

**Blackman v Wosler Holdings, Inc.**

2023 NY Slip Op 30024(U)

January 4, 2023

Supreme Court, New York County

Docket Number: Index No. 653015/2020

Judge: Louis L. Nock

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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**

**PRESENT:** HON. LOUIS L. NOCK **PART** **38M**

*Justice*

-----X

AARON BLACKMAN,

Plaintiff,

- v -

WOSLER HOLDINGS, INC. D/B/A SLINGSHOT HEALTH,

Defendant.

-----X

**INDEX NO.** 653015/2020

**MOTION DATE** 08/23/2022

**MOTION SEQ. NO.** 006

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 006) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, and 96

were read on this motion to AMEND PLEADING.

The action arises out of alleged unpaid amounts to plaintiff pursuant to an independent contractor agreement with Defendant Wosler Holdings, Inc. (Complaint, NYSCEF Doc. No. 1 ¶ 1). Plaintiff’s instant post-judgment motion, cast as one for amendment of the complaint, proposes to name the corporate defendant as a party plaintiff and to replace it with a nonparty individual, David Berman, M.D., as the sole party defendant in what actually presents as a new action.<sup>1</sup> Dr. Berman opposes the motion.

**Background**

Per the original complaint (NYSCEF Doc. No. 1), plaintiff invested \$50,000 in defendant Wosler Holdings, Inc., on the understanding that he would be paid a salary of \$10,000 per month and equity as an independent contractor commencing in February 2022 (NYSCEF Doc. No. 1 ¶¶10-15). Plaintiff alleges that he was not paid the agreed upon salary from February 2020

<sup>1</sup> Perusal of the proposed amended complaint reveals widespread changes throughout in redlined format (see, NYSCEF Doc. No. 89).

through July 2020 (NYSCEF Doc. No. 1 ¶ 18). The court previously granted plaintiff a default judgment against defendant Wosler Holdings, Inc., pursuant to 22 NYCRR 202.27 (NYSCEF Doc. No. 43). A judgment was entered in favor of plaintiff against defendant in the amount of \$200,299.04 (NYSCEF Doc. No. 53). The court thereafter granted plaintiff's motion to compel defendant; its president and CEO, David H. Berman, M.D.; and Dr. Berman's private practice, Park Avenue Medial Professionals, P.C., to comply with information subpoenas (Mot. Seq. 004) geared toward collection efforts (Order, NYSCEF Doc. No. 66). Citing CPLR 3025, plaintiff now moves (Mot. Seq. 006) for what he characterizes as an amendment to the complaint (post-judgment) on the stated basis of information derived through those subpoenas.

Dr. Berman was among one of the subpoenaed nonparties as he allegedly controlled Wosler Holdings, Inc. (Memorandum of Law in Support of Motion to Amend, NYSCEF Doc. No. 86). According to plaintiff, documents and testimony provided by Dr. Berman make clear that he is personally liable as an employer of plaintiff under the Labor Law (NYSCEF Doc. No. 86 at 5 of 17). Despite the judgment, defendant Wosler Holdings, Inc., did not pay it (NYSCEF Doc. No. 86 at 7 of 17). Plaintiff now seeks to "amend" the original complaint to name Dr. Berman as the sole defendant in the action, since plaintiff's effort to collect on its judgment against Wosler Holdings, Inc., have been unavailing.

Plaintiff moves to amend the complaint post-judgment, specifically, changing defendant Wosler Holdings, Inc. D/B/A Slingshot Health, to be a party plaintiff, adding David Berman, M.D., as the sole defendant, and changing virtually every allegation and cause of action, transforming the matter into a derivative lawsuit (Proposed Amended Complaint, NYSCEF Doc. No. 89).

### Discussion

The original complaint describes the nature of the action as “aris[ing] out of unpaid amounts due to Plaintiff from Defendant pursuant to an independent contractor agreement between Plaintiff and Defendant” and asserts causes of action for breach of contract, unjust enrichment, and quantum meruit (*see*, NYSCEF Doc. No. 1). The proposed amended complaint, which comes post-judgment, describes the nature of the action as a “derivative claim . . . asserted on Wosler’s behalf and is based on Berman’s failure to exercise due care and the breach of his duty to loyalty to Wosler as he took in \$18 million of investors’ money for a startup business that he was utterly unqualified to run, and then frittered it away” (NYSCEF Doc. No. 88 ¶ 1). The proposed amended complaint asserts three causes of action for breach of fiduciary duty, unpaid wages and benefits, and failure to provide wage statements (NYSCEF Doc. No. 88). In essence, plaintiff seeks not merely to amend the complaint, but to bring an entirely different action.

CPLR 3025 (c) provides that: “The court may permit pleadings to be amended before or after judgment to conform them to the evidence.” However, plaintiff does not seek to conform the previous pleading to the allegedly new information obtained through Dr. Berman’s information subpoena. Rather, plaintiff seeks to bring an entirely new lawsuit, solely against Dr. Berman.

Plaintiff ignores the implications that such a drastic application “to amend” would entail. Were such amendment to be granted, the newly proposed amended complaint would supersede the original complaint. When an amended pleading is served, the previous pleading is dead and the case stands as if the pleading had never been served” (*Westinghouse Elec. Corp. v Lyons*, 281 AD 820, 820 [1st Dept 1953]; *see also, Rifkind v Web IV Music, Inc.*, 67 Misc 2d 26, 30 [Sup Ct NY County 1971] [“the superseded complaint is, as a matter of law, no longer in the case as a

conclusive and impregnable delineation of the triable and determinable substantive issues”]).

While leave to amend is ordinarily liberally granted (CPLR 3025 [b]), plaintiff does not provide any authority to support the notion that “amendments” which alter the entire landscape of the case have been recognized by our courts under the inconspicuous rubric of an “amended” pleading.

That, and more. Granting such a drastic amendment would allow plaintiff to bring new claims under a legal theory that would otherwise be estopped in a separate action. In the original complaint, the plaintiff continually refers to his position with defendant Wosler Holdings, Inc., as an independent contractor (NYSCEF Doc. No. 1). Plaintiff also states he was an independent contractor in his affidavit (NYSCEF Doc. No. 12). The proposed amended complaint now characterizes plaintiff as an employee of Dr. Berman (*see*, NYSCEF Doc. No. 88). The doctrine of judicial estoppel binds a plaintiff to allegations made in obtaining a default judgment, precluding a plaintiff from raising alternate legal theories (*Becceril v City of New York Dept. of Health and Mental Hygiene*, 110 AD3d 517 [1st Dept. 2013], *lv denied* 23 NY3d 905 [2014]). Furthermore, even where a default judgment was vacated – as plaintiff may be seeking to do here if successful on this motion – courts have held that judicial estoppel still bars a later action in which a party “frames his pleadings in a manner inconsistent with a position taken in a prior judicial proceeding” (*Secured Equities Invs., Inc. v. McFarland*, 300 AD2d 1137, 1138 [4<sup>th</sup> Dept 2002]). The court cannot grant a motion “to amend” which, as a newly asserted action, would be judicially estopped.

According, it is hereby  
ORDERED that plaintiff's motion, cast as one to amend the complaint post-judgment, is  
denied.



<u>1/4/2022</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>			<input type="checkbox"/>	FIDUCIARY APPOINTMENT