

**Pavarini McGovern, LLC v Artisan Lofts Dev. Owner  
LLC**

2014 NY Slip Op 32292(U)

August 25, 2014

Supreme Court, New York County

Docket Number: 110289/2011

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 35

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PAVARINI MCGOVERN, LLC,

Index No. 110289/2011

Plaintiff,

Motion Seq. No. 002

-against-

ARTISAN LOFTS DEVELOPMENT OWNER LLC,

Defendant.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to, *inter alia*, compel payment pursuant to a dispute resolution board determination, defendant Artisan Lofts Development Owner, LLC (“defendant”) moves pursuant to CPLR 3025(b) for leave to file and serve an amended answer with counterclaims.

*Factual Background*

This action arises from the construction of a residential condominium at 157 Chambers Street in Manhattan (the “Project”). On September 1, 2006, defendant, as owner, and plaintiff, as construction manager, entered into a construction management agreement (the “CMA”) wherein they agreed to refer disputes and claims to a dispute resolution board (the “DRB”).

Section 9.1.1 of the CMA provides that:

During both the Preconstruction and Construction Phases, Claims, disputes or other matters in question between the parties to this Agreement shall be resolved as provided in [the DRB’s Procedures, attached to the CMA] as a condition precedent to litigation.

Section 4.3 of the DRB Procedures provides that:

the written resolution of the DRB shall be binding upon the Parties for the duration of the Project through completion and Final Payment. . . No earlier than sixty (60) days after completion of the Project and issuance of Final Payment, either Party may challenge the results of any DRB resolution through litigation. The time for challenging the results of

the DRB resolutions is meant to be a “cooling off” period subsequent to the completion of resolutions by the DRB.

In November 2008, after work on the Project had commenced, the parties amended the CMA (the “TCO Agreement”) by which defendant would compensate plaintiff for achieving certain milestones in obtaining temporary certificates of occupancy (“TCOs”) related to the Project. Defendant allegedly owes \$550,000 pursuant to the TCO Agreement.

When defendant failed to make payment, plaintiff submitted the issue to the DRB in December 2010. Two months later, the DRB issued a resolution directing defendant to pay the aforementioned sum to plaintiff. Following DRB’s resolution, plaintiff immediately demanded the payment, but defendant stated that plaintiff would first have to make a formal application for payment. Thereafter, plaintiff submitted to defendant an AIA Requisition for Payment.

In response, defendant stated that certain documentation and certification would be required by its lender before issuing payment. In turn, plaintiff requested that the DRB issue a clarifying resolution regarding defendant’s purported conditions precedent to payment.

In July 2011, the DRB issued another resolution which stated that defendant owed plaintiff the \$550,000 sum; there were no conditions precedent to making the payment; and defendant should issue the payment immediately. Despite the two DRB resolutions, defendant never issued the payment. Plaintiff further claims that interest of at least \$117,881.60 is owed, since the payment is now late pursuant to the CMA.

On August 10, 2011, the DRB issued a third resolution (the “August Resolution”), stating the following:

The DRB declares that the parties have in good faith proceeded diligently with the DRB process . . . and that both parties should be given leave to commence litigation of their

disputes . . . .

*If, however, either party feels aggrieved with the foregoing, the aggrieved party may certainly seek a court order compelling further compliance with the DRB process.”<sup>1</sup>*  
(Emphasis added).

The DRB reasoned:

[I]t is clear that the DRB is a “real time” disputes resolution process intended to take place during the actual construction of the Project . . .

In the current situation, the Project has been completed and occupied for many months, but final payment has not been made because of the pendency of disputes and other related reasons. Therefore, the parties are stuck in a conundrum that under a literal reading of the contract documents there appears to [be] a practical impossibility of proceeding to court because a Resolution of the DRB is a condition precedent to litigation, but the parties cannot agree upon the conditions precedent to final payment, and litigation cannot be commenced until the issuance of final payment, but final payment cannot be made, notwithstanding the issuance of the prior DRB Resolution . . .

[F]urther obstacles stand in the way of making final payment. Among other things, a lending institution is apparently in possession of the funds needed to make final payment, and the lending institution refuses to release those funds until mechanics liens of record have been discharged and the pending disputes have been resolved. In fact, [plaintiff] is one such lienor. All the foregoing is, in effect, one large, irreconcilable “Catch 22.”

The DRB therefore recommends that pending disputes be taken to court and finally resolved . . . without fulfilling the seemingly impossible conditions precedent, namely the making of final payment . . . [and] strongly recommends that the parties abandon present efforts to obtain DRB Resolutions of pending disputes and that court proceedings be promptly initiated to adjudicate the disputes . . .

Thus, in September 2011, plaintiff commenced this action.<sup>2</sup> In its first cause of action for

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<sup>1</sup> The Amended Complaint does not mention the August Resolution, and submits same in Reply.

<sup>2</sup> Plaintiff also sought a preliminary injunction to require defendant to comply with the DRB’s directive to make payment. The court denied plaintiff’s application, finding that the complaint seeks a permanent injunction and declaratory judgment that together would provide relief identical to the ultimate relief that plaintiff seeks.

specific performance, plaintiff seeks an order requiring defendant to comply with the DRB's resolutions for payment and continue participating in any hearings on claims/disputes before the DRB for resolution through final payment, as defined in the CMA. In the alternative, plaintiff seeks a judgment in the sum of \$550,000. The second cause of action seeks permanent injunctive relief to restrain defendant from refusing to comply with the DRB resolutions.

### *Arguments*

Defendant argues that leave to amend should be granted as it is to be freely given and generally does not involve the merits of the amended pleading. The counterclaims are based on plaintiff's failures to comply with the CMA -- the same agreement upon which plaintiff's claims in the pending action are based. Defendant contends that plaintiff breached the CMA by, *inter alia*, failing to complete the Project within the specified contract time and in accordance with the terms of the CMA; failing to indemnify plaintiff for damage to adjoining property caused by defendant and its subcontractors; and refusing to reimburse plaintiff for certain overcharges incurred by defendant. Moreover, plaintiff cannot claim prejudice in having the counterclaims litigated in this action. Plaintiff has not pursued discovery with respect to its pending claims, which arise from the same contract and set of transactions, and thus, both claims would be most efficiently adjudicated in one action.

In opposition, plaintiff argues that under the CMA, defendant's own "final payment" to plaintiff is a condition precedent to litigation, which it failed to satisfy. The CMA provides that all claims, disputes or other matters in question between the parties shall be resolved as per the DRB procedures, which provide that DRB's resolution shall be binding upon the parties for the duration of the project through completion and final payment. It is undisputed that defendant has

not issued such final payment, and thus, it has no right to pursue its proposed counterclaims. Moreover, this amount is only part of the final payment due, as defendant still owes plaintiff the contract balance on the “guaranteed maximum price.” In fact, defendant never submitted the required final certificate for payment setting forth the entire balance found to be due to plaintiff. Until final payment is made, DRB has continuing jurisdiction to hear the parties’ disputes and claims. Thus, the counterclaims are devoid of merit, and plaintiff’s motion must be denied.

Alternatively, plaintiff argues that the motion should be denied on procedural grounds because it fails to include an affidavit of merit from an individual with personal knowledge of the new pleading’s subject matter. Defendant’s attorney’s affirmation, combined only with documents already in the record, fails to provide adequate support for the motion.

In reply, defendant notes that plaintiff does not claim that it would suffer prejudice or surprise if the amendment were permitted. Nor could it claim prejudice, since the action remains in a very early stage.

As to the merits of the proposed counterclaims, defendant contends that plaintiff misconstrues the CMA. The DRB was intended to be a “real time” method for resolving disputes between the parties contemporaneously with the progress of the Project, and construction has long since ceased, and the Project has been complete for some time. Further, DRB concluded in its August 2011 resolution that the parties are at a fundamental impasse regarding final payment, and that they are released from the DRB process and free to pursue litigation of their respective claims.

Plaintiff has not proffered any reasons why it believes the DRB process should continue in these circumstances, particularly where construction is complete and the CMA is clear that

DRB resolutions are interim, not final, and that all disputes must ultimately be resolved by agreement between the parties or through post-construction litigation.

Additionally, plaintiff's claim that final payment under the CMA is a condition precedent to litigation is contradicted by its own recent litigation activity. Plaintiff filed a separate action in 2014 against defendant alleging breach of the CMA. Thus, plaintiff's assertion of contract claims in that action is incompatible with its claim in opposition herein that final payment is a condition precedent to any claims under the CMA. It is illogical for plaintiff to contend that this purported condition precedent should apply to defendant's proposed counterclaims, but not to its direct claims against defendant in the other action. In fact, plaintiff's commencement of the other action constitutes an acknowledgment that the DRB process is complete, and that there is no condition precedent that must be satisfied before the parties may proceed to litigation.

Also, defendant contends that its motion is not procedurally defective, as an affidavit of merit is not required where a party merely seeks leave to amend its pleading to add claims. Case law provides that a proposed amendment in this fashion may be supported by a sufficient showing of merit through the submission of an affirmation by counsel. Here, the counterclaims allege that plaintiff breached the CMA. Defendant does not allege that the CMA does not exist or is unenforceable, nor could plaintiff do so, given that it commenced another action against defendant seeking to hold it liable for purported breaches of the same agreement.

Moreover, the motion is supported by an affirmation of merit from defendant's counsel, which describes the factual basis of the proposed counterclaims. The counterclaims adequately state claims for breach of contract and are meritorious on their face. Also, defendant argues that the proposed amended answer and counterclaims (verified by defendant) constitute the requisite

affidavit of merit, in the event the court does not find that counsel's affirmation is sufficient. Finally, defendant maintains that it could have asserted its counterclaims in a separate action against plaintiff, but doing so would be a waste of judicial resources. Thus, the motion should be granted and all claims between the parties should be litigated in this action.

After the motion was fully submitted, plaintiff submitted a letter to the court addressing defendant's reply. Defendant also submitted a letter in reply to plaintiff's letter. These submissions are discussed in further detail below.

#### *Discussion*

Leave to amend a pleading under CPLR 3025(b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law (*see McGhee v Odell*, 96 AD3d 449, 946 NYS2d 134 [1<sup>st</sup> Dept 2012]). A party opposing leave to amend "must overcome a heavy presumption of validity in favor of permitting the amendment (*id.*).

On a motion for leave to amend to add claims, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit (*see MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 901 NYS2d 522 [1<sup>st</sup> Dept 2010]). Thus, a proposed amendment may be supported by a showing of merit through the submission of an affirmation by counsel, along with other evidence (*id.*). Moreover, under CPLR 105(u), a verified pleading may be used anytime an affidavit is called for (*see JPMorgan Chase Bank, N.A. v Clancy*, 117 AD3d 472, 985 NYS2d 507 [1<sup>st</sup> Dept 2014]). Here, the moving papers are supported by counsel's affirmation and exhibits attached thereto; the reply is further supported by a verified copy of the proposed amended answer and

counterclaims. As such, defendant's motion is not procedurally defective, and will be evaluated on the merits.<sup>3</sup>

And, as to the letters submitted by plaintiff and defendant on August 11 and August 12, respectively, in the first letter, plaintiff wrote the court to address points raised by defendant in reply for the first time. While, typically the court does not consider arguments made for the first time in reply, since plaintiff had an opportunity to, and did, address defendant's new arguments, the court will consider defendant's reply in its entirety, as well as the parties' letters subsequent thereto in the interest of evaluating all of the parties' contentions (*see Fiore v Oakwood Plaza Shopping Center, Inc.*, 164 AD2d 737, 565 NYS2d 799 [1<sup>st</sup> Dept 1991]; *Town Residential LLC v. Oge*, 2014 WL 4063043 [Sup Ct New York Cty 2014]).

Here, plaintiff does not claim that the proposed counterclaims would cause prejudice or surprise. And, plaintiff's claim that the proposed counterclaims are meritless, in that a condition precedent to litigation in the CMA (*i.e.*, issuance of "final payment" pursuant to the DRB's directives in its resolutions) has not been satisfied, is unavailing to warrant denial of the motion.

As seen above, section 9.1.1 of the CMA expressly provides that *during the preconstruction and construction* phases of the Project, claims and disputes are to be resolved as provided in the DRB Procedures as a "condition precedent" to litigation. Therefore, under the plain reading of this dispute resolution clause, the parties agreed to submit claims and disputes to the DRB during this limited period. It is undisputed that construction on the Project concluded long ago, and well before this action was commenced. As the language of the CMA supports

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<sup>3</sup> Contrary to plaintiff's contentions, *Guzman v Mike's Pipe Yard*, (35 AD3d 266, 825 NYS2d 480 [1<sup>st</sup> Dept 2006]) is inapposite to the present matter, as it concerned a motion to amend the answer to assert a new affirmative defense, and not a new *claim*. Moreover, the moving papers in *Guzman* also lacked any other evidence of a viable defense. Here, defendant submits numerous exhibits in support of its claim that it may now litigate its counterclaims.

defendant's argument that "final payment" is not a condition precedent to litigation, it cannot be said that defendant's counterclaims are palpably meritless for failure to comply with a condition precedent established via the DRB rules. In other words, the DRB Procedures (including resolutions resulting therefrom) are no longer applicable, given that construction has been completed (*see Application of Liebhafsky*, 100 AD2d 764, 474 NYS2d 723 [1<sup>st</sup> Dept 1984] ("Because the scope of the Architect's authority is limited to the "operational phases of the construction, and the petitioners terminated the contract and the respondent ceased construction before any demand for arbitration was made, respondent's claim was thus not subject to initial review by the Architect") *citing Pigott Const. Intern., Ltd. v. Rochester Institute of Technology*, 84 A.D.2d 679, 446 N.Y.S.2d 632 [1<sup>st</sup> Dept 1981] (where construction contract gave architect authority to determine disputes "relating to the execution or progress of the Work or the interpretation of the Contract Documents" owner's claims for defects, asserted after substantial completion of the work, did not fall within scope of contractual condition precedent requiring reference of claims to the architect as a condition precedent to arbitration))).

In any event, a complete reading of the August Resolution combined with the presumption in favor of permitting amendment and the history of this litigation warrant the granting of defendant's motion.

The August Resolution demonstrates that DRB believed that, although the Project had long been completed and that it had directed payment by defendant, the parties had reached an "irreconcilable" impasse on multiple grounds. As such, the DRB recommended that the parties take their disputes to court without fulfilling the "seemingly impossible" condition precedent of making final payment. These statements convincingly support defendant's position with respect

to the instant motion.

Thus, the DRB's additional statement, in the August Resolution, that an aggrieved party may seek a court order compelling further compliance with the DRB process, does not preclude defendant from pursuing its counterclaims herein. Indeed, plaintiff's complaint, which seeks specific performance and an injunction (essentially for compliance with DRB's directive that defendant issue payment), remains active and plaintiff is already pursuing relief pursuant to the August Resolution.

Moreover, that plaintiff has commenced a separate action against defendant for breach of the CMA supports defendant's request to pursue its claims in the instant action. Plaintiff's position is inherently contradictory, and *Riggs v Wade Lupe Constr. Co., Inc.* (176 AD2d 1177, 575 NYS2d 613 [3d Dept 1991]) is inapposite (as among other things, it did not concern a motion to amend a pleading) and not binding on this court.

*MCC Development Corp. v Perla* (81 AD3d 474, 916 NYS2d 102 [1<sup>st</sup> Dept 2011]), cited in opposition, is similarly unavailing. *Perla* did not involve the essential facts at issue in the case at bar; the mediator therein did not declare an irreconcilable impasse or recommend that the parties take their disputes to court.

Accordingly, defendant's motion to amend its Answer to assert its proposed counterclaims, is warranted.

#### *Conclusion*

Based on the foregoing, it is hereby

ORDERED that defendant's motion for leave to file and serve the amended answer with counterclaims is granted, and the proposed amended answer annexed to defendant's reply papers

(Exhibit "6") shall be deemed served upon service of a copy of this order with notice of entry;  
and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon  
plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: August 25, 2014

A handwritten signature in black ink, appearing to read 'C.R. Edmead', written over a horizontal line.

Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**