

Ober v Noah's Ark Moving Co.

2007 NY Slip Op 30983(U)

April 25, 2007

Supreme Court, New York County

Docket Number: 0115971/2003

Judge: Jane S. Solomon

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

PRESENT: Solomon

PART 55

Index Number : 115971/2003
OBER, JILL
VS.
NOAH'S ARK MOVING
SEQUENCE NUMBER : 004
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____

MOTION DATE 3-16-07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3
4-5
6-7

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion **is decided in accordance with the annexed memorandum decision and order.**

NB: Pre-Trial conference
in Part 55 on 7/23/07
at 2:00 PM

FILED
APR 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/25/07


JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
JILL OBER,

Plaintiff,

INDEX NO. 115971/03

-against-

NOAH'S ARK MOVING COMPANY,
BAKER INTERNATIONAL INSURANCE AGENCY,
and AMERICAN HOME ASSURANCE COMPANY

Defendants.

DECISION and ORDER

-----X
NOAH'S ARK MOVING COMPANY,

Third-party Plaintiff,

-against-

INDEX NO. 590444/04

BIG APPLE MOVING AND STORAGE, INC.

Third-party Defendant.

-----X
JANE S. SOLOMON, J.

FILED
APR 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Jill Ober ("Ober") moves to amend the
Complaint to allege a cause of action in conversion. For the
reasons described herein the motion is granted.

In October 2000, Ober contracted with defendant Noah's
Ark Moving Company ("Noah's Ark") to move her personal belongings
from her home into storage. Noah's Ark stored her property from
October 17, 2000 to December 14, 2000. During this time, Ober
alleges that she visited her property and noticed that several
items were damaged or missing. She then arranged to have her

property transferred to former third-party defendant Big Apple Moving and Storage Company ("Big Apple"). (A more detailed recitation of the facts is found under the decision for Motion Sequence 003.)

Ober filed a Summons and Complaint in this action on September 11, 2003, alleging negligence against Noah's Ark and breach of contract against former defendant Baker International Insurance Agency ("Baker"). Ober filed an Amended Summons and Complaint in or around July 2004, which added American Home Assurance Company ("American Home") as a defendant. Noah's Ark commenced a third-party action against Big Apple on April 8, 2004, alleging that Big Apple damaged Ober's possessions after it removed them from its warehouse. The action was discontinued against Baker, and the actions against American Home and Big Apple were dismissed by court order, on March 10, 2005 and November 30, 2006, respectively.

Ober now moves to amend the Complaint to allege a cause of action in conversion. The proposed Second Amended Complaint alleges that Noah's Ark failed to return her property. Although not specifically alleged as such, it necessarily is limited to property missing at or before the time she transferred possession to Big Apple. She claims that she reported both the loss of and the damage to her goods to Noah's Ark long before this case

began, and that during discovery she testified that Noah's Ark failed to return some of her property. Accordingly, she argues that Noah's Ark cannot claim surprise, and that it will not be prejudiced by permitting her to amend the Complaint to add a conversion claim.

In opposition, Noah's Ark argues that Ober is guilty of laches due to the fact that this action began more than three and a half years ago; Noah's Ark's Answer was served on October 28, 2003; Ober has already filed an amended Complaint in July 2004; and discovery has been completed, including its deposition of Ober. Moreover, it argues that this Court's November 30, 2006 Order dismissed its Third-Party Complaint against Big Apple, thereby precluding it from alleging any conversion attributable to Big Apple. This misconstrues the claim, which is limited to Noah's Ark's conduct while Ober's property was stored with it. It argues that if the motion is granted, it will suffer great prejudice for an alleged conversion that Ober has known about since 2000.

The First Department has liberally granted leave to amend pleadings under CPLR § 3025(b). See Garner v. Agioylastis, 18 A.D. 368 (1st Dep't 2005). While Noah's Ark is correct that Ober has known about the alleged conversion since 2000, the proposed amendment merely seeks to add a new theory of recovery

on existing evidence, and therefore its addition cannot be considered to be a surprise or prejudicial. See Beverage Marketing USA Inc. v. South Beach Beverage Co., Inc., 20 A.D.3d 439 (2nd Dep't 2005).

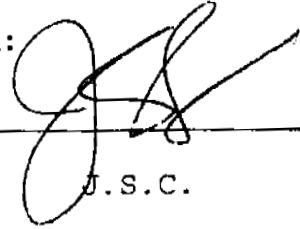
Accordingly, it hereby is

ORDERED that Ober's motion for leave to amend the Complaint is granted, and the Second Amended Complaint in the proposed form annexed to her moving papers as Exhibit G shall be deemed served upon service of a copy of this order with notice of entry thereof; and it further is

ORDERED that Noah's Ark shall serve an answer to the Second Amended Complaint within 20 days of the date of said service; and it further is

ORDERED that counsel shall appear at a pre-trial conference in Part 55 on July 23, 2007 at 2:00 PM.

Dated: April 25, 2006

ENTER: 

J.S.C.

JANE S. SOLOMON
FILED
APR 30 2007
NEW YORK
COUNTY CLERK'S OFFICE