

Verch v Peter Charles Associates, Ltd.

2008 NY Slip Op 33489(U)

December 18, 2008

Supreme Court, Nassau County

Docket Number: 15067/06

Judge: Kenneth A. Davis

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SCAN

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

JILL VERCH and ERIC VERCH,

Plaintiff,

SUBMISSION DATE: 12/3/08
INDEX No.: 15067/06

-against-

PETER CHARLES ASSOCIATES, LTD., PETER
CHARLES LOPIPERO, DIANE R. LOPIPERO,
IMPERIAL MARBLE AND GRANITE, LLC,
ISLAND STONE INC., JOHN SERINGER,
CONSUMER WHAREHOUSE CENTER INC. and
ULTRACRAFT CABINETRY a/k/a FRANKEL
RANDOLPH GROUP, INC.

MOTION SEQUENCE
#15,16,17

Defendants.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	XX
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Motion Sequence # 15 has been settled by stipulation of the parties.

Motion [Sequence # 016], by plaintiffs, Jill Verch and Eric Verch, for an Order, *inter alia*, pursuant to CPLR 2221, granting reargument of this Court's Decision and Order dated May 22, 2008; and,

Cross-motion [Sequence # 017], by defendants, Peter Charles Associates, Ltd., Peter Charles Lopipero and Diane R. Lopipero (collectively referred to herein as the "Peter Charles defendants"), for an Order, *inter alia*, pursuant to CPLR 3211(a)(7), dismissing the sixth cause of action contained in the

plaintiffs' amended complaint; the motions are determined as follows:

This action involves a contract between the plaintiffs, Jill and Eric Verch, and the Peter Charles defendants and related entities/persons, also named defendants in this matter, under which defendants were to perform construction, design and renovation work for plaintiffs at their residence located at 120 Ivy Lane, Lido Beach, New York 11561. Plaintiffs allege that the work was not properly performed, resulting in economic loss and further damages. Plaintiffs claim that they sustained damages in an amount not less than \$250,000 resulting from the defendants' breach of contract, delay in performance, defective and negligent workmanship, use of unlicensed contractors, subcontractors and workers, breach of express and implied warranties, fraud, defective design, and negligent misrepresentation in the renovation of the plaintiffs' premises.

Plaintiffs commenced this action on or about November 2, 2006. Issue was thereafter joined by the Peter Charles defendants, Imperial Marble and Granite, LLC, Island Stone, Inc. and Consumers Warehouse Center, Inc., through the service of Verified Answers. Defendants Seringer and Ultracraft Cabinetry defaulted.

On December 13, 2006, plaintiffs moved for an Order seeking a default judgment against Seringer and Ultracraft Cabinetry. The default judgment motion was unopposed by Ultracraft Cabinetry. Seringer, however, opposed the motion and asked this Court to "excuse" its default. This Court, by Short Form Order dated

February 8, 2007, in its discretion, vacated the default judgment against Seringer, but granted default judgment against Ultracraft Cabinetry.

On February 7, 2007, plaintiffs served their First Set of Interrogatories and their First Request for the Production of Documents. Apparently as a result of each defendants' blatant refusal to comply with discovery, by Notice of Motion dated March 15, 2007, plaintiffs moved, pursuant to CPLR 3124, to compel the defendants to comply with the outstanding discovery, including interrogatories and document demands. Thereafter, by Notice of Motion dated April 3, 2007, plaintiffs moved, *inter alia*, pursuant to CPLR 3211(b), for an Order dismissing the affirmative defenses raised by various defendants, including those interposed by Seringer. The Peter Charles defendants cross moved, pursuant to CPLR 3211(a)(7), dismissing the plaintiffs' causes of action against them. Notably, Seringer did not participate in the motion practice or any conferences resulting therefrom.

By Decision and Order dated July 20, 2007, this Court ordered: the Peter Charles defendants, Imperial Marble and Granite, LLC., Island Stone, Inc., John Seringer, and Consumers Warehouse Center, Inc. to respond to Plaintiffs' First Set of Interrogatories and Plaintiffs' First Request for Production of Documents within 30 days after service of a copy of the Order with Notice of Entry; and, granted that portion of plaintiffs' motion seeking to dismiss each and every one of Seringer's affirmative defenses.

Seringer and the Peter Charles defendants refused and failed

to comply with the July 20, 2007 Order. Apparently, defendants, Imperial Marble and Granite, LLC. and Island Stone LLC., also failed to comply with said Order as well. As noted in this Court's Order dated January 2, 2008, with the exception of defendant, Consumers Warehouse Center, Inc., the remaining defendants all failed to respond to the July 20, 2007 Order. Thus, plaintiffs, on September 20, 2007, made another discovery motion seeking the penalties of CPLR 3126 and the striking of defendants' - namely, Peter Charles defendants, Imperial Marble, Island Stone and John Seringer - answers.

The Peter Charles defendants and Seringer failed to oppose plaintiffs' motion to strike. However, the Court, in its discretion under CPLR 3124 and 3126, in an Order issued on January 2, 2008, held, as follows:

It is hereby ordered that the defendants shall reply to the demands for Interrogatories and Documents within 20 days from the date of entry of the instant Order. The failure to respond will result in the striking of the defaulting parties answer and plaintiff shall be permitted to file a Note of Issue for an Inquest against the non-complying parties.

The January 2, 2008 Order was entered on January 7, 2008 (*Aff in Opp to Seringer's Motion*, Ex. A); thus, the non-complying parties had until January 28, 2008¹ to respond to plaintiffs'

¹Technically, defendants' responses to plaintiffs' demands were due on January 27, 2008 - i.e., twenty days from the date of the January 2, 2008 Order; however, because January 27, 2008 was a Sunday, defendants were allowed until January 28, 2008 to serve their responses to

discovery demands. The January 2nd Order also permitted the plaintiffs to file a Note of Issue for an Inquest in the event that the defendants failed to respond to their discovery demands within the requisite time. Plaintiffs thus filed a Note of Issue on January 30, 2008.

Thereafter, the Peter Charles defendants and Seringer, separately moved to be relieved from the terms of the January 2, 2008 Order and to vacate the Note of Issue. Seringer also sought an Order extending his time, *nunc pro tunc*, for his response to plaintiffs' discovery demands, for a period of 15 days, until February 11, 2008, thereby deeming his discovery Response as having been timely made.

This Court in an Order dated May 22, 2008 decided that as Seringer provided his Response to plaintiffs' demands on February 8, 2008,² albeit the Court was not entirely persuaded that Seringer's conduct was not willful and intentional (*cf.*, *Perellie v. Crimson's Rest.*, 108 AD2d 903, 904), defendant showed a good cause for the extension of time for his response to plaintiffs' discovery demands as set forth in the January 2nd Order (*Judith S. v. Howard S.*, 46 AD3d 318 [1st Dept. 2007]). This Court also found that Seringer had a meritorious defense or claim - namely, law office failure. Accordingly, Seringer's motion, pursuant to CPLR 5015(a), relieving him from the terms of this Court's Order dated January 2, 2008 was granted.

plaintiffs' discovery demands.

²Seringer's response was rejected by plaintiff's counsel as untimely.

Similarly, this Court in its May 22, 2008 Order also relieved the Peter Charles defendants from the January 2, 2008 Order. As for the vacatur of the Note of Issue, this Court, determined that in the absence of any indication that there remained any outstanding discovery, Seringer and the Peter Charles defendants' motion to vacate the Note of Issue was denied. Also in its May 22, 2008 Order, this Court granted a motion brought by non-party "Edward Frankel and Bob Randolph, Inc." for an Order vacating the default judgment against the "a/k/a Frankel-Randolph Group Inc." of the named defendant "Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc." This Court found that non-party "Edward Frankel and Bob Randolph, Inc." had an interest in protecting itself from plaintiffs' attempts to execute on the default judgment against Ultracraft Cabinetry which plaintiff baldly asserts is "also known as" the Frankel-Randolph Group Inc. As to the merits of its application, this Court determined that the movant non party, as "an[] interested person," was never named in the lawsuit and was never properly served with a summons and complaint. Thus jurisdiction against the movant could not be sustained in this case and therefore the motion to vacate the default judgment against the a/k/a was granted. This Court also determined that "to the extent that there is a case against the movant, plaintiffs' action as against the movant is dismissed against it." This Court found that as there is no action against the movant, there is no need to "dismiss" plaintiffs' action.

The May 22, 2008 Order forms the basis for the within motions.

It must first be noted however that on December 3, 2008, the parties, at a Conference before this Court, stipulated and agreed that the motion by the Peter Charles defendants to vacate the Note of Issue is granted as to all defendants except Imperial Granite & Marble, LLC., Island Stone Inc., and Ultracraft Cabinetry. The Note of Issue is vacated as against Peter Charles defendants, Seringer and apparently also Consumers. Plaintiff is scheduled to take an inquest as to Imperial, Island Stone and Ultracraft Cabinetry on January 22, 2009.

Plaintiffs' motion for an Order granting them leave amend their summons and complaint to add as a defendant "Edward Frankel and Bob Randolph, Inc." is denied. While amendment of a pleading should be freely granted (CPLR 3025[b]), it may be denied where the proposed amended cause of action plainly lacks merit (*Lucido v. Mancuso*, 49 AD3d 220, 221-22 [2nd Dept. 2008]). This Court stated in its Decision and Order dated May 22, 2005, that "Edward Frankel and Bob Randolph, Inc." is an "interested party" within the meaning of CPLR 5015(a). However, as stated in the May 22nd Decision, and again in support of their instant motion to amend, plaintiffs have failed to establish or even allege a relationship between the acts of the movant corporation and plaintiffs' causes of action. Jurisdiction over this New Jersey non party corporation cannot be sustained in this case. This Court stated in its May 22nd Order and again reiterates now that plaintiffs' action against the nonparty New Jersey corporation is dismissed for want of jurisdiction. Accordingly, plaintiffs' motion to amend the complaint to add as a

defendant "Edward Frankel and Bob Randolph, Inc." is denied.

As stated in this Court's May 22nd Order, the default judgment against defendant Ultracraft Cabinetry (without the a/k/a) stands. Also as stated above, and as agreed to by the parties at a conference before this Court on December 3, 2008, the Peter Charles defendants' motion to vacate the note of issue is granted as against all defendants except, including Ultracraft Cabinetry. For these reasons, plaintiffs' motion to reargue that branch of the May 22, 2008 Order which vacated the default judgment against Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc. is denied.

Plaintiffs' motion to reargue that branch of the May 22, 2008 Order which vacates the default judgment against Seringer and the Peter Charles defendants is also denied.

A motion to reargue is to be granted when the court overlooks or misapprehends the law or facts in the determination of its prior decision (CPLR 221[d]; *Diorio v. City of New York*, 202 AD2d 625 [2nd Dept. 1994]; *Pro Brokerage Inc. V. Home Ins. Co.*, 99 AD2d 971 [1st Dept. 1984]). The purpose of a motion to reargue is not to afford an aggrieved party a second chance (*Pro Brokerage Inc. v. Home Ins. Co.*, supra). The party seeking a motion to reargue must set forth the facts or law the court overlooked in making its original decision.

In its May 22, 2008 Order, this Court "excused" the defendants' default of its January 2, 2008 Order. Plaintiffs submit that in doing so, the Court misapprehended and/or overlooked the fact that the defendants have yet to comply with all of the

outstanding discovery. Plaintiffs claim that the defendants never responded to their demands for the production of documents and that there has not been any compliance with their discovery demands such that this Court excuse the continued contumacious behavior of the Seringer and the Peter Charles defendants. Plaintiffs submit that defendants' continued failure to respond to plaintiffs' document demands despite the numerous court orders repeatedly granting them additional opportunities to comply has been overlooked by this Court and reargument is not only proper but it is necessary to preserve the integrity of this Court's order.

Plaintiffs' second basis for reargument is that the reasonable excuse proffered by the defendants - i.e., law office failure - for their contumacious behavior is insufficient. As to Seringer, plaintiffs' submit that this Court's determination that Seringer proffered a meritorious defense overlooks the fact that this Court by its prior Order dated July 20, 2007, struck seven of the ten affirmative defenses contained in Seringer's verified answer; thus, plaintiffs argue that Seringer's Verified Answer accepted in lieu of an Affidavit of Merit is insufficient as a matter of law and therefore his application to vacate the default of the January 2, 2008 Order is insufficient.

As to the Peter Charles defendants, plaintiffs argue that the general assertion of law office failure or legal malpractice asserted by defendants' present counsel is unsupported by anyone with personal knowledge of the defendants' prior representation and provides no viable excuse for not complying with this Court's

Orders regarding discovery.

It is undisputed that the defendants served (and the plaintiffs received) a response to their First Set of Interrogatories. As to plaintiff's First Request for the Production of Documents, this Court notes that the demanded documents were in fact served upon the plaintiffs in September 2007. Defendants also annex a copy of their response in opposition to plaintiffs' instant motion to reargue. While it is certainly true that not all of the document demands were met, defendants' response thereto is that such requests were onerous and clearly the type of demands for which a protective order should issue, *infra*. Further, the production of most of the documents demanded certainly precludes this Court from granting plaintiffs' motion to strike or granting the instant motion to reargue this Court's decision dated May 22, 2008.

Plaintiffs' motion to reargue that branch of the May 22nd Order which vacates the default judgment against Seringer and the Peter Charles defendants is denied. The vacatur of these defendants' default stands. As the Note of Issue has already been vacated (in the conference before this Court on December 3, 2008), discovery shall proceed and plaintiffs' alternative request to vacate the note of issue and allowing discovery to proceed is moot.

Under these circumstances, plaintiffs' application for sanctions against the Peter Charles defendants is also denied.

Plaintiffs' motion for an Order granting them leave to amend their summons and complaint to add Norcraft Companies LLC as a

defendant is granted. Plaintiffs base this request upon the fact that defendant Ultracraft Cabinetry is a division of Norcraft Companies, LLC. As there is no opposition to this motion, and as plaintiffs are well within the statute of limitations with regard to amending the summons and complaint to add them as a defendant, said motion to amend the complaint is herewith granted.

The cross motion by the Peter Charles defendants dismissing plaintiffs' sixth cause of action contained in the amended complaint on the grounds that it no longer states a cause of action is granted. Plaintiffs oppose this motion on the grounds that this Court has previously denied this exact same application by the defendants for this same relief.

Plaintiffs' sixth cause of action sounds in fraudulent conveyance and is asserted against Peter Charles and Diane Lopipero. The thrust of this cause of action is that upon receiving notice of plaintiffs' intent to pursue legal remedies against the defendants for, *inter alia*, defective and negligent workmanship under their contract, defendant Peter Charles, in contemplation of the lawsuit transferred title to his residence at 1006 West Shore Drive, Oyster Bay, New York which he jointly owned with his wife, defendant, Diane Lopipero out of his name and into his wife's name only. Plaintiffs allege that this transfer was without consideration and/or nominal consideration and was intended to remove assets out of his name in order to become judgment proof from the plaintiffs. Plaintiffs allege that his transfer is a fraudulent conveyance and a voidable transaction that was conducted

in order to avoid a potential judgment. Plaintiffs allege that this transfer is in violation of the Debtor and Creditor Law §273-a and is improper and illegal. Plaintiffs seek the following relief for this cause of action:

127. Accordingly, the aforesaid conveyance should be deemed void by this Court and any further conveyance of the aforesaid house located at 1006 West Shore Drive, Oyster Bay, New York to any other third party should be restrained until a final determination is made in the underlying within action.

In interposing this cause of action, plaintiffs also filed with the Nassau County Clerk a Notice of Pendency regarding title to the property at 1006 West Shore Road, Oyster Bay, New York.

The Peter Charles defendants in this case, now submit a copy of the deed to the property known as 1006 West Shore Road, Oyster Bay, New York dated June 30, 2008 whereby Diane R. Lopipero has transferred title to this property out of her name and back into her and her husband as tenants by the entirety. In its prior orders, this Court determined that defendants' motion to dismiss the sixth cause of action for failure to state a cause of action is denied. However, in light of this transaction, this Court grants the Peter Charles defendants' motion to dismiss the sixth cause of action as it is now moot. The sixth cause of action in the amended complaint and the ad damnum clause of the complaint ask this Court to void that transfer thereby placing title back in Peter Charles Lopipero and Diane R. Lopipero, as tenants by the entirety. The deed transferring title to Diane R. Lopipero individually has effectively been voided. The defendants have transferred title to

that real property as it was before the transfer of title in the deed dated September 13, 2006 and the plaintiffs have been restored status quo ante. As such, the cause of action is dismissed as moot.

The Court herewith directs the plaintiffs to file with the Nassau County Clerk a cancellation of the Notice of Pendency filed against the marital residence of Peter Charles and Diane Lopipero at 1006 West Shore Road, Oyster Bay, New York.

The Peter Charles defendants also move for a protective order with regard to the request for the production of documents served by the plaintiffs herein upon them upon the grounds that while some of the demands have been produced, others should be stricken because they demand extensive amounts of irrelevant information, call for opinions and interpretations and seek material not only irrelevant to the causes of action alleged but also information which cannot conceivably lead to relevant information and are otherwise overly onerous and are designed to harass the defendants.

Pursuant to CPLR 3122(a):

Within twenty days of service of a notice or subpoena duces tecum under rule 3120 or section 3121, the party or person to whom the notice or subpoena duces tecum is directed, if that party or person objects to the disclosure, inspection or examination, shall serve a response which shall state with reasonable particularity the reasons for each objection. ***

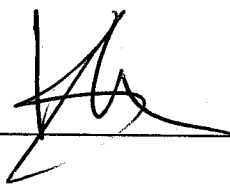
It is clear in this case, that the plaintiffs served their First set of Interrogatories and First Request for the Production of Documents on February 7, 2007. The Peter Charles defendants have clearly missed their opportunity to object to the discovery demands as they admittedly served their responses September 14, 2007 and

that in response to this Court's Order dated July 20, 2007. The failure of a party to challenge the propriety of a notice for discovery and inspection within the time prescribed by the rule forecloses inquiry into the propriety of the information sought except with regard to material that is privileged or requests that are palpably improper (*Otto v. Triangle Aviation Services, Inc.*, 258 AD2d 448, [2nd Dept. 1999]).

Accordingly, the Peter Charles defendants' motion for a protective order is denied.

This shall constitute the decision and order of this Court.

Dated: DEC 18 2008



KENNETH A. DAVIS

J.S.C.

ENTERED

JAN 02 2009

*** HARRIS COUNTY
COUNTY CLERK'S OFFICE