendants suffer no prejudice if leave is granted. (NYSCEF 44).

## III. ANALYSIS

A motion for leave to amend a pleading should be freely granted unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit. (CPLR 3025; *Crossbeat N.Y., LLC v LIIRN, LLC*, 169 AD3d 604, 604

[1<sup>st</sup> Dept 2019], quoting *CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC*, 146 AD3d 60, 65 [1<sup>st</sup> Dept 2016]). No prejudice or surprise is shown when the proposed amended complaint sets forth new claims or theories based on the facts set forth in the original complaint. (*See e.g., Brewster v Baltimore & Ohio R.R. Co.*, 185 AD2d 653 [4<sup>th</sup> Dept 1992] [when proposed amendment sets forth no new facts but adds additional theory of recovery, leave should generally be granted]; *see also MBIA Ins. Corp. v J.P. Morgan Securities, LLC*, 144 AD3d 635 [2d Dept 2016] [defendants could not legitimately claim surprise or prejudice as proposed amendment premised on same facts, transactions, or occurrences as in original complaint]).

While it is unclear whether a motion for leave to amend must be accompanied by an affidavit of merit or other evidentiary proof (*compare Boliak v Reilly*, 161 AD3d 625, 625 [1<sup>st</sup> Dept 2018] [affidavit of merit or other evidentiary showing in support of motion not required]; *Hickey v Kaufman*, 156 AD3d 436, 436 [1<sup>st</sup> Dept 2017], *lv denied* 32 NY3d 905 [2018] [same], *with Velarde v City of New York*, 149 AD3d 457 [1<sup>st</sup> Dept 2017] [“plaintiff must submit evidentiary proof of the kind that would be admissible on a motion for summary judgment”]), the standard is unchanged, and the burden of proof lies with the proponent. (*JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc.*, 107 AD3d 643, 644 [1<sup>st</sup> Dept 2013]).

Absent evidentiary support for the assertion that plaintiff’s wife has a cause of action solely by virtue of marriage, and even if plaintiff sufficiently shows that that his wife has an interest in his property by virtue of their marriage, he fails to allege, other than conclusorily, that he has an interest in the properties, and does not address or rebut defendants’ allegations based on the deeds to the properties. Consequently, plaintiff fails to meet his burden in demonstrating that the proposed amendments have the requisite merit. (*See Reyes v BSP Realty Corp.*, AD3d , 2019 WL 1522620, \*1 [1<sup>st</sup> Dept 2019] [denying leave where plaintiff’s allegations “could not be

established as a matter of law”]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff’s motion for leave to amend is denied in its entirety.

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4/15/2019

DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE