

Weiss v Bretton Woods Condominium II

2014 NY Slip Op 33905(U)

October 2, 2014

Supreme Court, Nassau County

Docket Number: 7878-12

Judge: Arthur M. Diamond

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----x
ILAN WEISS,

Plaintiff,

-against-

**BRETTON WOODS CONDOMINIUM II
and BOARD OF MANAGERS OF BRETTON
WOODS CONDOMINIUM II,**

Defendant.

TRIAL PART: 10

NASSAU COUNTY

INDEX NO: 7878-12

MOTION SEQ. NO: 5

SUBMIT DATE: 9/8/14

-----x
The following papers having been read on this motion:

Notice of Motion.....	1
Opposition.....	2
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Motion by plaintiff for an order pursuant to CPLR § 3025(b) for leave to serve an amended complaint; pursuant to CPLR §305 and §1003 for leave to add an additional party defendant; for leave to "renew" plaintiff's prior motion for summary judgment on the fifth cause of action is determined as hereinafter provided.

For background information and relevant facts, this Court respectfully refers to the prior orders dated June 17, 2013 and December 6, 2013.

In the order dated December 6, 2013, this Court granted plaintiff's motion for summary judgment with respect to plaintiff's second cause of action and denied it as to plaintiff's fifth and sixth cause of action.

Plaintiff now seeks leave to renew the order with respect to the fifth cause of action. Plaintiff argues that renewal is proper as new facts have emerged since the prior motion, to wit: plaintiff has paid the only amount found by the Court to be in dispute.

A motion for leave to renew "shall be based on new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR § 2221[e][2][3]; see *Aha Sales, Inc. v Creative Bath Products, Inc.*, 110 AD3d 1020 [2d Dept 2013]; *Empire State Conglomerates v*

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Mahbur, 105 AD3d 898, 899 [2d Dept 2013]; *Wells Fargo Bank, N.A. v Russell*, 101 AD3d 860 [2d Dept 2012]). Further, “[w]hile a court has discretion to entertain renewal based on facts known to the movant at the time of the original motion, the movant must set forth a reasonable justification for the failure to submit the information in the first instance” (*Jacobson v Adler*, 119 AD3d 902 [2d Dept 2014]; *Aha Sales, Inc. v Creative Bath Products, Inc.*, *supra*; *Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585, 585-586 [2d Dept 2012]).

A motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (CPLR 2221[d][2]; *Grimm v Bailey*, 105 AD3d 703 [2d Dept 2013]; *see Matter of American Alternative Ins. Corp. v Pelszynski*, 85 AD3d 1157, 1158 [2d Dept 2011], *lv to app denied* 18 NY3d 803 [2012]). “While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented” (*Ahmed v Pannone*, 116 AD3d 802 [2d Dept 2014] quoting *Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011]).

Plaintiff's motion for leave to renew is, in actuality, one for leave to reargue.

Upon consideration, this Court finds that plaintiff is entitled to summary judgment on the fifth cause of action declaring that he is not liable for the legal fees demanded by defendants. This declaration is consistent with the prior order dated December 6, 2013.

In support of its motion for leave to amend his complaint, plaintiff notes the following: a preliminary conference has not been held in this matter; plaintiff has responded to all outstanding discovery demands. (¶ 12 of Steven Legum's Affirmation); and defendants will not suffer any prejudice by virtue of the amendment.

In opposition, defendant argues that the instant application to amend does not delineate “what material was omitted and what material was added by the proposed second amendment to the complaint” (¶ 10 of Helen Benzie's Affirmation in Opposition) and the “claims alleged in the proposed second amended complaint do not stand a good chance of success and, therefore, should not be dignified by being iterated in this action” (*Id.* at ¶ 21).

In response, plaintiff urges that a cursory examination of the pleadings “reveals the addition

of the newly interposed seventh and eighth causes of action for tortious interference with contract, as well as the ninth cause of action seeking treble damages for wrongful interference with plaintiff's possession of his property." (¶ 2 of Mr. Legum's Affirmation).

"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]). "Merely 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. New York*, 60 N.Y.2d 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]).

Plaintiff now seeks leave to amend the complaint to assert a cause of action against Richard Wagner for intentional interference with contractual relations; a cause of action against the Board for intentional misrepresentation, and for unlawful ejection.

The proposed amended complaint does considerably more than assert additional causes of action. It asserts a claim against a person sought to be named as an additional party to the action, namely, Richard Wagner (*see Konrad v 136 East 64th Street Corporation*, 246 AD2d 324 [1st Dept 1998]).

"When a party seeks not only to amend the pleadings, but also to assert claims against persons sought to be joined as additional parties in the action (CPLR 1003), the court may also consider the prejudice to the other defendants and the extent of the delay in moving to add the new parties and the reasons therefor (*Antollino v Wright*, 2013 WL 1783554 (N.Y. Sup.); *Haughton v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 305 AD2d 214 [1st Dept 2013]; *Konrad v 136 East 64th*

Street Corp., supra).

Accepting the allegations contained in the second amended complaint as true (*see Giraldo v Twins Ambulance 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*).

Under the circumstances, plaintiff's request to assert a claim against Richard Wagner as an additional party is granted as defendants have not demonstrated that they would suffer any prejudice by this amendment (*cf. Haughton v Merrill Lynch, Pierce, Fenner & Smith, Inc. supra*).

Plaintiff is directed to serve a supplemental summons and a second amended verified complaint on Richard Wagner individually.

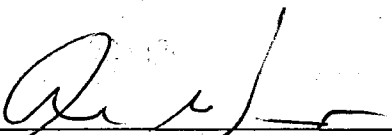
Accordingly, the proposed amended complaint shall be deemed served upon the other defendants Bretton Woods Condominium II and Board of Mangers of Bretton Woods Condominium II when a copy of this order is served upon their attorneys.

The parties shall appear for a preliminary conference in DCM on October 20, 2014 at 9:30.

This constitutes the order and judgment of this Court.

ENTER

DATED: October 2, 2014


HON. ARTHUR M. DIAMOND
J. S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE