

Migliore v Manzo

2006 NY Slip Op 30044(U)

October 25, 2006

Supreme Court, Orange County

Docket Number: 0001852/8522

Judge: Lawrence I. Horowitz

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

P R E S E N T:
HON. LAWRENCE I. HOROWITZ,
SUPREME COURT JUSTICE

----- x

PHILIP MIGLIORE,

Plaintiff,

-against-

Index No. 1852/2003
ORDER and DECISION

SHERRYL MANZO,

Defendant.

----- x

HOROWITZ, JSC,

The following papers were read on this motion:

Notice of Motion with Affirmation, with Exhibit A through I	1
Affirmation in Opposition, with Exhibits A to C	2
Reply Affirmation	3

Defendant moves pursuant to CPLR 3025 for an Order granting her leave to serve an amended answer herein which seeks to add a counterclaim premised on breach of contract and an affirmative defense premised on the failure to add a necessary party.

The determination to permit an amendment is committed almost entirely to this Court's discretion and where no prejudice is shown is to be determined on a *sui generis* basis. See, Murray v. City of New York, 43 N.Y.2d 400, 405, 401 N.Y.S.2d 773, 372 N.E.2d 560(1977).

CPLR 3025 provides permits this Court to freely grant leave to amend "upon such terms as may be just". CPLR 3025(b). Thus, absent prejudice or surprise, "motions for leave to amend are liberally granted". Ricca v. Valenti, 24 A.D.3d 647, 648,

807 N.Y.S.2d 123, 124 (2nd Dept., 2005). “It is likewise true that the merits of a proposed amendment will not be examined on the motion to amend-unless the insufficiency or lack of merit is clear and free from doubt.” Norman v. Ferrara, 107 A.D.2d 739, 740, 484 N.Y.S.2d 600, 601 (2nd Dept.,1985)(citations omitted). Thus, only in cases “where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit” should leave be denied. Id.

Plaintiff does not claim prejudice or surprise, but rather claims that the proposed amendment to include the counterclaim for breach of contract must be denied as it is barred by the Statute of Limitations. Citing references in defendant’s counsel’s previous submissions, Plaintiff takes the position that the alleged breach occurred on or about September 22, 1999 and thus as that date is more than six years ago the proposed breach of contract action is time barred.

CPLR § 203 provides the general method for computing periods of limitations. That statute specifically provides that a “defense or counterclaim is interposed when a pleading containing it is served. ***A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed...***”. CPLR §203(d)(emphasis added).

The claims asserted in the complaint herein were interposed on June 18, 2003, the date when the within action was commenced via the filing of the summons and complaint with the clerk’s office. See, CPLR §304. Based on the foregoing, the counterclaim sounding breach of contract is timely.

Furthermore, the Court will permit the amendment with regard to the addition of the affirmative defense, reminding the parties that at this juncture the Court is not

deciding whether or not Philip and/or Diana Migliore *are* necessary parties, just permitting the Defendant to assert same. Compare, O'Neal v. Cohen, 186 A.D.2d 639, 588 N.Y.S.2d 621 (2nd Dept., 1992). The Court again notes that based on the submissions, the Plaintiff is unable to demonstrate any prejudice or surprise if Defendant is granted leave to file and serve an amended answer containing the affirmative defense. Absent same, an amendment, even a late one shall be freely permitted. See, Public Adm'r of Kings County v. Hossain Const. Corp., 27 A.D.3d 714, 716, 815 N.Y.S.2d 621, 622 (2nd Dept., 2006).

WHEREFORE, based on the foregoing, it is

ORDERED that Defendant's motion is granted, Defendant is directed to serve its amended answer forthwith, and it is further

ORDERED that all parties and counsel are to appear to report on the status of any outstanding discovery, and for other matters, at a conference to be held at the Supreme Court, Part 6, Orange County Government Center, 255 Main Street, Goshen, New York 10924, at 9:00 A.M., on November 14, 2006.

The foregoing constitutes the decision and order of this Court.
Dated: Goshen, New York
October 25, 2006

HON. LAWRENCE IVAN HOROWITZ
SUPREME COURT JUSTICE