

**Colazzo v Diehard Exterminating Inc.**

2023 NY Slip Op 34030(U)

November 8, 2023

Supreme Court, New York County

Docket Number: Index No. 656221/2018

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH PART 12

*Justice*

-----X

TONINO COLAZZO, DANIELLE COLAZZO, NICHOLAS COLAZZO,

Plaintiff,

INDEX NO. 656221/2018

MOTION DATE N/A

MOTION SEQ. NO. 002

- v -

DIEHARD EXTERMINATING INC., PEST ELIMINATION SYSTEMS TECHNOLOGY, INC., VINCENT PONTE, DEAN BILLINGS, JOHN DOE ENTITIES

Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 70, 71, 72, 73, 74, 77, 79, 80, 81

were read on this motion to/for AMEND CAPTION/PLEADINGS

In this action for breach of contract and fraud, plaintiff Tonino Colazzo (plaintiff), as executor of the estate of Marguerite Colazzo (decedent), moves pursuant to CPLR 3205 for an order granting plaintiff leave to amend the complaint filed in the action on December 13, 2018. No opposition has been submitted in response to the motion.

**I. Background**

Plaintiff commenced this action in December of 2018 following the discovery of alleged extensive financial wrongdoing by defendants, DieHard Exterminating Inc., Pest Elimination Systems Technology Inc., Vincent Ponte, Dean Billings, and John Doe Entities (collectively, defendants) in relation to various contractual obligations of DieHard Exterminating Inc. and Pest Elimination Systems Technology Inc., (together, defendant companies) to decedent, previously a minority owner of defendant companies.

The initial complaint asserts 13 causes of action against defendants on behalf of plaintiff, as well as two additional plaintiffs, Danielle Colazzo and Nicholas Colazzo (collectively, the prior plaintiffs) who have since withdrawn from the case following satisfaction/discontinuance of their claims (*see* NYSCEF doc. nos. 66 and 69).

It is undisputed that decedent co-owned defendant companies with Vincent Ponte and Dean Billings (defendant executives) until the end of 2013, when decedent sold her interests to them. According to plaintiff, the alleged fraud centers around a scheme that defendant executives conducted over a matter of years while decedent was a minority owner of defendant companies and involved, among other things: (i) the secret diversion of millions of dollars from defendant companies for the benefit of defendant executives, to the exclusion of decedent; (ii) the exploitation of the resulting financial shortfalls at defendant companies as a pretense to reduce the financial benefits provided to decedent as a member of the companies; and (iii) ultimately, the inducement of decedent to sell her interests in defendant companies at a drastically-discounted price based upon the same fraudulent financial results at the end of 2013.

Plaintiff now seeks leave to amend the complaint to: (i) narrow the claims before the Court in this action; and (ii) allege limited supplemental facts in support of plaintiff's remaining causes of action. The first amended complaint removes the prior plaintiffs, Danielle and Nicholas Colazzo, from the caption and streamlines the allegations to include four causes of action for: breach of contract as against defendant Diehard and defendant executives (first cause of action); fraud as against all defendants (second cause of action); breach of fiduciary duty as against all defendants (third cause of action); and unjust enrichment as against all defendants (fourth cause of action). The amended complaint also seeks to add additional facts with respect to payments made by defendants to plaintiff following the commencement of the action.

## I. Discussion

“Leave to amend a pleading pursuant to CPLR 3025 (b) is freely given, and will be denied only if there is ‘prejudice or surprise resulting directly from the delay’ in moving to amend, ‘or if the proposed amendment is palpably improper or insufficient as a matter of law’” (*Carrasquillo v Wilfred Realty Corp.*, 205 AD3d 516, 517 [1<sup>st</sup> Dept 2022], quoting *McGhee v Odell*, 96 AD3d 449, 450 [1<sup>st</sup> Dept 2012][internal quotation marks omitted]). Pursuant to CPLR 3025 (b), “[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 or by stipulation of all parties” (*RBP of 400 W. 42 St., Inc. v 400 West 42nd St. Realty Assoc.*, 27 AD3d 250, 250 [1<sup>st</sup> Dept 2006]).

A motion for leave to amend is committed to the sound discretion of the trial court (*Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc., LLC*, 4 AD3d 290 [1<sup>st</sup> Dept 2004]). “In exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom” (*Branch v Abraham & Strauss Dept. Store*, 220 AD2d 474, 475 [2<sup>d</sup> Dept 1995]).

To establish it is entitled to leave to amend under CPLR 3025 (b), a movant “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” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1<sup>st</sup> Dept 2010]). “[T]he 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,” such as that seeking summary judgment (*Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [1<sup>st</sup> Dept 2007]).

Plaintiff argues that the proposed amendments to the complaint will cause no prejudice to defendants, nor will the new allegations constitute surprise, as they concern post-commencement payments and the partial discontinuance of the action. Plaintiff also contends that although there has been delay in prosecuting this action, it was due to unforeseen severe illnesses, both COVID and non-COVID related, as well as the satisfaction/discontinuance of the prior plaintiffs' claims. However, notwithstanding the amount of time that has passed since the initial complaint was filed, the proposed amendments reflect facts relating to events occurring in the intervening period after the action's commencement, which cause no prejudice to defendants. A review of the proposed amended complaint supports these claims.

To find prejudice, there must be some indication that the defendant has been hindered in the preparation of his case or prevented from taking some measure in support of his position (*see Abdelnabi v New York City Tr. Auth.*, 273 AD2d 114, 115 [1st Dept 2000]). Mere delay is insufficient to defeat the motion for leave to amend, and as the motion is unopposed defendants fail to show prejudice (*176 West 87<sup>th</sup> Str. Owners Corp. v Guercio*, 216 AD3d 401, 402 [1<sup>st</sup> Dept 2023]; *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]).

The Court grants plaintiff's unopposed motion insofar as it seeks to amend the caption to remove the two former plaintiffs, Danielle and Nicholas Colazzo, as parties and to remove the claims initially brought by the former plaintiffs. Likewise, upon review of the allegations raised in the proposed amended complaint, the Court grants the unopposed motion as it finds there is no prejudice or surprise to defendants, nor is the proposed amendment palpably insufficient or devoid of merit (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d at 499-500).

**II. Conclusion**

Accordingly, it is

ORDERED that the motion by plaintiff, Tonino Colazzo, to amend the complaint is granted; and it is further

ORDERED that amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 12

-----X  
TONINO COLAZZO, as Executor of the Estate of  
Marguerite Colazzo,

Index No.: 656221/2018

Plaintiff,

v.

DIEHARD EXTERMINATING INC., PEST  
ELIMINATION SYSTEMS TECHNOLOGY, INC.,  
VINCENT PONTE and DEAN BILLINGS, and  
JOHN DOE ENTITIES,

Defendants.


-----X;

and it is further

ORDERED that the parties are to appear for a compliance discovery conference on January 10, 2023 in Room 328, 80 Centre Street, New York, New York at 2:15 p.m.

This constitutes the decision and order of the court.

11/8/2023  
DATE

  
LESLIE A. STROTH, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE