

DeCarlo v Travertine, LLC

2013 NY Slip Op 33351(U)

May 28, 2013

Sup Ct, New York County

Docket Number: 100483/12

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

FRANK DECARLO and DULCINEA BASSO

INDEX No. 100483/12

Plaintiff,

-against-

TRAVERTINE, LLC, et al.,

Defendants.

FILED
JUN 03 2013
COUNTY CLERK'S OFFICE
NEW YORK

MOTION DATE _____

MOTION SEQ. No. 001

MOTION CAL No. _____

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

PAPERS NUMBERED

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

Answering Affidavits- Exhibits _____ 2

Replying Affidavits _____ 3

CROSS-MOTION: YES NO

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

Plaintiffs' motion to strike and defendants' cross motion to compel are resolved in accordance with this court's order dated December 20, 2012.

Dated: 5/28/13


DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

FRANK DECARLO and DULCINEA BENSON,

INDEX NO.
100483/12

Plaintiffs,

- against -

TRAVERTINE, LLC, THE CAPPELLETTO
GROUP, DANAЕ CAPPELLETTO, DUSTIN
CAPPELLETTO, ALEXANDER T. MELILLO,
and JOHN DOE,

FILED

DECISION/ORDER

Defendants.

JUN 03 2013

COUNTY CLERK'S OFFICE
NEW YORK

DONNA M. MILLS, J:

In the instant action plaintiff Frank DeCarlo alleges that he was severely beaten while on the premises of the defendant Travertine LLC, by defendant Alexander T. Melillo. Plaintiffs now seek an Order, pursuant to CPLR § 3025(b) to amend the caption to add a party. Defendant Melillo cross-moved to compel disclosure which has been withdrawn. Defendants, Travertine, LLC, The Cappelletto Group, Danae Cappelletto, and Dustin Cappelletto ("Cappelletto Defendants") also cross-move for an Order compelling plaintiffs to comply with discovery obligations by producing a video which plaintiff identified depicting the incident that is the subject of this lawsuit.

In support of plaintiffs' motion to amend the caption, they contend that they recently learned that there are other individuals that share in the ownership of the defendant Travertine LLC. This information was obtained from a Notice of Public Hearing that "Travertine d/b/a Ken and Cook/Lil Charlie's 19 Kenmare St." was seeking an alteration of their liquor license from the State Liquor Authority.

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]). 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]).

“Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position” (Valdes v Marbrose Realty, 289 AD2d 28, 29 [2001]).

The proposed amendment is neither palpably insufficient not patently devoid of merit, and there is no evidence that the amendment, which merely added a new theory of recovery rather than alleging new or different transactions or occurrences, would prejudice or surprise the defendant (see Medical Arts Off. Servs., Inc. v Erber, 89 AD3d 698 [2011]).

Here, the Cappelletto Defendants have demanded the production of the subject video. In response to the demand, plaintiffs’ counsel responded that he does not have a copy of the video in his possession. Apparently the video is in the possession of the New York County District Attorney’s Office. Counsel for the Cappelletto Defendants has made a Freedom of Information Act request to receive a copy of the video from the New York County District Attorney’s Office. This request was denied on the grounds that the criminal proceeding against defendant Melillo was, and is still pending. As such, the Cappelletto Defendants motion is denied with leave to renew in the event the video is not turned over to them after the criminal proceeding ends.

Accordingly, it is

ORDERED that the plaintiff’s motion for leave to amend is granted and the caption should

be changed to add Travertine D/B/A Ken And Cook/LIL Charlie's 19 Kenmare St., and it is further

ORDERED that the amended summons and 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;

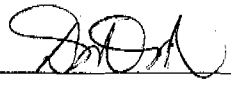
ORDERED that the defendants shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that defendant Travertine's cross-motion to compel is denied with leave to renew; and it is further

ORDERED that counsel are directed to appear for a compliance conference in Room 574, 111 Centre Street, on June 28, 2013, at 10:00 AM.

Dated: 5 / 28 / 13

So Ordered



Donna M. Mills, J.S.C.

DONNA M. MILLS, J.S.C.