SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART COM 2

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BBM CONSTRUCTION CORP.,

Plaintiff,

-against-

MORRIS HERSKO and SARA G. HERSKO,

Defendants.

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3-18-14

Index No. 504076/2012
DECISION AND ORDER
Seq no 2

SCHMIDT, DAVID, J.:

Defendants Morris Hersko and Sara G. Hersko move for an order, pursuant to CPLR 3025 (b) and (c), granting them leave to amend the Answer and Counterclaim filed herein in the proposed form annexed as exhibit A to the affirmation of Simon Schwartz, dated September 30, 2013 (Schwartz aff.). Plaintiff BBM Construction Corp. (BBM) opposes.

For the following reasons, the motion is denied.

I. Background

Plaintiff commenced the instant action on November 28, 2012 by filing a Summons and Verified Complaint (Complaint) with the County Clerk. The Complaint alleges that, pursuant to an agreement entered into on May 7, 2012, plaintiff performed certain renovation and related work at defendants' home for the sum of $234,462.47, and that defendants breached this agreement by failing to pay this amount, except for the sum of $88,039.98, leaving a balance due and owing of $146,422.67 plus interest.

The causes of action sound in breach of contract (first cause of action), recovery of the reasonable value for work, labor, services and materials furnished by plaintiff to defendant at defendants' special instance and request (second cause of action), account stated (third cause of

action) and foreclosure of a mechanic's lien filed by plaintiff on the subject property (fourth cause of action).

On January 8, 2013, defendants served their Verified Answer and Counterclaim (Answer). In the Answer, defendants raise four affirmative defenses and interpose one counterclaim. The *first affirmative defense* alleges that the court lacks personal jurisdiction over the defendants due to insufficient service of process. The *second affirmative defense* asserts that the complaint fails to state a cause of action. The *third affirmative defense* alleges that there was an oral agreement between the parties in which defendant Morris Hersko (Hersko)'s agreement to pay plaintiff's invoices was expressly conditioned on the following terms: (i) renovation work on the property would not exceed $150,000; (ii) for the agreed upon sum of $150,000, plaintiff agreed to deliver the house substantially completed and in move-in condition; and (iii) plaintiff required prior approval from defendants for any work that exceeded the qualitative or quantitative norm agreed by and between the parties. Defendants further allege that plaintiff breached all the of the aforementioned conditions and are therefore excused from paying any amounts claimed by plaintiff in excess of the amount ($88,039.98) already paid. The *fourth affirmative defense* states that implicit in the parties' oral agreement was the understanding that all work performed by plaintiff would be in substantial compliance with all applicable code requirements and would be approved upon inspection. In this connection, defendants assert that plaintiff's work was "largely worthless and must be redone by other contractors in compliance with the applicable law and code requirements." Answer ¶ 13.

The *counterclaim* alleges that as a result of the breaches identified in the third and fourth affirmative defenses, defendants suffered damages in an amount not yet determined but not less

than $30,000.00.

The instant motion, for leave to file a proposed amended answer (the Proposed Answer), pursuant to CPLR 3025 (b) and (c), was filed on October 9, 2013. The Proposed Answer contains six affirmative defenses and two counterclaims, including for breach of fiduciary duty.

II. Discussion

In support of their motion, defendants contend that the new defenses and counterclaim merely clarify or expand on the same core allegations set forth in the original Answer. *See* Schwarz aff., ¶ 8. More specifically, defendants state that their proposed amendment is based on "detailed facts and supporting documents deduced during the recently held depositions of Moses Kupferstein [BBM's principal] and [defendant] Morris Hersko ... ." *Id.* According to defendants, even the sole new legal theory reflected in defendants' proposed breach of fiduciary duty counterclaim and related affirmative defense "flows entirely from the same underlying facts as more fully elucidated in the deposition taken by plaintiff of [defendant] Morris Hersko, and in the documents introduced by plaintiff into evidence during that deposition." *Id.* Finally, defendants contend that, by their amendment, they are conforming the Answer to the evidence derived from the depositions, pursuant to CPLR 3025 (c).[1]

In opposing the motion, plaintiff asserts that it would be prejudiced if amendment was permitted. First, plaintiff argues that defendants are using the proposed amended pleading as a means to avoid providing certain discovery (which failure is the subject of plaintiff's separate

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[1] This section of CPLR 3025, entitled "Amendment to conform to the evidence," provides that "[t]he court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances."

Motion to Strike). Indeed, plaintiff notes that the timing of the filing of the instant motion, on October 9, 2013, the day before the October 10, 2013 compliance conference, demonstrates that the instant motion is simply a means to provide a cover for defendants' ongoing refusal to provide plaintiff with outstanding discovery. Second, plaintiff asserts that to permit amendment at this stage would prejudice it by allowing defendants to change the entire factual basis of their case after discovery and depositions have been conducted. This, in spite of the fact that the "facts" and "allegations" that defendants seek to add to support their amendment occurred prior to the lawsuit and defendants knew or should have known these facts at the time they served the Answer. Third, plaintiff argues that, rather than clarifying their position, the proposed amendment contradicts admissions contained in defendants' original verified answer. Fourth, plaintiff asserts that the amendment, and in particular, the breach of fiduciary duty counterclaim and related affirmative defense, lacks merit. Finally, plaintiff contends that defendants have failed to comply with all of the requirements set forth in CPLR 3025 (b) for leave to amend.

Generally, in the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely given unless the proposed amendment is palpably insufficient as a matter of law or is patently devoid of merit. *American Cleaners, Inc. v American Intl. Specialty Lines Ins. Co.*, 68 AD3d 792, 794 (2d Dept 2009).

Here, however, as plaintiff correctly points out, the instant motion does not comply with the recent amendment to CPLR 3025 (b), effective January 1, 2012, which requires that: "Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." *See e.g. Karl's Plumbing & Heating Co. Inc. v Yevool, Inc.*, 41 Misc 3d 1223(A), 2012 NY Slip

Op 52499(U), *2 (Sup Ct, Queens County 2012) (denying motion to amend answer based, in part, on defendants' failure to "highlight the difference between the original pleading and the proposed amended pleading," pursuant to CPLR 3025 [b]).[2]

Defendants also neglect to annex any portion of the deposition transcripts on which they base their motion. This seems especially problematic in light of defendants' assertion that the proposed amendment is based on facts elicited during depositions and their wish to conform the pleadings to the evidence. In particular, defendants' omission leaves the court without the ability to independently evaluate whether the proposed amendment accurately reflects the testimony on which it is purportedly based. Remarkably, there is not even a single colloquy from the depositions excerpted in either defendants' counsel's moving affirmation in support of amendment or his affirmation in reply.

Furthermore, to the extent that defendants, in their reply, now assert that the amendment is based exclusively on Hersko's (and not Kupferstein's) deposition testimony (*see* reply affirmation ¶ 8 ["everything in the proposed amendment is contained in the extensive question and answer taken at the two day Hersko deposition ..."]), such facts would have been known to movants from the beginning and could have been plead without trouble at the inception of the litigation or, at the very least, before depositions of the parties were held.[3] Under similar circumstances, courts have denied motions for leave to amend pleadings where, as here, a

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[2] *Karl's Plumbing* and the amendment to CPLR 3025 (b) are discussed more extensively in Patrick M. Connors, Supplementary Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:9A (2013 Cumulative Pocket Part).

[3] Defendants appear to retract their original assertion that the amendment is based, in some part, on Kupferstein's deposition testimony – the likely reason being that the deponent was never provided with the transcript for examination and signature, as required by CPLR 3116.

movant has not provided a reasonable excuse for the delay. *See e.g. Lattanzio v Lattanzio*, 55 AD3d 431, 431-32 (1st Dept 2008) (holding that "[t]he motion court did not improperly deny leave to defendants to further amend their answer, because the factual basis of the proposed amended answer was known at the time of the original answer") (citation and inner quotation marks omitted); *see also Prince v O'Brien*, 256 AD2d 208, 211-12 (1st Dept 1998). To the extent that defendants appear to rely on CPLR 3025 (c) to justify the timing of their amendment, such reliance is misplaced as there has been no trial. *See e.g. Mew Equity, LLC v Sutton Land Services, LLC*, 34 Misc 3d 1224(A), 2012 NY Slip Op 50217(U), *8 (Sup Ct, Kings County 2012 [Battaglia, J.]) (prior to trial, party's motion for leave to serve an amended pleading pursuant to CPLR 3025 [c] was not properly made).

Nevertheless (and putting aside for the moment the deficiencies that have already been identified that weigh against granting the motion), the court will now address the other arguments that plaintiff raises, namely, that the proposed amendment is "palpably insufficient as a matter of law or is patently devoid of merit."

As an initial matter, plaintiff argues that the Proposed Answer is devoid of merit in that it contradicts defendants' prior sworn statements. Specifically, plaintiff notes that, in the Answer, Hersko admitted to an "agreement ...to pay the plaintiff's invoices," as confirmed by several payments made by defendants in the aggregate sum of $88,039.98. *See* affirmation in opposition of Joshua D. Spitalnik, dated December 9, 2013 (Spitalnik aff.), ¶ 28. Plaintiff further notes that in the Proposed Answer, defendants now claim, contrarily, that they "never made any partial payments [of invoices and] never gave any assurances of payment." *See* Proposed Answer ¶ 21.

In response, defendants contend that Hersko's denial in the Proposed Answer that

defendants never made partial payments does not represent a contradiction of Hersko's prior sworn statement. Rather, it reflects Hersko's testimony at his deposition where he explained that the partial payments of $88,039.98 did not, for the most part, correspond to actual periodic invoices submitted by plaintiff, but were merely payments on account for past and future work performed by plaintiff on the premises, up to an agreed cap of $150,00.00.

However, given that it has not been supplied with Hersko's deposition testimony (or any portion thereof), the court is unable to assess whether defendants' explanation adequately resolves the apparent contradiction.

Plaintiff also claims that there is an inherent contradiction in the Proposed Answer. Specifically, defendants allege that they terminated plaintiff, while simultaneously alleging that "[plaintiff] prematurely terminated its renovation work at the Property." *See* Proposed Answer ¶¶ 9, 19, 38. While the court is willing to accept defendants' explanation that its allegation with respect to plaintiff's termination is really an allegation of plaintiff's anticipatory repudiation of the oral agreement, plaintiff should not be left in an unenviable position of having to guess the nature of defendants' proposed amendment.

Plaintiff also argues, and the court agrees, that defendants' new theory, *i.e.*, the breach of a fiduciary duty based on Kupferstein and Hersko's "long standing friendship"; the relationship of trust created during the one month that Kupferstein, gratis, supervised a handyman who performed some initial work on the property; and Kupferstein's superior knowledge of the renovation work required at the property (Schwartz aff., Ex. A, ¶ 25), is devoid of merit in light of certain admissions made by Hersko during his deposition.

"In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a

fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct." *Guarino v North Country Mtge. Banking Corp.*, 79 AD3d 805, 807 (2d Dept 2010) (internal quotations and citation omitted). "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *People v Coventry First LLC*, 13 NY3d 108, 115 (2009) (internal citation and quotation marks omitted). Furthermore, a fiduciary duty exists "only when a person reposes a high level of confidence and reliance in another, who thereby exercises control and dominance over him." *Id.*

Here, defendants' allegations of Kupferstein's control and dominance over Hersko is belied by Hersko's own testimony. During his deposition, Hersko admitted to overseeing the work and knowing everything that was occurring on the Project:

Q: Were you involved with the day-to-day overseeing of the renovation work at your property?

A: Correct; coming in and out every day, yes.

Q: In fact, sometimes multiple times a day, correct?

A: As I said, yeah.

Q: You knew what was happening at your project at all times?

A: Correct.

Spitalnik aff., Ex. C at 149:21-150:7.

As defendants contend that their amendment is based on facts drawn from Hersko's deposition testimony, such facts fail to show such a high level of trust and confidence or the exercise of control and dominance by Kupferstein over Hersko sufficient to establish the

existence of a breach of fiduciary duty claim. If anything, Hersko's constant oversight of all aspects of the project coupled with the detailed invoices and statements that plaintiff sent Hersko on an almost weekly basis (*see* Spitalnik aff., Ex. A), appear, by any other measure, to have all of the characteristics and attributes of an arms-length transaction.

As a final matter, plaintiff's argument that the Proposed Answer is designed solely to frustrate its effort to obtain discovery, and in particular, responses to Requests Nos. 20-22 was (or should have been) mooted by the court's December 18, 2013 Order, issued at the conclusion of a conference held on the same date. In particular, plaintiff sought documents that pertained to: (i) defendants' allegations in their counterclaim that plaintiff's work was incomplete; (ii) defendants' allegations in their counterclaim that they suffered damages in at least the sum of $30,000; and (iii) the retention by Hersko of contractors to repair or complete the work performed by plaintiff. At the conference, defense counsel argued that a stack of color photographs taken post-plaintiff's termination and Hersko's expert's report was a sufficient response to these document requests and that the contemporaneous documents (*e.g.*, invoices from the contractors who completed the project) sought by plaintiff was simply meant to harass and amounted to little more than a fishing expedition. The court rejected this argument, and ordered, *inter alia*, that "[Hersko] shall provide plaintiff by January 20, 2014 with all documents requested [by plaintiff] in its 1/31/13 [First Notice for Discovery and Inspection]. To the extent such documents are not in defendant's possession, [Hersko] shall provide an affidavit stating such documents are not in his possession, custody or control."[4]

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[4] During the conference, the court opined that even under the proposed counterclaims, which allege that defendants had overpaid plaintiff for the reasonable value of incomplete, poor quality and unnecessary renovation services, the discovery sought by plaintiff could not fairly be

Subsequent to the compliance date set forth in the December 18, 2013 Order, the court received correspondence from counsel for both parties as to whether or not there had been full compliance with the court's directive. The court will take up this issue when it considers the merits of plaintiff's Motion to Strike. Nevertheless, the court takes this opportunity to remind counsel that, in appropriate circumstances, sanctions may issue as a result of a party's failure to respond to valid discovery requests.

In conclusion, for all the reasons discussed above, the motion is denied.

The foregoing is the decision and order of the court.

Dated: March 18, 2014

ENTER:

J.S.C.

HON. DAVID I. SCHMIDT

characterized as irrelevant.