

**Arena of Long Beach, NY, Inc. v City of Long
Beach, N.Y.**

2010 NY Slip Op 30815(U)

April 5, 2010

Supreme Court, Nassau County

Docket Number: 007810/09

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

THE ARENA OF LONG BEACH, NY, INC.,

Plaintiff,

-against-

THE CITY OF LONG BEACH, NEW YORK
and CHARLES T. THEOFAN, as CITY
MANAGER OF THE CITY OF LONG BEACH,

Defendants.

TRIAL/IAS, PART 2
NASSAU COUNTY

INDEX No. 007810/09

MOTION DATE: March 2, 2010
Motion Sequence # 002

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Supplemental Affidavit in Support..... X
- Supplemental Affirmation in Opposition... X
- Reply Affidavit X

This motion, by plaintiff The Arena of Long Beach, N.Y., Inc. (the Arena), pursuant to CPLR 1002 to join Bernard Sherech as an additional plaintiff, for leave pursuant to CPLR 3025(b) to amend the complaint in the form annexed to the moving papers and alternatively, if found necessary, for leave to serve an amended or supplemental notice of claim is determined as hereinafter provided.

BACKGROUND

In or about October 6, 2006, plaintiff Arena took possession of a recreational enclosed facility used for ice skating and hockey, known as the Long Beach Ice Arena located at 150 West Bay Drive, Long Beach, New York pursuant to the assignment of an amended lease.

The original tenant named in the lease was Long Beach Arena Inc., also known as the Santini Group, which is not a party to this action. Plaintiff apparently remained at the premises pursuant to what it alleges was a further lease agreement (commencing in or about May 1, 2007) for a term of ten years, to begin at the expiration of the original lease term, with two ten year renewal options. The parties further allegedly agreed at that time to continue the existing rent moratorium. Notwithstanding these agreements, and what plaintiffs characterize as the parties' expressed intention to reach an agreement as to an appropriate rent for the lease period and any extension thereof, defendant served plaintiff with a thirty day notice to quit calling for plaintiff to vacate the premises no later than April 30, 2009 and instituted an eviction proceeding in the Long Beach City Court based on plaintiff's failure to pay rent due as of April 1, 2009. The proceeding was withdrawn on April 7, 2009 upon execution of an agreement pursuant to which plaintiff surrendered possession of the property on or about May 19, 2009.

In this action, commenced on or about April 23, 2009, plaintiff seeks to recover money damages stemming from defendants' alleged breach of the various purported agreements between plaintiff corporation and defendant City of Long Beach. The notice of claim served on the City of Long Beach on April 22, 2009, pursuant to General Municipal Law § 50-e, lists there claims: 1) tortious interference with the lease and occupancy of the Arena; 2) tortious interference with plaintiff's business contracts and prospects; 3) slander of plaintiff corporation and its president, Bernard Sherech, in the community in which they do business.

Plaintiffs seek leave to amend their original complaint which asserted causes of action for declaratory relief that plaintiffs possess an enforceable lease, breach of contract, loss of profits, unjust enrichment and injunctive relief. The proposed amended complaint, in addition to supplementing plaintiffs' breach of contract and unjust enrichment claims, purports to assert two additional causes of action for conversion, defamation and tortious interference with contract.

Defendant opposes plaintiffs' motion predicated on the three pronged contention that

1) plaintiffs' cause of action for defamation lacks merit; 2) plaintiffs' notice of claim is jurisdictionally defective as it fails to delineate the required specific facts and circumstances underlying the proposed new causes of action; and 3) plaintiffs have failed to proffer a reasonable excuse for their delay in filing a legally sufficient notice of claim. Moreover, defendant alleges that plaintiffs were aware of the proposed defamation claim since the publication of the alleged defamatory statements in or about April and May 9, 2009 yet failed to include them in the original complaint.

DECISION

Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. (*Tyson v Tower Ins. Co. of New York*, 68 AD3d 977, 2nd Dept., 2009). Mere lateness, unless coupled with prejudice, does not bar amendment. (*Matter of Ronson*, 32 AD3d 956, 958, 2nd Dept., 2006). In order to establish prejudice, which must be significant, there must be some indication that the opposing party will be hindered in the preparation of its case or prevented from taking some measure to support its position. (*Spitzer v Schussel*, 48 AD3d 233, 2nd Dept., 2008). A defendant cannot legitimately claim surprise or prejudice where the proposed amendment is premised upon the same facts, transactions or occurrences alleged in the original complaint. (*Janssen v Incorporated Village of Rockville Centre*, 59 AD3d 15, 27, 2nd Dept., 2008).

The decision whether to grant leave to amend a pleading rests within the discretion of the court. (*Gitlin v Chirinkin*, 60 AD3d 901, 902, 2nd Dept., 2009). Here, the plaintiffs' proposed amendments are neither palpably insufficient nor patently devoid of merit. Moreover, defendant has not demonstrated that it will suffer prejudice or surprise in the event leave to amend were granted. Defendant cannot legitimately claim surprise or prejudice inasmuch as the proposed amendments are premised on the same facts, transactions, occurrences alleged in the original complaint. (*Janssen v Incorporated Village of Rockville Centre*, *supra* at p. 27).

Given that defendant City of Long Beach examined the individual plaintiff, Bernard Sherech at the General Municipal Law §50-h hearing regarding the tortious interference and defamation alleged in the proposed amended complaint and set forth in the original notice of claim, and given that said defendant has not yet served an answer, there is no basis to conclude that defendant would be prejudiced by plaintiff's service of the proposed amended complaint with respect to these claims.

Protection from defamation is afforded where the person making the statement does so fairly in the discharge of a public or private duty in which the person has an interest and where the statement is made to a person or persons with a corresponding interest or duty. (*Jung Hee Lee Han v State of New York*, 186 AD2d 536, 537, 2nd Dept., 1992). Whether, and the extent to which, the defamatory statements alleged in the proposed amended complaint are protected by privilege as urged by defendant, cannot be determined on the record at this stage of the proceeding. Nor can it be said that plaintiffs' allegations, while disputed, are patently devoid of merit for the limited purpose of sustaining the currently proposed amendments.

Since the proposed conversion claim asserted in the third cause of action of the amended complaint did not arise until May 18, 2009, when plaintiff surrendered the leased premises, it could not have been included in the original complaint and can properly be asserted in the amended complaint.

Given that plaintiffs are entitled to leave to amend the complaint, in the interests of judicial economy, plaintiffs shall serve an amended notice of claim on defendant reflective of the claims asserted in the amended complaint of which defendant has been well aware since at least the 50-h hearing.

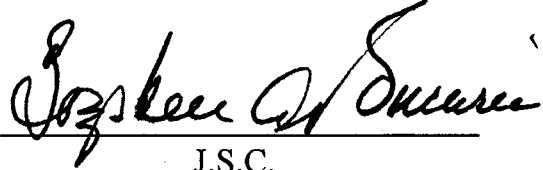
A notice of claim must set forth, *inter alia*, "the time when, the place where and the manner in which the claim arose." General Municipal Law § 50-e[2]. General Municipal Law § 50-e(6), authorizes the court, in its discretion, to grant leave to serve an amended notice of claim where an error in the original notice of claim was made in good faith, and where the other party has not been prejudiced thereby. (*Delaney v Town of Islip*, 63 AD3d 658, 660, 2nd Dept., 2009; *Gatewood v Poughkeepsie Housing Authority*, 28 AD3d 515, 2nd Dept., 2006).

Accordingly, the plaintiff's motion is **granted**.

A Preliminary Conference has been scheduled for May 20, 2010 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated

5 April 10


J.S.C.

ENTERED

APR 06 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE