

**Michael Anthony Contr. Corp. v Queens N.Y. Realty
LLC**

2017 NY Slip Op 33573(U)

September 12, 2017

Supreme Court, Nassau County

Docket Number: Index No. 604986/2014

Judge: Jerome C. Murphy

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This opinion is uncorrected and not selected for official publication.



**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

MICHAEL ANTHONY CONTRACTING CORP.,

Plaintiff,

- against -

**QUEENS N.Y. REALTY LLC, MIDRE CONTRACTING
CORP., ACTION STORE FRONTS INC., ROMAN IRON
WORKS INC., MAX HOROWITZ & SON INC.,
PRIME LIGHT ELECTRICAL CONSTRUCTION
MAINTENANCE INC., and SURETEC INSURANCE
COMPANY,**

Defendants

- and -

MICHAEL PERNA,

**Additional Defendants on Counterclaims pursuant to
CPLR 3019(d).**

TRIAL/IAS PART 18

Index No.: 604986-14

Motion Date: 7/12/17

Sequence Nos.: 004, 005

MG, MG

DECISION AND ORDER

QUEENS N.Y. REALTY LLC, on behalf of itself and as subrogee of all other persons similarly situated as trust fund beneficiaries of Lien Law Trusts of third-party defendant Michael Anthony Contracting Corp.,

Third-Party Plaintiff,

- against -

MICHAEL ANTHONY CONTRACTING CORP.,
MICHAEL PERNA, HYMAN HAYES ASSOCIATES,
LLC, MYLES HYMAN, TYNDALL INDUSTRIES,
LLC, DENNIS SERNA, M/E ENGINEERING, P.C.,
F. JOSEPH STRAUB, P.E., HIG SERVICES, INC.,
LONG ISLAND CONCRETE INC., HART ROOFING
& WATERPROOFING, INC., MONTEC INDUSTRIES,
INC., and JOHN DOES #1-10, inclusive, as those persons
and entities having an interest in the trust funds received,
or to be received by Michael Anthony Contracting Corp.,
for the improvement of the property located at 105-12
101st Avenue, Queens County, New York (a/k/a Block
9423, Lot 6 on the Land and Tax Map of Queens County,
New York),

Third-Party Defendants.

The following papers were read on this motion:

Sequence No. 004:

Second Amended Notice of Motion, Notice of Motion, Affirmation and Exhibits.....1
Affidavit in Opposition.....2
Affirmation in Further Support.....3

Sequence No. 005:

Notice of Motion, Affirmation in Support, Affidavit of Benjamin Mason, M.D. and
Exhibit.....4
Affirmation in Opposition.....5

PRELIMINARY STATEMENT

In Sequence No. 004, plaintiff brings this application for an Order prohibiting defendant, Queens N.Y. Realty LLC, from changing attorneys without the prior consent of this Court and without good reason shown therefore; and for such other and further relief as to this Court deems just and proper. Opposition to this application has been submitted.

In Sequence No. 005, third-party plaintiff brings this application for an Order granting third-party plaintiff leave to amend the caption to add its principal, Benjamin Mason, as an additional third-party plaintiff; granting third-party plaintiff leave to amend the caption and file and serve a third amended third-party complaint in the form annexed hereto; and for such other and further relief as this Court deems just and proper. Opposition to this application has been submitted.

BACKGROUND

Plaintiff, Michael Anthony Contracting Corp. ("Michael Anthony") commenced this action to recover from Queens N.Y. Realty LLC ("QNYR"), for unpaid billings in connection with the construction of the eye surgical facility and medical offices known as "Mason Eye Surgery Center" located at 105-12 101st Avenue, Queens, New York. The other defendants are holders of liens filed against the premises in connection with the construction project.

The underlying third party action against the third party defendants arises out of the construction of the Mason Eye Surgery Center. The third party plaintiffs' complaint asserts that the third party defendants' respective actions and omissions resulted in extensive delays, shoddy design, workmanship and materials that caused actionable damages to the third party plaintiff as well as the plaintiff and potentially the party seeking herein to be added as a third party plaintiff, to wit, Dr.

Benjamin Mason.

DISCUSSION

Upon the instant motion, counsel for the plaintiff seeks an Order preventing the defendant, QNYR, from changing attorneys without the prior consent of this Court and without good reason shown therefore. Plaintiff submits that since the commencement of this action, the defendant has changed attorneys at least eight (8) times, unnecessarily delaying the litigation and denying the plaintiff the opportunity to move this litigation forward and recover the substantial sums due and owing to the plaintiff from the defendant.

Benjamin Mason, M.D., a managing member of QNYR, opposes the application arguing that he changed attorneys “specifically to keep the case moving” and that “[t]hese transitions are smooth and have not served to delay [his] defense” (Mason Aff., ¶5).

The right to a substitution should not be confused with the right to discontinue. The first is almost an absolute right (*Matter of Lydig's Will*, 262 NY 408, 409 [1933]). The second is entirely discretionary and should not be allowed where the rights of third parties or the rights of the attorney will be impaired (CPLR 3217 [a] [2], [b]; *Frear v. Lewis*, 201 App.Div. 660, 667–669 [2nd Dept. 1922]). Indeed, in a proper case, if necessary to protect the interests of others, or if sought for “ulterior and inequitable purposes”, a substitution will be denied (*Hirshfeld v. Bopp*, 5 App. Div. 202, 205–206 [1st Dept. 1896]; see also, *Glenmark, Inc. v. Carity*, 22 AD2d 681, 682 [1st Dept. 1964]).

Here, the defendant has not offered any reason for the need to change attorneys so often. Nor has the defendant cited to any case law or any other legal basis on which to oppose the plaintiff's

instant motion. Indeed, there is no evidence on this record that the plaintiff is filing this motion to deny the defendant the right to change his attorneys. In the end, and keeping in mind that the plaintiff has thus far consented to each previous request to change attorneys without question – only recently questioning whether the defendant was again seeking substitution of counsel for “inequitable purposes” – this Court finds that plaintiff is entitled to the instant relief.

The motion by third party plaintiff, namely QNYR on behalf of itself and as subrogee of all other persons similarly situated as trust fund beneficiaries of Lien Law Trusts of third-party defendant Michael Anthony Contracting Corp., for an Order granting it leave to amend the caption to add its principal, Benjamin Mason, as an additional third-party plaintiff, and granting it leave to amend the caption and file and serve a third amended third-party complaint, is also granted.

Specifically, the proposed amendment (I) adds the third-party plaintiff’s principal, Dr. Benjamin Mason, as a third party plaintiff; and (ii) removes references to and allegations regarding dismissed third party defendants, Tyndall Industries, LLC, Montec Industries, Inc., Midre Contracting Corp. and Prime Light Electrical Construction Maintenance Inc.

It is well settled that leave to amend pleadings is freely given “absent prejudice” or surprise resulting directly from the delay (*McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]). “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’” (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]).

Here, Dr. Benjamin Mason seeks to be added as an additional third party plaintiff – in his individual capacity – based upon the fact that a number of the salient contract documents refer to him individually and may be constructed to disregard the third party plaintiff limited liability company, to wit, QNYR. To date, no depositions have taken place. Moreover, as counsel for the third party plaintiff herein avers, document discovery is in its nascent stage.

In addition, as averred by the counsel for the third party plaintiff, the basis for removal of Tyndall Industries, LLC, Montec Industries, Inc., Midre Contracting Corp., and Prime Light Electrical Construction Maintenance Inc. is that these parties have been previously dismissed from this action.

Thus, this Court, in the exercise of its discretion, and given that there is no showing of any prejudice by the delay in bringing this motion, herewith grants the plaintiff's motion to amend the caption (*Jacobson v. McNeil Consumer & Specialty Pharms.*, 68 AD3d 652 [1st Dept. 2009]; *Kushner v. Queens Tr. Corp.*, 97 AD2d 432 [2nd Dept. 1983]; *Zacher v. Oakdale Islandia Ltd. Partnership*, 211 AD2d 712 [2nd Dept. 1995]).

Therefore, it is

ORDERED, that the plaintiff's motion for an order prohibiting the defendant, Queens N.Y. Realty LLC, from changing attorneys without the prior consent of this Court and without good reason shown therefore, is granted; and it is further,

ORDERED, that the third-party plaintiff's motion for an order granting it leave to amend the caption to add its principal, Benjamin Mason, as an additional third-party plaintiff, and to amend the caption and file and serve a third amended third-party complaint as proposed, is granted; and it

is further,

ORDERED, that the third party plaintiffs are granted leave to file and serve the third amended third party complaint in compliance with this decision within thirty (30) days of the date of this Order; and it is further,

ORDERED, plaintiff's counsel shall forthwith transmit copies of this Decision & Order to all parties who have appeared in this action; and it is further,

ORDERED, that the parties and/or their counsel are directed to appear for a conference in this case on October 23, 2017 in Part 18 at 9:30 a.m.

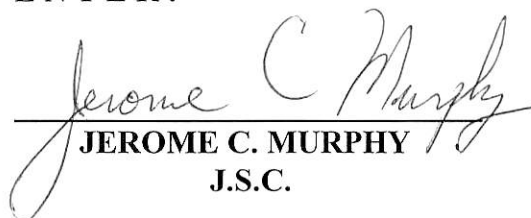
The parties' remaining contentions have been considered and do not warrant discussion.

To the extent that requested relief has not been granted, it is specifically denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
September 12, 2017

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED
SEP 20 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE