

Eshaghpour v Sagan
2022 NY Slip Op 34119(U)
December 6, 2022
Supreme Court, New York County
Docket Number: Index No. 654858/2021
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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ROBIN ESHAGHPOUR,

Plaintiff,

- v -

ALBEN SAGAN, THE PUBLIC ADMINISTRATOR OF
NEW YORK COUNTY AS ADMINISTRATOR C.T.A. OF
THE ESTATE OF LEE POWER, JANET ELIZABETH
BRAKER, LINDA BASS, MARION SMART, SUSAN
O'LEARY, DEREK CAMP, JACQUELINE TRUTWEIN,
PAUL SMITH, JULIE KNIGHT, THE ESTATE OF
CHRISTINE CORNEY,

Defendants.

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INDEX NO. 654858/2021

MOTION DATE 09/22/2022

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 129, 130, 131, 132, 133, 134, 135, 138, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160

were read on this motion to AMEND PLEADINGS.

Plaintiff Robin Eshaghpour, as Trustee of the Robin Eshaghpour Revocable Trust (“Plaintiff”), seeks leave to file a Proposed Second Amended Complaint. Plaintiff seeks leave primarily to add allegations that the Intervenor-Defendants Janet Elizabeth Braker, Linda Bass, Marion Smart, Susan O’Leary, Derek Camp, Jacqueline Trutwein, Paul Smith, Julie Knight, the Estate of Christine Corney (the “Intervenor-Defendants”) and Denise Ozturk (collectively, the “Heirs”) consented to the May 20, 2021 Agreement between Plaintiff and Defendant Alben Sagan, on behalf of the Estate of Lee Power, as required under a Surrogate’s Court Order dated October 21, 2019 (the “Surrogate’s Court Order”). For the following reasons, Plaintiff’s motion is **granted**.

CPLR 3025(b) provides that “[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court.” “Motions for leave to amend should be freely granted, absent prejudice or surprise . . . unless the proposed amendment is palpably insufficient or patently devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]). “A proposed amended complaint that would be subject to dismissal *as a matter of law* is, by definition, ‘palpably insufficient or clearly devoid of merit’ and thus should not be permitted under CPLR 3025” (*Olam Corp. v Thayer*, 2021 NY Slip Op 30345[U], 3–4 [Sup Ct, NY County 2021]; *see also Scott v Bell Atl. Corp.*, 282 AD2d 180, 185 [1st Dept 2001], *affd as mod sub nom. Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314 [2002]). Further, Courts have held that prejudice “arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position” (*Valdes v Marbrose Realty*, 289 AD2d 28, 29 [1st Dept 2001]; *Anoun v City of New York*, 85 AD3d 694, 694 [1st Dept 2011]). A party opposing leave to amend “must overcome a heavy presumption of validity in favor of [permitting amendment].” (*CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC*, 146 AD3d 60, 65 [1st Dept 2010]).

In a Decision and Order dated July 25, 2022 (NYSCEF 120, 129), the Court dismissed Plaintiff’s First and Second Causes of Action for Specific Performance and Breach of Contract, respectively, in part on the ground that Plaintiff did not adequately plead the Heirs’ contemporaneous consent to the May 20, 2021 Agreement (NYSCEF 129 at 69:1-70:6). Plaintiff now seeks to remedy that defect. In a Proposed Second Amended Complaint (NYSCEF 134), Plaintiff alleges that between March and May 2021, Plaintiff communicated by telephone on a near daily basis with counsel representing the Heirs, during which counsel expressed the

Heirs' consent to the transaction (*id.*, at ¶ 9); that on May 17, 2021 and May 18, 2021 Plaintiff received notification of the Heirs' consent from counsel respectively (*id.*, at ¶¶ 55-56); and that in the days immediately following execution of the May 20, 2021 Agreement, counsel for the Heirs reaffirmed their consent to Plaintiff (*id.*, at ¶¶ 63-64). Whether counsel made the alleged statements, whether they had authority to do so, and whether the consents covered the actual transaction that was consummated, are fact issues that cannot be resolved on a motion for leave to amend. Taking Plaintiffs' factual allegations to be true, for purposes of this motion, Plaintiff's claims in the Proposed Second Amended Complaint are not "palpably insufficient or patently devoid of merit" (*MBIA Ins. Corp.*, 74 AD3d at 499).

Intervenor-Defendants' assertion of prejudice is unpersuasive. The cases relied upon by the Intervenor-Defendants concern motions to amend pleadings containing contradictory pleadings at the summary judgment stage (*see e.g., DeLuca v Pecoraro*, 109 AD3d 636 [2d Dept 2013]). Here, the Proposed Second Amended Complaint comes prior to discovery. Moreover, the allegations in the Proposed Second Amended Complaint are not "entirely inconsistent" with the allegations contained in the Amended Complaint (*id.* at 638). The Court has considered the Public Administrator and Intervenor-Defendants' other arguments and finds them unpersuasive.

Defendant Alben Sagan's cross-motion to dismiss the Amended Complaint (which has already been decided, *see* NYSCEF 120, 129) and to dismiss the Proposed Second Amended Complaint is denied.

Accordingly, it is:

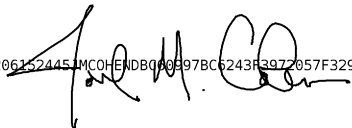
ORDERED that Plaintiff's motion for leave to file the Proposed Second Amended Complaint is **granted**; it is further

ORDERED that Plaintiff shall file the Second Amended Complaint on NYSCEF within five (5) business days of the date of this Decision and Order; it is further

ORDERED that Defendants shall serve an answer or otherwise respond to the Second Amended Complaint within 20 days from the date of said filing; and it is further

ORDERED that Defendant Sagan’s cross-motion to dismiss is **denied**.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

12/6/2022
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE