

Teddimatts, Inc. v Fleetwod Chateau Owners Corp.
2016 NY Slip Op 30921(U)
May 12, 2016
Supreme Court, Westchester County
Docket Number: 54344/2015
Judge: Mary H. Smith
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DECISION AND ORDER

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

TEDDIMATTS, INC.,

Plaintiff,

-against-

MOTION DATE: 02/17/16¹
INDEX NO.: 54344/2015

FLEETWOOD CHATEAU OWNERS CORP.,

Defendant.

The following papers numbered 1 to 11 were considered in connection with plaintiff's motion to strike defendant's second amended answer and defendant's cross-motion for leave to amend its amended answer and strike plaintiff's pleadings:

Papers Numbered

Notice of Motion – Affirmation (Paulose) – Exhs. (A-B).....	1-3
Notice of Cross-Motion – Memorandum of Law – Affirmations (Kent) – Affidavit (Capobianco) – Exhs. (A-T)	4-9
Answering Affirmation (Paulose) – Exhs. (A-B).....	10-11

Upon the foregoing papers, it is Ordered that plaintiff's motion for an Order striking defendant's second amended answer and granting plaintiff time to respond to defendant's first amended answer and defendant's cross-motion seeking leave to amend its amended

¹This motion was fully submitted and returnable to the Hon. Francesca E. Connolly on February 17, 2016 but was reassigned to the undersigned. The Court apologizes for the delay in rendering a decision which was due to the voluminous number of motions transferred to our Part.

answer and to preclude plaintiff from offering evidence and striking plaintiff's pleadings are disposed of as follows:

The Court notes that it will not restate certain background facts that have previously been set forth in the Decision and Order (Connolly, J) dated December 15, 2015.

Under CPLR 3025, subdivision (a), "a party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." (emphasis supplied). However, if a party cannot amend under CPLR 3025, subdivision (a), a party can seek to amend under CPLR, subdivision (b) which requires leave of court or a stipulation of all parties.

Here, defendant's missed their opportunity to amend once as of right and as a result, sought relief to amend its answer in its prior motion that was before Justice Connolly. In the Decision and Order dated December 15, 2015, Justice Connolly granted defendant's leave to amend to include counterclaims for breach of contract and account stated and deemed the proposed amended answer served. The next day, December 16, 2015, defendant's filed a second amended answer, without leave of court, elaborating on its counterclaims for breach of contract and account stated and adding a counterclaim for fraud, which was improper under CPLR 3025. Defendants incorrectly argue that it is entitled to amend the amended answer without leave based on CPLR 3025, subdivision (a) and cited inapposite case law in support. However, alternatively, defendant also seeks leave from the Court to amend for a second time.

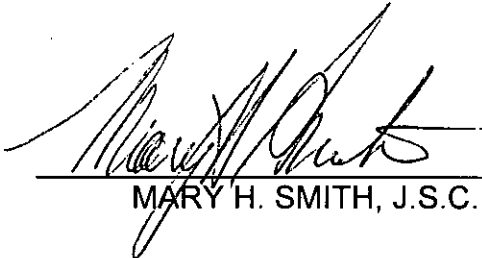
As previously noted, defendant is seeking to add a counterclaim for fraud and both parties in this action have pleaded breach of contract claims. Under CPLR 3025, subdivision (b), "leave shall be freely given upon such terms as may be just" unless the amendment sought is palpably improper or insufficient as a matter of law or unless prejudice or surprise results. See Barnes v. Nassau Cty., 108 A.D.2d 50, 52 (2d Dep't 1985); see Hylan Elec. Contracting, Inc. v. MasTec N. Am., Inc., 74 A.D.3d 1148, 1148 (2d Dep't 2010). The Second Department has not looked favorably on permitting a party to amend its pleading to add fraud claims if such claims arise out of, or "are not sufficiently distinct from," the alleged breach of contract claims. Kestenbaum v. Suroff, 268 A.D.2d 560, 561 (2d Dep't 2000); Rubinberg v. Correia Designs, Ltd., 262 A.D.2d 474, 475 (2d Dep't 1999). "A cause of action to recover damages for fraud does not lie where [...] the only fraud claimed relates to an alleged breach of contract." Rocchio v. Biondi, 40 A.D.3d 615 (2d Dep't 2007).

Here the question of plaintiff's alleged misrepresentations, as asserted by defendant, is integral to the question of the alleged breach of contract claim, not separate and distinct, as for example, a fraudulent inducement to contract might be. See Krantz v. Chateau Stores of Canada Ltd., 256 A.D.2d 186, 187 (1st Dep't 1998); McGee v. J. Dunn Construction Corp. 54 A.D.3d 1010 (2d Dep't 2008); Kestenbaum v. Suroff, supra. Accordingly, the Court denies defendant's request for leave to amend for a second time and concomitantly grants plaintiff's relief striking defendant's second amended answer. Plaintiff has ten (10) days from the date hereof to file and serve its Reply to defendant's first amended answer.

In accordance with the Differentiated Case Management System now in place, the branch of defendant's cross-motion seeking to strike plaintiff's pleading due to its alleged refusal to follow discovery obligations is respectfully referred to the Compliance Conference Part for determination.

As previously scheduled, the parties shall appear for a Compliance Conference in the Compliance Part, room 800 on June 30, 2016 at 9:30 a.m.

Dated: May 12, 2016
White Plains, New York



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