

Maheras v Awan

2013 NY Slip Op 31062(U)

May 13, 2013

Supreme Court, New York County

Docket Number: 114296/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

MARK MAHERAS, et al.,

INDEX No. 114296/11

Plaintiffs,

MOTION DATE _____

-v-

MOTION SEQ. NO. 3

AYAZ AWAN, et al.,

Defendants.

MOTION CAL NO. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1, 2, 5

Answering Affidavits- Exhibits 3

Replying Affidavits _____

FILED

CROSS-MOTION: YES NO

MAY 14 2013

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

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 5/13/13

Donna M. Mills
J.S.C.

Check one: FINAL DISPOSITION

DONNA M. MILLS, J.S.C.
NON-FINAL DISPOSITION

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

MARK MAHERAS, DANA WHITTLE,
CHRISTINA KELSEY, and ADRIAN SOLOMON,

INDEX NO.
114296/11

Plaintiff,

- against -

AYAZ AWAN, et al.,

Defendants.

FILED

DECISION/ORDER

MAY 14 2013

NEW YORK
COUNTY CLERK'S OFFICE

DONNA M. MILLS, J:

Plaintiffs are owners of a certain property known as 261 West 137th Street, New York, NY. The basis of their action is the alleged faulty construction and renovation work done by the various contractor defendants. Defendant, Ayaz Awan ("Awan") brings this motion for an Order pursuant to CPLR § 3212 dismissing plaintiff's complaint against him. Plaintiffs cross move for an Order pursuant to CPLR §§ 3025 and 2001 for leave to file and serve a second amended complaint and to join additional defendants.

BACKGROUND

Plaintiffs contracted with defendant Awan's company, defendant New York Best Development, Inc., to have renovations performed on plaintiffs' residential property. The reconstruction included a total demolition and gut renovation of the electric and HVAC systems. Through Awan, plaintiffs hired defendant K.T. Seung as architect. Plaintiffs allege in their amended complaint that the defendants engaged in a scheme to defraud them. The amended complaint alleges specific acts of misrepresentation made by Awan.

Awan contends that in the instant action, he was improperly sued in his individual capacity, and the claims against him should be dismissed because he did not exercise any control over the project separate and distinct from his role as project superintendent. Moreover, Awan argues that in a prior lawsuit, another Justice of coordinate jurisdiction in

this court, determined that any allegations of negligent work, economic duress and fraud, had no merit. Accordingly, it is Awan's contention that the issues raised against him in the instant action were previously litigated to a final judgment, and as such, the plaintiffs are barred from arguing them under the doctrines of res judicata and claim preclusion.

At the outset, contrary to Awan's position that he should not be sued individually, it is clear that the amended complaint has various claims against him sounding in fraud in the inducement and misrepresentation to enter a construction contract.

The doctrine of res judicata "operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same factual grouping or transaction and which should have or could have been resolved in the prior proceeding" (Luscher v Arrua, 21 AD3d 1005, 1006, 1007 [2005], quoting Koether v Generalow, 213 AD2d 379, 380 [1995]). To determine what "factual grouping" constitutes a "transaction," the court must consider how "the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether . . . their treatment as a unit conforms to the parties' expectations or business understanding or usage" (Smith v Russell Sage Coll., 54 NY2d 185, 192-193 [1981]).

Given that an overarching concern in applying the doctrine of res judicata is for fairness (see, Matter of Hodes v. Axelrod, 70 N.Y.2d 364, 374, 520 N.Y.S.2d 933, 515 N.E.2d 612), I find that the issues posed by the instant litigation, and the issues presented in the relevant prior litigation, are not so closely related in time, space, motivation, or origin, that treating them as a unit would have been convenient for trial and would have conformed to the parties' expectations (cf., Schwartzreich v. E.P.C. Carting Co., 246 A.D.2d 439, 668 N.Y.S.2d 370). The previous action for summary judgment in lieu of a complaint concerned the failure to repay a promissory note between the plaintiffs and Awan, whereas this action is now focused on the alleged fraud and conspiracy to commit

fraud between Awan and other defendants in the construction of the plaintiffs' residential premises.

In the proposed Second Amended Complaint, plaintiffs seek to amend by adding an Eighth Cause of Action to pierce the corporate veil of NY Best, High Rise and Summit, and a Ninth Cause of Action for professional malpractice by K.T. Seung; and joining additional defendants Malik Ali and Summit Builders, Inc.

In the absence of significant prejudice or surprise to the opposing party, leave to amend a pleading should be freely given (see CPLR 3025 [b]), unless the proposed amendment is palpably insufficient or patently devoid of merit (see Bernardi v Spyratos, 79 AD3d 684, 688 [2010]).

A party opposing leave to amend "must overcome a heavy presumption of validity in favor of [permitting amendment]" (Otis El. Co. v 1166 Ave. Of Ams. Condominium, 166 AD2d 307 [1990]). "Mere lateness is not a barrier to the amendment" (Edenwald Contr. Co. v City of New York, 60 NY2d 957, 959 [1983]). Prejudice to warrant denial of leave to amend requires " 'some indication that the defendant[s] ha[ve] been hindered in the preparation of [their] case or has been prevented from taking some measure in support of [their] position' " (Kocourek v Booz Allen Hamilton Inc., 85 AD3d 502, 504 [2011]).

The proposed amendment is neither palpably insufficient nor patently devoid of merit, and there is no evidence that the amendment prejudices the defendants.

Accordingly, it is

ORDERED that the motion of defendant to dismiss the complaint herein is denied in its entirety; and it is further

ORDERED that the plaintiff's motion for leave to amend the complaint is granted, in part, as follows: leave is granted to amend the causes of action with the exception of the second and sixth causes of action which are against the defendants that have previously

been dismissed from the case; and it is further

ORDERED that the caption in the second amended complaint which includes the City Department of Buildings and Chris Wolf is stricken from the caption; and it is further

ORDERED that the second amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 574, 111 Centre street, on may 17, 2013, at 10:00 AM.

Dated: 5/13/13

So Ordered

DM

Donna M. Mills, J.S.C.

DONNA M. MILLS, J.S.C.

FILED
MAY 14 2013
NEW YORK
COUNTY CLERK'S OFFICE