

Frazzetta v P.C. Celano Contr.

2007 NY Slip Op 32263(U)

July 20, 2007

Supreme Court, Suffolk County

Docket Number: 0014591/2001

Judge: Denise F. Molia

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SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA,
Justice

JOSEPH and REGINA FRAZZETTA,

Plaintiffs,

- against -

P.C. CELANO CONTRACTING, ANN CAVASINNI,
AS EXECUTRIX OF THE ESTATE OF VICTOR
CAVASINNI and PETER CAVASINNI,

Defendants.

CASE DISPOSED: NO
MOTION R/D: 8/8/06
SUBMISSION DATE: 3/16/07
MOTION SEQUENCE NO.: 004 MD
005 XMOT D

ATTORNEY FOR PLAINTIFF
Law Offices of Glenn J. Wurzel
62 Nichols Court, Suite 303
Hempstead, New York 11550

ATTORNEYS FOR DEFENDANTS
Stephen P. Gelfand, P.C.
870 West Jericho Turnpike
Huntington, New York 11743

Upon the following papers filed and considered relative to this matter:

Notice of Motion dated July 19, 2006; Affirmation dated July 19, 2006; Exhibits A through D annexed thereto; Notice of Cross Motion dated August 19, 2006; Affirmation dated August 19, 2006; Exhibits A through P annexed thereto; Reply Affirmation dated October 11, 2006; Reply Affirmation dated September 27, 2006; Exhibit A annexed thereto; and upon due deliberation; it is

ORDERED, that the motion by plaintiff, pursuant to CPLR 305, 1003, and 3025, for an Order amending the summons and complaint to add Celano Construction Corp., is denied.

Plaintiffs commenced the instant action sounding in breach of contract, for damages allegedly incurred by plaintiffs as the result of the alleged inferior construction work performed at plaintiff's residence by the defendant contractor, P.C. Celano Contracting. The original named defendants were P.C. Celano Contracting, Victor Cavasinni and Peter Cavasinni. Although the plaintiff has not identified a specific date for the breach, it is alleged that the parties entered into a contract on November 19, 1998, and that plaintiff made payments to the defendants on December 4, 1998, February 1, 1999, April 6, 1999 and May 28, 1999. The summons and complaint were dated June 8, 2001.

The defendant Victor Cavasinni died on January 11, 2003. By Order dated April 4, 2005 Ann Cavasinni, as Executrix of the Estate of Victor Cavasinni was substituted for the decedent,

Victor Cavasinni and the caption was amended accordingly.

On or about July 6, 2004 the defendant, Peter Cavasinni, filed a petition in bankruptcy. By Order of the Honorable Melanie L. Cyganowski, dated December 28, 2004 the automatic bankruptcy stay was lifted as to Peter Cavasinni, so that disclosure could take place in the instant action. Subsequently, the debts of Peter Cavasinni were discharged in the bankruptcy proceeding. However, the Bankruptcy Court did not make a determination as to whether P.C. Celano Contracting was the d/b/a of Peter Cavasinni, and therefore also granted a discharge of its debts, leaving that determination to this Court.

The plaintiff now alleges that it has come into possession of two documents, which would provide a basis for the addition of the entity known as Celano Construction Corp., as a party defendant to this action. The first document, alleged to be written by Peter Cavasinni and recovered from the Suffolk County Department of Consumer Affairs pursuant to a Freedom of Information Request, is a letter dated January 3, 2000 in which Peter Cavasinni writes, "P.C. Celano Contracting has been licensed by Consumer Affairs for approximately four (4) years. It is the successor in interest to Celano Construction Corp., a construction company previously licensed by Consumer Affairs and in good standing in Suffolk County for well over twenty (20) years." The second document is on Celano Construction Corp. letterhead and appears to be an order form. Said document is dated April 26, 1999 and signed by Regina Frazettas as "homeowner." There is no other signature on the document, nor is there reference to a property address where work is to be performed, date of installation or other services to be performed, or amount of payment for the items or services. Neither is it indicated whether such document is intended to be relied upon as a complete agreement or as an attachment to a more formal agreement.

From these two aforesaid documents, the plaintiff maintains that P.C. Celano Contracting and Celano Construction Corp., are one in the same with the business names being used interchangeably. On that basis, the plaintiff now seeks to amend the complaint, six years after the fact, to allow the addition of a new party defendant, concluding that to do so would not be of surprise or prejudice to the defendants and would be justified since the two entities are united in interest such that the relation back doctrine should be applied. A review of the evidence does not support plaintiff's application.

As a general rule, motions to amend or supplement pleadings shall "be freely given upon such terms as may be just," absent prejudice or unfair surprise to the defendant. CPLR 3025(b); Scheuerman v. Health & Hosps. Corp. of City of New York, 243 A.D.2d 553, 663 N.Y.S.2d 123. It is essential however, that a party seeking leave to amend a complaint must allege legally sufficient facts to establish a *prima facie* cause of action and demonstrate the merits of the proposed pleading. East Asiatic Co. v. Corash, 34 A.D.2d 432, 312 N.Y.S.2d 311. Leave to amend should be denied where the proposed amendment clearly lacks merit. Perrini v. City of New York, 262 A.D.2d 541, 694 N.Y.S.2d 401; Parisi v. Leppard, 237 A.D.2d 419, 655 N.Y.S.2d 546.

The plaintiff has not cited any authority to support its contention that Celano Construction Corp., which has not been shown to be a party to the subject contract, is liable for the breach of a contract which was entered into after a successor in interest had taken over the business. The two pieces of evidence submitted by plaintiff in support of the motion are insufficient to warrant the amendment of the complaint at this late date. It has not been established that the parties are united in interest. On the other hand, the fact that Victor Cavasinni, the principal of the proposed additional defendant is deceased and cannot speak to the business practices of the corporate

entity is prejudicial to Celano Construction Corp. Accordingly, the motion is denied.

ORDERED, that the cross motion by defendants, pursuant to CPLR 3211, 3124, and 3126, for an Order (1) dismissing the Complaint for failure to file a Note of Issue; (2) dismissing the plaintiff's Second Cause of Action for failure to state a claim; (3) dismissing the action as against the defendant, P.C. Celano Contracting for lack of jurisdiction; (4) compelling plaintiffs to respond to defendants' discovery demands; (5) directing that the claims of the plaintiffs be resolved in favor of defendants if discovery is not provided; and (6) directing that plaintiffs are precluded from offering any evidence at trial if discovery is not provided; is decided as follows:

ORDERED, that the Complaint as against the defendant, P.C. Celano Contracting is dismissed.

The individual defendant, Peter Cavasinni became a debtor in a bankruptcy proceeding, filed by virtue of a voluntary petition pursuant to Title 11 of the United States Bankruptcy Code on July 7, 2004 in the United States Bankruptcy Court for the Eastern District of New York, Central Islip Division, under Case Number 04-84341-m1c. The petition was filed in the name of "Peter Cavasinni dba PC Celano Contracting." Thereafter, by Order of Discharge dated November 1, 2004, the debtor was issued a discharge of debts, including that of the plaintiffs herein.

During the course of the bankruptcy proceedings, the plaintiffs moved for a lift stay order which would authorize and permit them to continue the instant matter as against PC Celano Contracting and Victor Cavasinni. The Bankruptcy Court, by decision dated November 17, 2004 held, in pertinent part:

"As the Court reviews the instant motion, the Court finds that certainly there is no reason why the litigation can't continue against Victor Cavasinni, now the estate of Victor Cavasinni. Clearly, the stay cannot be lifted or should not be lifted in order for judgment to be sought against Peter Cavasinni. What is being sought, however, is not the latter relief, rather, to have Peter Cavasinni be deposed for purpose of enabling the Frazzettas to prosecute the action against Victor Cavasinni.

The Court believes that that request should be granted in that limited fashion, that certainly judgment cannot be sought nor obtained against Peter Cavasinni, but the stay can and should be lifted in order to enable him to be deposed.

The more problematic issue is whether or not the stay should be lifted in order to continue the prosecution as against P.C. Solano (*sic*) Contracting. The debtor contends that this is a sole proprietorship as to which he is the sole member, sole person affiliated with the same, that he filed the appropriate d/b/a papers, with Suffolk County and that were the Frazzettas to continue to prosecute the action as against Solano (*sic*) Contracting and obtain a judgment, it would be the same as prosecuting it as against him personally and as if the company itself had filed.

Certainly, to the extent that P.C. Solano (*sic*) Contracting is a sole proprietorship, the arguments of the debtor are correct, namely, that proceeding against P.C. Solano (*sic*) Contracting would be the same as if P.C. Solano (*sic*) Contracting had filed for bankruptcy, and further, on the basis of the two exhibits it appears that that is the case. However, the Court does believe that the Frazzettas should have the opportunity to seek discovery of Peter Cavasinni to determine whether or not P.C. Solano (*sic*) Contracting is indeed a sole proprietorship. If that is the case, and if, indeed, the State Court agrees and so finds, then the Frazzetta cannot proceed to trial against P.C. Solano (*sic*) Contracting, nor can a judgment be enforced and entered against P.C. Solano (*sic*) Contracting. That would be the same as going against Peter Cavasinni, and that would not be permitted under the Bankruptcy Code.”

In the instant proceeding, the defendant, Peter Cavasinni, has submitted an affidavit that he was the sole owner and proprietor of the defendant, P.C. Celano Contracting, and that such entity was not a corporation. In support of this representation, the defendant has submitted the following documents to substantiate his claim: a copy of the bankruptcy petition commenced in the name of “Peter Cavassini dba P.C. Celano Contracting” as debtor; letterhead of a copy of a letter to Suffolk County Department of Consumer Affairs dated February 3, 2000 identifying P.C. Celano Contracting as the correspondent; a copy of a Home Improvement Contractor License issued by Suffolk County to P.C. Celano Contracting dated March 21, 1996; a business certificate issued by Suffolk County to P.C. Celano Contracting dated July 24, 1995; Income Tax returns for the years 1997, 1998, 1999 and 2000 identifying the filer as Peter Cavasinni as proprietor of P.C. Celano Contracting; a Specialty Contractor Policy of Insurance issued by Maryland Casualty Company to Peter Cavasinni d/b/a P.C. Celano Contracting, in effect from March 7, 1998 through March 7, 1999; and copies of contracts between the parties herein dated November 19, 1998 and February 23, 1999 identifying the contractor as P.C. Celano Contracting. It is also noted that the plaintiffs commenced the instant action against P.C. Celano Contracting, and not against a corporate entity.

The plaintiff has failed to submit evidence to dispute defendant’s contention that he was the sole owner and proprietor of a business entity known as P.C. Celano Contracting, which entity was neither a corporation or partnership with any other person or entity. There is no indication that a search of the records of the New York Secretary of State was conducted or that a corporate certificate was filed on behalf of P.C. Celano Contracting, Inc. Accordingly, the Court finds that P.C. Celano Contracting is a sole proprietorship owned by Peter Cavasinni. Inasmuch as the debt of Peter Cavasinni to the plaintiffs, Joseph Frazzetta and Regina Frazzetta, was discharged by Order of the United States Bankruptcy Court for the Eastern District of New York, the claim of said plaintiffs as against the defendant, P.C. Celano Contracting, must also be dismissed in the instant action.

ORDERED, the plaintiff’s Second Cause of Action for fraud as against the remaining defendant, is dismissed for failure to state a claim. It is well settled in this jurisdiction that a cause of action alleging fraud does not lie where the only claim for fraud relates to a breach of contract. See, Wit Holding Co. v. Klein, 282 A.D.2d 527, 724 N.Y.S.2d 66, 68; Alamo Contract Builders, Inc. v. CTF Hotel Co., 242 A.D.2d 643, 663 N.Y.S.2d 42; McKernin v. Fanny Farmer Candy Shops, 176 A.D.2d 233, 574 N.Y.S.2d 58. A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege

fraud. Non-Linear Trading Co. v. Braddis Assocs., 243 A.D.2d 107, 675 N.Y.S.2d 5. A plaintiff may only assert fraud and breach of contract claims in the same complaint so long as the claim for fraud is not simply a misrepresentation of the promise to perform in the future. See, First Bank of the Americas v. Motor Car Funding, Inc., 257 A.D.2d 287, 291-291, 690 N.Y.S.2d 17. Under the circumstances presented, the alleged misrepresentations relating to the performance of work by defendants at the plaintiffs' residence are not sufficiently distinct from the breach of contract allegations, and therefore do not constitute a separate cause of action sounding in fraud. The Second Cause of Action must therefore be dismissed.

ORDERED, that the remaining portions of the cross-motion for dismissal for failure to file a note of issue and for preclusion are denied; and it is further

ORDERED, that within twenty (20) days of the date of the entry of this Order the plaintiffs are directed to respond to defendant's outstanding disclosure demands.

The foregoing constitutes the Order of this Court.

Dated: July 20, 2007

DENISE F. MOLIA

HON. DENISE F. MOLIA J.S.C.