

Hung v Harlington Realty Co. LLC
2016 NY Slip Op 31264(U)
June 29, 2016
Supreme Court, New York County
Docket Number: 160688/2014
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 7**

CARRIE HUNG, D/B/A Wedding Atelier,

Plaintiff,

-against-

HARLINGTON REALTY CO. LLC,

Defendant.

Index No.: 160688/2014
DECISION/ORDER
Motion Seq. Nos. 1 and 2

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion to amend the caption under CPLR 3025, defendant's cross-motion under CPLR 3212 for summary judgment, and plaintiff's motion under CPLR 3124.

Papers	Numbered
Plaintiff's Notice of Motion (seq #1).....	1
Defendant's Notice of Cross-Motion for Summary Judgment.....	2
Plaintiff's Notice of Motion for Leave to Amend (seq #2)	3
Plaintiff's Affidavit in Opposition to Cross-Motion.....	4
Plaintiff's Affirmation in Further Support of Motion to Compel and in Opposition to Cross-Motion.....	5
Plaintiff's Memorandum of Law in Further Support and in Opposition to Cross-Motion.....	6
Defendant's Reply Affidavit in Support of Cross-Motion	7
Defendant's Affirmation (Lon Paul Fischman) in Opposition to Plaintiff's Motion (seq #1)	8
Defendant's Affirmation (Murray Shactman) in Opposition to Plaintiff's Motion (seq #2).....	9
Plaintiff's Affirmation in Further Support of Motion for Leave to Amend	10

Cozen O'Connor, New York City (Amanda Nelson & Jill Mandell of counsel), for plaintiff.
Fischman & Fischman, New York City (Lon Paul Fischman & Murray Shactman of counsel), for defendant.

Gerald Lebovits, J.

The court consolidates motion sequence numbers 1 and 2 for disposition.

Plaintiff, Carrie Hung, d/b/a Wedding Atelier, moves for leave to amend the caption under CPLR 3025 (b). Defendant, Harlington Realty Co. LLC, cross-moves under CPLR 3212 for summary judgment. Plaintiff also moves to compel defendant to comply with outstanding disclosure demands under CPLR 3124 or, alternatively, to strike defendant's answer for failing to comply with disclosure demands.

I. Plaintiff's Motion for Leave to Amend

Plaintiff's motion for leave to amend the caption under CPLR 3025 (b) is granted.

Under CPLR 3025 (b), “[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court.” A court must “examine the sufficiency of the merits of the proposed amendment.” (*Heller v Louis Provezano, Inc.*, 303 AD2d 20, 22 [1st Dept 2003].) A motion to amend must be supported by an affidavit of merits and evidentiary proof supporting the motion that could likewise be considered on a motion for summary judgment. (*Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 116 [1st 1998].)

On a motion for leave to amend, a plaintiff need not establish the merit of its proposed new allegations. (*Lucido v Mancuso*, 49 AD3d 220, 227 [2d Dept 2008].)

A court should freely grant a motion for leave to amend a pleading “so long as there is no surprise or prejudice to the opposing party.” (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]; accord CPLR 3025 [b].) Mere delay is insufficient to defeat a motion for leave to amend. (*Kocourek*, 85 AD3d at 504.) Prejudice requires some indication that the opposing party has been hindered in preparing the case or been prevented from taking some measure favouring the opposing party's position. (*Id.*)

An amendment “which would shift a claim from a party without standing to another party who could have asserted that claim in the first instance is proper.” (*MK W. St. Co. v Meridien Hotels*, 184 AD2d 312, 313-314 [1st Dept 1992].) An amendment would be proper because “such an amendment, by its nature, does not result in surprise or prejudice to the defendants who had prior knowledge of the claim and an opportunity to prepare a proper defense.” (*Id.*)

Plaintiff proposes to amend the caption to substitute Wedding Atelier, LLC, as a plaintiff. When this case was originally filed, the business entity of Wedding Atelier, LLC did not exist, so could not be named as a party. Plaintiff argues that the proposed amendment is proper because Wedding Atelier could have asserted the claim for the security deposit under the lease in the first place. (Plaintiff's Affirmation in Further Support of Motion for Leave to Amend, at ¶ 2.) Under the lease assignment, Wedding Atelier now has standing to seek the relief requested in the complaint. (Plaintiff's Affirmation in Support of Motion #2, Exhibit F.)

This amendment does not result in prejudice or surprise. Defendant was in possession of the lease assignment, defendant knew about the possibility that Wedding Atelier could sue to attempt to recover the security deposit, and defendant had an opportunity to prepare a defense. (*See Kocourek*, 85 AD3d at 505 [finding that defendants “have not identified any way in which they would be prejudiced were plaintiff granted leave”].)

Leave to amend the caption should be freely granted. Absent prejudice or surprise resulting directly from the delay in seeking leave, motions under CPLR 3025 (b) for leave to amend a caption are to be freely granted unless the proposed amendment is “palpably insufficient or patently devoid of merit.” (*Clarke v Laidlaw Tr., Inc.*, 125 AD3d 920, 922 [2d Dept 2015].)

Here, plaintiff's proposal to amend the caption to substitute Wedding Atelier, LLC as a plaintiff is not insufficient or devoid of merit, and could easily have been expected by the defendant.

II. Defendant's Cross-Motion for Summary Judgment

Defendant argues that the instant action should be dismissed because plaintiff lacks standing to bring it. (Defendant's Affidavit in Support of Cross-Motion, at ¶ 15.) However, plaintiff is granted leave to amend the complaint to substitute Wedding Atelier, LLC, which has standing in the instant action due to the lease assignment.

Dismissing the complaint for lack of standing is unwarranted. The issue of standing is rectified by the court's granting plaintiff's motion for leave to amend the complaint to substitute Wedding Atelier as a plaintiff.

III. Plaintiff's Motion to Compel

Plaintiff moves to strike defendant's answer for failure to provide disclosure or, alternatively, for an order under CPLR 3124 to compel defendant to comply with outstanding disclosure demands. The court grants it in part and denies it in part: Plaintiff's motion to compel disclosure is granted, but plaintiff's motion to strike defendant's answer is denied.

CPLR 3101 (a) mandates that all parties provide "full disclosure of all matters material and necessary to the defense of an action." (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952 [1998].) The court must take a "liberal and practical view . . . of what is necessary." (*Marie Dorros, Inc. v Dorros Bros., Inc.*, 274 AD 11, 13 [1st Dept 1948].)

Plaintiff argues that defendant's answer should be stricken because defendant did not respond to plaintiff's Request for the Production of Documents. Defendant argues that it did not respond to disclosure because it filed the current cross-motion for summary judgment, thus staying disclosure under CPLR 3214 (b). (Defendant's Affirmation in Opposition and in Support of Cross-Motion, at ¶ 51.) Court rules provide that a pending dispositive motion does not stay disclosure. (Plaintiff's Memorandum of Law in Further Support of Motion to Compel, at 3.) Plaintiff cites the New York Uniform Rules for New York County Supreme Court in support of this argument, but appears to have made an error in the citation page number. (Plaintiff's Memorandum of Law in Further Support of Motion to Compel, at 17.) Presumably, the plaintiff was attempting to cite to Justice Wooten's court rules on pp. 54-55 (rather than pp. 44-45), as the present case was originally handled by Justice Wooten. Justice Wooten's rules state that "[t]he filing of a motion for summary judgment will not stay the discovery process. . . ." (New York County Supreme Court, Civil Branch, Uniform Rules, p. 54.)

Plaintiff requires information that is material and necessary to litigate this case; this information is contained in documents in defendant's possession. Plaintiff served its First Request for the Production of Documents on or about March 9, 2015. (Plaintiff's Notice of Motion, Exhibit D.) Plaintiff also sent a letter to defendant's counsel to demand responses to the request on May 12, 2015. (Plaintiff's Notice of Motion, Exhibit E.) Defendant did not respond to disclosure. Following the preliminary conference on December 2, 2015, Justice Paul Wooten

wrote that failure to comply with the preliminary conference order may result in an order of preclusion, striking of the answer, or dismissal of the case.

An order to strike the defendant's answer is harsh in the current circumstances. But defendant must respond to plaintiff's First Request for the Production of Documents, dated March 9, 2015, contained in plaintiff's Affirmation in Support of Motion to Compel, Exhibit D.

Therefore, this court must compel disclosure of the Documents to Be Produced that plaintiff requested in the First Request for the Production of Documents, dated March 9, 2015. (Plaintiff's Affirmation in Support of Motion to Compel, Exhibit D, at ¶¶ 1-54.) Defendant must respond by August 10, 2016. Failure to comply with this order may result in an order of preclusion, striking of the answer, or dismissal of the case.

Accordingly, it is

ORDERED that plaintiff's motion (motion sequence 1) to strike defendant's answer is denied and plaintiff's motion to compel is granted; and it is further

ORDERED that defendant's cross-motion for summary judgment is denied; and it is further

ORDERED that plaintiff's motion (motion sequence 2) for leave to amend the caption of the suit to substitute a different plaintiff is granted and plaintiff shall settle an order; and it is further

ORDERED that defendant Harlington Realty Co. LLC must produce to plaintiff, by August 10, 2016, all non-privileged documents responsive to plaintiff's demand for disclosure and inspection in Harlington's possession, custody, or control. Disclosure to be completed by November 1, 2016. Parties must appear at a compliance conference on September 14, 2016, at 12:00 p.m., in Part 7, room 731, at 111 Centre Street. Plaintiff to file its note of issue/certificate of readiness on or before November 30, 2016; and it is further

ORDERED that counsel for plaintiff is directed to serve a copy of this order with notice of entry upon defendant, on the County Clerk's Office and the General Clerk's Office, who are directed to amend their records accordingly.

This opinion is the court's decision and order.

Dated: June 29, 2016


J.S.C.
HON. GERALD LEBOVITS
J.S.C.