Bene LLC v New York SMSA L.P.
2017 NY Slip Op 31541(U)
July 21, 2017
Supreme Court, New York County
Docket Number: 156876/2014
Judge: Kelly A. O'Neill Levy
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

----------X

BENE LLC,

Plaintiff,

-against-

NEW YORK SMSA LIMITED PARTNERSHIP D/B/A VERIZON WIRELESS, AND "ABC-XYZ CORPORATIONS", "JOHN DOE" AND "JANE DOE,"

Defendants.

----------X

DECISION/ORDER
Mot. Seq. 002

Index No.: 156876/2014

KELLY O'NEILL LEVY, J.:

This action stems from the alleged breach of a lease between a landlord, plaintiff Bene LLC and tenant, defendant New York SMSA Limited Partnership d/b/a Verizon Wireless ("Verizon Wireless"), for a building located at 77 Cooper Street in Manhattan. Pursuant to the lease, Verizon Wireless was permitted to install antennas on the roof of the building and upon termination of the lease, was to have removed them. According to the complaint, Verizon Wireless alleged that it terminated the lease on March 21, 2013. Despite plaintiff's numerous requests to Verizon Wireless that it remove the equipment, the antennas were never removed, and plaintiff alleges that, among other things, Verizon Wireless failed to restore the building to its original condition, damaged the building, and created a potential public safety hazard for pedestrians below.

Verizon Wireless moved, by order to show cause, for a declaratory judgment that plaintiff is responsible for maintaining the subject building in such a condition that it shall not be dangerous to the general public; that Verizon Wireless is not responsible for any dangerous condition at the building; or in the alternative, for a declaratory judgment that plaintiff is responsible for maintaining the building and protecting public safety, while granting Verizon Wireless access to remove antennas from the building to minimize the potential public safety risk

alleged by plaintiff and requiring plaintiff to execute permit applications for antenna removal. Plaintiff cross-moved to amend the complaint and dismiss the conversion and declaratory judgment claims against it.

On January 25, 2017, the parties stipulated to a partial settlement of the action. The stipulation contains numerous provisions concerning removal of the antennas. Pursuant to the stipulation, Verizon Wireless's order to show cause was to be withdrawn without prejudice to the claims or defenses therein provided all the terms of the stipulation were complied with. In light of the stipulation provisionally resolving the motion, by order of April 21, 2017, the court continued to hold plaintiff's cross-motion in abeyance pending confirmation of compliance with the stipulation. By stipulation dated May 30, 2017, the parties notified the court that the subject antennas were removed from the building on May 9, 2017, thus resolving defendant's motion. The court now considers plaintiff's cross-motion.

Plaintiff cross-moves to amend the complaint and dismiss the conversion and declaratory judgment claims against it. Plaintiff seeks to amend the complaint to add a cause of action for "lulling fraud," alleging that Verizon Wireless gave false statements in order to prevent the plaintiff from timely asserting its rights against it. Plaintiff points to delays and misinformation that Verizon Wireless gave in the course of settlement discussions that "lulled" it into not commencing an action against it within the applicable statute of limitations.

Pursuant to CPLR 3025 (b), motions for leave to amend pleadings should be freely granted absent prejudice or surprise resulting therefrom unless the proposed amendment is "palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v. Greystone & Co. Inc.*, 74 AD3d 499 (1st Dep't 2010). "While it is true that motions for leave to amend pleadings are to be liberally granted in the absence of prejudice or surprise... it is equally true that the court should examine the sufficiency of the merits of the proposed amendment when considering such

motions." *Heller v. Louis Provenzano, Inc.*, 303 AD2d 20, 25 (1st Dep't 2003), *citing Zabas v. Kard*, 194 AD2d 784, 784 (2d Dep't 1993). *See also Ancrum v. St. Barnabas Hosp.*, 301 AD2d 474, 475 (1st Dep't 2003).

A properly-pled claim for fraud must include "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). Plaintiff claims that the fraud was "lulling" in that Verizon Wireless's conduct lulled plaintiff and its management company, Elite Management (Elite), into believing that Verizon Wireless "would eventually reach a fair settlement particularly where Verizon continued to increase their offers to settle, and continued to demonstrate a willingness to resolve the dispute amicable [sic], which continued up to April 30, 2013," shortly after which plaintiff retained counsel.[1] Plaintiff annexes to its papers the September 13, 2014 affidavit of Robert Mozillo, a principal of Elite, who details the unfruitful, years' long communications between plaintiff Elite and Verizon and Verizon's alleged efforts to delay resolution of this matter in an effort to avoid liability under the lease.

Verizon Wireless argues that plaintiff has failed to file its motion to amend in a timely manner and that it will be prejudiced by the amendment in that it will result in unnecessary costs, delays, and further motion practice. "Prejudice does not occur simply because a defendant is exposed to greater liability or because a defendant has to expend additional time preparing its case. Rather, prejudice occurs when the party opposing amendment has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." *Jacobson v. McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654 (1st Dep't 2009)(internal citations omitted). *See also Kocourek v. Booz Allen Hamilton Inc.*, 85 AD3d 502,

[1] Amended complaint, ¶57.

504 (1st Dep't 2011), *Tri-Tec Design, Inc. v. Zatek Corp.*, 123 AD3d 420, 420 (1st Dep't 2014). Such is not the case here.

Applying the liberal standard on motions to amend, it is ordered that the portion of plaintiff's cross-motion seeking to amend the complaint in the proposed form annexed to the moving papers is granted. Plaintiff shall serve and file the amended complaint with executed verification within 10 days of service of this decision and order with notice of entry; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service.

This constitutes the decision and order of the court.

ENTER:

Dated: July 21, 2017

Kelly O'Neill Levy

Kelly O'Neill Levy, J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.