

YDRA, LLC v Mitchell
2013 NY Slip Op 33832(U)
March 5, 2013
Supreme Court, Queens County
Docket Number: 20692/11
Judge: Bernice D. Siegal
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ORIGINAL

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

-----X
YDRA, LLC.

Plaintiff,

-against-

JOHN A MITCHELL, MITCHELL &
INCANTALUPO, CHRISTOPHER V.
PAPA R.A., A.I.A., WHITESTONE 8888 CORP.,
AND WAX FERRARO ARCHITECT, P.C.,

Defendants.
-----X

Index No.: 20692/11
Motion Date: 12/12/12
Motion Cal. No.: 9
Motion Seq. No.: 1

The following papers numbered 1 to 14 read on this motion for an order adding Paul Skalar as a defendant pursuant to CPLR §1003 and amending the complaint pursuant to CPLR §3025(b) on behalf of plaintiff YDRA LLC.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Partial Opposition.....	5 - 9
Affirmation in Opposition.....	10 - 12
Reply Affirmation.....	13 - 14

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Plaintiff, YDRA, LLC ("YDRA") moves for an order pursuant to CPLR §1003 adding Paul Sklar as a defendant and amending the complaint pursuant to CPLR §3025(b).

Background

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COUNTY CLERK
QUEENS COUNTY

On or about September 2, 2012, Plaintiff commenced the within action asserting claims of legal malpractice, architectural malpractice, fraudulent inducement, contract rescission and negligence. On or about November 23, 2011, Plaintiff executed a Stipulation of Discontinuance in favor of Christopher V. Papa.

Plaintiff now seeks to add Paul Sklar ("Sklar"), the Chairman and CEO at Whitestone 8888's Corp.; amend the fourth cause of action asserting legal malpractice claims against John A. Mitchell and Mitchell & Incantalupo ("Mitchell"); and amend the complaint removing Christopher V. Papa from the caption and complaint.

The court notes that the Mitchell defendants did not oppose the within motion.

Plaintiff's motion for leave to amend the complaint in the form annexed to the reply papers to add a separate cause of action for fraud as against Sklar and to "amplify" the cause of action as against the Mitchell defendants is granted; and Plaintiff's motion to remove Christopher V. Pappa from the caption and complaint is denied, as more fully set forth below.

Discussion

Amend Pleadings to Add Cause of Action against Paul Sklar

Leave to amend a pleading should be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit and will not prejudice or surprise the opposing party. (See CPLR §3025(b); *Bloom v. Lugli*, 102 A.D.3d 715 [2nd Dept January 16, 2013]; *Greco v. Christoffersen*, 70 A.D.3d 769 [2nd Dept 2010].)

CPLR §1003 provides, in pertinent part, that "[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of

court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it.”

Proposed defendant Sklar, by his attorney, argues that the proposed amendment should be denied because the elements of fraud against Sklar have not been plead with particularity pursuant to CPLR §3016(b). It is well settled, that a cause of action for fraud must be plead with particularity. (See CPLR §3016(b); *Pace v. Raisman & Associates, Esqs., LLP*, 95 A.D.3d 1185 [2nd Dept 2012].) Although Plaintiff’s original proposed pleading does not meet the particularity requirements of CPLR § 3016, a viable cause of action for fraud can be sustained where, as here, one comes forward with “facts ... sufficient to permit a reasonable inference of the alleged conduct.” (See *Pludeman v. Northern Leasing Systems, Inc.*, 10 N.Y.3d 486 [2008]; see also *Polonetsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46 [2001].) Nonetheless, the court notes that Plaintiff submitted a second proposed Amended Complaint in reply that sufficiently plead with particularity Plaintiff’s claim of fraud as against Sklar. Generally, a proposed Amended Complaint submitted in reply would not be considered, however, the court afforded Sklar the opportunity to submit a sur-reply.

Accordingly, Plaintiff’s motion for leave to amend the complaint in the form annexed to the reply papers to add a separate cause of action for fraud as against Sklar is granted. (See CPLR § 3025(b).)

Plaintiff’s Motion to Amend Complaint to Remove Christopher V. Pappa

Defendant Wax Ferraro Architect, PC n/k/a Robert Phillip Ferraro Architect, PC (“Wax”) opposes that portion of plaintiff’s motion to remove Pappa from the Caption and Complaint based on the Stipulation of Discontinuance. However, Wax and the Mitchell defendants served their

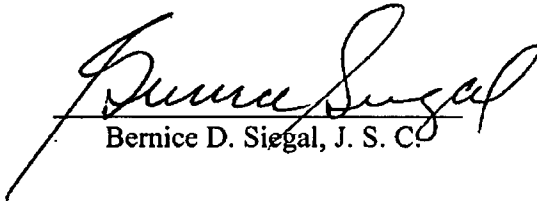
respective answers, with cross-claims against Papa prior to the Stipulation of Discontinuance. Therefore, when YDRA voluntarily discontinued its direct claim as against Pappa the Wax and Mitchell co-defendants cross-claims are converted to third-party claims. Therefore, it would be prejudicial to both Wax and Mitchell to grant Plaintiff motion to amend the Caption and Complaint to reflect the discontinuance of Papa. (See *Schwartz v. Sayah*, 83 A.D.3d 926 [2nd Dept 2011].)

Conclusion

For the reasons set forth above, Plaintiff's motion for leave to amend the complaint in the form annexed to the reply papers to add a separate cause of action for fraud against Sklar and to "amplify" the cause of action against the Mitchell defendants is granted. Plaintiff's motion to remove Christopher V. Pappa from the caption and complaint is denied.

Accordingly, pursuant to CPLR §3025(b), plaintiff is granted leave to serve and file an amended complaint within twenty (20) days of entry of this order, in accordance with this order. Defendants shall have the statutorily prescribed time to interpose responsive papers.

Dated: March 5, 2013


Bernice D. Siegal, J. S. C.

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