

<b>Gross v Hearing Better for Life, LLC</b>
2023 NY Slip Op 30430(U)
February 8, 2023
Supreme Court, New York County
Docket Number: Index No. 653906/2021
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 43

-----X  
 MIRIAM R. GROSS,

Plaintiff,

- v -

HEARING BETTER FOR LIFE, LLC, TANTILLO LAW,  
 PLLC

Defendant.  
 -----X

INDEX NO. 653906/2021

MOTION DATE 11/07/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
 MOTION**

**HON. ROBERT R. REED:**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to

AMEND CAPTION/PLEADINGS

In this breach of contract action, plaintiff moves, pursuant to CPLR 3025, to file an amended complaint to assert claims for fraudulent inducement, fraudulent concealment, unjust enrichment, and breach of fiduciary duty.

This action was commenced by Miriam R. Gross, as trustee of the Miriam R. Gross 2018 Grantor Retained Annuity Trust #2, to recover on a \$3.5 million loan to defendants. In motion sequence, 002, plaintiff seeks to amend her complaint to add claims sounding in fraud, for alleged misrepresentations against Cheryl Ann Monaco, Steven Wise and Atlas Worldwide LLC (“proposed defendants”). Plaintiff asserts that the proposed defendants induced her to enter into the promissory note for the loan. Plaintiff also seeks to add Brent S. Tantillo, the escrow agent, as a defendant to the action, to assert claims against him for breach of contract, breach of fiduciary duty and conversion. No opposition to the motion was filed.

It is well settled that “leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit”

ORDERED that the plaintiff's motion for leave to amend the complaint is granted; and it is further

ORDERED that the amended complaint, in the form annexed to the 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; and it is further

ORDERED that a supplemental summons and amended complaint, in the form annexed to the motion papers, shall be served, in accordance with the Civil Practice Law and Rules, upon the proposed defendants within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action shall bear the following caption:

Miriam R. Gross, as Trustee of the Miriam R. Gross 2018 Grantor Retained Annuity Trust #2,

Plaintiff,

-against-

Hearing Better for Life, LLC, Tantillo Law, PLLC, Brent S. Tantillo, Cheryl Ann Monaco, as Executrix of the Estate of John Monaco, Steven Wise, and Atlas Worldwide LLC

Defendants.

and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the parties being added pursuant hereto; and it is further

(*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [citation omitted]). “[A] party opposing leave to amend must overcome a ‘heavy presumption of validity’ (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal citation omitted]), by demonstrating prejudice or surprise or that 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]).


Prejudice exists where a party “has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position” (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]). Here, no party to this action has appeared or otherwise answered the complaint. There can be no reasonable argument that defendants have been hindered in the defense of its case, or that the proposed amendment results in prejudice or surprise to defendants.

Further, the plaintiff established that the proposed amendments are not palpably insufficient by the submission of documentation relevant to her proposed causes of action. The party moving for the amendment need not establish the merit of the claim, only that the proposed amendment is not palpably insufficient or clearly devoid of merit (*Agbo v Constantin Assoc., LLP*, 204 AD3d 599 [1st Dept 2022]). Plaintiff submitted Atlas Worldwide’s operating agreement (NYSCEF doc. no. 24), Atlas Worldwide’s bank statements (NYSCEF doc. no. 27), credit and security agreements between proposed defendants (NYSCEF doc. no. 29) and proof of funds disbursement to Brent S. Tantillo, the escrow agent (NYSCEF doc. no. 26). The documents submitted are sufficient proof that the proposed amendments are not palpably devoid of merit (*Agbo* 204 AD3d 599 [1st Dept 2022]).

Accordingly, it is hereby

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website].

02/08/2023  
DATE

  
ROBERT R. REED, 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