Mastrobattista v Borges

2011 NY Slip Op 30695(U)

March 16, 2011

Sup Ct, NY County

Docket Number: 111452/2006

Judge: Saliann Scarpulla

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SCANNED ON 3/17/2011

[* 1]

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

PRESENT: SALIANN SCARPULLA PART 19

Index Number : 111452/2006
MASTROBATTISTA, JOHN D.
VS
BORGER, RAQUEL MOURA
Sequence Number : 005
AMEND

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
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

FILED
MAR 17 2011
NEW YORK
COUNTY CLERK'S OFFICE

motion ~~and cross-motion are~~ IJ decided in accordance with accompanying memorandum decision.

This constitutes the decision and order of the Court.

Dated: 3/16/11

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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JOHN D. MASTROBATTISTA and ANNE ROOME

Plaintiffs,

-against-

RAQUEL MOURA BORGES, A2B LLC, PIER HEAD ASSOCIATES LTD., LUKE LICALZI, P.E., LUKE LICALZI, P.E., P.C. and KARL BEITIN P.E.

Defendants.

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Index Number 111452/2006
Submission Date 11/10/2010
Mot. Seq. No. 005
DECISION & ORDER

FILED
MAR 17 2011
NEW YORK
COUNTY CLERK'S OFFICE

Appearances:

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By Stacy John Haigney, Esq.
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For Defendant Borges:
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For Defendant A2B:
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By David Gordon, Esq.
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For Defendant Beitin:
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Kapiloff & Troy, P.C.:
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New York, New York 10017
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For Defendants Licalzi:
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By James M. Boyce, Esq.
267 Carleton Avenue, Suite 301
Central Islip, New York 11722
631-650-1200

Papers considered in review of this motion to amend the complaint:

Papers	**Numbered**
Notice of Mot. and Motion with Annexed. Ex.....	1
Memo. of Law in Supp. of Motion.....	2
A2B's Affirm. in Opp.....	3
Licalzi's Affirm. in Opp.	4
Beitin's Affid. in Opp.....	5
Joint Memo. of Law in Opp.....	6
McCarrick's Affirm. in Reply and in Supp.....	7

HON SALIANN SCARPULLA, J.:

In this action between neighbors in three joint brownstone townhouses, plaintiffs move for leave to amend the complaint pursuant to CPLR 3025 to add three causes of action and an additional party to the action. Plaintiff John D. Mastrobattista ("Mastrobattista") owns and resides at 169 East 62nd Street, where he also maintains his medical practice. Plaintiff Anne Roome ("Roome") owns and resides at 165 East 62nd Street. Defendants Raquel Moura Borges ("Borges") and A2B, LLC ("A2B") are owners of the middle town home at 167 East 62nd Street.

Mastrobattista and Roome (hereinafter collectively "plaintiffs") filed an original complaint on August 15, 2006, alleging that defendants damaged their property through unlawful extensive construction that enlarged the existing rear space and added a roof penthouse and an enclosed deck. Plaintiffs alleged in their original complaint that defendants "(i) filed false applications to obtain building permits from the Department of Building (DOB) allowing the work to be done; (ii) physically cut through Plaintiffs' roofs causing substantial structural damage and loss of waterproof capacity; (iii) destroyed permanent structures (and chattels) belonging to the Plaintiffs; (iv) in performing their work, repeatedly and in total disregard of Plaintiff's objections trespassed on Plaintiffs' Premises; (v) constructed an illegal penthouse and other structures which, among other things, physically encroach upon 169 and 165 Premises; [and] (vi) negligently and over

Plaintiffs' objections attempted to repair Plaintiffs' roofs, both the original damages and the resulting negligent repair having resulted in both substantial water damage to interior structures and the persistence of mold supporting conditions." (Orig. Compl., ¶ 4). These allegations are the bases of ten causes of action for trespass, conversion, encroachment, negligence, public nuisance, private nuisance, injunctive relief, punitive damages and joint tortfeasor liability.

Now, plaintiffs' proposed amended complaint aims to completely rework the complaint from scratch by adding three causes of action and augmenting the factual allegations of the complaint, increasing its page count from twenty-five to ninety-nine. Plaintiffs seek to add a cause of action to enforce an 1869 protective covenant, explaining that its omission from the original complaint was a mere oversight and that unfair prejudice is unlikely because all parties were aware of the covenant from the start of the action. Plaintiffs also move to add a cause of action for removal of encroaching structures under Real Property Actions and Proceedings Law ("RPAPL") § 871.

Plaintiff's third proposed cause of action is pursuant to New York Civil Rights § 76-a, proverbially known as a "SLAPP-back" action. The "SLAPP-back" action is in response to Borges' and A2B's first counterclaim for abuse of process for plaintiffs' alleged malicious complaints to the Department of Buildings. Plaintiffs also seek to re-characterize their fifth cause of action of negligence against engineers on the project,

defendants Luke Licalzi, P.E. and Luke Licalzi, P.E., P.C. (hereinafter collectively "Licalzi") and Karl Beitin, to sound in professional malpractice.

Plaintiffs seek further leave pursuant to CPLR 1001 and 1002(b) to add Banif Finance (USA) Corp., the holder of two mortgages, which separately started a proceeding to foreclose on 167 East 62nd Street, *Banif Finance (USA) Corp. v A2B, LLC, Global Access Investment Advisor LLC, Raquel Moura Borges, Antonio Luis Pires, Paulo Rosa DE Aquino , John D. Mastrobattista, Anne Roome and Rottenberg Lipman Rich, P.C. and John Doe "1" through John Doe "10,"* Index No. 105932/2010, Supreme Court, New York County (hereinafter the "foreclosure action").

In opposition, defendants argue that leave must be denied as late in light of the fact that plaintiffs knew of the facts and documents forming the basis of the three proposed causes of action at the time of the filing of the original complaint in 2006. Specifically, defendants point to plaintiffs' deposition testimony that they were aware of the 1869 covenant at the time they purchased their respective properties prior to the commencement of this action in 2006, and that plaintiffs sought removal of the penthouse addition since May of 2009, but inexplicably stalled on moving to amend the complaint until filing the present application on July 19, 2010. Plaintiffs' third proposed cause of action is opposed as without merit and as barred by a three-year statute of limitations.

Discussion

CPLR 3025(b) provides that leave to amend a pleading shall be freely given, upon such terms as may be just. Mere lateness is not a barrier to the amendment; the party opposing amendment of a pleading must establish potential for significant prejudice. *Abdelnabi v New York City Tr. Auth.*, 273 A.D.2d 114, 115 (1st Dep't 2000). Prejudice is not found in the mere exposure of a party to greater liability. *Loomis v Civetta Corinno* Constr. Corp., 54 N.Y.2d 18, 23 (1981). Instead, "there must be some indication that a [party] has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position." *Id.* "So, the showing of prejudice that will defeat the amendment must be traced right back to the omission from the original pleading of whatever it is that the amended pleading wants to add–some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one now wants to add." Siegel, Amendment of Pleadings § 237 (4th Ed. 2005) (citations omitted); *see also Spink v Cohen*, 156 A.D.2d 201, 201 (1st Dep't 1989) (leave to amend denied after a building demolition that left opposing party unable to examine the premises for cause of collapse).

While highly liberal, CPLR 3025(b) is less forgiving when the party seeking amendment knew from the beginning of the facts on which the proposed amendments are made and who could have pleaded without trouble earlier, but waited until the eve of trial

to do so. Siegel, Amendment of Pleadings § 237 (4th Ed. 2005) (citing *L.B. Foster Co. v Terry Contracting, Inc.*, 25 A.D.2d 721, 722 (1st Dep't 1966)). Leave to amend must also be denied where it is futile, as when a party attempts to assert a claim that is subject to dismissal. *See Viacom Intl. v Midtown Realty Co.*, 235 A.D.2d 332, 333 (1st Dep't 1997).

Here, despite the fact that plaintiffs had sufficient knowledge of the facts to include the claims for breach of a protective covenant and RPAPL § 871 in the original complaint and failed to do so merely as an oversight, granting leave to assert these two causes of action does not unfairly prejudice Borges and A2B, because all parties were aware of the facts and circumstances supporting these claims at the time of the commencement of the action and have already obtained relevant disclosure. Permitting amendment at this time does not unfairly prejudice defendant, because discovery has not yet been completed.

However, addition of the causes of action for violation of New York Civil Rights Law § 76-a., as against Borges and A2B is unwarranted because the proposed "SLAPP-back" cause of action is untimely. Pursuant to CPLR 214(2), "an action to recover upon a liability, penalty or forfeiture created or imposed by statute . . ." must be brought within three years from the time the cause of action accrued." Plaintiffs argue that it was Borges' and A2B's first counterclaim for abuse of process, served with the answer on November 20, 2006, that gave rise to the "SLAPP-back" cause of action. Therefore, the statute of limitations lapsed on November 19, 2009, seven months before plaintiffs moved

to include it in the amended complaint on July 19, 2010. Plaintiffs' explanation that they delayed moving to assert the "SLAPP-back" action to try persuade Borges and A2B to withdraw their first counterclaim is unavailing, because plaintiffs have not offered any legal authority for the proposition that mere discussions or attempts at negotiation, could either legally or equitably toll the statute of limitations.

Further, the relation-back provision of CPLR 203(f) is inapplicable here because the "SLAPP-back" claim accrued for the first time after the filing of the original complaint, and no part of the original complaint gave notice thereof. *See B.B.C.F.D., S.A. v Bank Julius Baer & Co.*, 62 A.D.3d 425, 425 (1st Dep't 2009); *see also Matter of Nelson v Stroh*, 303 A.D.2d 499, 502 (2nd Dep't 2003). Plaintiffs' alternative argument that the "SLAPP-back" claim did not accrue until plaintiffs had obtained sufficient discovery to "verify their own allegations" is unpersuasive, because it implies that plaintiffs had to first establish entitlement to recover under this cause of action before they could assert it.[1] That is not the standard for pleading a cause of action under CPLR 3013.

Leave to amend the fifth cause of action, renumbered the seventh cause of action in the proposed amendment complaint, to add a claim of professional malpractice against

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[1]In their memorandum of law, dated June 4, 2010, plaintiffs state on page 9 that "[I]t was there [sic] Defendants' filing of a frivolous counterclaim that gave birth to this [SLAPP-back] cause of action. Moreover, A2B and Borges [sic] aggravation of their wrongful SLAPP conduct occurred subsequently when they refused to withdraw their counterclaim." Plaintiffs have not specified the legal definition of the term "aggravation" of a cause of action, and the Court is unaware of any legal authority that would shed light on how the principle of "aggravation" relates to the statute of limitations analysis.

Licalzi and Seitin is also denied. To maintain a cause of action for professional malpractice, plaintiff must set forth either the existence of contractual privity between the professional and client or the presence of fraud, collusion, malicious acts or other special circumstances. *See e.g., AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 N.Y.3d 582, 595 (2005) (citations omitted); *see also Ossining Union Free School District v Anderson LaRocca Anderson*, 73 N.Y.2d 417, 425 (1989).

In the proposed seventh cause of action, plaintiffs allege that defendants Licalzi and Beitin failed to exercise "specific levels of technical skill, competence, ability, and diligence," thereby departing from the standard of care owed to plaintiffs. Nothing in the proposed cause of action for malpractice specifies the basis for, or the origin of, the allegation that Licalzi and Beitin owed a duty to neighboring building owners, Mastrobattista and Roome, who never hired Licalzi and Beitin and who were not the intended beneficiaries of the engineering services performed for Borges and A2B. *See Sykes v RFD Third Avenue 1 Assocs.*, 67 A.D.3d 162, 169-170 (1st Dep't 2009); *see also McGee v City of Rensselaer*, 174 Misc. 2d 491, 495 (Sup. Ct., Rensselaer County, October 18, 1997). Therefore, leave to amend the complaint to add two causes of action for professional malpractice, as against Licalzi and Beitin, and for violation of Civil Rights Law § 76-a is denied.

Further, plaintiffs' complete reworking of the complaint to include an overly detailed description of the discovery collected over the course of this proceedings is not

consistent with the CPLR 3014 requirement that "every pleading shall consist of plain and concise statements . . ." The quadrupling of the complaint to ninety-nine pages is unnecessary, as the purpose of pleading is to apprise the opposing party of the nature of the claims asserted, not to try the entire action at pleading stage. While plaintiffs may wish to conform the complaint to the new evidence obtained through discovery, this should be done in a practically concise manner, without superfluous verbiage or recitations from deposition records and other evidence. *See Aetna Casualty & Surety Co. v. Merchants Mut. Ins. Co.*, 84 A.D.2d 736, 736 (1st Dep't 1981) (dismissing a forty-two page complaint characterized as "a veritable novella"). Therefore, leave to amend the complaint beyond what is necessary to assert the causes of action for breach of protective covenants and violation of RPAPL § 871 is denied. In addition, Plaintiffs may amend the facts section of the complaint to conform to the evidence obtained through discovery in a clear, brief, plain and concise manner.

There is also no basis to add Banif Finance (USA) Corp. either as a necessary or permissive party because the mortgage foreclosure action has no overlapping issue of fact or law with the present action. This action was brought against individual defendants for damages arising out of their individual actions and does not involve any dispute over right to ownership or possession of 167 East 62nd Street. Plaintiffs in this action do not have any competing interest with Banif Finance (USA) Corp. in the property itself. Therefore, the Court may accord complete relief to the parties in this action without joining Banif

Finance (USA) Corp. Any concern that plaintiffs' sought-after injunctive relief under a proposed RPAPL § 871 claim for the removal of encroaching property may be rendered meaningless by Banif Finance (USA) Corp.'s foreclosing on the property is ameliorated by plaintiffs' ability to address these issue in the foreclosure action, as they are already parties to the foreclosure action. Also, plaintiffs' previously filed notice of pendency against 167 East 62nd Street in relation to the action preserves plaintiffs' rights as against any future purchasers of this property.

In accordance with the foregoing, it is

ORDERED that the motion by plaintiffs John D. Mastrobattista and Anne Roome for leave to amend the complaint is granted only to the extent plaintiffs may assert two new causes of action for breach of a protective covenant and RPAPL § 871 in compliance with the instructions specified in the above decision, and the motion is otherwise denied; and it is further

ORDERED that plaintiffs John D. Mastrobattista and Anne Roome shall file and serve an amended complaint as permitted by the above decision within thirty days of this decision and order.

This constitutes the decision and order of the Court.

Dated: March 16, 2011
New York, New York

ENTER:

Hon. Saliann Scarpulla, J.S.C.

FILED

MAR 17 2011

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