

# The New York Court of Appeals Approves CPLR 3025 (b) Complaint Amendment After Appellate Court Dismissal

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The New York Court of Appeals recently endorsed the trial court's discretion to grant leave to amend a complaint under CPLR 3025 (b), holding that when the appellate court dismisses the plaintiffs' complaint without prejudice, and the original action remained pending in the trial court with defendants' counterclaims, the trial court may grant plaintiffs leave to file a third amended complaint.

In [\*Favourite Limited, et al. v. Benedetto Cico, et al.\*](#), plaintiffs, the Upper East Side Suites LLC (UESS) and investors in UESS, sued the sole managers of UESS, Carla and Benedetto Cico, after a failed short-term accommodations business that left no proceeds returnable to the investor members. Plaintiffs alleged an undisclosed and unauthorized failed property purchase transaction, and that defendants lied about the business operations. Plaintiffs filed suit in May 2016 for alleged breach of the operating agreement, breach of fiduciary duty, and related claims. The investors removed the Cicos as managers, and plaintiffs were unaware that Benedetto Cico contemporaneously resigned as the registered agent for UESS, leading the Delaware Secretary of State to cancel the LLC's certification of formation in November 2016.

In February 2018, the trial court dismissed the original complaint for UESS' failure to appear after losing counsel. The investors filed an amended complaint against the Cicos without UESS. In October 2018, the trial court denied the Cicos' motion to dismiss, and granted a cross motion for leave to file a second amended complaint with UESS also included as a plaintiff, after acquiring a Delaware Certificate of Revival for UESS.

Defendants appealed the October 2018 order, and during the appeal, filed counterclaims that, critically, remained pending in the trial court.

In March 2020, nearly four years after the action commenced, the Appellate Division reversed the October 2018 order and granted defendants' motion to dismiss the complaint on the ground that UESS was not properly revived, and thus, UESS lacked standing or capacity. The dismissal was without prejudice.

Plaintiffs renewed efforts to revive UESS, and in December 2020, filed another Delaware Certificate of Revival. The trial court thereafter granted plaintiffs' motion to file a third amended complaint, pursuant to CPLR 3025 (b). Defendants opposed amendment because the Appellate Division had dismissed the entire second amended complaint. Only defendants' counterclaims remained. The trial court explained that plaintiffs could have filed a timely separate action, pursuant to CPLR 205 (a), and consolidated it with the current action, but that "would make no sense." In the same order, the trial court granted plaintiffs' motion to dismiss defendants' counterclaims.

A divided 3-2 Appellate Division reversed with respect to the leave to file a third amended complaint, on the grounds that "no complaint remained pending to amend" and "the amendment was time-barred." The Appellate Division affirmed the dismissal of defendants' counterclaims, and that part of the order was not at issue later at the Court of Appeals.

A divided 4-3 Court of Appeals reversed the Appellate Division decision, with respect to the third amended complaint.

The Court of Appeals explained that CPLR 3025 (b) prescribes "that '[a] party may amend his or her pleading...at any time by leave of court,' and that such leave 'shall be freely given.'" Thus, the Court of Appeals has held that "a request for leave to amend should generally be granted absent prejudice or surprise to the opposing party." The trial court's decision is reviewed for abuse of discretion.

In [\*Favourite Limited, et al. v. Benedetto Cico, et al.\*](#), prejudice or surprise were not at issue. The Court of Appeals explained that the key question is, "when an appellate court has dismissed a complaint in its entirety," "without prejudice and not on the merits," whether a trial court has "discretion to grant leave to amend that complaint under CPLR 3025 (b)."

The Court of Appeals noted the easy case, that when the appellate court's dismissal of a complaint is *with* prejudice, the trial court may not permit amendment under CPLR 3025 (b). Here, the Appellate Division's order and opinion provided no language preventing plaintiffs from curing UESS' standing or capacity issue. Moreover, the action remained pending at the trial court with the counterclaims. Notably, the majority was explicitly not offering an opinion on a case in which no action remained at the trial court.

The New York Court of Appeals ultimately held that the trial court, Supreme Court, retained the discretionary power to grant plaintiffs' motion to file a new amended complaint, since "the original action remained pending in Supreme Court even after the complaint was dismissed." Explicit permission was not required from the appellate court. This is within a trial court's discretion to manage its docket. The majority noted that either way, plaintiffs would have been within the six-month limit under CPLR 205 (a) to file a new action, once Executive Order 202.8's tolling period is factored in.

The majority took no issue with leave to amend being granted in the same order that the defendants' counterclaims were dismissed, even though no action would have remained at Supreme Court if the defendants' counterclaims were dismissed first. The majority noted that "the CPLR is a set of procedural rules, and Supreme Court has discretion as to the order in which it addresses matters before it, which may have practical, procedural and even substantive consequences for the parties."

While a complicated path, the case ultimately affirms the broad scope of CPLR 3025(b).

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