

<b>Crafted Kitchen v Chung</b>
2014 NY Slip Op 31502(U)
June 10, 2014
Supreme Court, New York County
Docket Number: 155151/2012
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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CRAFTED KITCHEN ,

Plaintiff,

Index No. 155151/2012

-against-

**DECISION/ORDER**

ALEX CHUNG and ZHAN DENG,

Defendants.

-----X  
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	<u>3</u>
Answering Affidavits to Cross-Motion.....	<u>4</u>
Replying Affidavits.....	<u>5</u>
Exhibits.....	<u>6</u>

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Plaintiff commenced the instant action to recover for labor and services performed in conjunction with the renovation of defendants' home. By decision/order dated January 31, 2014, this court granted plaintiff partial summary judgment pursuant to CPLR § 3016(f) on its third cause of action and denied defendants' motion for leave to file an amended answer asserting four counterclaims against plaintiff (the "January Decision"). Defendants now move to reargue/renew the January Decision and, upon reargument/renewal, reverse its prior determination granting plaintiff's motion for partial summary judgment and denying defendants' motion for leave to amend their answer. For the reasons set forth below, defendants' motion is granted in part and

denied in part.

The relevant facts are as follows. In this action, plaintiff Crafted Kitchen, Inc., d/b/a Crafted Home NY (“Crafted”) seeks damages for construction services provided to defendants. On or about November 29, 2011, plaintiff and defendants entered into a written contract (the “Contract”) wherein plaintiff was to provide construction services and perform renovations for the defendants’ home. At some point after plaintiff began the project, defendants allegedly refused to provide plaintiff access to their home and ceased any further payments to plaintiff. Based on this, plaintiff declared defendants in breach of the Contract.

Thereafter, on or about August 3, 2012, plaintiff commenced this action by filing a summons and verified complaint containing five causes of action. The third cause of action was brought pursuant to CPLR § 3016(f) and annexed to the verified complaint was an itemized project statement. In the January Decision, this court granted plaintiff partial summary judgment on its third cause of action on the ground that defendants failed to raise an issue of fact by asserting only a general denial to the itemized project statement in their answer. Additionally, the court denied defendants’ motion for leave to amend their answer to assert counterclaims on the ground that defendants failed to support their motion with an affidavit of merit as to the proposed counterclaims.

On a motion for leave to reargue, the movant must allege that the court overlooked or misapprehended matters of fact or law. *See* CPLR 2221(d)(2). Here, defendants’ motion for an order granting them leave to reargue this court’s January Decision is denied as they have not alleged that this court overlooked or misapprehended matters of fact or law.

On a motion for leave to renew, the movant must allege new facts not offered on the prior

motion that would change the prior determination and a reasonable justification for the failure to present those facts on the prior motion. See CPLR § 2221(e)(2) and (3). “Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion, courts have discretion to relax this requirement and to grant such a motion in the interest of justice.” *Mejia v. Nanni*, 307 A.D.2d 870, 871 (1<sup>st</sup> Dept 2003) (internal citations omitted). Further, “the requirement that new facts be presented to support a motion to renew need not be applied to defeat substantive fairness.” *Lambert v. Williams*, 218 A.D.2d 618, 620-21 (1<sup>st</sup> Dept 1995) (internal citations omitted). In the present case, defendants argue that renewal should be granted as their attorney, apparently due to his own personal problems, failed to include defendants’ affidavits of merit with annexed spreadsheets detailing the alleged deficiencies in plaintiff’s work, which they contend would change this court’s prior determination in the January Decision. Initially, the court finds that defendants’ attorney’s personal problems do not provide a reasonable justification for their failure to provide the documents on the prior motion. However, in the interest of substantive fairness this court finds that renewal of the January Decision is appropriate as defendants should not be punished for their attorney’s failures. Thus, defendants’ motion for renewal is granted.

Upon renewal, the court first turns to defendants’ motion for leave to amend their answer to assert counterclaims sounding in breach of contract, negligence, breach of express warranty and breach of implied warranty. Pursuant to CPLR § 3025(b), “[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit. On a motion for leave to amend, [the party] need not establish the merit of its proposed new allegations, but simply

show that the proffered amendment is not palpably insufficient or devoid of merit.” *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1<sup>st</sup> Dept 2010) (internal citations omitted).

In the present case, the portion of defendants’ motion for leave to amend their answer to assert counterclaims for breach of contract and negligence against plaintiff is granted. As an initial matter, these proposed counterclaims are not palpably insufficient or devoid of merit. Further, contrary to plaintiff’s contention, there is no unfair prejudice or surprise to it as defendants’ original answer contained allegations supporting claims sounding in negligence and breach of contract stemming from plaintiff’s work at defendants’ home. Specifically, included in defendants’ affirmative defenses were the following: (1) “Plaintiff failed to perform contracted for services in a skillful and workmanlike manner”; (2) “Plaintiff performed what work they performed for the defendants in a reckless, careless and negligent manner”; and (3) “Plaintiff inexcusably failed to perform substantially in accordance with the terms of the contract.” Further, unlike the case cited by plaintiff in opposition to the instant motion, discovery is still open and no depositions have yet gone forward. *See Lattanzio v. Lattanzio*, 55 A.D.3d 431 (1<sup>st</sup> Dept 2008). Thus, plaintiff is not precluded from seeking further discovery related to the new counterclaims.

However, the portion of defendants’ motion seeking leave to add counterclaims for breach of express warranty and breach of implied warranty is denied on the ground that said claims are completely devoid of merit. It is well settled that if a contract is “deemed one essentially for the provision of a service, a cause of action for breach of warranty cannot lie.” *R.W. Kern, Inc. v. Circle Industries Corp.*, 158 A.D.2d 363 (1<sup>st</sup> Dept 1990). Instead, “[i]f the service is performed negligently, the cause of action accruing is for that negligence. Likewise, if

it constitutes a breach of contract, the action is for that breach.” *Aegis Prods. v. Arriflex Corp. of Am.*, 25 A.D.2d 639 (1<sup>st</sup> Dept 1966). Here, it is clear that the Contract between the parties was essentially one for labor and services. Thus, defendants cannot maintain a counterclaim against plaintiff for breach of warranty, express or implied, as a matter of law.

The court now turns to plaintiff’s cross-motion pursuant to CPLR § 3016(f) for partial summary judgment. Pursuant to CPLR § 3016(f):

In an action involving the . . . performing of labor or services . . . the plaintiff may set forth and number in his verified complaint the items of his claim and the reasonable value or agreed price of each. Thereupon the defendant by his verified answer shall indicate specifically those items he disputes and whether in respect of delivery or performance, reasonable value or agreed price.

To meet the pleading requirements of CPLR § 3016(f), plaintiff’s complaint “must contain a listing of the goods or services provided, with enough detail that it ‘may readily be examined and its correctness tested entry by entry.’” *Summit Sec. Services, Inc. v. Main Street Lofts Yonkers, LLC*, 73 A.D.3d 906, 907 (2<sup>nd</sup> Dept 2010) (quoting *Teal, Becker & Chiaramonte, CPAs v. Sutton*, 197 A.D.2d 768 (3<sup>rd</sup> Dept 1993)); *see also Epstein, Levinsohn, Bodine, Hurwitz & Weinstein, LLP v. Shakedown Records, Ltd.*, 8 A.D.3d 34 (1<sup>st</sup> Dept 2004) (“The degree of specificity required by the statute is satisfied when the opposing party is able to respond in a meaningful way on an item-by-item basis.”). If plaintiff does this, the defendant must specifically dispute the items on the list individually and indicate the exact grounds for each denial; a blanket general denial will be insufficient. *Id.* Stated another way, mere general denials are insufficient to raise any triable issues, making summary judgment appropriate. *See O’Callaghan v. Republic W. Ins. Co.*, 269 A.D.2d 114 (1<sup>st</sup> Dept 2000). However, the First Department has held that a rigorous application of the CPLR § 3016(f) requirements should not be used to deny a party its day in

court when they have presented sufficient evidence in opposition to summary judgment to raise a material issue of fact. *Metro Envelope Corp. v. Westvaco*, 72 A.D.2d 695 (1<sup>st</sup> Dept 1979).

Specifically, in *Metro*, the court found that the “law favors affording to litigants their ‘day in court’” and summary judgment should be avoided when CPLR § 3016(f) is used as a pleading trap for the wary whose failure to offer more than general denials is “mere failure of draftsmanship.” *Id.* at 696; *see also Cibro Petroleum Products, Inc. v. East Schodack Fule & Contracting Corp.*, 135 A.D.2d 947 (3<sup>rd</sup> Dept 1987) (holding that parties are entitled to litigate questions of fact and “a rigorous application of the CPLR § 3016(f) requirements should not be used to deny defendants that opportunity”).

In the present case, plaintiff’s motion pursuant to CPLR § 3016(f) for partial summary judgment on its third cause of action is denied as there remain material issues of fact as to the amount due, if any, to either party. As an initial matter, the court adheres to its prior determination that plaintiff’s complaint meets the specificity requirements of CPLR § 3016(f) and defendants general denial asserted in their answer was insufficient to raise a material issue of fact. However, the court finds that such general denial was merely a drafting failure as defendants clearly dispute the quality of plaintiff’s work and, as such, challenge the amount due, if any, to plaintiff. In both their affidavits, defendants clearly detail the many aspects of plaintiff’s work that they claim was inadequate and in violation of the terms of the Contract. Further, defendants’ proposed counterclaims are clearly related to plaintiff’s claim for unpaid services and a determination on the counterclaims bears directly on what amounts, if any, are due to either party. Indeed, defendants’ counterclaims for breach of contract and negligence go directly to the heart of whether plaintiff is entitled to any further payment from defendants and

the allegations in defendants' affidavits in support thereof clearly raise issues of fact as to the amount due to either party. Thus, defendants should be given an opportunity to litigate these disputed issues of fact and the court will refrain from applying a rigorous application of CPLR § 3016(f)'s pleading requirements in this matter.

Based on the foregoing, defendants' motion for renewal is granted. Upon renewal, this court reverses its prior decision granting plaintiff's motion for partial summary judgment on its third cause of action and denying defendants' motion for leave to amend their answer to assert counterclaims for breach of contract and negligence. Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on its third cause of action is denied; and it is further

ORDERED that the Judgment of this court dated March 5, 2014, and accompanying restrictions are hereby vacated and lifted; and it is further

ORDERED that defendants' motion for leave to amend their answer is granted, in part, as follows: leave is granted to assert counterclaims for breach of contract and negligence in the form annexed to defendants' moving papers and to this extent the amended answer in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend their answer is denied with respect to asserting counterclaims for breach of the expressed warranty and breach of the implied warranty; and it is further

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

ORDERED that defendants' Order to Show Cause seeking a stay of the enforcement of the Judgment of this court dated March 5, 2014, is denied as moot as said Judgment is vacated by this order. This constitutes the decision and order of the court.

Dated: 6/10/14

Enter: CK

J.S.C.

**CYNTHIA S. KERN**  
J.S.C.