Shaykhlishlamov v Perry St. Dev. Corp.
2015 NY Slip Op 31406(U)
April 29, 2015
Supreme Court, New York County
Docket Number: 154911/2012
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Irem Shaykhlislamova

-v-

Perry Street Development Corp

INDEX NO. 154911/12

MOTION DATE

MOTION SEQ. NO. 006

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that Hanart International Corp.'s motion to dismiss the third-party complaint is granted pursuant to CPLR 3211(a)(1); thus the third-party complaint is hereby severed and dismissed with prejudice as to Hanart International Corp.; it is further

ORDERED that third-party plaintiffs' cross-motion for leave to file and serve the amended third-party complaint (to name Hanart Building Technology, LLC as a third-party defendant) is granted, and the proposed amended third-party complaint annexed to third-party plaintiffs' cross-motion (Exhibit "H" thereto) shall be deemed served upon service of a copy of this order with notice of entry; it is further

ORDERED that third-party plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4.29.15

J.S.C.

HON. CAROL EDMEAD

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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IRENA SHAYKHLISHLAMOVA,

Plaintiff,

-against-

PERRY STREET DEVELOPMENT CORP., CHARLES BLAICHMAN, RICHARD BORN, IRA DRUKIER, SCORCIA AND DIANA ASSOCIATES, LLC, BOARD OF MANAGERS OF 166 PERRY STREET CONDOMINIUM, PENMARK MANAGEMENT, LLC, ABC INC., ASYMPTOTE ARCHITECTURE, PLLC and XYZ CORP.,

Defendants.

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PERRY STREET DEVELOPMENT CORP., CHARLES BLAICHMAN, RICHARD BORN, and IRA DRUKIER,

Third-Party Plaintiffs,

- against -

CHINA CONSTRUCTION AMERICA, INC., FRONT, INC., FACADE TECHNOLOGY, LLC, and HANART INTERNATIONAL CORP.,

Third-Party Defendants.

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Caption Continues on Next Page

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PERRY STREET DEVELOPMENT CORP., CHARLES BLAICHMAN, RICHARD BORN, and IRA DRUKIER,

Second Third-Party Plaintiffs,

- against -

HEITMANN AND ASSOCIATES, INC.,

Second Third-Party Defendant.

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

MEMORANDUM DECISION

In this action alleging property damage, third-party defendant Hanart International Corp. ("HIC") moves pursuant to CPLR 3212(1) and (7) to dismiss the third-party complaint of Perry Street Development Corp. (the "Sponsor"), Charles Blaichman ("Blaichman"), Richard Born ("Born"), and Ira Drukier ("Drukier") (collectively, "third-party plaintiffs") and for reasonable attorneys' fees, costs, fees, and disbursements.

Factual Background

The Sponsor filed a Condominium Offering Plan (the "Offering Plan") for the renovation and creation of condominium units at 166 Perry Street, New York, New York (the "Perry Project").

According to the amended complaint, plaintiff Irena Shaykhlishlamova ("plaintiff") executed a purchase agreement for the Unit on July 28, 2010, and closed title to her Condominium unit 1C (the "Unit") on September 10, 2010, after which she noticed certain construction defects in her Unit.

As a result, plaintiff commenced this action alleging, *inter alia*, breach of contract for construction defects against, among others, the Sponsor and its principals (Blaichman, Born, and Drukier), which in turn, commenced the third-party complaint against, among others, HIC for breach of contract[1] (first cause of action), a declaration that HIC is obligated to defend and indemnify third-party plaintiffs (second cause of action), contractual indemnification (third cause of action), common-law indemnification (fourth cause of action), and contribution (fifth cause of action).

In support of dismissal, HIC's sole owner and president, Mason Y. Chang ("Chang"), contends that the alleged causes of action in the third-party complaint arose prior to the establishment and existence of HIC. Based on a New York State Department of State Division of Corporations print out ("NYSDOC print out"), HIC was not incorporated and did not exist until September 17, 2013 -- three years after plaintiff closed on the Unit in September 2010 and discovered the construction defects. As such, HIC "neither performed any construction work at" or "provided any materials for" the Perry Project location (Chang Affidavit, ¶11), and "never entered into any contract" with third-party plaintiffs.

Discovery shows that the materials involved in the Perry Project came from China, and that the entity actually involved in the construction work and/or provision of materials was "Shanghai Hanart Façade Specialist Co., Ltd.," ("Shanghai Hanart") a company based in Shanghai, China, with whom HIC has "no relationship" or ownership interest (Chang Affidavit, ¶¶14, 17). Third-party plaintiffs misidentified Shanghai Hanart as HIC because both companies'

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[1] Third-party plaintiffs allege that HIC breached its contractual obligations by "failing . . . to agree to defend" "pay all attorneys' fees and defense costs" and "failing to agree to indemnify" third party plaintiffs (¶¶37-40).

names contain the word "Hanart."

In opposition, third-party plaintiffs argue that documents show that HIC and Chang were involved in the subject Perry Project.

The NYSDOC print out shows the service of process address for HIC as 1123 Broadway, New York, New York 10010. An internet search for the Perry Project includes a search result for the website "hanart.com," which lists "166 Perry Street, New York" as a "featured project." And, the "Contact Us" page on the website shows the same Manhattan address as listed on HIC's NYSDOC print out.

Chang's LinkedIn profile identifies him as "President at Hanart Building Technology," but does not list any affiliation with HIC. Chang's LinkedIn profile also depicts him as Senior Project Manager of third-party defendant CCA Façade Technology, LLC ("CCA"), which performed work in regard to the Perry Project. Additionally, Chang was present for inspections at the "Hanart Factory" on January 31, 2008.

A separate NYSDOC print out for Hanart Building Technology, LLC ("HBT") shows that this company was incorporated in 2008; yet, the address for service of process (210 West 14th Street) is different from that which is indicated on the Hanart website's "Contact Us" page (*i.e.*, 1123 Broadway).

Thus, despite Chang's contentions, the overlap between HIC and HBT, and fact that Chang was involved in the Perry Project, warrants denial of HIC's motion.

In the alternative, assuming HIC is in fact the incorrect entity, third-party plaintiffs cross move for leave to amend the third-party complaint to name HBT as a third-party defendant based on the above. There would be no prejudice in permitting an amendment, since discovery in the

third-party action has not yet commenced.

In reply in support of HIC's motion, and in opposition to third-party plaintiffs' cross-motion, Chang avers that "neither HIC nor HBT has ever provided any work, service, or materials in connection with the [Perry Project]," and that aside from submitting an attorney affirmation (by counsel, who lacks personal knowledge of the subject matter) third-party plaintiffs fail to come forward with any evidence to support their claims against either entity. Likewise, neither HIC nor HBT has ever entered into any contract with third-party plaintiffs.

Chang concedes that he was working for third-party defendant CCA as a project manager in connection with the Perry Project from September 2006 through April 2009. However, it was Shanghai Hanart -- not HIC or HBT – which provided materials for the project. And, as evidence by a letter from third-party plaintiffs to Shanghai Hanart, third-party plaintiffs are aware of the fact that it was Shanghai Hanart which provided such materials. Moreover, HIC and/or HBT have no business relationship or ownership interest with or regarding Shanghai Hanart.

Thus, since third-party plaintiffs have known all along that Shanghai Hanart was the party involved with the Perry Project the litigation as to HIC and HBT is frivolous; the latter parties should be entitled to legal fees and costs.

In reply in support of the cross-motion, third-party plaintiffs reiterate that discovery is not complete. Thus, Chang's contention that "discovery shows that the company involved in this construction was not [HIC] or [HBT] is simply false." And, Chang continues to produce documents as exhibits in the motion practice which have not yet been exchanged with any parties.

Chang, who now identifies himself as the president and sole owner of both HIC and HBT

and admits he was a project manager with CCA, also claims that HIC and HBT have no relationship to the Perry Project. However, there is more than a mere coincidence of entity names between the two companies.

There is no explanation as to how Chang came to possess the documents attached to his motion papers, given his contention that HIC and HBT have no relationship to the Perry Project. These documents do not appear to be public documents and rather appear to be discoverable materials pertaining to the project. Somehow, these documents are in the possession of the president and sole owner of two entities that allegedly have no business relationship with Shanghai Hanart.

Chang fails to dispel the obvious connections between the entities and cannot hide behind his position as project manager for CCA. Absent from his affidavit is any discussion of the website printouts of HBT, which list 166 Perry Street as a featured project.

Third-party plaintiffs further note that photographs of the building located at 166 Perry Street, which were visible on the hanart.com website before the third-party action was commenced, are now removed.

In addition to the above, which shows that the application for leave to amend is not palpably meritless, Chang fails to set forth any arguments as to which non-moving parties would be prejudiced. In fact, no other party in the action has opposed the cross-motion. Thus, there is no prejudice to the other parties.

Discussion

Motion to Dismiss

Pursuant to CPLR 3211(a)(l), a party may move for judgment dismissing one or more

causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" *(DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intern.*, 80 AD3d 448 [1st Dept 2011], *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Such evidence must be unambiguous, authentic and undeniable (*see NRAM PLC v Societe Generale Corp. and Inv. Banking*, 2014 WL 3924619 [Sup Ct New York Cty 2014]).

Affidavits do not constitute documentary evidence within the meaning of 3211(a)(1) (*see Art and Fashion Group Corp. v Cyclops Production, Inc.*, 120 AD3d 436 [1st Dept 2014]; *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]). At the same time, however, documents such as business records attached to an affidavit may be accepted as documentary evidence (*see Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383 [1st Dept 2002]).

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). On a motion to dismiss, 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 into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra; Nonnon v City of New York*, 9

NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Nevertheless, the court may consider evidentiary material in evaluating a motion made under CPLR 3211(a)(7); when such material is considered, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). In other words, "dismissal results only if the movant demonstrates conclusively that the plaintiff has no cause of action, or that 'a material fact as claimed by the pleader to be one is not a fact at all'" (*Laquila Group, Inc. v Hunt Const. Group, Inc.*, 44 Misc 3d 1203(A), 2014 WL 2919334 [Sup Ct New York Cty 2014], *citing Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2d Dept 2010]).

With further regard to a CPLR 3211(a)(7) motion, "affidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless . . . the affidavits establish conclusively that plaintiff has no cause of action" (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635 [1976]; *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128 [1st Dept 2014]).

HIC moves to dismiss the third-party complaint on the ground that it did not provide any work/materials regarding, or have any connection to, the Perry Project, on the basis that it did not exist at the time the events underlying the action occurred. The NYSDOC print out for HIC demonstrates that it was not incorporated until September 2013, and that its address for process is 1123 Broadway in Manhattan. A bank statement submitted by Chang further shows that HIC did not make its first deposit until December 4, 2013. Under CPLR 3211(a)(1), such documents constitute documentary evidence, as they are unambiguous, and there is no dispute to their

authenticity.

Third-party plaintiffs' contentions do not address these controlling facts, and its claim that an "obvious" connection exists between HIC and HBT and/or Shanghai Hanart, is unavailing. HIC has established that it did not exist at the time of the events giving rise to the subject action, and third-party plaintiffs fail to adequately assert any relationship between HIC and the Perry Project at the time of the events giving rise to the complaint. That HIC and CCA (which allegedly performed work at the Perry Project) shared the same President (*i.e.*, Chang) is insufficient *(see e.g., Mercer v. 203 East 72ndCorp.*, 300 A.D.2d 105 [1st Dept 2002] (that "the proposed defendant and a named defendant had common shareholders, officers and a comptroller was insufficient to establish that the two entities were united in interest")). Therefore, the third-party complaint against it must be dismissed (*see e.g. Rainbow Hospitality Mgmt., Inc. v Mesch Engineering, P.C.*, 270 AD2d 906 [4th Dept 2000] (plaintiff entity which did not exist at the time the conduct complained of occurred lacked cause of action); *11 King Ctr. Corp. v City of Middletown*, 115 AD3d 785 [2d Dept 2014] (documentary evidence established that party corporation did not exist at time subject deed was executed)).

Notwithstanding, the court declines to award costs and/or attorneys' fees. As discussed further below, the record does not demonstrate that third-party plaintiffs' motion, claiming that HIC/HBT/Shanghai Hanart had a business relationship regarding the Perry Project, is not completely without merit in law, or was undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure HIC, or was premised on an assertion of false statements (see 22 NYCRR § 130-1.1). Accordingly, the court finds that the action against HIC was not frivolous so as to warrant the issuance of such costs and fees to HIC.

Cross-Motion for Leave to Amend

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 [1st 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 [1st 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.*).

Notwithstanding the court's findings as to HIC, the cross-motion for leave to amend the third-party complaint to add *HBT* as a third-party defendant must be granted.

As demonstrated by a separate NYSDOC print out, HBT was incorporated in April 2008 (*i.e.*, before plaintiff purchased the Unit). Third-party plaintiffs further show that HBT may have overlapped to some extent with HIC and/or Shanghai Hanart, as evidenced by the fact that the Perry Project was listed on a "Hanart" website as a current "featured project." The website printouts themselves also make reference to a "Hanart Building Technology." And, Chang admits that Shanghai Hanart supplied materials for the Perry Project.

At most, Chang's documentary submissions in opposition show that Shanghai Hanart provided materials to the project. They do not go so far as conclusively establishing that *HBT*

had no involvement. The only remaining purported evidence to support HBT's claim is based entirely on Chang's affidavit in opposition. However, as noted above, affidavits do not constitute documentary evidence in the evaluation of allegations in pleadings (*see Art and Fashion Group Corp. v Cyclops Production, Inc.*, 120 AD3d 436 [1st Dept 2014]).

As such, the court cannot conclude as a matter of law that the proposed amendment patently lacks merit.

Moreover, as to prejudice, HBT fails to establish how any party would be prejudiced by the amendment, particularly in light of the fact that discovery as to the third-party complaint has not yet commenced (*see Northeast Sort & Fulfillment Corp. v Reader's Digest Ass'n, Inc.*, 1999 WL 35021475 [Sup Ct Westchester Cty 1999] ("[defendants] failed to demonstrate any prejudice that they will suffer if leave to amend is again given to plaintiff, particularly in view of the fact that discovery has not yet been completed in this action")).

Accordingly, the cross-motion must be granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that Hanart International Corp.'s motion to dismiss the third-party complaint is granted pursuant to CPLR 3211(a)(1); thus the third-party complaint is hereby severed and dismissed with prejudice as to Hanart International Corp.; it is further

ORDERED that third-party plaintiffs' cross-motion for leave to file and serve the amended third-party complaint (to name Hanart Building Technology, LLC as a third-party defendant) is granted, and the proposed amended third-party complaint annexed to third-party plaintiffs' cross-motion (Exhibit "H" thereto) shall be deemed served upon service of a copy of

this order with notice of entry; it is further

ORDERED that third-party plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 29, 2015

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

HON. CAROL EDMEAD