

Shmueli v The Savoy Condominium, LLC
2018 NY Slip Op 33303(U)
December 19, 2018
Supreme Court, New York County
Docket Number: 160302/2016
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 12EFM

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SARIT SHMUELI,

Plaintiff,

- v -

THE SAVOY CONDOMINIUM, LLC, MAXWELL-
KATES, INC.,

Defendants.

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INDEX NO. 160302/2016

MOTION DATE

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to amend caption/pleadings.

Plaintiff moves for an order granting her leave to file and serve a second amended complaint and for a jury trial. Defendants oppose.

In her first amended complaint, plaintiff alleges that she slipped and fell in defendant's condominium building where she resides and injured herself, and seeks compensatory damages. (NYSCEF 5). In her proposed second amended complaint, plaintiff alleges that defendants have engaged in corruption, criminal activity, harassment, threats, obstruction of justice, abuse of power, and retaliation against her for various issues related to the condominium and its management. (NYSCEF 22).

Defendants argue that plaintiff's proposed complaint is improper as it does not relate to the claims in the original complaint, which were solely for personal injuries based on plaintiff's slip and fall, and that they had no notice of the new allegations. They allege they are prejudiced by their inability to investigate the new claims in a timely manner. (NYSCEF 24). According to plaintiff, as discovery has not yet commenced, defendants are not prejudiced by the amendment

of her complaint, and she relates her slip and fall to the allegations raised in her proposed complaint, including that the slip and fall was caused by defendants' retaliatory actions. (NYSCEF 30).

Pursuant to CPLR 3025(b), a party may amend her pleading or supplement it by setting forth additional or subsequent transactions or occurrences at any time by leave of court, which shall be freely given upon such terms as may be just. A motion for leave to amend should be freely granted unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit. (*Maldonado v Newport Gardens, Inc.*, 91 AD3d 731 [2d Dept 2012]).

No prejudice or surprise is shown when the proposed complaint sets forth new claims or theories based on the facts stated in the original complaint. (*See e.g., Brewster v Baltimore & Ohio R. Co.*, 185 AD2d 653 [4th Dept 1992] [when proposed amendment sets forth no new facts but merely adds additional theory of recovery, leave should generally be granted]; *see also MBI/Ins. Corp. v J.P. Morgan Securities, LLC*, 144 AD3d 635 [2d Dept 2016] [defendants could not legitimately claim surprise or prejudice as proposed amendment premised on same facts, transactions, or occurrences as in original complaint]). Where new facts are set forth in a proposed amended complaint, there is no notice to the opposing party, and surprise or prejudice is established. (*See Bonanni v Straight Arrow Publishers, Inc.*, 133 AD2d 585 [1st Dept 1987] [leave to amend should have been denied as original complaint gave no notice that party intended to proceed against other party on different and new theory, which required different factual proof]).

Plaintiff's proposed amendment sets forth both new facts and new claims that are not alleged in her first amended complaint. (*Biondi v Behrman*, 149 AD3d 562 [1st Dept 2017], *lv*

dismissed in part and denied in part 30 NY3d 1012 [motion for leave to amend should have been denied as defendants had no notice of plaintiff's new claims, and new theory not related to claims in original pleading]; *Hustedt Chevrolet, Inc. v Jones, Little & Co.*, 129 AD3d 669 [2d Dept 2015] [allegations in original complaint did not give notice of facts, transactions, or occurrences giving rise to proposed new claim]). Thus, absent notice, the proposed second amended complaint is prejudicial to defendants.

Moreover, while plaintiff numbers the paragraphs in her proposed second amended complaint, as required by CPLR 3014 (every pleading shall consist of plain and concise statement in consecutively-numbered paragraphs; each paragraph shall contain one allegation, if possible; and separate claims shall be separately stated and numbered]), she does not state separate claims, and some of the paragraphs state no legal claim or basis for relief or damages.

In any event, on a motion to amend, the court must also determine whether the proposed amendment has merit (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]), and may deny leave to amend if the proposed amendment is palpably insufficient or patently devoid of merit on its face (*Guinta's Meat Farms, Inc. v Pina Constr. Corp.*, 80 AD3d 558 [2d Dept 2011]).

Construing plaintiff's new claims to the extent possible, some of them are not legally cognizable, such as the harassment claim (*Pollack v Cooperman*, 109 AD3d 973 [2d Dept 2013], *app dismissed* 23 NY3d 949 [2014] [New York state does not recognize civil claim for harassment]), and the obstruction of justice claim (*Adamski v Romano-Schulman*, 56 AD3d 1078 [3d Dept 2008] [no private right of action exists for obstruction of justice]). Her claim of retaliation, absent an allegation that plaintiff engaged in protected activity under New York state or city human rights laws also fails (*Ananiadis v Mediterranean Gyros Prods., Inc.*, 151 AD3d

915 [2d Dept 2017]), and the abuse of power claim fails absent an allegation that defendants are government employees (*Kreamer v Town of Oxford*, 91 AD3d 1157 [3d Dept 2012]). Plaintiff also sets forth no viable cause of action based on “corruption,” “criminal activity,” and “threats.” Additionally, a fraud claim must be pleaded with particularity, and plaintiff has not done so. (CPLR 3016[b]). Thus, the proposed new claims are palpably insufficient and devoid of merit. (See e.g., *Mance v Mance*, 128 AD2d 448 [1st Dept 1987], *app dismissed in part, denied in part* 70 NY2d 668 [among other reasons, as proposed fraud claim insufficiently pleaded, there was no merit to proposed amended complaint]).

Plaintiff’s request for a jury trial is denied as premature and as she must abide by CPLR 4102(a) in seeking a jury trial. For all of these reasons, it is hereby

ORDERED, that plaintiff’s motion is denied.

<u>12/19/2018</u>							
DATE				BARBARA JAFFE, J.S.C.			
CHECK ONE:	☐	CASE DISPOSED	☒	NON-FINAL DISPOSITION	☒		
	☐	GRANTED	☒ DENIED	GRANTED IN PART	☐	OTHER	
APPLICATION:	☐	SETTLE ORDER		SUBMIT ORDER	☐		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	☐	REFERENCE	