Board of Mgrs. of the Sunrise Manor Condominium Assn. v Sunrise Enter., Inc.
2017 NY Slip Op 31349(U)
May 22, 2017
Supreme Court, Queens County
Docket Number: 703755/14
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Allan Weiss IA Part 2
Justice

BOARD OF MANAGERS OF THE SUNRISE MANOR CONDOMINIUM ASSOCIATION, INDIVIDUALLY AND ON BEHALF OF ALL UNIT OWNERS OF THE SUNRISE MANOR CONDOMINIUM,

Plaintiff,

-against-

SUNRISE ENTERPRISE, INC., ARKADY ZIRKIEV, ZOYA AKSAKALOVA,

Defendants.

ARKADY ZIRKIEV,

Third-party Plaintiff

-against-

TIPPS CONS, INC. a/k/a TIPP ROOFING COMPANY, BUSKO CORP., VULKAN HVAC, INC., MERCON CONTRACTION CORP., KINGS ELECTRIC CO., INC., and BLC DRYWALL CORP.,

Third-party Defendants.

Index No: 703755/14

Motion Date: January 10, 2017
January 12, 2017

Motion Seq. No. 5 & 6

The following papers numbered 1 to 36 were read on this motion by defendant, Zoya Aksakalova (Seq. 5), to dismiss plaintiff's complaint as against it, pursuant to CPLR 3211 (a) (7), and cross motion by plaintiff for leave to amend the complaint, pursuant to CPLR 3025 (b), along with an application by plaintiff (Seq. 6), seeking leave to reargue a prior decision of this court, pursuant to CPLR 2221 (d).

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Upon the foregoing papers, it is ordered that Aksakalova's motion to dismiss, plaintiff's cross motion to amend, and plaintiff's order to show cause to reargue, are determined as follows:

In this action for, among other things, breach of contract, defendant, Arkady Zirkiev, moved to dismiss the First, Second and Fourth Causes of Action - three of the four causes of action in the complaint - which motion was granted by order, dated May 4, 2016, and filed on May 10, 2016. The result of such decision was that Zirkiev was no longer a defendant in this case, as the Third Cause of Action was for breach of contract solely against the "architect" defendants , who had been stipulated out of the case in January 2016. Plaintiff moved for leave to "replead/amend" the complaint, pursuant to CPLR 3211 (e) and 3025 (b), which motion was denied by decision dated October 5, 2016, and filed October 11, 2016. Plaintiff now moves for leave to reargue that motion, pursuant to CPLR 2221 (d). Defendant, Aksakalova, moves to dismiss plaintiff's complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action against it. Plaintiff opposes, and cross-moves, pursuant to CPLR 3025 (b), to amend its complaint.

Plaintiff submitted the instant order to show cause, pursuant to CPLR 2221 (d), seeking leave to reargue its denied motion to replead or amend its complaint, under CPLR 3211 (e) or 3025 (b), maintaining that the court was mistaken in its interpretation of the applicable law, and failed to consider, or misinterpreted, the statements in the supporting papers and pleadings regarding the necessary elements of the proposed causes of action.

"Initially, it should be noted that, regardless of statutory time limits concerning motions to reargue, every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action" (*Liss v Trans. Auto Sys.*, 68 NY2d 15, 20 [1986]; *see Butler v County of Suffolk*, 146 AD3d 853 [2017]). Even when a motion is "technically untimely under 2221 (d) (3), a court has discretion to reconsider its prior ruling" (*HSBC Bank USA N.A. v Halls*, 98 AD3d 718, 721 [2012]; *see Terio v Spodek*, 63 AD3d 719 [2009]; *Itzkowitz v King Kullen Grocery Co., Inc.*, 22 AD3d 636 [2005]). Consequently, although plaintiff's motion for leave to reargue was served beyond the applicable 30-day statutory limit, the court will consider such motion.

Leave to reargue is warranted herein as plaintiff has demonstrated that "the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*Schneider v. Solowey*, 141 AD2d 813, 813 [1988]; *see Markovic v J&A Realty, LLC*, 124 AD3d 846 [2014]; *Vaughn v Veolia Transp., Inc.*, 117 AD3d 939 [2014]; *Ahmed v Pannone*, 116 AD3d 802 [2014]). Movant has established that, in deciding plaintiff's prior motion, the court misapplied a controlling principle of law, (*see Vaccariello v Meineke Car Care Center, Inc.*, 136 AD3d 890 [2016]; *Cioffi v S.M. Foods, Inc.*, 129 AD3d 888 [2015]), by mistakenly denying plaintiff's motion to replead, pursuant to CPLR 3211 (e), despite the permissible and applicable language of the court- cited cases of *175 E. 74th Corp. v Hartford Acc. & Indem. Co.*, 51 NY2d 585 [1980]; *Canzano v Atanasio*, 118 AD3d 837 [2014]; and *Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15 (2008).

Upon reargument, plaintiff has demonstrated its entitlement to replead. The proposed amended complaint does not propound a new theory of law not previously advanced in the original motion papers (*see Simpson v Loehmann*, 21 NY2d 990 [1968]; *Mazinov v Rella*, 79 AD3d 979 [2010]; *Shallash v New Island Hosp.*, 66 AD3d 988 [2009]). The standard to be applied to a request for leave to replead, i.e., such relief should be freely granted absent significant prejudice or surprise to the opposing party, unless the proposed amendment is patently devoid of merit or palpably insufficient (*see Jackson v Gross*, – AD3d –, 2017 NY Slip Op. 03498 [2d Dept. 2017]; *Mials v Millington*, – AD3d –, 2017 NY Slip Op. 03168 [2d Dept. 2017]; *Mahler v North Shore Camp, LLC*, 145 AD3d 678 [2016]; *Galbraith v Westchester County Health Care Corp.*, 113 AD3d 649 [2014]), is consistent with the standard governing motions for leave to amend under CPLR 3025. In the case at bar, plaintiff's proposed amendments are not devoid of merit or palpably insufficient, and Zirkiev "cannot legitimately claim surprise or prejudice ... (as) [t]he proposed amendments are premised upon the same facts, transactions, or occurrences as alleged in the original complaint" (*MBIA Ins. Corp. v J. P. Morgan Securities, LLC*, 144 AD3d 635, 639 [2016]; see *Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15 [2008]). "The legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt" (*MBIA Ins. Corp. v J. P. Morgan*

Securities, LLC, 144 AD3d 635, 639 [2016], quoting *Sample v Levada*, 8 AD3d 465, 467-468 [2004]). As such, plaintiff's application for leave to replead is granted, and the order of October 5, 2016, dismissing the action as against defendant, Zirkiev, is vacated.

With regard to the motion by defendant, Aksakalova, to dismiss plaintiff's action against her, plaintiff has, therein, cross-moved for leave to amend its complaint, pursuanrt to CPLR 3025. Necessarily addressing plaintiff's cross motion first, it has been above-determined, "within the Supreme Court's broad discretion" (*Freeman v City of New York*, 111 AD3d 780, 783 [2013] that plaintiff's "proposed amendment was neither palpably insufficient nor patently devoid of merit, and the (defendant) did not demonstrate that it would suffer prejudice or surprise if leave to amend were granted" (*Peerless Ins. Co. v Micro Fibertek, Inc.*, 67 AD3d 978, 980 [2009]; *see DeLuca v Pecoraro*, 109 AD3d 636 [2013]; *Spodek v Neiss*, 104 AD3d 758 [2013]).

As such, plaintiff's cross motion for leave to amend its complaint is granted.

Having granted plaintiff leave to amend the complaint, "the amended complaint superseded the original complaint" (*Poly Mfg. Corp. v Dragonides*, 109 AD3d 532 [2013]). Consequently, Aksakalova's motion to dismiss the original complaint is denied as academic (*see Gotlin v City of New York*, 90 AD3d 605 [2011]; *Bobash, Inc. v Festinger*, 57 AD3d 464 [2008]; *DePasquale v Est. of DePasquale*, 44 AD3d 606 [2007]).

Accordingly, plaintiff's Order to Show Cause for leave to reargue is granted, and upon reargument, the October 5, 2016 Order is vacated and plaintiff's motion for leave to replead/amend its complaint is granted. Plaintiff's cross motion for leave to amend its complaint is granted. Defendant, Akksakalova's motion to dismiss is denied as academic.

Plaintiff shall **file** a copy of the amended complaint with the Clerk of the Supreme Court within thirty (30) days of entry of this Order and thereafter serve such pleading upon all parties pursuant to the applicable sections of the CPLR.

A copy of this Order is being mailed to the attorneys for the parties.

Dated: May 22, 2017

J.S.C.

FILED
MAY 25 2017
COUNTY CLERK
QUEENS COUNTY