Index No.: 656188/2016 Seq. No. 004

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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HOWARD J. KAPLAN and MICHELLE A. RICE,
Plaintiffs,

Index No.: 656188/2016

-against-

Mot. Seq. No. 004

LADENBURG THALMANN & CO., INC.,
HOWARD M. LORBER, RICHARD J. LAMPEN,
and SIGNATURE BANK,
Defendants.

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ANDREA MASLEY, J.S.C.:

Plaintiffs Howard J. Kaplan and Michelle A. Rice move for an order striking an attorney statement filed by defendant Signature Bank. Signature Bank cross-moves, pursuant to CPLR 3025 (b), for leave to amend its answer.

Background

The court assumes familiarity with the background facts of this action, as set forth in its decision on motion sequence numbers 002 and 003. The facts relevant to this motion and cross motion are as follows.

Pursuant to a sublease, plaintiffs' former firm Arkin Kaplan Rice LLP (AKR), provided its sub landlord, defendant Ladenburg Thalmann & Co. (Ladenburg), with a letter of credit issued by Signature Bank, as security for the sublease (Rosenblith affirmation dated 6/1/17, exhibit 3, letter of credit). The letter of credit provided that it would automatically renew each year until August 31, 2009, unless Signature Bank elected not to renew it (*id.* at 1). Pursuant to an amendment dated September 14, 2011, the final expiration date of the letter of credit was extended to June 29, 2015 (Rosenblith affirmation, exhibit 4, 9/14/11 amendment).

As part of their verified complaint, plaintiffs allege that Signature Bank received notice of the court's June 3, 2013 order (Sherwood, J.) in a related action, *Arkin Kaplan Rice LLP v*

Kaplan (2013 NY Slip Op 31210[U], *10-11 [Sup Ct, NY County 2013]), granting Kaplan and Rice summary judgment and holding that thyey were not personally liable under the sublease and were released from liability (verified complaint, ¶¶ 73-74). Plaintiffs further allege, "[u]pon information and belief, [that] as a result, Signature Bank did not renew the letter of credit, which then expired on August 31, 2013" (*id.*, ¶ 74). In its answer to the verified complaint, Signature Bank responded to this paragraph by "den[ying] the truth of the allegations as to Signature [Bank], aver[ring] that the [letter of credit] was not renewed because the amount of the [letter of credit] had been exhausted, and refer[ring] to the court all legal conclusions" (Signature Bank answer, ¶ 71).

As part of its opposition to the motions to dismiss filed by Signature Bank's codefendants (mot. seq. nos. 002, 003), plaintiffs argued that they had sufficiently alleged that certain transfers out of AKR's account with Signature Bank were fraudulent and unauthorized (NYSCEF Doc. No. 79, plaintiffs' mem at 18-19). As evidence thereof, plaintiffs cited Signature Bank's answer for its "admission" that the letter of credit, which purportedly authorized such transfers, expired in 2013 (*id.* at 18-19, 19 n 13). Signature Bank did not move to dismiss the complaint; however, it filed an affirmation from its counsel, entitled "Attorney Statement," in which counsel affirmed that he made an "inadvertent error" in drafting the answer (Garbaccio affirmation dated 5/11/17, exhibit C, attorney statement dated 4/21/17, ¶ 2). Specifically, counsel affirmed that "[t]he response should have made clear that the [letter of credit] was renewed subsequent to August 2013 (with a final expiry date in July 2015) and ultimately was exhausted prior to the final expiry date" (*id.*). Counsel then requested that his statement be deemed a motion to correct the alleged error in Signature Bank's answer (*id.*).

Plaintiffs now move to strike Signature Bank's attorney statement from the record. Signature Bank cross-moves, pursuant to CPLR 3025 (b), for leave to amend its answer.

Discussion

A. Plaintiff's Motion to Strike

In their notice of motion, plaintiffs do not specify the mechanism by which they seek to strike Signature Bank's Attorney Statement from the record. To the extent that plaintiffs refer to CPLR 2211 and 3024 (b) in their memorandum of law, the court will treat the motion to strike as made pursuant to those statutes.

CPLR 2211 provides that "[a] motion on notice is made when a notice of the motion or an order to show cause is served." Affirmative relief must be sought by notice of motion (*c.f. New York State Div. of Human Rights v Oceanside Cove II Apt. Corp.*, 39 AD3d 608, 609 [2d Dept 2007] ["Since the plaintiff merely requested this relief in its opposition papers, and did not make a motion on notice as defined in CPLR 2211, the plaintiff is not entitled to appeal as of right from the order denying its request"]). CPLR 3024 (b) provides that "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading."

Plaintiffs argue that the attorney statement serves no purpose, and that the request therein was not made by notice of motion or order to show cause. Accordingly, plaintiffs claim that the statement should be stricken. Further, plaintiffs assert that, to the extent that the court views the attorney statement as an application for leave to amend, Signature Bank's time to do so as of right has expired. Moreover, plaintiffs argue that Signature Bank cannot amend or correct their answer to "alter [its] representation of material facts" (*Bogoni v Friedlander*, 197 AD2d 281, 292 [1st Dept 1994], *lv denied* 84 NY2d 803 [1994]). Because Signature Bank's attempt to do so is allegedly prejudicial to them, plaintiffs ask that the statement also be stricken as prejudicial pursuant to CPLR 3024 (b).

In opposition, Signature Bank argues that CPLR 2001[1] allows it to correct a mistake in its

[1] Signature Bank cites to CPLR 2101, but in context is clearly referring to CPLR 2001.

pleadings, and that its failure to note that the letter of credit expired in 2015, rather than 2013, is clearly a mistake based on the terms of the letter of credit itself. Moreover, Signature Bank points out that plaintiffs have had the letter of credit in their possession since the beginning of the action, and cannot, therefore, claim surprise or prejudice as a result of a correction based thereon.

At the outset, it should be noted that, were the court inclined to treat the attorney statement as a motion to correct Signature Bank's answer, such motion would be denied. 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, the mistake, omission, defect or irregularity shall be disregarded . . . ." Thus, technical or procedural defects may be corrected, unless they prejudice a party's substantial rights (*e.g. Matter of United Servs. Auto. Assn. v Kungel*, 72 AD3d 517, 517-518 [1st Dept 2010]). In that sense, a court may not "correct" a party's pleadings to work a substantive change in that party's statements (*see Electric Ins. Co. v Grajower*, 256 AD2d 833, 834 [3d Dept 1998], *lv dismissed* 93 NY2d 848 [1999] [holding that court cannot "affirmatively impute to defendant's affidavit allegations that it did not contain" under CPLR 2001]). Here, as in *Electric Ins. Co. v Grajower*, Signature Bank asks the court to read into its answer allegations that it does not contain, namely, the date on which Signature Bank argues the letter of credit expired.

Having said that, however, the case law cited above furnishes a basis to disregard Signature Bank's attorney statement, but not to strike it from the record entirely. CPLR 2211, cited by plaintiffs, sets forth the requirements for bringing motions, but does not say anything about removing improperly brought motions, or, indeed, any documents from the public record. Further, plaintiffs' reliance on CPLR 3024 (b) is misplaced; CPLR 3024 (b) applies to striking prejudicial matter from a pleading, and Signature Bank's attorney statement is not a pleading.

Beyond those two statutes, plaintiffs have not provided any authority supporting their application. Accordingly, plaintiff's motion is denied.

B. Signature Bank's Cross Motion for Leave to Amend

Signature Bank cross-moves, pursuant to CPLR 3025 (b) for leave to amend its answer. Specifically, Signature Bank wishes to excise its statement, "that the [letter of credit] was not renewed because the amount of the [letter of credit] had been exhausted," from its answer (proposed amended answer, ¶ 71). Signature Bank argues that the proposed amendment is consistent with its position that it drew down on the letter of credit pursuant to the valid letter of credit and the court order, a position they claim is supported by the letter of credit and its amendments. Thus, Signature Bank claims that the proposed amendment has merit, and brings the answer in line with Signature Bank's defenses.

In opposition, plaintiffs assert that Signature Bank fails to provide the necessary explanation for why it is changing a fact admitted in its answer. Moreover, they claim that Signature Bank has failed to support its motion by an affidavit from someone with personal knowledge of the renewal of the letter of credit. Finally, they claim that the record does not support Signature Bank's version of events, and, therefore, Signature Bank's proposed amendment lacks merit.

"Leave [to amend] shall be freely given upon such terms as may be just" (CPLR 3025 [b]). "A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed" (*Spodek v Neiss*, 104 AD3d 758, 759 [2d Dept 2013] [internal quotation marks and citations omitted]). Generally speaking, the purpose of a motion to amend is not to permit a party "to alter [its] representation of material facts to best suit [its] theory of recovery and thereby overcome defenses raised in opposition" (*Bogoni*, 197 AD2d at 292). A party seeking to amend its answer, especially where

such amendment would have "the effect of changing the specific denials and repudiating the admissions contained in [the] original answer," must submit an affidavit "to explain the necessity and excuse for such an amendment" (*Gross v O'Connor*, 74 AD2d 633, 634 [2d Dept 1980]).

Signature Bank's application is flawed in two respects. First, it is not supported by an affidavit of "a person having personal knowledge;" Mr. Rosenblith's attorney affirmation and reply affirmation are not sufficient (*Guzman v Mike's Pipe Yard*, 35 AD3d 266, 266 [1st Dept 2006]). While Mr. Rosenblith may have personal knowledge of the circumstances of his drafting of the original answer, his affirmations do not demonstrate personal knowledge regarding the renewal of the letter of credit, or lack thereof, which facts underlie the proposed amended answer.

More significantly, however, neither Mr. Rosenblith's affirmation, nor the affirmation submitted by counsel for non-moving defendants Ladenburg, Howard M. Lorber, and Richard J. Lampen, adequately provides the requisite explanation of "the necessity and excuse" for the amended answer (*Gross*, 74 AD2d at 634). The crux of the arguments, by all parties in favor of the cross motion for leave to amend, is that plaintiffs have seized upon a mistake in Signature Bank's original answer to support a factually incorrect premise; namely, that the letter of credit expired in 2013, and, accordingly, the court should grant leave to amend in order to correct the record. It is not at all clear to the court, however, that plaintiffs' interpretation of Signature Bank's answer is correct. Indeed, plaintiffs' interpretation ignores the rest of the sentence, specifically, that the letter of credit expired because it was exhausted (Signature Bank answer, ¶ 71). Plaintiffs' own complaint suggests that such exhaustion occurred in 2015, when Ladenburg drew down on the letter of credit for the second time (verified complaint, ¶¶ 89-90). Moreover, Signature Bank has strenuously denied plaintiffs' allegations that renewal of the letter of credit was anything other than on its own terms. The plain

language of the letter of credit, as well as plaintiffs' own complaint, suggest that the letter of credit renewed each year automatically (verified complaint at 13 n 1; Rosenblith affirmation, exhibit 3, letter of credit at 1).

The parties remain free to argue which interpretation is better supported by the record evidence. Indeed, the parties devote a considerable amount of their briefing to arguing their respective positions regarding the letter of credit and its effect. The fact that plaintiffs proffer an interpretation that Signature Bank disagrees with, however, is not grounds to allow Signature Bank to excise its prior statement from its answer (*Bogoni*, 197 AD2d at 292).[2] Signature Bank does not suggest that newly revealed information requires it to retract what it has said, or provide any other satisfactory justification for allowing it to do so. Accordingly, Signature Bank's cross motion is denied.

Accordingly, it is hereby,

ORDERED that the motion of plaintiffs Howard J. Kaplan and Michelle A. Rice to strike defendant Signature Bank's attorney statement (NYSCEF Doc. No. 81) is denied; and it is further

ORDERED that the cross motion of defendant Signature Bank for leave to amend its answer is denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 242, 60 Centre Street, on November 15, 2017, at 10:30 AM/PM.

Dated: 10/23/17

ENTER:

HON. ANDREA MASLEY, J.S.C.

HON. ANDREA MASLEY

[2] The court notes, in any case, that Signature Bank's statement would remain in the record as an "informal judicial admission," even if superseded by an amended answer (*Stauber v Brookhaven Natl. Lab.*, 256 AD2d 570, 570–71 [2d Dept 1998] [holding that "any formal judicial admission deleted by the amendment is relegated to the status of an informal judicial admission which, although not conclusive, constitutes evidence of the proposition alleged"]).