

L & L Contr. Corp. v Bushwick Economic Dev. Corp.
2018 NY Slip Op 34096(U)
July 19, 2018
Supreme Court, Kings County
Docket Number: Index No. 500711/17
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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L & L CONTRACTING CORP d/b/a L & L CC,
Plaintiff, Decision and order

- against - Index No. 500711/17

BUSHWICK ECONOMIC DEVELOPMENT CORP.,
d/b/a BEDCO, and FRANK BOSWELL,
Defendant, July 19, 2018

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved seeking summary judgement dismissing the complaint on the grounds the plaintiff does not capacity to sue and has sued an improper party in any event. The plaintiff has cross-moved seeking to amend the complaint. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff L and L Contracting Corp., leased premises located at 862 Dekalb Avenue to the defendant Bushwick Economic Development Corp., beginning August 1, 2006. The complaint alleges that defendant owes plaintiff for the failure to provide various payments under the lease. Such payments include repairs, outstanding violations, legal fees and other obligations. The defendant has now moved seeking summary judgement on various grounds. First, defendant argues that L & L Contracting Corp., was dissolved by the New York State Division of Corporations on July 28, 2010 and thus has no capacity to maintain this lawsuit.

Further, defendant Boswell argues that in any event he cannot be served in his individual capacity.

The plaintiff did not oppose the motion per se and in fact expressly consented to dismiss any claims against Frank Boswell. The plaintiff did, however, move seeking to amend the complaint to remove L & L Contracting Corp., and replace it with another entity, namely Dipti K. Das as plaintiff. Indeed, the first paragraph of the amended complaint states that "at all times hereinafter mentioned Plaintiff Dipti K. Das was and is an individual with a principal residence of 10 Middle Road, Levittown, PA 19506" and that "at all times hereinafter mentioned, Dipti K. Das shall be known as 'Plaintiff'" (see, Amended Verified Complaint, ¶1, 2).

Conclusions of Law

A party may be allowed to amend or supplement a pleading "at any time by leave of court," and such "leave shall be freely given" (Holchender v WE Transport, Inc., 292 AD2d 568, 739 NYS2d 621 [2nd Dept. 2002]; CPLR 3025 [b]). The decision whether to grant such leave is within the court's sound discretion, to be determined on a case-by-case basis (Caruso v Anpro, Ltd., 215 AD2d 713, 627 NYS2d 72 [2nd Dept. 1995]). Generally, leave to amend should be granted where there is no significant prejudice or surprise to the defendants, and where

the documentary evidence submitted in support of the motion indicates that the proposed amendment to the pleading may have merit (Holchender, 292 AD2d at 569).

In this case there is no dispute that L & L Contracting is not a party to the action, indeed, cannot be a party to the action. Plaintiff's counsel representing another party (Das) seeks to be substituted for L & L Contracting Inc., instead. It is well settled that "[A]n amendment which would shift a claim from a party without standing to another party who could have asserted that claim in the first instance is proper since such an amendment, by its nature, does not result in surprise or prejudice to the defendants who had prior knowledge of the claim and an opportunity to prepare a proper defense" (MK West Street Co., v. Meridien Hotels Inc., 184 AD2d 312, 584 NYS2d 310 [1st Dept., 1992]). However, the incoming plaintiff must be able to demonstrate such entity could have asserted the claim in the first instance (see, Midland Mortgage Co., v. Imtiaz, 110 AD3d 773, 973 NYS2d 257 [2d Dept., 2013]). Thus, for the amendment to be valid Das must have had the right to initiate the lawsuit originally. However, the complaint does not establish that defendant Bedco had any relationship with Das in any individual capacity. Although Das did sign the lease as President of L & L Contracting it was not signed in an individual capacity. Thus, there is no relationship between Das and Bedco wherein Das may


assert any claims as an individual. This lack of privity necessitates the dismissal of the lawsuit.

Therefore, based on the foregoing the motion seeking summary judgement dismissing the lawsuit is granted and the motion seeking to amend the complaint is denied.


So ordered.

ENTER:

DATED: July 19, 2018
Brooklyn N.Y.



Hon. Leon Ruchel'sman
JSC


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