

Imber v Carl Fischer Photography, Inc.

2019 NY Slip Op 32441(U)

August 15, 2019

Supreme Court, New York County

Docket Number: 653353/2018

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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GERALD IMBER, M.D., P.C.,

Plaintiff,

- v -

CARL FISCHER PHOTOGRAPHY, INC.,

Defendant.

INDEX NO. 653353/2018

MOTION DATE 04/20/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74, 75

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

The issue before the court on this motion is whether the plaintiff, Gerald Imber, M.D., P.C. (Gerald Imber) should be granted leave to file an amendment complaint in this action seeking declaratory judgment and adding CNA Financial Group (CNA) and Continental Casualty Corp. (Continental) as defendants, or whether, as defendant Carl Fischer Photography, Inc. (CFP) argues, such amendment would be clearly unmeritorious or palpably improper such that leave to amend should be denied. For the reasons set forth on the record (8/15/19) and as otherwise set forth below, the motion is granted.

Leave to amend should be freely given (CPLR § 3025 [b]), unless the proposed amendment clearly lacks merit and "would serve no purpose but needlessly complicate discovery and trial" (Thomas Crimmins Contracting Co., Inc. v City of New York, 74 NY2d 166, 170 [1989]). Only where the proposed amendment would cause prejudice or surprise (McCaskey, Davies & Assocs. v New York Health & Hosps. Corp., 59 NY2d 755, 757 [1983]) or is palpably improper or

insufficient as a matter of law should leave to amend be denied (*Shepherd v New York City Tr. Auth.*, 129 AD2d 574, 574 [1987]). “Prejudice 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 [its] position” (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011] [quotation marks and citation omitted]). Mere delay is not a sufficient basis on which a motion for leave to amend should be denied (*Tri-Tec Design, Inc. v Zatek Corp.*, 123 AD3d 420, 420 [1st Dept 2014]).

The central issue before the court is whether Gereald Imber had valid insurance meeting the requirements the lease or if Gerald Imber can obtain a retroactive endorsement from CNA to that meets the requirements of the lease. For the avoidance of doubt, the insurance certificates indicate that the insured is Gerald Imber and not the named tenant under the lease and that the insurance otherwise does meet the terms of the lease because of the notice requirement in the insurance policies. Previously, this court had granted a TRO to give the Gerald Imber an opportunity to approach CNA and get an appropriate statement or retroactive endorsement (if possible) from CNA addressing this alleged deficiency so that Gerald Imber could demonstrate either no default or the potential for cure in connection with its Yellowstone application. Following a series of adjournments where counsel to Gerald Imber represented that CNA was difficult to reach because there is no assigned agent, only a call center, the court eventually lifted the TRO. The First Department in its review has issued a stay.

Simply put. the proposed Amended Complaint goes to the heart of the critical issue involved in this case – i.e., whether Gerald Imber’s insurance meets the terms of the lease. Although CFP

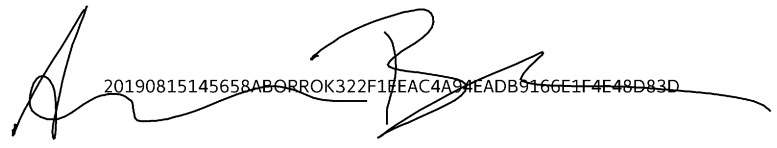
argues that granting leave to amend will result in significant delay in resolving this matter and will further prolong the litigation, these arguments fall short of the showing of degree of prejudice required to defeat a motion for leave to amend. CFP fails to allege facts sufficient to demonstrate that the proposed amendment would hinder its preparation of its case or prevent it from taking any measure in support of its position.

Moreover, pursuant to CPLR § 1003, “[p]arties may be added at any stage of the action by leave of court.” “CPLR §1003 gives a court ‘wide latitude and [is] to be liberally construed’” (*Maestracci v Helly Nahmad Gallery, Inc.*, 155 AD3d 401, 404 [1st Dept 2017], quoting *Micucci v Franklin Gen. Hosp.*, 136 AD2D 528, 529 [2d Dept 1988]). Here, it is necessary and appropriate for Gerald Imber to add CNA and Continental as defendants as they are essential parties with respect to resolution of the alleged deficiencies with the insurance policy.

Accordingly, it is

ORDERED that the plaintiff’s motion for leave to amend the complaint herein and add additional defendants is granted, and the amended complaint 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; and it is further

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



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8/15/2019

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