

**Patapova v Duncan Interiors, Inc.**

2013 NY Slip Op 33013(U)

November 27, 2013

Sup Ct, New York County

Docket Number: 652188/2010

Judge: Joan A. Madden

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

PRESENT:HON. JOAN A. MADDEN Justice

PART 11

NATALIA PATAPOVA and ROMAN KLIMENKO,

Plaintiff,

- v -

DUNCAN INTERIORS, INC. d/b/a DUNCAN MILLER ULLMANN, AND KIMBERLY MILLER, Defendant.

INDEX NO. : 652188/10

MOTION DATE: 11/14/13

MOTION SEQ. NO.: 001

The following papers, numbered 1 to \_\_\_\_\_ were read on this MOTION TO AMEND

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: [ ] Yes [ x ] No

Plaintiffs move for leave to amend the complaint to modify the allegations against defendants Kimberly Miller (“Miller”) and Duncan Interiors, Inc. d/b/a Duncan Miller Ullman (“DMU”) and to add James C. Cox, Jr. (“Cox”) as a defendant. Defendants oppose the motion, which is granted to the extent indicated below.

DMU was hired by plaintiffs to perform an interior design project at plaintiffs then newly purchased apartment. Miller is an owner and officer of DMU. This action, which was commenced on December 1, 2010, was removed by the originally named defendants, DMU, Miller, Turner Duncan, Chris Michero and Mark Keilson (“the original defendants”), to the United States District Court for the Southern District of New York on January 6, 2011. After the original defendants moved to dismiss the complaint, plaintiffs filed a first amended complaint, which alleged that DMU breached its contract with plaintiffs and that Miller committed fraud, and that the remaining defendants aided and abetted in DMU’s and Miller’s fraudulent conduct.

By decision and order dated March 22, 2012, the Federal Court dismissed the claims

against Turner Duncan, Chris Michero and Mark Keilson, but found that the fraudulent inducement claim against Miller was viable to the extent it was based on her representations as to her expertise and her prior experience designing a hotel. The breach of contract claim against DMU was not the subject of the motion to dismiss.

Plaintiffs subsequently filed a second amended complaint adding Cox as a defendant, and deleting those parties and the causes of action that were dismissed by the Federal Court. In its decision and order dated December 10, 2012, the Federal Court remanded this action back to this court, finding that as a result of the joinder of Cox destroyed diversity, it no longer had subject matter jurisdiction over the action.

In their proposed supplemental complaint, plaintiffs now seek to add Cox as a defendant in this action and to assert claims against him for breach of contract and breach of fiduciary duty, and to add certain other allegations. The claims against Cox are based on allegations that Cox is a real estate broker who represented plaintiffs in connection with the purchase of their home and who introduced plaintiffs to defendants DMU and Miller. Cox was allegedly put in charge of the funds used for the decorating and design and was given access to an account containing funds provided by plaintiffs in which plaintiffs deposited over \$500,000. It is also alleged that Cox failed to provide proper oversight over the project and failed to review invoices that were grossly inflated, and failed to provide a detailed accounting as requested by plaintiffs.

Defendants oppose the motion, arguing that the March 22, 2012 decision of the Federal Court dismissing the fraud claims against the defendants except for limited fraudulent inducement claim against Miller bars plaintiffs from pleading fraud allegations against Miller. In this connection, defendants argue that the court should not allow the addition of paragraphs 14, 20, 61, and 62 which attempt to bolster plaintiffs' fraud claims by adding allegations regarding alleged misrepresentations Miller made in estimated number of hours billed, even though the District Court specifically found that such allegations were insufficient to support a fraud claim since they were not distinct from the breach of contract claim. As for the claims against Cox, defendants argue that they lack merit and that Cox's status as plaintiffs' real estate agent does not give rise to any fiduciary duty.

“Leave to amend a pleading should be ‘freely given’ (CPLR 3025[b]) as a matter of

discretion in the absence of prejudice or surprise.” Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-356 (1<sup>st</sup> Dept 2005)(internal citations and quotations omitted). That being said, however, “in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted.” Eighth Ave. Garage Corp. v. H.K.L Realty Corp., 60 AD3d 404, 405 (1<sup>st</sup> Dept), lv dismissed, 12 NY3d 880 (2009). At the same time, leave to amend will be granted as long as the proponent submits sufficient support to show that proposed amendment is not “palpably insufficient or clearly devoid of merit.” MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1<sup>st</sup> Dept 2010)(citation omitted). In addition, “[o]nce 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 a subsequent basis for a motion for summary judgment” Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 AD3d 363, 365 (1<sup>st</sup> Dept 2007).

Here, there no prejudice or surprise resulting from proposed amendment, especially since discovery is in its initial phases. As for the merit of the proposed amendment, the court finds that the allegations against Cox are sufficient to make a prima facie showing of breach of contract and breach of fiduciary duty. However, to the extent plaintiffs attempt to supplement their complaint to add allegations in paragraph 1, incorrectly characterizing the action as one for fraud against DMU and breach of fiduciary against Miller, the amendment will not be permitted. Next, the allegations in paragraph 62 of the fraudulent inducement claim against Miller, as to additional misrepresentations made by Miller with respect to billing, will not be permitted as the Federal Court previously found that such allegations were insufficient to state a fraud claim against Miller, as they were duplicative of the breach of contract claim against DMU. In contrast, references in proposed amended complaint as to the dispute as to the amounts billed by DMU and Miller are permissible as they are arguably relevant to plaintiffs’ breach of contract claim against DMU.

Thus, plaintiffs’ motion to amend is granted except to the extent that the references in paragraph 1 to DMU’s fraud and Miller’s breach of fiduciary duty and paragraph 62 shall be deleted.

Accordingly, it is

ORDERED that the motion to amend is granted to the extent stated herein and plaintiff

shall serve an amended complaint consistent with this decision and order on the parties who have appeared in this action, together with a copy of this decision and order, within 30 days of date of this decision and order; and it is further

ORDERED that a supplemental summons and amended complaint, consistent with this decision and order, shall be served in accordance with the Civil Practice Law and Rules, upon Cox within 30 days of the date of this decision and order; and it is further

ORDERED that the action shall bear the following caption:

Natalie Patapova and Roman Klimenko,  
Plaintiffs

-v-

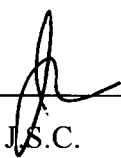
Duncan Interiors, Inc. d/b/a Duncan Miller  
Ullmann, and Kimberly Miller,  
Defendants.

And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of Trial Support Office (room 158), who are directed to mark the court's records to reflect the additional parties; and it is further

ORDERED that the preliminary conference scheduled for December 5, 2013 is hereby adjourned to February 13, 2013 at 9:30 am.

Dated: November 27, 2013

  
\_\_\_\_\_  
J.S.C.

**HON. JOAN A. MADDEN**  
**J.S.C.**

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION