

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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INDEX NO. 150312/2018

TRANSASIA COMMODITIES INVESTMENT LIMITED,

MOTION DATE 02/15/2019

Plaintiff,

MOTION SEQ. NO. 003

- v -

MICHAEL ZOLOTAS, AURORA PROPERTIES (USA), LLC,
AURORA PROPERTIES, INC

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 66, 67, 68, 69, 70, 71, 73, 74, 75, 76, 77, 78, 79

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

Upon the foregoing documents and for the reasons set forth on the record (9/23/19), the petitioner’s motion for leave to file an Amended Verified Petition is granted.

Leave to amend the pleadings under CPLR 3025(b) is to be freely given, and denied only where there is prejudice or surprise resulting from the delay to the opposing party, or if the proposed amendment is “palpably improper or insufficient as a matter of law” (*McGhee v Odell*, 96 AD3d 449 [1st Dept 2012] [quotation and citation omitted]). The party opposing leave to amend must overcome a heavy presumption in favor of the proposed amendment. Mere delay, without more, is insufficient to defeat a motion for leave to amend (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). Rather, “[p]rejudice requires some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position” (*id.*, citing *Cherebin v Empress Ambulance Serv., Inc.*,

43 AD3d 364, 365 [1st Dept 2007] [quotation omitted]). Ultimately, the decision to grant leave to amend is within the sound discretion of the trial court (*Surgical Design Corp. v Correa*, 31 AD3d 744, 745 [2d Dept 2006]).

Here, the respondents cannot show prejudice as the “litigation is still in its initial phase” (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 505 [1st Dept 2011] [finding no prejudice from proposed amendment]). It does not appear that much discovery has been conducted (*Jacobson v McNeil Consumer & Specialty Pharm.*, 68 AD3d 652 [1st Dept 2009] [no prejudice where “fact discovery was still being conducted, the deadline to complete expert depositions was eight months away, the deadline to file a note of issue was nine months away, and no trial date had yet been set”]). Thus, there is simply no prejudice to the respondents from the proposed amendment.

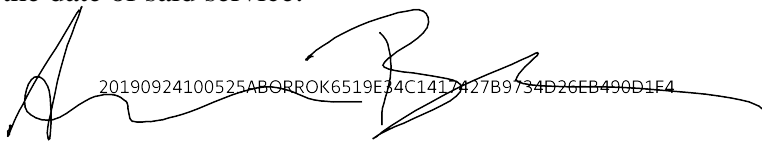
Turning to respondents’ argument that leave should be denied because the proposed amended petition was not in redline form, the redline copy of the petition is attached to the reply and the changes were discussed in the motion papers, giving respondents a clear indication of the proposed new claims (*see* NYSCEF Doc. No. 79; *Messersmith v Tate*, 59 Misc 3d 203 [Warren Cnty Sup Ct 2018] [noting failure to include redline of proposed amended complaint could be “easily corrected on reply”). Significantly, at oral argument, the court offered respondents an opportunity to file a sur reply to address any issues raised by the redline proposed amendment submitted and respondents declined.

Insofar as respondents argue that jurisdiction is not proper and/or that the claims in the proposed amended petition are time-barred, respondents conflate the more stringent standard applicable on a motion to dismiss with the more liberal standard applicable to motions for leave to amend (*Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008] [discussing the difference in relevant standards]). As the First Department explained in *MBIA Insurance Corp. v Greystone & Co., Inc.*, on a motion for leave to amend, the “plaintiff need not establish the merit of its proposed new allegations,” but must “simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit” (74 AD3d 499 [1st Dept 2010] [citing *Lucido v Mancuso*, *supra*]). Here, the petitioner has done so. The proposed amended petition is neither palpably insufficient nor devoid of merit. For purposes of a motion to amend, the proposed amended petition sufficiently alleges a jurisdictional basis (*i.e.*, the New York condo apartment and New York bank account) and is not untimely given the allegations of fraud and factual issues – at least at this juncture – with respect to when those facts were or reasonably could have been discovered by petitioner. If the respondents wish to test the merits of the proposed new claims and raise factual arguments with respect thereto, the respondents may move for dismissal or summary judgment upon a proper showing at the appropriate time (*Lucido*, 49 AD3d at 229). Finally, inasmuch as the respondents argue that Aurora Properties Inc. was never served with the original petition, that is an issue Aurora Properties Inc. may raise on a motion to dismiss. For purposes of this motion, the petitioner has sufficiently alleged that the entity was annulled three-years ago and the petition was served upon twelve different parties that had contact with Aurora Properties Inc. in order to provide the defunct entity notice (*see* NYSCEF Doc. Nos. 6 and 7).

Accordingly, it is

ORDERED that the petitioner’s motion for leave to amend is granted, and the amended verified petition 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 upon all respondents; and it is further

ORDERED that the respondents shall serve an answer to the amended verified petition or otherwise respond thereto within 20 days from the date of said service.



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9/24/2019

DATE

ANDREW BORROK, 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