

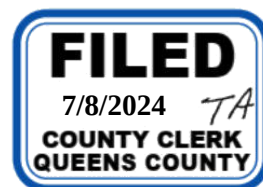
Simkhayev v Davydov
2024 NY Slip Op 35360(U)
July 3, 2024
Supreme Court, Queens County
Docket Number: Index No. 709758/2017
Judge: Marguerite A. Grays
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS
Justice

IAS PART 4

-----X
AVNER SIMKHAYEV,Index
No.: 709758/2017

Plaintiff(s),

Motion
Date: February 6, 2024

-against-

Motion
Cal. No.:AVNER DAVYDOV, ALBERT KIATEV,
ALL BOROUGH FAMILY OUTREACH REBORN
FOR NEW LIFE LLC,Motion
Seq. No.: 5Defendant(s).
-----X

The following papers numbered EF 66-75 read on this motion by plaintiff Avner Simkhayev for an Order: (1) pursuant to CPLR §3025, for leave to amend the Complaint to add new causes of action; and (2) pursuant to CPLR §1003, granting leave to amend the Complaint to add a party to the action and to remove defendant Reborn for New Life LLC as a party.

PAPERS
NUMBERED

Notice of Motion Affid.-Exhibits.....	EF 66-69
Answering Affid.-Exhibits.....	EF 70 - 75

Upon the foregoing papers, it is ordered that this motion by plaintiff Avner Simkhayev for an Order: (1) pursuant to CPLR §3025, granting leave to amend the Complaint to add new causes of action, and (2) pursuant to CPLR §1003, granting leave to amend the Complaint to add a party to the action and to remove defendant Reborn for New Life LLC as a party, is decided as follows:

By Verified Complaint dated July 12, 2017, plaintiff Avner Simkhayev sued defendants Avner Davydov, Albert Kateav, All Borough Family Outreach, Inc. and Reborn for New Life LLC for breach of contract and demanded judgment against the defendants in the amount of \$100,000 with interest from October 22, 2012.

On August 21, 2017, defendant Albert Kataev served and filed his Answer. Defendants All Borough Family Outreach Inc. and Reborn for New Life LLC have not appeared in this action.

On February 4, 2019, after a traverse hearing, defendant Avner Davydov's motion for an Order (motion sequence number 3), pursuant to CPLR §3211(a)(8), dismissing the action against him for lack of personal jurisdiction, was granted.

By Order dated August 14, 2023 (motion sequence number 4), plaintiff's motion for an Order amending the Complaint and adding Avner Davydov as a defendant to the proposed Amended Complaint was denied due to lack of service of the motion on all defendants.

Now, plaintiff moves for leave to serve an Amended Complaint pursuant to CPLR §3025. In support of the motion, plaintiff submits a proposed Amended Complaint which adds new Causes of Action that he claims relate back to the original cause of action for Breach of Contract originally asserted against defendant Avner Davydov. The proposed Amended Complaint includes causes of action for Fraudulent Inducement, Breach of a Fiduciary Duty, Common Law Dissolution and Promissory Estoppel.

Plaintiff argues that his motion should be granted as it is well settled that leave to amend a pleading is to be freely given unless the amendment is patently devoid of merit (CPLR §3025[b]). Further, plaintiff argues that the Court should exercise its discretion and allow plaintiff to add Avner Davydov as a defendant in this action. Plaintiff maintains that Avner Davydov was the proximate cause of plaintiff's damages and thus should be added as a party to the Amended Complaint. Plaintiff claims that defendant Reborn for New Life LLC should be dropped from the case as it has been dissolved.

In opposition, proposed party defendant Avner Davydov argues that the motion should be denied as the action was dismissed against him pursuant to CPLR §3211(a)(8) years ago and plaintiff is now trying to circumvent its statutory obligation to properly serve defendant by adding him back in the action pursuant to an Amended Complaint. Proposed party defendant Avner Davydov argues that plaintiff should be sanctioned for forcing defendant to incur substantial legal fees in opposing this frivolous motion.

In addition Avner Davydov argues that allowing the Amended Complaint in its proposed form would be highly prejudicial to plaintiff as it adds numerous new causes of action. Further he argues that any potentially meritorious claims would be time-barred by the applicable statute of limitations as the proposed Amended Complaint alleges that plaintiff lost a \$100,000 investment in a joint business venture with Avner Davydov in 2008.

As relevant here, pursuant to CPLR §1003, a party may be added or dropped from the action by leave of Court at any stage of the action and the Court has wide latitude to do so as the statute is to be liberally construed (*Micucci v Franklin Gen. Hosp.*, 136 AD2d 528, 529 [1988]; *see also, Maestracci v Helly Nahmad Gallery, Inc.*, 155 AD3d 401 [2017]). On a motion for leave to amend a Complaint to add a new party, it is not necessary for movant to serve a copy of the motion on the proposed party (*Levykh v Laura*, 274 AD2d 418 [2000]; *see also, Abraham v Torati*, 219 AD3d 1275 [2023]).

A decision to permit or deny amendment pursuant to CPLR §3025(b)) is committed to the sound discretion of the Trial Court (*US Bank N.A. v Murillo*, 171 AD3d 984 [2019]). It is well settled that "leave to amend a pleading should be granted where the amendment is neither palpably insufficient nor patently devoid of merit, and the delay in seeking amendment does not prejudice or surprise the opposing party" (*DLJ Mtge. Capital, Inc. v David*, 147 AD3d 1024, 1025 [2017]). The burden of establishing prejudice is on the party opposing the amendment (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *HSBC Bank USA, N.A. v Corrales*, 221 AD3d 984, 985 [2023]). "In determining a motion for leave to amend a pleading, a court shall not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt" (*JPMorgan Chase Bank, N.A. v Campbell*, 189 AD3d 1014, 1015 [2020]).

In support of the motion, plaintiff fails to address Avner Davydov's claim that the statute of limitations for the causes of action asserted against him, has run. Plaintiff does conclude, however, that the relation-back doctrine applies to the facts of this case. Such a bare conclusion is insufficient to demonstrate that the relation-back doctrine applies to the extent of deeming the claims timely (*see, Buran v Coupal*, 87 NY2d 173, 178 [1995]). Further, given the long history of this case, including that the Complaint originally asserted against Avner Davydov in 2017 was dismissed against him in 2019, plaintiff fails to demonstrate that he acted with due diligence to timely interpose a claim against Avner Davydov after the dismissal. Thus, plaintiff's arguments for adding Avner Davydov to the action and for amending the complaint to add new causes of action against him, are legally insufficient (*JPMorgan Chase Bank, N.A. v Campbell*, 189 AD3d at 1015).

In view of the foregoing, the motion for an Order, pursuant to CPLR §1003, (1) to add Avner Davydov as a party defendant is denied and (2) to drop defendant Reborn for New Life LLC from the action as a named defendant, is granted without opposition.

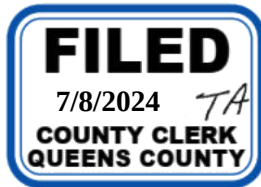
Plaintiff's motion for leave to amend the Complaint pursuant to CPLR §3025(b) is granted as to the remaining defendants, and the Amended Complaint in the proposed form annexed to the moving papers, with the exception of adding Avner Davydov as a party defendant, together with an Amended Summons (CPLR §305) reflecting the proper parties,

shall be filed and served upon remaining defendants Albert Kataev and All Borough Family Outreach Inc., within twenty (20) days after service of a copy of this Order together with Notice of Entry.

Defendants Albert Kataev and All Borough Family Outreach Inc. shall serve an Answer to the Amended Complaint within twenty (20) days from the date of said service as indicated above.

Any additional claims not explicitly addressed herein are denied.

Dated: 7/3/24




MARGUERITE A. GRAYS
J.S.C.