

**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

**Present: HON. EMILY PINES**  
J. S. C.

Original Motion Date: 02-02-2011  
Motion Submit Date: 02-24-2011  
Motion Sequence No's.: 002 MG  
003 MD

FINAL  
 NON-FINAL

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**JOSE PAULINO,**

**Plaintiff,**

**-against-**

**CHRIS LIANO, ROBERT DOSCH, and  
THE PALMS HOLDING, INC.,**

**Defendants.**

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Attorney for Plaintiff  
Ernest Owen Saasto, Esq.  
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Huntington, New York 11743

Attorney for Defendants  
Nicholas G. Kaizer, Esq.  
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Petitioner, Jose Paulino, in this dissolution proceeding, moves, by Notice of Motion (motion sequence # 002) for an Order pursuant to CPLR §3025 (b) (erroneously set forth as CPLR § 1003), permitting the Petitioner to amend his Petition to add the names of Maryann Mercogliano and Laura Asner as respondents and to change the name of the corporate respondent from The Palms Holding Inc. to The Palms Holdings Inc. Counsel for the current respondents opposes the motion and cross moves, via Notice of Cross Motion (motion sequence # 003), to dismiss the original Petition under CPLR § 3212.

The gravamen of the action concerns Petitioner's assertion that he is a 33%

shareholder of a corporation which he created with respondents Liano and Dosch. Pursuant to an asserted oral agreement, the three agreed to form a corporation for the purposes of purchase, construction and sale of a hotel known as “the Palms Hotel” located in Fire Island, New York. According to the Petitioner, he paid \$30,000.00 to each of the individual respondents, expended approximately \$400,000 to construct the hotel and completed the task on November 2005. However, he asserts he was never issued his shares of the subject corporation and commenced this proceeding. In support of his motion to amend his Petition, Mr Paulino states that during discovery he learned that Mary Ann Mercogliano, Liano’s mother was listed as 100% shareholder of the corporation from its formation in 2004 through 2008 and Laura Asner, Liano’s wife, was then listed as 100% owner of the corporation as of January 1, 2008. Despite repeated requests for accounting of hotel profits from his co shareholders, none have been forthcoming. Petitioner seeks to amend the Petition to name the listed shareholders as necessary parties to the BCL 1104-a Petition and to include the proper name of the hotel entity. In addition, Petitioner seeks to add a cause of action against Liano and Asner for fraud in the inducement and against Mercogliano and Asner for conversion.

Respondent opposes the motion to amend, claiming that Petitioner has not set forth the basis for a claim of fraud or for conversion, such being a mere repetition of his original breach of contract claim. With regard to the motion to amend the petition to name the two shareholders, Respondent cross-moves to dismiss on the ground that Petitioner, not listed as a shareholder on any certificate, lacks standing to bring the Proceeding.

In general, courts should grant motions to amend pleadings pursuant to CPLR § 3025(b) freely in absence of prejudice or surprise to the opposing party. **Maya’s Black Creek LLC v Angelo Balbo Realty Corp**, 82 AD 3d 1175, 920 NYS 2d 172 (2d Dep’t 2011). Moreover, a court should not examine the merits nor the legal sufficiency of the proposed amendment unless it is palpably insufficient or patently devoid of merit on its face. **See, Rosicki , Rosicki & Assocs. P C v Cochems**, 59 AD

3d 512, 873 NYS 2d 184 (2d Dep't 2009), **Lucido v Mancusco**, 49 AD 3d 220, 851 NYS 2d 238 ( 2d Dep't 2008).

The mere fact that a corporation fails to issue stock to a particular individual does not preclude a finding that such person is entitled to the rights of a shareholder. **Kun v Fulop**, 71 AD 3d 832, 896 NYS 2d 462 ( 2d Dep't 2010). Thus, the Court must look to the relationship between the parties and, whether they entered into a contractual agreement to provide shares and whether consideration was given therefor. **Id.**

Petitioner's motion to amend his complaint is granted. Based upon his uncontradicted Affidavit, the status of the shares of the corporation were not discovered until discovery commenced and such information was in the hands of the Respondents. The named shareholders, are, as petitioner set forth, necessary parties to the dissolution proceeding. In addition, whether Petitioner is or is not a shareholder of the subject corporation is clearly a question of fact based upon the law set forth above and thus, Summary Judgment dismissing the Petition is inappropriate at this juncture.

With regard to the claims for conversion against the newly named parties and for fraud in the inducement against Liano and Dosch, the Court will permit the amended pleading to go further as not palpably improper, as the Second Department case law directs. The Amended pleading suggests that Mercogliano and Asner took his shares of the corporation and thereby interfered with his legal rights thereto. The fraud claim asserts that Liano and Dosch intentionally misrepresented the promise of the shares as an inducement to Paulino to provide funds and labor, and that he justifiably relied on such promises, false when made, to his economic detriment. Both at least at this stage set forth the bases for the tort claims asserted.

Based on the above, the Petitioner's motion to amend his petition is granted in all respects except that the Amended pleading annexed to the papers will be

deemed filed and served as of the date of this Decision and the Respondents/Defendants shall have thirty days to serve and file answers thereto. A conference is scheduled for all counsel appearing in this matter on July 12, 2011 at 2 o'clock p.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: May 4, 2011  
Riverhead, New York

  
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**EMILY PINES**  
J. S. C.

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