SHORT FORM ORDER
SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:
HON. ANTHONY L. PARGA
JUSTICE

----------X PART 6

GREAT AMERICAN RESTORATION SERVICES INC.,

Plaintiff,

INDEX NO. 5559/10

-against-

MOTION DATE: 03/05/12
SEQUENCE NO. 001

STEVEN SIPPIN, TAMMAR SIPPIN a/k/a TAMMY SIPPIN, NASSAU EDUCATORS FEDERAL CREDIT UNION, JOHN DOES 1-10,

Defendants.

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Notice of Motion, Affs. & Exs.....1
Affirmation in Opposition & Exs.....2
Reply Affirmation.....3

Upon the foregoing papers, plaintiff's motion to amend its Reply to defendants Steven Sippin and Tammar Sippin a/k/a Tammy Sippin's counterclaims to add an additional affirmative defense, pursuant to CPLR §3025, is denied.

This action was commenced by plaintiff Great American Restoration Services, Inc. (hereinafter "GARS") for breach of contract involving construction work to rebuild the home of defendants Steven Sippin and Tammar Sippin a/k/a Tammy Sippin (hereinafter collectively referred to as "Sippins"), located at 58 Strathmore Street, North Woodmere, New York, after it was completely destroyed by fire. Plaintiff's second amended complaint contains causes of action for breach of contract, unjust enrichment, and to foreclose a mechanic's lien. The Sippins answered plaintiff's complaint and asserted counterclaims for breach of contract and negligently performed work. The Sippins allege that due to the negligent work performed by GARS, and the breach of contract by GARS, the Sippins were caused to expend $105,194.29 in additional labor

costs and approximately $83,711.47 in additional material to complete the re-construction of their house and to repair and/or redo improper work previously performed by GARS.

Plaintiff herein seeks leave to amend its Reply to the Sippins' counterclaims to add a sixth affirmative defense as follows: "Sippin's counterclaims fail because Sippin failed to comply with the contractual termination procedure in Section Seven of the parties' contract by failing to give Great American written notice of termination. Sippin's counterclaims fail because Sippin failed to give Great American notice and a chance to cure any alleged defaults." Plaintiff annexes its proposed Third Amended Verified Reply, containing said new counterclaim, to its motion papers as Exhibit "E." The Court notes that the plaintiff has failed to annex a copy of the parties' contract to its motion.

Defendants Sippins oppose plaintiff's application, contending that the proposed affirmative defense is without merit and that the Sippins would be unduly prejudiced by the amendment to plaintiff's Reply. Prior to the instant motion being brought, plaintiff served three complaints - an initial complaint, an amended complaint, and a second amended complaint - and also served three versions of the Reply to defendants' counterclaims - a initial Reply, an Amended Reply, and a Second Amended Reply. Defendants Sippins contend that each time plaintiff amended its pleadings, "in the spirit of cooperation and in the interest of judicial economy" defendants Sippins consented to the service of the amended pleadings. The plaintiff's Second Amended complaint was served in December 2010 and plaintiff's Second Amended Reply was served in February 2011. Defendants Sippins contend that the instant motion was brought by plaintiff in January 2012, after the parties had exchanged over 1,300 pages in discovery documents and after they had spent eight days conducting the depositions of David Pinto (the owner of GARS), Avi Pinto (David's brother), Steven Sippin, and Tammy Sippin. The last of the depositions was completed on November 29, 2011. Defendants contend that there has been no discovery regarding the claims in plaintiff's proposed affirmative defense or any prior notice that this defense would be raised by the plaintiff.

Defendants Sippins first argue that the plaintiff's proposed counterclaim has no merit, as the plaintiff *did* receive notice of termination, by letter to plaintiff's counsel on January 11, 2010. A copy of said letter was also served upon plaintiff by the defendants, on or about October 26,

2010, contained within defendants Sippins' Response to Plaintiff's Notice for Discovery and Inspection. In addition, counsel for plaintiff explicitly acknowledged receipt of the notice of termination in his subsequent correspondences. A review of the parties' contract, which defendants contend was drafted by GARS, demonstrates that the contract does not expressly provide for GARS to have an "opportunity to cure" defective work or defaults, as asserted in its proposed additional sixth affirmative defense. Copies of the letter giving notice of termination, plaintiff's counsel's acknowledgment of same, defendants' Response to Plaintiff's Notice for Discovery and Inspection, and the parties' contract are annexed as exhibits to defendants' opposition papers.

Additionally, defendants Sippins contend that they will suffer significant prejudice by the amendment to plaintiff's Reply because the nature and facts surrounding the proposed affirmative defense were never addressed during discovery, discovery has been completed, and the addition of the proposed defense would necessitate further document discovery and further depositions of David Pinto and Avi Pinto. Defendants contend that plaintiff never raised any objection to the method or timing of the defendants' termination of the contract, nor did plaintiff ever indicate that there was a breach of the contract because GARS should have been given a right to cure. Plaintiff's interrogatory responses do not indicate that it was making any claim that GARS did not receive a notice of termination or that GARS should have had a chance to cure any defects. As plaintiff never previously raised such an affirmative defense, defendant contends that plaintiff's attempt to raise said defense after the completion of discovery amounts to "trial by ambush," as defendants have not had an opportunity to conduct the appropriate discovery with which to develop their trial strategy regarding same.

The decision whether to permit an amendment to a pleading is one that lies in the discretion of the trial court. (See, *Surgical Design Corp. v. Correa*, 31 A.D.3d 744, 819 N.Y.S.2d 542 (2d Dept. 2006); *Thone v. Crown Equip. Corp.*, 27 A.D.3d 723, 810 N.Y.S.2d 925 (2d Dept. 2006); *Voyticky v. Duffy*, 19 A.D.3d 685, 798 N.Y.S.2d 494 (2d Dept. 2005), *lv.dismissed in part, denied in part*, 6 N.Y.3d 800 (2006); *Travelers Prop. Cas. v. Powell*, 289 A.D.2d 564, 735 N.Y.S.2d 208 (2d Dept. 2001)). In exercising its discretion, the court should take into consideration "how long the amending party was aware of the facts upon which the

motion was predicated, whether a reasonable excuse for the delay was offered and whether prejudice resulted therefrom." (*Brooks v. Robinson*, 56 A.D.3d 406, 867 N.Y.S.2d 133 (2d Dept. 2008); *Cohen v. Ho*, 38 A.D.3d 705, 833 N.Y.S.2d 542 (2d Dept. 2007)). Leave to amend a pleading is to be freely given where there is no showing of genuine prejudice or surprise to the nonmoving party, and no showing that the proposed amendment is "palpably insufficient as a matter of law" or "totally devoid of merit." (*Consolidated Payroll Services, Inc. v. Berk*, 794 N.Y.S.2d 410 (2d Dept. 2005); *Bolanowski v. Trustees of Columbia University in City of New York*, 21 A.D.3d 340, 800 N.Y.S.2d 560 (2d Dept. 2005); *Alatorre v. Hee Ju Chun*, 44 A.D.3d 596, 848 N.Y.S.2d 174 (2d Dept. 2007); *Maspeth Federal Savings and Loan Ass'n*, 67 A.D.3d 750, 888 N.Y.S.2d 599 (2d Dept. 2009)).

In the instant matter, the plaintiff served two amended complaints and two amended Replies to defendants' counterclaims prior to seeking the relief herein. Plaintiff's Second Amended Reply was served in February 2011, over one year after the letter terminating the parties' contract was sent to plaintiff's counsel. It is evident that plaintiff was aware of the facts upon which this motion is predicated from the outset of this action in 2010, yet plaintiff failed to raise said defense despite serving a total of three Replies to defendants' counterclaims. Plaintiff offers no excuse for the delay in raising the proposed defense herein, and the Court notes that discovery in this action is complete and the action was certified for trial on March 5, 2012.

In addition, defendants Sippins have demonstrated that plaintiff's delay in bringing the within motion until after the completion of all depositions and document discovery is prejudicial to them, as defendants did not conduct discovery regarding the defense which plaintiff seeks to add. Further, where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave to amend a pleading should be denied. (*Morton v. Brookhaven Mem. Hosp.*, 32 A.D.3d 381, 820 N.Y.S.2d 294 (2d Dept. 2006); *Reuter v. Haag*, 224 A.D.2d 603, 6399 N.Y.S.2d 697 (2d Dept. 1996)(a court need not grant leave where the merit of the proposed amendment is plainly lacking); *Thone v. Crown Equip. Corp.*, 27 A.D.3d 723, 810 N.Y.S.2d 925 (2d Dept. 2006); *Probst v. Cacoulidis*, 295 A.D.2d 331, 743 N.Y.S.2d 509 (2d Dept. 2002)(a cause of action totally devoid of merit or palpably insufficient as a matter of law will not be allowed)). Plaintiff seeks to amend its reply to include an affirmative defense that the

counterclaims fail because GARS received no written notice of termination and no chance to cure the alleged defects, however, defendants have demonstrated that there was, in fact, written notice of termination of the contract and that there was no express requirement within the contract that plaintiff be allowed to cure the defects.

As the plaintiff offers no excuse for its delay in bringing the instant motion to add an affirmative defense relating to notice of termination of the contract, as the defendants have demonstrated that they will suffer undue prejudice by the late amendment, and as discovery has been completed and the case has now been certified for trial, the plaintiff's motion for leave to amend its Reply to defendants' counterclaims to add a sixth affirmative defense is denied.

This constitutes the decision and Order of this Court.

Dated: April 12, 2012

Anthony L. Parga, J.S.C.

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