

**Hayner Hoyt Corp. v Nayana, Inc.**

2018 NY Slip Op 33799(U)

August 28, 2018

Supreme Court, Tompkins County

Docket Number: 2012-0289

Judge: Eugene D. Faughnan

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Court/County: \_\_\_\_\_

Case Title: \_\_\_\_\_

Docket Number: \_\_\_\_\_ 2012/0289

Judge: \_\_\_\_\_ Eugene D. Faughnan

EXPERT(s): \_\_\_\_\_

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DECISION & ORDER  
Maureen Reynolds, Tompkins County Clerk

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 2<sup>nd</sup> day of July, 2018.

PRESENT: HON. EUGENE D. FAUGHNAN  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : TOMPKINS COUNTY

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THE HAYNER HOYT CORPORATION,

Plaintiff,

-vs-

DECISION AND ORDER

Index No. 2012-0289  
RJI No. 2017-0305-M

NAYANA, INC.

Defendant.

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APPEARANCES:

Counsel for Plaintiff:

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**EUGENE D. FAUGHNAN, J.S.C.**

This matter comes before the Court upon a motion filed February 21, 2018 by Nayana, Inc. (“Defendant”) seeking to reargue its prior motion for summary judgment which was the subject of this Court’s decision dated December 22, 2017. Defendant also filed a motion to amend its answer to include counterclaims on April 16, 2018. The Hayner Hoyt Corporation (“Plaintiff”) filed a motion to reargue its opposition to Defendant’s motion for summary judgment on April 26, 2018.

The facts in this matter are outlined in detail in this Court’s decision of December 22, 2017. In short, this matter involves a dispute arising out of a contract between the parties in which Plaintiff was to build a hotel in Clay, New York. Plaintiff alleges that Defendant failed to make payments for construction services pursuant to the contract in the amount of \$184,119.21 plus an alleged oral agreement to pay \$74,721 for a total of \$258,840.21. Defendant argued that the Plaintiff failed to satisfy a condition precedent to suit by failing to submit the non-payments to the architect pursuant to the contract.

This matter was commenced by the filing of a verified summons and complaint dated March 30, 2012. Plaintiff granted Defendant an indefinite extension to serve an answer. Following several years of discussions between the parties, Plaintiff demanded an answer and the issue was joined with the service of an answer on or about June 28, 2017.

**Defendant’s Motion to Reargue**

Defendant seeks to reargue alleging that the Court misapprehended the facts and law in finding the parties had an oral agreement separate and apart from the contract, and failing to dismiss any such claim.

A motion to reargue may be submitted where there are “matters of fact or law allegedly

overlooked or misapprehended by the court in determining the prior motion” CPLR §2221. “A motion for leave to reargue (*see* CPLR 2221 [d] [2]) is addressed to the sound discretion of the court and is properly granted upon a showing that the facts and/or law were overlooked or misapprehended by the court in determining the prior motion.” *Cascade Bldrs. Corp. v. Rugar*, 154 AD3d 1152, 1154 (3<sup>rd</sup> Dept. 2017).

In the present matter, Defendant argues that the Court misapprehended the facts regarding an alleged oral agreement, and either explicitly or implicitly found such an agreement to exist. It correctly points out that the alleged oral agreement was not specifically referenced in the verified complaint but in Plaintiff’s opposition to Defendant’s motion for summary judgment. However, the Court notes that the amount claimed in the verified complaint clearly includes the amount purportedly due under the claimed oral agreement. The difference between the alleged contract amount and the amount claimed in the verified complaint is \$74,721; the amount of the alleged oral agreement. A demand for a bill of particulars would have further clarified the claim had such a demand been served. However, this matter has a somewhat unusual procedural posture in that the answer was served, with consent, over five years after the filing of the action. Summary judgment was then sought less than three months later without any indication that discovery has occurred.

To clarify the Court’s prior decision, the Court determined that there was insufficient evidence upon which to evaluate any claim based upon an alleged oral agreement. This remains true. To the extent that the prior decision was interpreted to conclusively find the existence of that oral agreement, the Court finds that the existence of any oral agreement remains unresolved and subject to further discovery.

Defendant also seeks dismissal of any claim premised upon the alleged oral agreement arguing that any such claim is barred by the merger and integration clause of the contract. However, at this early stage in this action, discovery is required to determine the nature and extent of the any alleged oral agreement, and whether it is merged into the written contract. This portion of

Defendant's motion to reargue is DENIED without prejudice, and Defendant is granted leave to renew its motion for summary judgment regarding the alleged oral agreement following discovery.

### **Defendant's Motion to Amend Its Answer**

Defendant also moves for leave to amend its answer to assert counterclaims pursuant to CPLR §3025(b). Defendant seeks to assert a claim for liquidated damages for alleged delays in the completion of the project. Plaintiff opposes the motion arguing that it is prejudiced by the assertion of this counterclaim, approximately ten years after the completion of the project and six years after the commencement of this action.

"In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" *Palmatier v. Mr. Heater Corp.*, 156 AD3d 1167, 1169 (3<sup>rd</sup> Dept. 2017); *citing Lucido v. Mancuso*, 49 AD3d 220, 222, (3<sup>rd</sup> Dept. 2008); *see* CPLR 3025 [b]; *LaLima v. Consolidated Edison Co. of N.Y., Inc.*, 151 AD3d 832, 834 (2<sup>nd</sup> Dept 2017).

In the present matter, Plaintiff does not argue that the claim is patently devoid of merit. Rather, Plaintiff argues that with the passage of ten years since the completion of the project, documents *may* not be available and memories have faded. However, Plaintiff did not commence this action until nearly four years after completion of the project and the five year delay in the service of the Defendant's answer was with the Plaintiff's consent. Defendant's application to amend its answer to assert counterclaims was made less than a year after the service of its answer and prior to any discovery.

Defendant argues that there is no prejudice, as the counterclaim arises out of the same contract and other facts and circumstances as the Plaintiff's claim. Further, both parties acknowledge that the project was not completed on time pursuant to the contract. This could potentially give rise

to liquidated damages, pursuant to the contract. Therefore, it cannot be said that the counterclaim is devoid of merit.

Plaintiff alleges the *possibility* of prejudice and suggests explanations for the delay in completion which may serve as defenses to the counterclaim. The affidavit of Jeremy Thurston dated October 17, 2017 references specific change orders which Plaintiff argues explain the delays in completion. The Plaintiff's possession of these documents belie its argument of prejudice. Moreover, Plaintiff has failed to identify any evidence for the alleged delay which is not in its possession.

The Court concludes that the counterclaim arises out of the same facts and circumstances as the Plaintiff's action, and there is no prejudice in the assertion of this claim at this time. The Court finds that the delay between the completion of the project and the filing of this action was solely within Plaintiff's control, and the delay in the service of the answer was with Plaintiff's consent. Thereafter, the Defendant's delay in seeking to amend their answer was less than a year and before any discovery. Further, Plaintiff has admitted to possession of documents which may form the basis for a defense to the counterclaim and have otherwise only claimed the *possibility* of prejudice. Finally, since it is undisputed that the project was not completed by the completion date in the contract, the counterclaim can not be found to be devoid of merit. Therefore, Defendant's motion to amend its answer to include a counterclaim for liquidated damages is **GRANTED**.

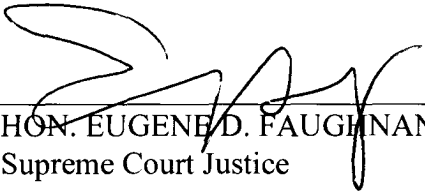
### **Plaintiff's Motion to Reargue**

This Court's decision was entered on January 25, 2018. Plaintiff seeks reargument pursuant to CPLR §2221, *supra*. Plaintiff filed its motion on April 26, 2018; some 91 days after service and the filing of the notice of entry. Any such motion "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry" CPLR §2221(d)(3). Defendant's motion to reargue was made on February 21, 2018, which was timely.

The Court concludes that Plaintiff failed to timely file its motion to reargue. *See Pearson v. Goord*, 290 AD2d 910 (3<sup>rd</sup> Dept. 2002). Therefore, Plaintiff's motion to reargue is dismissed.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: August 28, 2018  
Ithaca, New York



HON. EUGENE D. FAUGHNAN  
Supreme Court Justice