

360 W. 11th St. LLC v ACG Credit Co. II, LLC

2010 NY Slip Op 32123(U)

August 2, 2010

Sup Ct, NY County

Docket Number: 600141/06

Judge: Eileen Bransten

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

PRESENT

PART 3

Index Number : 600141/2007

360 WEST 11TH LLC

vs

ACG CREDIT COMPANY

Sequence Number : 008

AMEND SUPPLEMENT PLEADINGS

INDEX NO. 600141/07

MOTION DATE 3/11/10

MOTION SEQ. NO. 008

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for Amend

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

AUG 04 2010

NEW YORK
COUNTY CLERK'S OFFICE

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 8-2-10



HON. EILEEN BRANSTEN 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: PART 3

-----X
360 WEST 11TH STREET LLC, and
360 DEVELOPMENT CORP.,

Plaintiffs,

Index No. 600141/07
Motion Date: 3/11/10
Motion Seq. No.: 008

-against-

ACG CREDIT COMPANY II, LLC,

Defendant.

-----X
-----X

ACG CREDIT COMPANY II, LLC,

Counterclaim Plaintiff,

-against-

360 WEST 11TH STREET LLC, and
360 DEVELOPMENT CORP.,

Counterclaim Defendant,

FILED

AUG 04 2010

COUNTY CLERK'S OFFICE
NEW YORK

-----X
-----X

ACG FINANCE COMPANY, LLC, as successor in interest to
ACG CREDIT COMPANY II, LLC,

Third-Party Plaintiff,

-against-

JULIAN SCHABEL,

Third-Party Defendant.

-----X
BRANSTEN, J.:

In motion sequence number 008, Plaintiff and Counterclaim Defendants 360 West
11th Street LLC and 360 Development Corp. (collectively, "360") move pursuant to CPLR

305 and § 1003 for leave to add as defendants by service of a Supplemental Summons: (1) Daniel Bildner, Esq.; (2) Ian Peck; (3) William F. Dahill, Esq.; (4) Matthew B. West, Esq.; and (5) the law firm Wollmuth Maher & Deutsch LLP (collectively, the “Proposed Defendants”). Plaintiff further seeks, pursuant to CPLR 3025 (b), leave to serve and file a Second Amended Complaint to add claims against the current and Proposed Defendants. Defendant ACG Finance Company, as successor-in-interest to ACG Credit Company II, LLC (“ACG”) opposes.

Background

This action arises out of a February 2006 \$8 million loan (the “Loan”) made by defendant ACG to 360. The Loan was made pursuant to a February 10, 2006 Loan Agreement. Through the loan, ACG obtained a first priority mortgage on 360 West 11th Street in Manhattan (the “Property”).

ACG contends that under the terms of the Loan Agreement the only permitted encumbrance upon the Property was a previously existing \$786,000 mortgage with IISBC. ACG alleges that despite this provision of the Loan Agreement, when the Loan was issued another mortgage existed on the Property, a \$1.1 million home equity line of credit (the “HELOC”). ACG argues that the HELOC was an unpermitted encumbrance upon the Property, but that 360 chose not to pay off the HELOC upon receiving the Loan. As a result, ACG alleges that 360 was knowingly in default upon executing the Loan Agreement.

In late 2006, ACG declared certain Events of Default, as defined by the Loan Agreement, against 360.

In the same time period, 360, seeking to refinance the Loan, commenced this action in January of 2007, requesting, *inter alia*, that ACG provide a Loan payoff letter.

ACG answered and counterclaimed in March 2007. ACG claimed, in its 5th counterclaim, that it was due \$42,886 in attorneys' fees pursuant to the Loan Agreement. The attorneys' fees sought included \$25,596 for Greenberg Traurig fees, \$16,070 for Purrington Moody Weil fees and \$1,200 for Stonewater Partners fees.

In January 2009, ACG moved to amend its counterclaims to add a claim for fraud. ACG alleged that 360 had failed to identify the HELOC as a Permitted Encumbrance under the Loan Agreement and/or had failed to pay off the HELOC upon closing of the Loan.

ACG contends that 360 was "[i]ncensed by ACG's fraud claim" (Memorandum of Law in Opposition to Plaintiffs' Motion for Leave to Assert a Second Amended Complaint ["Plaintiff's Opp. Memo."]), p 6). ACG argues that in February of 2009, after ACG filed its counterclaim for fraud, 360's counsel, Mr. Larry Hutcher, wrote to both Mr. Philip Cohen, of Greenberg Traurig, and Mr. William Dahill, of Wollmuth Maher & Deutsch LLP, ACG's counsel. In letters to each Mr. Cohen and Mr. Dahill, 360's counsel allegedly accused both gentlemen of providing to this court misleading testimony. Counsel for 360 is further alleged to have threatened Messrs. Cohen and Dahill with the possibility of claims against them pursuant to 22 NYCRR § 130-1.1(a) and NY Judiciary Law § 487.

This court granted ACG leave to amend its counterclaims and assert its counterclaim for fraud against 360 on August 20, 2009.

Plaintiff brought this current motion to amend the complaint and add the Proposed Defendants on October 28, 2009. 360's proposed new claims focus upon the Greenberg Traurig invoices and the Proposed Defendants' conduct and testimony with respect thereto. 360 makes no statements regarding the Purrington Moody Weil or Stonewater Partners' fees.

360's proposed new claims are based upon its assertion that ACG's claim for reimbursement for legal services provided by Greenberg Traurig is improper. 360 asserts that ACG, Mr. Peck and Mr. Bildner have knowingly misstated the nature of the Greenberg Traurig legal services by falsely claiming that the services were for the administration and enforcement of the Loan. 360 asserts that most of Greenberg Traurig's services were unrelated to the administration and enforcement of the Loan and are therefore not 360's responsibility. 360 further asserts that ACG's current counsel, Messrs. Dahill and West and their firm of Wollmuth Maher & Deutsch LLP improperly continue to assert the claims for attorneys' fees despite knowing of the falsity of ACG's and Messrs. Peck's and Bildner's testimony.

Plaintiff seeks to add a seventh cause of action against Daniel Bildner, Esq. and an eighth cause of action against William F. Dahill, Esq., Matthew B. West, Esq. and the law firm Wollmuth Maher & Deutsch LLP pursuant to New York Judiciary Law § 487. Plaintiff

further seeks to add a ninth cause of action against ACG and Ian Peck and a tenth cause of action against William F. Dahill, Esq., Matthew B. West, Esq. and the law firm Wollmuth Maher & Deutsch LLP (“WMD”) pursuant to 22 NYCRR § 130-1.1 (a).

Discussion

The CPLR provides that a party may amend its pleading “at any time by leave of the court” and that such leave “shall be freely given” (CPLR 3025 [b]). Leave to amend a pleading rests upon the discretion of this, the trial, court (*see Loewentheil v White Knight, Ltd.*, 71 AD3d 581, 581 [1st Dept 2010]). While leave to amend is to be freely given, leave must be denied where the proposed amendment is plainly lacking in merit (*see Bd. of Managers of Gramercy Park Habitat Condo. v Zucker*, 190 AD2d 636, 636 [1st Dept 1993]; *Butt v New York Medical College*, 7 AD3d 744, 745 [2d Dept 2004]). The court should also deny a motion for leave to amend a complaint if the proposed amendment is palpably insufficient or would prejudice or surprise the defendant (*Martin v Village of Freeport*, 71 AD3d 745, 745 [2d Dept 2010]; *Atlantic Mut. Ins. Co. v Greater New York Mut. Ins. Co.*, 271 AD2d 278, 280 [1st Dept 2000]).

A. Plaintiffs’ Proposed Claims Pursuant to New York Judiciary Law § 487 (Proposed Claims Seven and Eight)

New York Judiciary Law § 487 states that “an attorney or counselor who (1) [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with the intent to deceive

the court or any party” . . . may “forfeit[] to the party injured treble damages, to be recovered in a civil action.”

360’s proposed seventh cause of action is against ACG’s former counsel, Bildner. 360 claim that Mr. Bildner made false statements and submitted false testimony to, and withheld information from, this court concerning the legal services rendered by his firm, Greenberg Traurig, to ACG. 360 further claims that Mr. Bildner knowingly misrepresented 360’s responsibility Greenberg Traurig’s services.

360’s proposed eighth cause of action is against ACG’s current counsel, Dahill and West, as well as the firm of which they are a part, WMD. 360 claims that Messrs. Dahill, West and WMD, in their capacity as counsel for ACG, and with an intent to deceive, withheld pertinent information from the court concerning: (1) the nature of Greenberg Traurig’s legal services rendered to ACG and 360’s responsibility therefore; (2) ACG’s knowledge of the HELOC and ACG’s possession of documents relating to the HELOC; and (3) the alleged false testimony of Messrs. Bildner and Peck. 360 further alleges that Dahill, West and WMD pursued claims in this action which they knew were based upon false testimony.

360 claims that but for the actions alleged in its proposed seventh and eighth causes of action, that it has been forced to defend claims “they should and would never have been involved in but for such misconduct (Proposed Second Amended Complaint, ¶¶ 141, 146).

360 goes beyond this contention in its Memorandum of Law in Support of Plaintiffs' Motion for Leave to Assert a Second Amended Complaint ("Plaintiffs' Memo."), contending that "[b]ut for these frauds [committed by the Proposed Defendants], this litigation never would have been commenced or pursued, and 360 would not have been forced to incur the extensive expenses it has incurred, and continues to incur [], in this action" (Plaintiffs' Memo. at 18).

Sufficiency of the 360's Proposed Seventh and Eighth Causes of Action

ACG contests the addition of 360's proposed seventh and eighth causes of action on the grounds, among others, that the claims are without merit. ACG first contends that Section 487 is applicable only to chronic and continued delinquent conduct and that no such conduct was here present. ACG next contends that the claimed delinquent conduct must be by an attorney and that proposed defendant Bildner was not acting as an attorney in his allegedly delinquent conduct. Third, ACG argues that 360 cannot establish damages as a result of the allegedly delinquent conduct. ACG further argues that 360's contention is but a litigation dispute.

In order to find liability under Section 487, it is usual that the court find a chronic and extreme pattern of legal delinquency (*see Markard v Bloom*, 4 AD3d 128, 129 [1st Dept 2004] [internal citation omitted]; *Havell v Islam*, 292 AD2d 210, 1st Dept 2010)). However, plaintiffs are correct that Section 487 states no requirement that a pattern of misconduct be present, and case law exists supporting liability under the section should a single act of

delinquent conduct be found sufficiently egregious (*see Trepel v Dippold*, 2005 WL 1107010, * 4 [SD NY 2005]). Egregious non-pattern conduct sufficient to state a claim under Section 487 has been found upon submitting a letter containing false statements in order to enable a client to remove seized property, manipulating the court to request sole ownership of a bank account while knowing another state's court had restricted access to that bank account, submitting a false embalming certificate to prevent an insurance company from verifying a claim and procuring an arrest warrant using fake information (*id.* [listing cases]).

Proposed Seventh Cause of Action

Upon review of the papers before this court, 360 has not demonstrated that Mr. Bildner has either exhibited a pattern of delinquent behavior or exhibited a single instance of delinquent behavior, let alone one so egregious as to give rise to liability under Section 487. Mr. Bildner stated the facts as he knew them, and answered the questions regarding those facts that were presented to him by 360's counsel at deposition. Should 360 contest the amount of Greenberg Traurig's bill or the services rendered thereunder, they may do so at trial. 360's proposed seventh cause of action against Mr. Bildner is without merit and therefore must be denied (*Bd. of Managers of Gramercy Park Habitat Condo. v Zucker*, 190 AD2d at 636). Because 360 alleges wrongdoing by Mr. Bildner only in its proposed seventh cause of action, 360 is also denied leave to add Mr. Bildner as an additional defendant.

Proposed Eighth Cause of Action

360's motion to amend its complaint for a second time to add a claim pursuant to New York Judiciary Law § 487 against Dahill, West and WMD must also be denied. 360 contends that these proposed defendants intentionally withheld information regarding "defendants' knowledge of the existence of the HELOC and possession of documents pertaining to same," submitted false testimony upon the alleged knowledge of the existence of the HELOC and now submit claim for fees due "grounded on the claim that defendant did not know, and was not informed, of the existence of the HELOC prior to the closing" of the Loan. 360 misstates the defendants' allegations. As noted in this court's August 20, 2009 Decision, defendants' assertions do not go toward their knowledge of the HELOC, but rather, 360's alleged failure to disclose the HELOC as an encumbrance upon the property or to pay off the HELOC upon receipt of the Loan, thereby placing 360 in default. Defendants have sufficiently posited that claim. 360's proposed eighth cause of action is also without merit and therefore must be denied (*Bd. of Managers of Gramercy Park Habitat Condo. v Zucker*, 190 AD2d at 636).

Because the court denies 360 leave to amend the complaint to add the proposed seventh and eighth causes of action based on the above grounds, the court need not address the sufficiency of the remainder of ACG's arguments, including 360's alleged delay in putting forth the proposed Second Amended Complaint.

**B. Plaintiff's Proposed Claims Pursuant to 22 NYCRR § 130-1.1 (a)
(Proposed Claims Nine and Ten)**

Prejudice

Delay in Bringing the Claims

360's moving papers argue that ACG will not be unfairly prejudiced by the proposed new claims. 360 asserts that it has not relevant discovery to provide to ACG, as the claims center around ACG's and the Proposed Defendants' own knowledge. 360 states that any discovery relevant to the claims has been accomplished, and that ACG has been on notice of the claims since at least the Hutcher letters in early 2009. Finally, despite the fact that 360 seeks to add four individuals, including ACG's current counsel their law firm as defendants, 360 claims that "the universe of trial witnesses and documentary evidence exhibits hardly changes whether or not the requested amendment is permitted" (Plaintiff's Memo. at 24).

ACG argues that 360's proposed new causes of action, and particular the proposed seventh cause of action against former ACG counsel Mr. Bildner, will prejudice ACG by causing significant delay in this matter. ACG alleges that Mr. Bildner must have time to retain counsel and for that counsel come up to speed on the case and that all new parties must have the time necessary to take discovery and make motions.

While the court is cognizant that a delay in these proceedings may be both costly and time-consuming, the delay may be compensated in interest should ACG ultimately receive a judgment in its favor. Delay alone is not so significantly prejudicial so as to deny 360 the

ability to amend on that ground (*see Masterwear Corp. v Bernard*, 3 AD3d 305, 306 [1st Dept 2004] [“mere lateness is not a barrier to an amendment. Lateness must be coupled with significant prejudice]). ACG’s argument that 360’s proposed new causes of action should be denied on the grounds that delay in the matter will cause prejudice is therefore denied.

Proposed Eighth and Tenth Cause of Action

ACG contends that should 360’s proposed new eighth and tenth causes of action against Dahill, West and WMD be allowed, the claims will result in ACG’s current counsel being forced to resign from this near trial-ready matter. ACG contends that it will thus be deprived of its counsel of choice. In response, 360 claims that any such resignation would be at the defendants’ discretion and will not lead to prejudice, as “presumably both defendants and defense counsel will be asserting the same defense” (Plaintiffs’ Reply Memorandum of Law in Further Support of Their Motion for Leave to Assert a Second Amended Complaint [“Plaintiffs’ Reply Memo.”] at 6).

The addition of 360’s proposed eighth and tenth causes of action will prejudice ACG. 360 is correct in that, at least without a motion to disqualify by 360, withdrawal from this matter by counselors Dahill, West and WMD may be a matter of choice. However, it is a “choice” shaped by the Code of Professional Responsibility.

The “advocate-witness” rule requires an attorney to withdraw from a case where it is likely that he will be called as a witness (Code of Professional Responsibility DR 5-102, 22

NYCRR 1200.21). Disciplinary Rule 5-102 (a) states that a “lawyer shall not act . . . as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client.” Rule 5-102 provides exceptions to this general rule, none of which apply here. The rule further states that “[n]either a lawyer nor the lawyer’s firm shall accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer’s firm may be called as a witness on a significant issue other than on behalf of the client” (DR 5-102 [b]). While the attorney may continue with the representation until it is “apparent” that the testimony may be prejudicial to the client (DR 5-102 [c-d]), the court will not force ACG and its counsel to decide between its counsel of choice and a running decision regarding whether upcoming testimony will be prejudicial, forcing withdrawal of the chosen counsel at an even more advanced stage of this litigation.

It is obvious here that counselors Dahill, West and WMD would, with the addition of 360’s proposed eighth and tenth causes of action, be called as witnesses: the claims are against the three. As the claim centers on the remuneration allegedly due for attorneys’ fees in servicing the Loan, the issue affects the proposed defendants’ client. ACG’s counsel would also be forced to prepare their own defense, or to take upon counsel to do so, while simultaneously attempting to prepare ACG’s defenses and counterclaims. Such forced action by the defendants and their counsel is prejudicial to ACG, and implicitly deprives it of its counsel of choice.

For the above reasons, leave for 360's to amend its complaint for the second time to add its proposed eighth and tenth causes of action is therefore—additionally for the eighth cause of action—denied on the grounds that such amendment is prejudicial to the current defendants.

Proposed Ninth Cause of Action

360's proposed ninth cause of action pursuant to 22 NYCRR § 130-1.1 (a) alleges that Mr. Peck and the ACG Defendants, with intent to deceive, have knowingly submitted false statements and testimony “concerning the legal services rendered by Greenberg Traurig, and plaintiff's responsibility therefore [sic], defendants' knowledge of the existence of the HELOC and possession of documents pertaining to same, and the false testimony submitted to the Court by both Bildner and Peck” (Proposed Second Amended Complaint, ¶ 155). 360 further contends that Mr. Peck and the ACG Defendants “with intent to deceive, have improperly pursued and sought to pursue claims in this action which were knowingly supported by false testimony” (Proposed Second Amended Complaint, ¶ 156). 360 contends that without this alleged “frivolous conduct” it would not have been “forced” to prosecute and defend this action (Proposed Second Amended Complaint, ¶ 159).

ACG first contends that Rule 130 does not support a cause of action thereunder except by “motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative.” In response, 360 argues that Rule 130 does not expressly preclude relief via an independent cause of action. 360's contention is without merit, and ACG is correct in its assertion. Rule

130 prescribes specific methods to obtain relief under the rule. The fact that it does not proscribe all methods by which relief may not be granted does not obviate the specific methods the rule delineates. 360's proposed ninth (and tenth, as an additional ground for denial for leave to amend) cause of action is therefore not properly before this court, and leave to amend the complaint for the second time to add 360's ninth (and tenth) cause of action is denied (*see* 22 NYCRR § 130-1.1 [d]).

Should the court treat 360's proposed cause of action under 22 NYCRR § 130-1.1 as a motion for sanctions, the motion would also be denied. 360 has not shown any conduct by any proposed defendant raising to the level of egregiousness required for sanctions under Rule 130. 360 has mis-stated the genesis of ACG's claims as based upon ACG's knowledge of the HELOC, rather than the HELOC's existence as an encumbrance on the Property. Further, questions of the amount of attorneys' fees due are not a basis for sanctions, but an issue to be decided at trial.

(Order on following page.)

Order

Accordingly, it is

ORDERED that plaintiff's motion for leave to amend its complaint to add additional defendants and additional causes of action is denied.

This constitutes the decision and order of the court..

Dated: New York, New York
August 2, 2010

ENTER:



Hon. Eileen Bransten, J.S.C.

FILED
AUG 04 2010
NEW YORK
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