

Community Counseling & Mediation Servs. v Chera
2016 NY Slip Op 31174(U)
January 11, 2016
Supreme Court, New York County
Docket Number: 603997/2006
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59**

COMMUNITY COUNSELING & MEDIATION
SERVICES,

Plaintiff,

-against-

RICHARD CHERA, NEXT GENERATION
CHERA LLC d/b/a NEXT GENERATION LLC,
MEIR WAX, KORDUN CONSTR. CORP., and
LONG ISLAND UNIVERSITY,

Defendants.

Index No. 603997/2006
Motion Sequence 013
DECISION and ORDER

FILED

JAN 14 2016

COUNTY CLERK'S OFFICE
NEW YORK

DEBRA JAMES, J.:

In this breach of lease action, plaintiff Community Counseling & Mediation Services moves to add additional defendants to the action, and to amend the decision and judgment of Special Referee Louis Crespo (the Referee), dated March 22, 2013. Defendants Richard Chera (Chera) and Next Generation Chera, LLC d/b/a Next Generation LLC (Next Generation) (together, the Landlord) oppose and cross-move to stay plaintiff's motion, to modify the decision and judgment, and for other relief.

Factual Background

Plaintiff is a commercial tenant on the seventh floor at One Hoyt Street, Brooklyn (the Building), pursuant to a seven-year lease executed on or about December 24, 2004. Next Generation owns the Building and Chera is a principal of Next Generation.

In April 2006, Long Island University (LIU) leased the third through eighth floors of the Building for a 15-year term, intending to use the space for undergraduate housing. LIU was unaware of any conflict of its lease with plaintiff's lease. LIU renovated its premises, using defendant Kordun Constr. Corp. as its general contractor.

Plaintiff commenced this action on November 17, 2006, alleging breach of lease, trespass, nuisance, and negligence, among other claims. Plaintiff amended its complaint on December 17, 2010, adding a breach of contract claim against LIU.

On April 1, 2011, this court granted LIU's motion for summary judgment, dismissing the original complaint and any cross claims as against it; granted, in part, the Landlord's motion for summary judgment and dismissed the complaint's second, third and fourth causes of action as against it; granted plaintiff's motion for summary judgment in its favor on the complaint's first cause of action for breach of lease. Such decision and order dated July 6, 2011 was subsequently affirmed by the Appellate Division, First Department. Community Counseling & Mediation Servs. v Chera, 95 AD3d 639 (1st Dept 2012).

On October 25, 2011, this court denied LIU's motion for summary judgment dismissing the amended complaint as against it.

This court referred the issue of plaintiff's award for damages, attorneys' fees and disbursements in connection with the breach of lease to the Referee to hear and determine. He held four days of hearings in September 2012, and issued his decision and judgment on March 22, 2013 (Referee's Decision). The Referee determined that the plaintiff should be awarded money damages in the amount of \$100,442, with 9% prejudgment interest from January 2, 2010; and, attorneys' fees and expenses of \$86,721.05, with 9% prejudgment interest from April 1, 2012. Additionally, he issued a judicial declaration that plaintiff's future rent obligations from April 1, 2013 to March 31, 2017, the end of the lease term, shall be \$932,616.

The Appellate Department affirmed the Referee's Decision on the whole, with two

notable exceptions. Community Counseling & Mediation Servs. v Chera, 115 AD3d 589 (1st Dept 2014). The Referee reduced plaintiff's request for attorneys' fees by 65% across the board, "factoring in failed motion practice, 'block billing,' as well as ambiguous entries by attorneys and weighing against duplication of work (i.e., time and labor required) coupled with the amount sought at this hearing and awarded (i.e., the 'results obtained')." The Referee reduced plaintiff's request for expense reimbursement by 65% as well. The Appellate Division rejected the Referee's Decision in regard to attorneys' fees and expenses, and held that fees for block-billed hours should be reduced by 10%, while all other attorneys' fees and expenses, including those related to the four-day hearing, should be paid in full. Community Counseling, 115 AD3d at 590.

Plaintiff's Motion to Add Defendants

Plaintiff moves here, pursuant to CPLR 1018, to add Next Generation Chera II LLC (NG II) and Next Generation Fulton LLC (NG Fulton) to the caption as defendants.

CPLR 1018 provides that "[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action."

Plaintiff submits rent bills for August, September, November and December 2013 requesting payment to "Next Generation Chera II," an entity that allegedly was previously unknown to plaintiff. Later, plaintiff received written notice, that, as of November 1, 2013, "Next Generation Fulton LLC" had acquired all the rights and interests of "Next Generation Chera II LLC." Rent bills for January-July 2014 request payment to NG Fulton.

The Landlord contends that plaintiff's motion to add defendants is procedurally

improper, since plaintiff has not sought permission to file or serve a supplemental summons or amended complaint. CPLR 1021 provides that a “motion for substitution may be made by the successors or representatives of a party or by any party.” However, as Landlord argues “this is not a case where one party is being substituted for another party”, but instead plaintiff seeks to amend the caption to include non-parties Next Generation Chera II and Next Generation Fulton LLC, as additional parties, not to substitute them.

“The joinder of an additional defendant by the filing of a supplemental summons and amended complaint may be accomplished only with prior judicial permission, and noncompliance renders the pleadings jurisdictionally defective.” Perez v Paramount Communications, 92 NY2d 749, 753 (1999). See also Dauernheim v Lendlease Cars, 202 AD2d 624, 625 (2d Dept 1994) (“plaintiff’s failure to obtain leave of court before service of its supplemental summons and amended complaint to add a new party defendant constituted a jurisdictional defect requiring dismissal of the action against the new party defendant”).

No proposed amended pleadings are annexed to plaintiff’s motion. Plaintiff contends that “[o]nly notice of the proposed addition or substitution is required,” citing Clancy v Bernstein (66 NYS2d 52, 52-53 [(Sup Ct, NY County 1946)]), where the court held that “to continue an action against the representative of the deceased defendant . . . [only] notice of such application is required to be given to the person to be substituted.” Again, plaintiff conflates addition and substitution of parties. The law does not permit the addition of a defendant without amending the summons and complaint. Plaintiff’s motion to add NG II and NG Fulton to the caption as defendants is denied without prejudice.

Plaintiff's Motion to Amend the Referee's Decision

Plaintiff relies upon CPLR 2001, in conjunction with CPLR 5019 (a), as authority to amend the Referee's Decision.

CPLR 2001 provides that "the court may permit a mistake, omission, defect or irregularity, . . . to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced".

CPLR 5019 (a) states that a "judgment or order shall not be stayed, impaired or affected by any mistake, defect or irregularity in the papers or procedures in the action not affecting a substantial right of a party. A trial or an appellate court may require the mistake, defect or irregularity to be cured."

The Appellate Division rejected the Referee's Decision that plaintiff's attorneys' fees and expenses be reduced by 65%. Instead, it held that only "block-billed fees" should be reduced by 10%, while plaintiff "is entitled to 100% of the balance of the attorneys' fees incurred, including those for the four-day damages trial". Community Counseling, 115 AD3d at 590. Plaintiff argues "that the record is not clear as to what specific hours were block-billed, [so] it would be appropriate for the court to conduct a hearing as to those hours." However, a review of the transcript of the hearing before the referee shows that block billed fees were assessed for the first two years of services (2006 and 2007) performed by plaintiff's attorney. Therefore, plaintiff shall settle order, attaching a long account of the fees assessed during such two year period with the application of the reduction thereon.

The Referee's Decision awarded plaintiff damages and heavily-discounted attorneys' fees and expenses. Prejudgment statutory interest of nine percent was to be calculated by the

clerk of the court, from January 1, 2010 for damages, and from April 1, 2012 for attorneys' fees and expenses. Plaintiff maintains that CPLR 5002 entitles it to interest "from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment."¹ Plaintiff's request that the Referee's Decision be amended to be consistent with CPLR 5002, granting interest on the entire amount of attorneys' fees and expenses, once determined, is granted. Defendant's objection that plaintiff's appeal of the Referee's Decision failed to seek an adjustment in the interest award is unavailing. "Interest under CPLR 5002 is a matter of right and is not dependent upon the court's discretion or a specific demand."

Dermigny v Harper, 127 AD3d 685, 686 (2d Dept 2015), quoting Matter of Kavares (Motor Veh. Acc. Indem. Corp.), 29 AD2d 68, 70 (1st Dept 1967), affd 28 NY2d 939 (1971).

The Landlord's Cross Motion

The Landlord requests a stay of the amendment of the Referee's Decision pending resolution of plaintiff's breach of contract claim against LIU. The Landlord maintains that plaintiff is seeking an impermissible double recovery. See Leighty v Brunn, 125 AD2d 648, 648-649 (2d Dept 1986) ("It is beyond cavil that a plaintiff is entitled to only one recovery with respect to an identical damage claim"). The Landlord contends that a judgment against LIU in favor of plaintiff would necessitate a modification of the judgment against the Landlord already determined. See Singleton Mgt. v Compere, 243 AD2d 213, 218 (1st Dept 1998) ("in order to avoid a double recovery any damages that may be recovered in this action must necessarily be

¹ Plaintiff, at times, uses the term postjudgment instead of prejudgment referring to interest. It takes postjudgment to mean from the time a decision was rendered. The court more accurately uses prejudgment to mean "to the date of entry of final judgment," in accordance with CPLR 5002.

reduced by the amount of the settlement in the prior action”).

However, no stay was granted in either Leighty or Singleton Mgt. while the collateral actions proceeded. In fact, there is no indication that such a request was even made of the trial court in those actions. Upon further deliberation, the court shall sever the complaint against the Landlord, and plaintiff shall be granted judgment thereon, and the action against LIU shall be continued and restored to the trial calendar. On the trial of the action against LIU, LIU will be entitled to argue the extent that any recovery that plaintiff receives from the Landlord under the herein judgment duplicates damages plaintiff seeks from LIU. The Landlord’s cross motion to stay consideration of plaintiff’s instant motion is denied.

The Landlord also cross-moves to permit discovery in advance of the hearing on the issue of the block-billed fees. Such cross-motion is rendered moot in light of the court’s determination that the record of the hearing before the referee already elicited the documentation pertaining to attorneys’ fees incurred by plaintiff .

In Community Counseling, the Appellate Division, First Department ordered the “delet[ion of] Richard Chera’s name from the first decretal paragraph” of the Referee’s Decision, because plaintiff did not assert the cause of action for breach of lease, addressed in the first decretal paragraph, against Chera individually (115 AD3d at 589). Thus defendant Richard Chera is no longer a party to this action as the breach of lease cause of action is the complaint’s only surviving cause of action involving Chera.

Accordingly, it is

ORDERED that that prong of the motion by plaintiff Community Counseling & Mediation Services to amend the decision and judgment of the Special Referee, dated March

22, 2013, to add Next Generation Chera II LLC and Next Generation Fulton LLC to the caption as defendants is denied, without prejudice; and it is further

ORDERED that that prong of the motion by plaintiff Community Counseling & Mediation Services to amend the decision and judgment of the Special Referee, dated March 22, 2013, to award plaintiff 100% of its attorneys' fees and expenses, including those related to the four-day hearing, is granted, and plaintiff shall settle order and judgment on notice, attaching a long account with respect to the first two years of attorneys fees, reflecting such block-billed hours reduced by 10%; and it is further

ORDERED that that prong of the motion by plaintiff Community Counseling & Mediation Services to amend the decision and judgment of the Special Referee, dated March 22, 2013, to award prejudgment statutory interest of nine percent to be calculated by the Clerk of the Court, from January 1, 2010 for damages, and from April 1, 2012 for all attorneys' fees and expenses, as determined in accordance with the Appellate Division's Decision and Order dated March 25, 2104, is granted; and it is further

ORDERED that those prongs of the cross motion by defendants Richard Chera and Next Generation Chera, LLC d/b/a Next Generation LLC to stay the instant motion, and to permit discovery in advance of a hearing on block-billing are denied; and it is further

ORDERED that that prong of the cross motion by defendants Richard Chera and Next Generation Chera, LLC d/b/a Next Generation LLC to delete Richard Chera's name from the first decretal paragraph of the decision and judgment of the Special Referee, dated March 22, 2013, is granted, and Richard Chera is hereby dismissed from the action and plaintiff is granted judgment on its complaint against defendant Next Generation Chera, LLC d/b/a Next

Generation LLC, and plaintiff shall settle order and judgment against defendant Next Generation Chera, LLC d/b/a Next Generation LLC on notice in accordance with the foregoing, and such complaint against defendant Next Generation Chera, LLC d/b/a Next Generation LLC is severed; and it is further

ORDERED, that the action against defendant Long Island University shall continue; and it is further

ORDERED that plaintiff shall, within 20 days from service of a copy of the notice of settlement of order and judgment, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the clerk of the Trial Support Office (Room 158) and shall serve and file with such Clerk the note of issue and statement of readiness on the continued action and shall pay the fee therefor, and such Clerk shall cause the matter to be placed upon the calendar for such trial.

Dated: January 11, 2016

ENTER:


DEBRA A. JAMES J.S.C.

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