SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 19
NASSAU COUNTY

GA BUCKINGHAM, LLC, CARROLLTON NRC, LLC, CEDAR VALLEY, NRC, CHESTNUT RIDGE NRC, LLC, HARALSON, NRC, LLC, PINE KNOLL NRC, SOCIAL CIRCLE NRC, LLC, UNIVERSITY NRC, LLC, WOODSTOCK NRC, LLC, ROSWELL NRC, LLC and HART CARE CENTER NRC, LLC,

Plaintiffs,

-against-

SA-GA OPERATOR HOLDINGS, LLC s/h/a CYPRESS HEALTH CARE MANAGEMENT OF GEORGIA, LLC, CHC-CARROLLTON NURSING & REHAB CENTER, LLC, CHC-CEDAR VALLEY NURSING & REHAB CENTER, LLC, CHC-CHESTNUT RIDGE NURSING & REHAB CENTER, LLC, CHC-HARALSON NURSING & REHAB CENTER, LLC, CHC-SOCIAL CIRCLE NURSING & REHAB CENTER, LLC, CHC-WOODSTOCK NURSING & REHAB CENTER, LLC, CHC-ROSWELL NURSING & REHAB CENTER, LLC, and CHC-HART CARE CENTER, LLC,

Defendants.

Decision and Order

MOTION SUBMITTED:
October 14, 2011
MOTION SEQUENCE:01
INDEX NO. 016701-09

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Memorandum of Law in Support	2
Affirmation in Opposition	3

Memorandum of Law in Opposition	4
Memorandum of Law in Reply	5

The Defendants move for, *inter alia*, an order pursuant to CPLR 3025(b) granting them leave to serve and file an amended answer and counterclaims.[1]

For the reasons that follow, the Defendants' motion, to the extent not withdrawn, is granted.

In August 2009, GA Buckingham, LLC ("GAB") and its wholly owned subsidiaries ("GAB Subsidiaries") (GAB and the GAB Subsidiaries are collectively referred to as "Plaintiffs") commenced an action against SA-GA Operator Holdings, LLC s/h/a Cypress Health Care Management of Georgia, LLC ("CHC") and is wholly owned subsidiaries ("CHC Subsidiaries") (CHC and CHC Subsidiaries are collectively referred to as "Defendants") seeking, *inter alia*, to recover the unpaid aggregate rent obligations pursuant to a lease entered into in May 2003 between GAB and CHC ("master lease") (Ex. "A" to Motion).[2] Pursuant to the master lease, the GAB Subsidiaries are the lessors under 10 separate leases with the CHS Subsidiaries as lessees.[3]

With respect to the resolution of "additional rent" disputes, paragraph 20(h) of the master lease provides, in relevant part:

> (h) Verification and Resolution of Additional Rent. CHM and the CHM Lessees acknowledge that Lessors shall have the right, following delivery by CHM and the CHM Lessees of the annual audited financial statements of the CHM Lessees and the calculation of Aggregate Rent, to cause its representatives or a firm of independent certified public accountants to audit and verify CHM and the CHM Lessees' annual financial results and calculation of Aggregate Rent. CHM shall provide reasonable access to the books and records of CHM and the CHM Lessees and shall use

---

[1] The Defendants also moved for an order pursuant to CPLR 3212 dismissing the complaint given Plaintiffs' failure to comply with Limited Liability Law § 808. The Plaintiffs have since obtained the requisite certificates demonstrating their compliance with Limited Liability Law § 808 and, as such, the Defendants withdrew that branch of their motion (Defendants' Reply Memorandum of Law at p.1, fn 1).

[2] According to the complaint, between September 1, 2003 and December 31, 2007, the Defendants failed to pay their aggregate rent obligations in the amount of $3,785,336, which is the sum purportedly due after application of the agreed upon offsets and credits (Ex. "A" to Motion at ¶ 13).

[3] The CHC Subsidiaries occupy and operate nursing home facilities in Georgia.

> reasonable efforts to cause their personnel and their auditors to cooperate with Lessor and its representatives and auditors and provide their workpapers and other relevant information. In the event that Lessor or Lessors' Affiliates believe that an increase in Aggregate Rent is due and payable for any Lease Year, Lessor or Lessor's Affiliates shall sent [sic] written notice to the CHM Lessees, and within twenty (20) days thereafter, Lessor and Lessees and their respective Affiliates and auditors shall meet to cooperatively and in good faith resolve such dispute. In the event that Lessor and Lessees are unable to resolve such dispute within such time period, the dispute shall be submitted to a neutral firm of independent certified public accountants of national standing (which have not acted as the accountants for Lessor, Lessees or its Affiliates within at least three years prior to completion of the applicable Lease Year), whose determination shall be final, binding and conclusive upon Lessor, CHM and the CHM Lessees (Ex. "D" to Motion at p. 24).[4]

In May 2005, an action was commenced in Georgia between the Plaintiffs and the Defendants and was subsequently settled pursuant to an agreement dated April 30, 2009 ("settlement agreement") (Ex. "2" to Affirmation in Opposition).[5] The settlement agreement set forth the manner in which the parties would resolve their rental disputes. Specifically, the settlement agreement provides, in relevant part:

> The parties shall submit to binding mediation of GAB's claims for Rents due under the [master lease] for the period of September 1, 2003 through December 31, 2007 ("Past Due Rents") for determination by JAMS in New York City, New York (the "Mediation" and the "Mediator") . . . . The Mediator shall consider and determine the matters set forth in subparagraph © hereof in determining the amount of Past Due Rents. The determination of the Mediator shall be final and binding (Ex. "2" to Affirmation in Opposition at ¶ 4[a]).

After entering into the settlement agreement in the Georgia action, the Plaintiffs commenced the instant action in the Supreme Court, Nassau County, seeking to recover, *inter alia*, the unpaid aggregate rent due under the master lease. The parties thereafter entered into a

---

[4] The master lease was amended on August 29, 2003 ("first amendment"). A second amendment was entered into on January 15, 2004 ("second amendment").

[5] Pursuant to the settlement agreement, the Plaintiffs and Defendants executed a third amendment to the master lease and the second amendment was "deemed null and void". The third amendment modified the Defendants' rent obligations after December 31, 2007 and, as such, the Plaintiffs' claims, which pertain to rent obligations from September 1, 2003 through December 31, 2007, are not affected by the third amendment (Ex. "2" to Affirmation in Opposition).

stipulation ("stipulation") agreeing to the following terms:

> 1. Defendants' time to appear, answer or otherwise respond to the complaint in this action shall expire on May 21, 2010.
>
> 2. Defendants waive any defenses or counterclaims, and shall not assert, that Plaintiffs failed to satisfy any condition precedent under that certain Settlement Agreement dated April 30, 2008 to submit the claim set forth in the complaint to binding mediation or arbitration.
>
> 3. Plaintiffs' claim for Past Due Rents as described in Article 4 of the Settlement Agreement dated April 30, 2008 shall be determined in this action or a settlement thereof, not in binding mediation (Ex. "3" to Affirmation in Opposition).

The Defendants answered the complaint and asserted a counterclaim and various affirmative defenses. Specifically, in the ninth affirmative defense, the Defendants asserted that the "Plaintiffs' failed to comply with contractual conditions precedent to bringing a suit under the parties' agreements" (Ex. "E" to Motion at ¶ 28).[6] The Defendants now move, *inter alia*, to amend their answer and assert a second counterclaim based on the ninth affirmative defense. The Plaintiffs oppose the amendment on the ground that it has no merit insofar as the Defendants waived the very affirmative defense they seek to amend when they executed the settlement agreement in the Georgia action and the stipulation in the instant action.

Pursuant to CPLR 3025, a party may amend his pleading at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just and in the absence of prejudice or surprise to the opposing party "resulting directly from the delay" *McCaskey, Davies and Assocs., Inc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]; *Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008]). The Second Department recently revisited the 'leave should be freely granted' policy applicable to motions pursuant to CPLR 3025 and stated, in relevant part:

> '[T]he legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt' . . . . These cases make clear that a plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance . . . .

---

[6] The contractual obligations are set forth in paragraph 20(h) of the master lease (Ex. "D" to Motion at p. 24).

Cases involving CPLR 3025(b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed. No evidentiary showing of merit is required under CPLR 3025(b). The court need only determine whether the proposed amendment is "palpably insufficient" to state a cause of action or defense, or is patently devoid of merit. Where the proposed amended pleading is palpably insufficient or patently devoid of merit, or whether the delay in seeking the amendment would cause prejudice or surprise, the motion for leave to amend should be denied. If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing.

(*Lucido v Mancuso*, 49 AD3d at 227, 229, *supra*).

The court notes that the Defendants' waivers in the settlement agreement (Georgia action) and in the stipulation (instant action) do not constitute express waivers of the contractual conditions precedent set forth in paragraph 20 of the master lease. Given the liberal standard enunciated in *Lucido v Mancuso*, the court does not consider the proposed amendment either "palpably insufficient" or "patently devoid of merit". Moreover, Plaintiffs' opposition fails to allege any prejudice or surprise with respect to the proposed amended pleadings.

Accordingly, it is hereby ordered that the branch of the Defendants' motion for leave to amend their answer is granted and the proposed verified amended answer annexed to the motion papers shall be deemed served upon service of a copy of this order with notice of entry. The Plaintiffs shall serve and file their answer to the counterclaim within 20 days from the date of service of this decision with notice of entry.

This constitutes the decision and order of the court.

Dated: January 23, 2012

Hon. Vito M. DeStefano, J.S.C.