

**JPMorgan Chase Bank N.A. v Tommy Interior Contr.
Corp.**

2012 NY Slip Op 30162(U)

January 12, 2012

Sup Ct, Nassau County

Docket Number: 22461/09

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

JPMORGAN CHASE BANK N.A.,

Plaintiff,

- against -

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 22461/09
Motion Seq. No.: 03
Motion Date: 12/16/11

TOMMY INTERIOR CONTRACTING CORP., ESTIA
PROPERTY MANAGEMENT LLC and THANAS PANDO
a/k/a PANDO THANAS a/k/a THANAS PARDO,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR §§ 2221 and 5015, for an order vacating this Court's June 3, 2011 Decision and Order; and moves, pursuant to CPLR § 3025(b), for an order granting its request to amend the Summons and Verified Complaint; and moves, for an order deeming its proposed Supplemental Summons and Amended Complaint served upon the defendants.

Defendant Thanas Pando a/k/a Pando Thanas a/k/a Thanas Pardo ("Pando") opposes that portion of the motion which seeks to amend the Summons and Verified Complaint and to have it deemed served upon defendants. No other opposition was submitted to the instant motion.

The instant action was commenced to collect monies due and owing to plaintiff from

defendants under a certain Promissory Note (“Note 1”) and the absolute, personal, unconditional and continuing guaranty thereunder (“Guaranty 1”) and a second Promissory Note (“Note 2”) and the absolute, personal, unconditional and continuing guaranty thereunder (“Guaranty 2”).

The June 3, 2011 Decision and Order of this Court held that plaintiff’s motion for default judgment against defendant Tommy Interior Contracting Corp. (“Tommy”) on the First Cause of Action regarding Note 1 was granted, that plaintiff’s motion for summary judgment against defendant Pando on the Second Cause of Action regarding Guaranty 1 was granted, that plaintiff’s motion for default judgment against defendant Estia Property Management LLC (“Estia”) on the Third Cause of Action regarding Note 2 was granted, that plaintiff’s motion for summary judgment against defendant Pando on the Fourth Cause of Action regarding Guaranty 2 was granted and that plaintiff’s motion by for a judgment in favor of plaintiff and against defendants Tommy, Estia and Pando, jointly and severally, for reasonable attorneys’ the sum of \$1,200.00 was also granted.

Plaintiff now submits that CPLR § 5015(a)(2) provides that “[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person which such notice as the court may direct, upon ground of...newly discovered evidence which, if introduced...would probably have produced a different result...” Plaintiff further submits that, “[s]ubsequent to the issuance of the Short Form Order, dated June 3, 2011, it has come to the attention of Plaintiff that the Verification of the original Complaint may not have been properly notarized by the witnessing notary. Accordingly, Plaintiff proffers that it would be in the utmost interest of justice to vacate said Short Form Order as such inkling could case doubt on the validity of the court proceedings which relied on the Complaint and could be found to prejudice the Defendants. In light of the foregoing, Plaintiff respectfully requests that the Short Form Order, dated June 3, 2011, be vacated and that the parties to this action be

permitted to continue the litigation (*sic*) the within matter.”

Plaintiff also requests that, in light of the reasoning behind its request to vacate the Short Form Order, it be permitted to amend the Verified Complaint. Plaintiff states, “[t]o avoid doubt and insure clarity of the record, Plaintiff has prepared a Supplemental Summons and an Amended Complaint which now correctly states the relevant facts and circumstances relating to the within action....Certain factual allegations contained in the Complaint have also been amended to ensure absolute conformity with the books and records maintained by Plaintiff relating to the within action.” Plaintiff argues that amending the Verified Complaint will not prejudice any of the defendants because the defendants, having duly made, executed and delivered to plaintiff Note 1, Note 2 and the Personal Guaranties, are already aware of the correct nature of Note 1, Note 2 and the Personal Guaranties. Plaintiff asserts that denial of plaintiff’s request to amend may cause prejudice to defendants.

Defendant Pando submitted opposition to the portion of plaintiff’s motion which seeks to amend the Summons and Verified Complaint and have it deemed served upon defendants. Defendant Pando does not oppose the portion of the motion seeking to vacate this Court’s June 3, 2011 Decision and Order. Defendant Pando argues that “[p]laintiff had admitted that the verification of the original complaint commencing the action was improperly verified. As a result of that admission, it is clear that the complaint is fatally defective and this action should be dismissed. Plaintiff also admits that facts and circumstances recited in the complaint were not in conformity with the books and records maintained by the plaintiff.” Defendant Pando adds, “the integrity of the legal process is better served if this action is dismissed due to plaintiff’s irregularities and apparent improprieties. There will be no prejudice to plaintiff if they are required to commence a new action due to actions cause by their own wrongdoing.”

In reply to defendant Pando’s opposition, plaintiff states “[a]t no time has Plaintiff stated

that the original Compliant was 'improperly verified,' nor has Plaintiff advised 'that facts and circumstances recited in the complaint were not in conformity with the books and records maintained by [P]laintiff.'...In fact, as stated in Plaintiff's Motion, the request to amend the complaint is being made in light of the fact that the original complaint **may** not have been properly notarized. The Court should not penalize the Plaintiff for being overly cautious in scrutinizing the records and seeking this revision, especially in the current environment.

Moreover, the Court should not castigate Plaintiff for revising the complaint to conform with the most up-to-date and accurate records maintained by Plaintiff. Plaintiff strongly objects to the mischaracterization of its request and contends that the strongly worded and baseless statements made by the Defendant in Opposition are tendered for the sole purpose of preventing Plaintiff from being able to collect from the Defendant what is due and owing." Plaintiff further argues that defendant Pando's opposition fails to claim any prejudice or surprise that would come about by the granting of plaintiff's motion.

As plaintiff has presented the Court with newly discovered evidence, its motion, pursuant to CPLR §§ 2221 and 5015(a)(2), for an order vacating the June 3, 2011 Decision and Order of this Court is hereby **GRANTED**.

With respect to plaintiff's application to amend the Summons and Verified Complaint, generally, leave to amend a pleading should be freely granted. *See* CPLR § 3025(b). The party seeking such amendment must demonstrate a proper basis for same. *See Wieder v. Scala*, 168 A.D.2d 355, 563 N.Y.S.2d 76 (1st Dept. 1990). Such an application must be supported by an affirmation that the proposed amendment is meritorious. *See Zaid Theatre Corp. v. Suna Realty Co.*, 18 A.D.3d 352, 797 N.Y.S.2d 434 (1st Dept. 2005).

A motion for leave to serve an amended pleading will only be denied where the amendment is wholly devoid of merit or is significantly prejudicial to the non-moving party. *See Norman v. Ferrara*, 107 A.D.2d 739, 484 N.Y.S.2d 600 (2d Dept.1985). The merits of the proposed amended pleading will not be reviewed "... unless the insufficiency or lack of merit is

clear and free from doubt.” *Id.* at 740, 741.

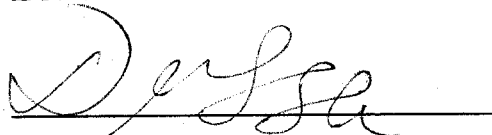
Based upon the papers before it, plaintiff’s argument detailed above and the fact that defendant Pando’s opposition fails to claim any prejudice or surprise that would come about by the granting of plaintiff’s motion, plaintiff’s motion, pursuant to CPLR § 3025(b), for an order permitting it to amend its Summons and Verified Complaint is hereby **GRANTED**.

Plaintiff is directed to serve the Supplemental Summons and Amended Complaint, in the form annexed as Exhibit 7 to the instant motion, upon all parties herein by January 27, 2012. A copy of this Order shall be served with those papers.

It is further ordered that the parties shall appear for a Preliminary Conference on February 28, 2012, at 9:30 a.m., at the Preliminary Conference Desk, in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
January 12, 2012

ENTERED
JAN 17 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE