

Zupa v Paradise Point Assn., Inc.
2017 NY Slip Op 30806(U)
March 1, 2017
Supreme Court, Suffolk County
Docket Number: 27815/2012
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX NO. 27815/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 VICTOR J. ZUPA and MARY ZUPA,

Plaintiffs,

- against -

PARADISE POINT ASSOCIATION, INC.,

Defendant.

ORIG. RETURN DATE: JANUARY 12, 2017
 FINAL SUBMISSION DATE: JANUARY 12, 2017
 MTN. SEQ. #: 005
 MOTION: MG

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Upon the following papers numbered 1 to 8 read on this motion _____
 FOR LEAVE TO AMEND ANSWER _____

Notice of Motion and supporting papers 1-3; Memorandum of Law in Support 4; Affidavit
 in Opposition and supporting papers 5, 6; Memorandum of Law in Opposition 7; Reply
 Affirmation 8; it is,

ORDERED that this motion (seq. #005) by defendant PARADISE
 POINT ASSOCIATION, INC. for an Order, pursuant to CPLR 3025 (b), granting
 defendant leave to serve and file an Amended Verified Answer, is hereby
GRANTED for the reasons set forth hereinafter. The Court has received
 opposition to this application from plaintiffs VICTOR J. ZUPA and MARY ZUPA.

Plaintiffs are the owners of a parcel of residential property in a private community known as Paradise Point, which is located in the Town of Southold. The property, commonly known as 4565 Paradise Point Road, is improved with a single family residence, tennis court and dock ("Property"). Defendant is a not-for-profit corporation that holds title to the common areas within the residential community, including the roads, boat basin and jetty, and has easement rights in certain private properties.

On June 7, 2012, defendant filed a lien against the Property in the sum of \$47,594 for unpaid fees, charges and assessments allegedly incurred by plaintiffs during the period from July 2000 to July 2011. In addition to charges for association dues and dock fees, the statement of amount due set forth in the lien document, which contains the same charges as set forth in an August 2011 Statement of Member account allegedly served on plaintiffs by defendant, includes two "litigation assessment" charges totaling \$10,000, four "working capital assessment" charges totaling \$20,000, a "capital gains & improvement assessment" charge of \$1,750, and a "dock owners share of dredging cost" charge of \$2,044.

On September 10, 2012, plaintiffs commenced this action for a judgment declaring that defendant lacks the authority to record such lien against the Property. More specifically, the First cause of action in the complaint asserts that plaintiffs' Property is not subject to any covenants or restrictions permitting defendant to impose and record a lien against the Property, and the Second cause of action asserts that defendant lacks the authority to impose and record a lien against the Property for capital assessments. Plaintiffs, by their Third cause of action, seek a judgment enjoining defendant from imposing and recording a lien against their Property based on an alleged breach of covenants and resolutions. Plaintiffs also assert claims for damages sounding in breach of contract and willful exaggeration of the amount of the lien. Finally, plaintiffs assert a claim for unjust enrichment, alleging that they are entitled to compensation for costs they incurred in dredging the canal and boat basin. Defendant, by its Verified Answer, asserts counterclaims for breach of an "implied agreement . . . to pay fees, dues and assessments charged . . . as a result of their ownership of the [Property]," and for foreclosure of the lien.

By Order dated May 6, 2013, this Court denied a motion by plaintiffs for partial summary judgment in their favor on the causes of action for declaratory and injunctive relief, and denied a motion by defendant for summary judgment on

its first counterclaim. By Order dated November 14, 2013, this Court denied a motion by plaintiffs for leave to renew and reargue their prior motion for partial summary judgment, as well as for leave to serve an amended complaint to add a cause of action for slander of title.

Defendant has now filed the instant application for leave to serve and file an Amended Verified Answer to interpose the affirmative defense of the statute of limitations. Specifically, defendant alleges that plaintiffs' Fourth and Fifth causes of action for breach of contract and unjust enrichment are barred, in whole or in part, by the six-year statute of limitations prescribed by CPLR 213. Defendant's current counsel, who was substituted in this matter on or about December 7, 2016, indicates that a review of defendant's file revealed an invoice from plaintiffs to defendant, dated October 27, 2011, in which plaintiffs itemize a list of the amounts they claim are due to them from defendant. The amounts on this invoice total \$249,037. Defendant contends that the amounts sought date back to payments made and expenses incurred in 1999 through July of 2006, more than six years prior to the commencement of this action. Therefore, defendant argues that these amounts are barred by the six-year statute of limitations.

Plaintiffs oppose the motion, alleging that plaintiffs would suffer substantial prejudice if the amendment is permitted, as they have spent considerable time and money preparing for the trial of this matter under the impression that the statute of limitations defense had been waived. Further, plaintiffs claim that defendant has provided no reasonable explanation for its delay in seeking the amendment until now, on the eve of trial. Plaintiffs allege that defendant has known about this invoice for many years, having originally been served with it in 2011. Plaintiffs also indicate that the invoice was exchanged during the discovery process and used at a deposition of a representative of defendant on September 23, 2015.

CPLR 3025 (b) provides that leave to amend a pleading "shall be freely given." Thus, leave should be given where the amendment is neither palpably insufficient nor patently devoid of merit, and the delay in seeking amendment does not prejudice or surprise the opposing party (*see HSBC Bank v Picarelli*, 110 AD3d 1031 [2013]; *Aurora Loan Servs. LLC v Dimura*, 104 AD3d 796 [2013]). Moreover, "the determination whether to grant such leave is within the discretion of the motion court, and the exercise of that discretion will not be lightly disturbed" (*Zelevnik v MSI Constr., Inc.*, 50 AD3d 1024 [2008]; *see*

Pergament v Roach, 41 AD3d 569, 572 [2007]). “In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom” (*Cohen v Ho*, 38 AD3d 705, 706 [2007]; see *American Cleaners, Inc. v American Intl. Specialty Lines Ins. Co.*, 68 AD3d 792 [2009]). While delay in seeking to amend a pleading is a consideration of the trial court, it does not bar the court from exercising its discretion in favor of permitting the amendment where there is no prejudice (see *Kimso Apts., LLC v Gandhi*, 24 NY3d 403 [2014]).

Generally, the affirmative defense of the statute of limitations is waived if not raised either by a pre-answer motion to dismiss or in the responsive pleading (see CPLR 3211 [e]; *Lefkowitz v Kaye, Scholer, Fierman, Hays & Handler*, 271 AD2d 576 [2000]). However, in *Deutsche Bank Trust Co. Ams. v Cox*, 110 AD3d 760 (2013), the Second Department held:

Defenses waived under CPLR 3211 (e) can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025 (b) so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay and is not palpably insufficient or patently devoid of merit (CPLR 3025 [b]). Mere 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

(*Deutsche Bank Trust Co. Ams.*, 110 AD3d 760, 762; see *Civil Serv. Empls. Assn. v County of Nassau*, 144 AD3d 1075 [2016]; *Bank of N.Y. Mellon v Aquino*, 131 AD3d 1186 [2015]).

Here, the Court finds that defendant has proffered a reasonable excuse for the delay in seeking leave to amend its answer. Defendant was required to retain new counsel on or about December 7, 2016, after its prior counsel indicated that he was no longer able to represent defendant in this matter. Defendant's current counsel promptly made the instant motion to amend after he discovered the invoice. In addition, the Court finds that the delay did not result in prejudice or surprise to plaintiffs. The invoice at issue was prepared by

plaintiff VICTOR J. ZUPA himself, and based upon damages purportedly incurred by plaintiffs more than six years prior to the commencement of this action.

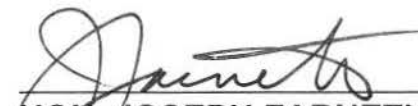
Furthermore, the proposed amendment is neither palpably insufficient nor patently devoid of merit (see *US Bank, N.A. v Primiano*, 140 AD3d 857 [2016]; *HSBC Bank*, 110 AD3d 1031). Although judicial discretion should be exercised sparingly when leave to amend is sought on the eve of trial (see *Morris v Queens Long Is. Med. Group, P.C.*, 49 AD3d 827 [2008]; *Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys., Inc.*, 15 AD3d 523 [2005]; *Rosse-Glickman v Beth Israel Med. Ctr.-Kings Hwy. Div.*, 309 AD2d 846 [2003]), courts have repeatedly granted leave to assert the affirmative defense of the statute of limitations even on the eve of trial (see *McCaskey, Davies & Associates, Inc. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Bd. of Educ. v Eugene J. Donohue Assocs.*, 298 AD2d 482 [2002]; *Lane v Beard*, 265 AD2d 382 [1999]).

Accordingly, this motion to amend is **GRANTED**. The proposed Verified Amended Answer with two counterclaims, annexed to defendant's moving papers as Exhibit "E," shall be deemed served upon plaintiffs as of the date of service of the instant Order upon plaintiffs with notice of entry. Plaintiffs may then serve responsive pleadings, pursuant to CPLR 3025 (d), if so advised.

The non-jury trial of this matter is scheduled to commence in this Part on **April 18, 2017 at 9:30 a.m.**, and continue day-to-day until complete.

The foregoing constitutes the decision and Order of the Court.

Dated: March 1, 2017



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

 X NON-FINAL DISPOSITION