SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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OLAM CORP., A DELAWARE CORPORATION,

Plaintiff,

- v -

WILLIAM THAYER, R AND B SUPPLY CHAIN INC., XRC LABS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, XRC FUND II, LLC, A DELAWARE LIMITED LIABILITY COMPANY

Defendants.

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INDEX NO. 652764/2018

MOTION DATE 11/24/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 41, 42, 43, 44, 45, 46, 47, 48, 49, 52, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion for LEAVE TO AMEND COMPLAINT.

Plaintiff seeks leave to file an amended complaint to assert claims against Pano Anthos, the alleged principal of the XRC defendants. For the reasons stated on the record after oral argument on February 3, 2021, the motion for leave to amend is denied.

The Court supplements its oral decision to discuss in greater detail the standard for determining whether leave to amend a complaint should be denied on the ground that the proposed amendment is "palpably insufficient or clearly devoid of merit" (*see, e.g.*, *Sorge v Gona Realty, LLC*, 188 AD3d 474, 475 [1st Dept 2020]). In particular, the question is whether the standards of *palpable* insufficiency or *clear* lack of merit are more lenient than the standard for determining whether the proposed amended complaint would – if approved – survive a motion to dismiss under CPLR 3211.

That question was addressed most directly in *Scott v Bell Atl. Corp.*, 282 AD2d 180 [1st Dept 2001], affd as mod sub nom. *Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314

[2002], in which the court held that "[a] proposed amendment that cannot survive a motion to dismiss should not be permitted" (*id*. at 185). In support of that conclusion, the court cited *Glenn Partition, Inc. v Trustees of Columbia Univ. in City of New York*, 169 AD2d 488 [1st Dept 1991]. In that case, the court observed that "[a]lthough CPLR Section 3025(b) provides that leave to amend a complaint shall be freely granted, this Court has held that in determining whether to grant leave to amend the court must examine the underlying merits of the causes of action asserted therein, since, to do otherwise, would constitute a waste of judicial resources" (*id*. at 489 [citations omitted]).

These cases reflect the commonsense view that it would be pointless to grant leave to file an amended complaint if the Court concludes that the complaint will, in turn, be dismissed under CPLR 3211. Federal courts, applying their own permissive standard for permitting amendment of complaints, have reached the same conclusion (*e.g.*, *IBEW Local Union No. 58 Pension Tr. Fund and Annuity Fund v Royal Bank of Scotland Group, PLC*, 783 F3d 383, 389 [2d Cir 2015] ["the standard for denying leave to amend based on futility is the same as the standard for granting a motion to dismiss"]).

While that would seem to be the end of the matter, counsel in this and other cases before this Court have suggested that motions for leave to amend – which are to be "freely granted" per CPLR 3025 – should not be subject to the same scrutiny that would be applied in the context of a motion to dismiss. In support of that argument, counsel reference cases such as *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010], which hold that "[o]n a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show

that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*id.* at 500).[1] That language has been used, in whole or part, in many subsequent cases (*e.g.*, *Sorge*, 188 AD3d at 475; *WDF, Inc. v Trustees of Columbia Univ.*, 170 AD3d 518 [1st Dept 2019]; *Koch v Sheresky, Aronson & Mayefsky LLP*, 161 AD3d 647 [1st Dept 2018]).

Notably, however, other cases have indicated that "palpable" insufficiency is equivalent to insufficiency "as a matter of law" (*e.g.*, *Mashinsky v Drescher*, 188 AD3d 465, 465 [1st Dept 2020] ["Leave to amend pleadings should be freely granted in the absence of prejudice or surprise so long as the proposed amendment is not *palpably insufficient as a matter of law*"] [citations omitted; emphasis added]; *LDIR, LLC v DB Structured Products, Inc.*, 172 AD3d 1, 4 [1st Dept 2019] [citations omitted] [leave to amend should be denied "if the proposed amendment is palpably improper or *insufficient as a matter of law*"] [citations omitted; emphasis added]) or a failure to "state prima facie a viable cause of action" (*Gonik v Israel Discount Bank of New York*, 80 AD3d 437, 438-39 [1st Dept 2011] [trial court properly denied leave to amend because the proposed claims were "clearly time-barred"]). Questions of sufficiency and viability as a matter of law are, of course, the guiding principles for deciding motions to dismiss under CPLR 3211.

In the end, the Court concludes that, consistent with *Scott v Bell Atl. Corp.*, 282 AD2d at 185, leave to amend a complaint should be denied if the proposed complaint could not survive a motion to dismiss. A proposed amended complaint that would be subject to dismissal *as a*

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[1] In support of that proposition, the *MBIA* court cited *Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363 [1st Dept 2007], which held that "in considering the proposed amendment, 'the court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face. Once a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment' (*Hospital for Joint Diseases Orthopaedic Inst. v Katsikis Envtl. Contrs.*, 173 AD2d 210, 210 [1991] [citations omitted])."

matter of law is, by definition, "palpably insufficient or clearly devoid of merit" and thus should not be permitted under CPLR 3025. Any other conclusion would lead to the waste of public and private resources – namely, amending the complaint only to have it be dismissed after a separate round of briefing, argument, and decision – that the First Department warned against in *Glenn Partition,* 169 AD2d at 489 (*see also E. Asiatic Co. v Corash*, 34 AD2d 432, 434 [1st Dept 1970] [holding that lower court erred by "grant[ing] the motion to amend without passing upon" the merits of the amended claims because "[w]e can no longer afford the time or judicial manpower for the repeated applications for the same relief which necessarily result from postponing decision"]).

The bottom line is that the decision as to the facial sufficiency of the proposed amended complaint should be made before granting leave to amend, rather than deferring it to a later date. When the non-moving party opposes amendment on the ground of futility, the moving party should be prepared in its reply brief to defend the proposed pleading as if it were opposing a motion to dismiss.[2]

In the instant case, the proposed claims against Mr. Anthos fail, as a matter of law, because they are barred by the applicable statutes of limitation and do not relate back to the filing date of the original complaint against other parties. Accordingly, for the reasons more fully stated on the record after oral argument on February 3, 2021, it is

ORDERED that Plaintiff's motion for leave to file the proposed amended complaint is **DENIED**; it is further

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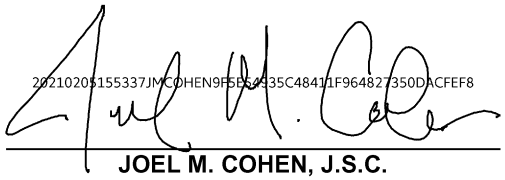
[2] This approach is consistent with the statutory mandate that leave to amend "shall be freely given upon such terms as may be just …" (CPLR 3025). The point of the statute is that factual allegations and claims are not locked in stone and may change as the case progresses. It does not, however, sanction the addition of causes of action that fail to state viable claims for relief as a matter of law.

ORDERED that the remaining parties appear for a preliminary conference, to be conducted by telephone, on **March 9, 2021 at 10 a.m.**; and it is further

ORDERED that the parties upload a transcript of the February 3 proceedings to NYSCEF upon receipt.



2/5/2021
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE