

**NYCTL 2005-A Trust v Bullard Purchasing & Sales,
Inc.**

2012 NY Slip Op 32599(U)

October 9, 2012

Supreme Court, New York County

Docket Number: 104092/2010

Judge: Joan A. Madden

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SCANNED ON 10/15/2012

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

HON. JOAN A. MADDEN

J.S.C.

PRESENT: _____

PART 11

Index Number : 104092/2010

Justice

NYCTL 2005-A TRUST

vs.

BULLARD PURCHASING & SALES

SEQUENCE NUMBER : 001

AMEND

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

determined in accordance with the annexed decision and order.

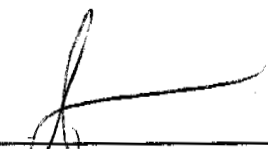
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NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: October 9, 2010


_____, J.S.C.

HON. JOAN A. MADDEN

1. CHECK ONE: CASE DISPOSED NON-FINAL DECISION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
NYCTL 2005-A TRUST and THE BANK OF NEW YORK AS COLLATERAL AGENT AND CUSTODIAN, INDEX NO. 104092/10

Plaintiff,

-against-

BULLARD PURCHASING & SALES, INC.; KANSAS FRIED CHICKEN, INC.; NEW YORK COMMUNITY BANK; JP MORGAN CHASE BANK successor in interest to WASHINGTON MUTUAL BANK; CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; THE PEOPLE OF THE STATE OF NEW YORK and "JOHN DOE #1" through "JOHN DOE #100," inclusive the last 100 names being fictitious and unknown to the Plaintiff, it being intended to designate fee owners, tenants or occupants of the liened premises and/or persons or parties, if any, having or claiming an interest in or lien upon the liened premises described in the complaint, if the aforesaid individual defendants are living, and if any or all of said individual defendants be dead, their heirs at law, next of kin, distributees, executors, administrators, trustees, committees, devisees, legatees, and the assignees, lienors, creditors and successors in interest of them, and generally all persons having or claiming under, by, through, or against the said defendants named as a class, of any right, title, or interest in or lien upon the premises described in the complaint herein,

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Defendants.

-----X
JOAN A. MADDEN, J.:

This is an action to foreclose on a tax lien in the "original amount" of \$4,975.12 on the premises known as 685 Lenox Avenue, New York, New York (Block 02013, Lot 0029).

Plaintiff seeks a total "unpaid balance" of \$11,423.78 as of March 4, 2010, together with interest at the rate of 18%, and attorney's fees pursuant to Administrative Code §11-335. Plaintiff moves

for an order pursuant to CPLR 3025 granting leave to serve an amended complaint in the proposed form as annexed to the motion papers, and to amend the notice of pendency.

Defendants-property owner Bullard Purchasing and Sales, Inc. (“merged into Kansas Fried Chicken, Inc.”) and Kansas Fried Chicken, Inc., oppose the motion, and cross-move for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint, an order pursuant to CPLR 6514(a) cancelling the notice of pendency, and an award of attorney’s fees pursuant to CPLR 6514(c). In the alternative, if plaintiff is permitted to amend, defendants seek to eliminate or reduce the amount of interest on plaintiff’s recovery. Plaintiff’s motion is granted and defendants’ cross-motion is denied.

“It is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party.” Kocourek v. Booz Allen Hamilton Inc., 85 AD3d 502, 504 (1st Dept 2011). “Prejudice requires ‘some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.’” Id (quoting Cherebin v. Empress Ambulance Service, Inc., 43 AD3d 364 [1st Dept 2007], quoting Loomis v. Civetta Corinno Construction Corp., 54 NY2d 18, 23 [1981]). Moreover, while the court will examine the underlying merits of a proposed amendment, leave to amend will be granted as long as the proponent submits sufficient support to show that the proposed amendment is not “palpably insufficient or clearly devoid of merit.” MBIA Insurance Corp v. Greystone & Co, Inc., 74 AD3d 499 (1st Dept 2010).

Plaintiff seeks to amend the complaint to change the tax lien information which incorrectly refers to a 2009-A tax lien, instead of the 2005-A tax lien on which this action based.

Specifically, plaintiff states that the original complaint includes the incorrect document date, recorded/filed date and CRFN number. Plaintiff's counsel submits an affirmation explaining that the "error in the pleadings was caused as a result [of] confusion arising from the numerous tax liens existing on the Premises, which resulted in the recording information for the NYCTL 2009-A Trust being mistakenly included."

Defendants have demonstrated no prejudice or surprise as a result of the amendment. The inaccuracies in the complaint were evident from the conflicting lien documents that were annexed to the complaint.¹ Defendants, however, did not object to those inaccuracies until plaintiff took affirmative steps to correct them by making the instant motion to amend. Also, the caption of the original complaint named the correct trust, NYCTL 2005-A Trust, and the amounts alleged as due and owing are not changed in the amended complaint which still states that the original amount of the lien is \$4,975.12 and the total unpaid balance is \$11,423.78.

Defendants' objection that the action was brought by the "wrong plaintiff," is without merit. In both the original and amended complaints, the plaintiff is the trust, NYCTL 2005-A Trust, and the bank is simply the custodian and agent of the trust. The change in the caption and the body of the amended complaint which adds the name "Mellon" to The Bank of New York is explained by the documents submitted with defendants' cross-motion, which show that in 2007, "The Bank of New York Mellon" was established as a result of the merger of The Bank of New York and Mellon Financial Corporation. Notably, defendants do not question the merit of the proposed amendment, and it is clear that the amendment is neither "palpably insufficient" nor

¹The incorrect and correct lien documents were also available through the public access recording system of the Office of the City Registrar ("ACRIS").

“patently devoid of merit,” so as to warrant denial of leave to amend.

Based on the foregoing, plaintiff shall be permitted to amend the complaint, and for the same reasons the notice of pendency shall also be amended to correct the inaccuracies as to the date of the tax lien certificate, the recording/filing date, and the CRFN number. See Tilden Development Corp v. Nicaaj, 49 AD3d 629 (2nd Dept 2008); Key Bank National Association v. Stern, 14 AD3d 656 (2nd Dept 2005). In view of this determination, defendants’ cross-motion for summary judgment dismissing the complaint, cancellation of the notice of pendency and an award of attorney’s fees, is denied. Defendants’ cross-motion in the alternative, to eliminate or reduce the amount of interest plaintiff is entitled to recover, is likewise denied, as the circumstances presented do not warrant such relief.

Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted, and the Supplemental Summons and Amended Notice, the Amended Complaint and the Amended Notice of Pendency, in the form as annexed to plaintiff’s motion papers, shall be deemed served upon service of a copy of this decision and order with notice of entry; and it is further

ORDERED that plaintiff shall forthwith serve a copy of this decision and order with notice of entry on the Clerk of the Trial Support Office (Room 158) and the County Clerk, so that their records may be altered to reflect the change in the caption naming plaintiff as “NYCTL 2005-A TRUST and The Bank of New York Mellon as Collateral Agent and Custodian”; and it is further

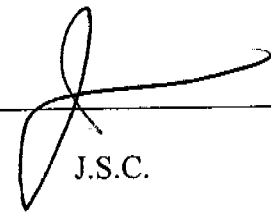
ORDERED that the cross-motion by defendants Bullard Purchasing and Sales, Inc. and Kansas Fried Chicken, Inc., is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on November 1, 2012 at 9:30 am, in Part 11, Room 351, 60 Centre Street.

The court is mailing copies of this decision and order.

DATED: October 9, 2012

ENTER:



J.S.C.

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