Hartnagel v FTW Contr.
2014 NY Slip Op 33847(U)
October 1, 2014
Supreme Court, Nassau County
Docket Number: 603011/13
Judge: Karen V. Murphy

Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

x

GREGG HARTNAGEL,

Plaintiff(s),

-against-

FTW CONTRACTING, METROPOLITAN FURNITURE & CONSTRUCTION CORP. and ASHER BENSHAR,

Defendant(s).

x

Index No. 603011/13

Motion Submitted: 8/4/14
Motion Sequence: 001, 002, 003

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XXX
Answering Papers.....XXX
Reply.....XX

Motion by defendants Metropolitan Furniture & Construction Corp. i/s/h/a Metropolitan Furniture & Construction Corp. ("Metropolitan") and Asher Benshar ("Benshar") for an order pursuant to CPLR § 3211(a)(1) and (7) dismissing the complaint as against them; or in the alternative, dismissing the complaint as against Benshar; and pursuant to 22 NYCRR 130-1.1(a) for costs, disbursements and attorney's fees based upon plaintiff's frivolous conduct is denied. Cross-motion by plaintiff for an order pursuant to CPLR § 3025(b) granting plaintiff leave to amend the complaint is granted. Motion by plaintiff for an order pursuant to CPLR § 3215 directing that defendants are in default is granted solely as to defendant FTW Contracting, there being no opposition thereto.

Plaintiff commenced this action seeking to recover damages for personal injuries allegedly sustained on October 20, 2012. On said date, plaintiff was employed as a construction worker at a job site controlled and/or operated by defendants.

In the complaint, plaintiff sets forth claims under negligence and violations of Labor Law §§ 200, 240(1) and 241(b).

This Court will first address plaintiff's cross-motion for leave to amend the complaint. Plaintiff seeks to amend the complaint to change the location of his accident from 50 North Road, Great Neck, New York to 48 North Road, Great Neck, New York. Mr. and Mrs. Doomchin own the property located at 48 North Road, Great Neck, New York.

"A party may amend its pleadings at any time by permission of the court, and leave should be freely given (*see* ***CPLR 3025[b]***), 'provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit' " (***Belus v Southside Hospital***, 106 AD3d 765 [2d Dept 2013], *quoting* ***Douglas Elliman, LLC v Bergere***, 98 AD3d 642, 643 [2d Dept 2012]; *see* ***Gotlin v City of New York***, 90 AD3d 605, 606-607 [2d Dept 2011]; ***Lucido v Mancuso***, 49 AD3d 220, 229 [2d Dept 2008], *appeal withdrawn*, 12 NY3d 813 [2009]). Further, "the Supreme Court has broad discretion in determining whether to grant leave, and its determination will not be lightly disturbed" (***Belus v Southside Hospital, supra***, *quoting* ***Douglas Elliman, LLC v Bergere, supra*** at 643; ***Tarek Youssef Hassan Saleh v 5th Ave. Kings Fruit & Vegetables Corp.***, 92 AD3d 749, 750 [2d Dept 2012]). "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (***HSBC v Picarelli***, 110 AD3d 1031 [2d Dept 2013], *quoting* ***Edenwald Contracting Co. v City of New York***, 60 NY2d 957 at 959 [1983] [internal quotation marks omitted]; *see* ***Aurora Loan Servs., LLC v Dimura***, 104 AD3d 796 [2d Dept 2013]; ***U.S. Bank, N.A. v Sharif***, 89 AD3d 723, 724 [2d Dept 2011]).

In opposition to the motion, defendants assert that "[p]laintiff is still not sure if the accident occurred at 48 North Road, Great Neck, County of Nassau, State of New York . . . ." (¶ 13 of Jennifer J. Bock's Affirmation in Opposition). As such, the proposed amendment is devoid of merit.

Accepting the allegations contained in the first amended complaint as true (*see* ***Giraldo v Twins Ambulette Serv., Inc.***, 96 AD3d 903 [2d Dept 2012]), we find that the proposed amendment is not palpably insufficient or patently devoid of merit, and defendants failed to establish that they would be surprised or prejudiced by this amendment (***Malanga v Chamberlain***, 71 AD3d 644 [2d Dept 2010]; ***Gotlin v City of New York, supra***).

Accordingly, plaintiff is directed to serve a duly executed first amended verified complaint upon defendants' attorney within twenty days from the date of this order.

Turning to the branch of the motion which seeks dismissal based upon CPLR §

3211(a)(1) and (7), such relief is denied.

"In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " (***Benishai v Epstein***, 116 AD3d 726 [2d Dept 2014], *quoting* ***Sierra Holdings, LLC v Phillips, Weiner, Quinn, Artura & Cox***, 112 AD3d 909, 910 [2d Dept 2013], *quoting* ***Leon v Martinez***, 84 NY2d 83, 87-88 [1994]). " 'When evidentiary material is considered' on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion has not been converted to one for summary judgment, 'the criterion is whether the [plaintiff] has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . . dismissal should not eventuate' " (***Jannetti v Whelan***, 97 AD3d 797 [2d Dept 2012], *quoting* ***Guggenheimer v Ginzburg***, 43 NY2d 268, 275 [1977]; *see* ***Sokol v Leader***, 74 AD3d 1181, 1182 [2d Dept 2010]). "Such a motion should be granted where, even viewing the allegations as true, the plaintiff cannot establish a cause of action" (***Cascardo v Snitow, Kanfer, Holtzer & Millus, LLP***, 100 AD3d 674 [2d Dept 2012]).

In light of the fact that plaintiff has corrected the address in the proposed amended complaint, dismissal against Metropolitan is unwarranted.

As to Benshar, Benshar argues that he entered into this agreement with Doomchins only in his capacity as President of Metropolitan. In support thereof, Benshar relies upon his own affidavit; and a contract dated June 17, 2012 annexed as Exhibit A to defendant's motion.

In opposition, plaintiff contends that the signatures on the copy of the contract submitted are barely legible; and there is nothing visible to indicate that Benshar signed the contract solely in his capacity as Metropolitan's owner and president.

While it is true that a corporate officer who signs an agreement in his corporate capacity will not be held liable on a contract unless he personally binds himself to the agreement (*see* ***Metropolitan Switch Bd. Co., Inc. v Amici Assoc., Inc.***, 20 AD3d 455 [2d Dept 2005]), the facts do not sufficiently demonstrate that Benshar signed the contract in his corporate capacity (*see* ***McCarthy v Young***, 57 AD3d 955 [2d Dept 2008]). The signatures on the contract are unclear.

At this stage of the litigation, the complaint states a valid cause of action against Benshar.

The branch of defendants' motion which seeks an award of sanctions is denied as defendants have not established that plaintiffs' conduct is frivolous within the meaning of 22 NYCRR 130-1.1(c); *see* ***Matter of Nathan F.T.***, 110 AD3d 820 [2d Dept 2013]; ***Matter of Lebron v Lebron***, 101 AD3d 1009 [2d Dept 2012]; ***Matter of Katz v Shomron***, 71 AD3d 770 [2d Dept 2010]).

"The court rule set forth in 22 NYCRR 130-1.1, which is intended to limit frivolous and harassing behavior (*see* ***Doe v Karpf***, 58 AD3d 669, 670 [2d Dept 2009]), authorizes a court, in its discretion, to award a party in a civil action reasonable attorney's fees resulting from frivolous conduct" (*see* ***Matter of Ernestine R.***, 61 AD3d 874, 876 [2d Dept 2009]). Conduct is frivolous within the meaning of the rule where, *inter alia*, it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" or "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (***22 NYCRR 130-1.1[c][1],[2]***; *see* ***Gelobter v Fox***, 90 AD3d 829, 832 [2d Dept 2011]; ***Dank v Sears Holding Mgt. Corp.***, 69 AD3d 557, 558 [2d Dept 2010]; ***Matter of Ernestine R., supra*** at 866; ***Doe v Karpf, supra*** at 670). A party seeking the imposition of a sanction or an award of an attorney's fee pursuant to 22 NYCRR 130-1.1(c) has the burden of demonstrating that the conduct of the opposing party was frivolous within the meaning of the rule, or that the action or proceeding was commenced or continued in bad faith (*see* ***Maybaum v Maybaum***, 89 AD3d 692, 697 [2d Dept 2011]; ***Providence Wash. Ins. Co. v Munoz***, 85 AD3d 1142, 1144 [2d Dept 2011]; ***Broich v Nabisco, Inc.***, 2 AD3d 474, 475 [2d Dept 2003]. (***Matter of Miller v Miller***, 96 AD3d 943 [2d Dept 2012]).

No such showing has been made here.

In view of the foregoing, defendants' motion is denied in its entirety; plaintiff's cross-motion for leave to amend the complaint is granted; and plaintiff's motion for an order finding that FTW is in default is granted. An inquest on damages against FTW shall be conducted at the time of the trial against the remaining defendants. Plaintiff's attorney shall serve a copy of this Order, with notice of entry, on the defaulting defendants by regular and certified mail, return receipt requested.

The foregoing constitutes the Order of this Court.

Dated: October 1, 2014
Mineola, N.Y.

Karen V. Murphy
J. S. C.