

Omansky v 160 Chambers St. Owners Inc.
2019 NY Slip Op 30828(U)
March 28, 2019
Supreme Court, New York County
Docket Number: 603738/2008
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: <u>HON. BARBARA JAFFE</u> -----X LAWRENCE OMANSKY, Plaintiff, - v -	Justice	PART	IAS MOTION 12EFM
		INDEX NO.	<u>603738/2008</u>
		MOTION DATE	_____
		MOTION SEQ. NO.	<u>017</u>

160 CHAMBERS STREET OWNERS INC, *et al.*,
 Defendants.

DECISION AND ORDER

-----X
 The following e-filed documents, listed by NYSCEF document number (Motion 017) 395, 396, 397, 398, 399, 400, 401, 406, 407, 408, 409 were read on this motion to _____ restore to trial calendar _____.

By supplemental decision and order dated January 20, 2016, I granted defendant 160 Chambers Street Owners, Inc.’s motion for summary judgment to the extent of granting it a judgment of possession and warrant of eviction for plaintiff’s commercial unit at the premises at issue, and a judgment for unpaid rent and attorney fees, costs, and disbursements, and dismissed plaintiff’s claims related to the commercial premises and counterclaims in the holdover proceeding that had been consolidated with this action. The action was thereupon marked disposed. (NYSCEF 127). The decision was affirmed. (155 AD3d 460 [1st Dept 2017]).

Thereafter, plaintiff’s claims against the individual defendants were dismissed. (NYSCEF 386). His third cause of action, based on defendants’ alleged failure to repair the skylights in his residential unit, was not dismissed. (*See* 158 AD3d 566 [1st Dept 2018]).

Although the matter was marked disposed in 2016, plaintiff never moved to restore it to active status; however, he filed a note of issue on May 3, 2016. Since then, the parties have been

litigating the issue of defendants' entitlement to attorney fees, and plaintiff's alleged non-compliance with post-judgment discovery.

By notice of motion, plaintiff now seeks orders: (1) restoring the action to the trial calendar; (2) expediting the trial; and (3) amending the *ad damnum* clause in the complaint.

160 Chambers opposes the motion solely as to expediting the trial and amending the *ad damnum* clause.

As it appears that the action should have remained active, and absent any opposition thereto, the action is restored to active status.

To the extent that plaintiff seeks a trial preference pursuant to CPLR 3403, his application is untimely. (CPLR 3403[b]). Nor does he establish that any of the grounds available for granting a trial preference apply here. Plaintiff, an attorney, knew or should have known for the last three years that his action was marked disposed and that no future appearances were scheduled, but took no action until now to correct the error.

A motion to amend an *ad damnum* may be granted absent any resulting prejudice to a defendant, and upon a showing that the plaintiff has a cognizable claim against the defendant and the damages, if proven, are reasonably expected to exceed those set forth in the current *ad damnum* clause. (*S.P. Duggal Corp. v Aetna Cas. and Sur. Co.*, 224 AD2d 357 [1st Dept 1996]).

Plaintiff contends that now that discovery is complete, he has a better idea of the extent of his damages, and seeks to increase the damages related to the third cause of action from the unidentified amount sought in his amended complaint (NYSCEF 69) to:

the amount of the abatement of maintenance [] at the rate of \$2,500 per month for each month an abatement is being awarded, and compensatory damages of One Hundred and Fifty Thousand (\$150,000.00) dollars for the restoration of Plaintiff's residence to a habitable condition, and punitive damages of FIVE Million (\$5,000,000.00) dollars as a result of the intentional and malicious failure of Defendants to cure said leaks for over TEN (10) years despite to their obligation to do so as per the Proprietary Lease . . .

(NYSCEF 396 [emphasis in original]).

160 Chambers contends that plaintiff offers no explanation for seeking to increase the *ad damnum* 10 years after commencement of the litigation, and observes that plaintiff alternatively claims that the amendment is not based on new facts or is based on new facts. (NYSCEF

To the extent that plaintiff's original *ad damnum* does not include an exact amount of compensatory damages and plaintiff now seeks to set forth an exact amount, 160 Chambers does not show that the amendment is not meritorious or that they are prejudiced. (*See e.g., Salmeron v Lincoln Spencer Apts., Inc.*, 37 Misc 3d 139[A], 2012 NY Slip Op 52212[U] [App Term, 1st Dept 2012] [absence of dollar amount in ad damnum clause is correctable by amendment]).

Nevertheless, if plaintiff is now able to quantify his damages, and absent any dispute that defendants received no discovery related to the amount of plaintiff's damages, the amendment is granted on condition that plaintiff provide proof to support his alleged compensatory damages amount. (*See e.g., Kassis v Teachers' Ins. and Annuity Assn.*, 289 AD2d 223 [1st Dept 2002] [any potential for prejudice arising from amendment was cured by permitting expert to reinspect premises]; *Georgeson, Inc. v Hussein*, 23 Misc 127[A], 2009 NY Slip Op 50569[U] [amendment of ad damnum clause properly permitted, especially as party granted leave to conduct discovery on additional damages]).

Plaintiff does not establish entitlement to amend his claim to add punitive damages 10 years after the litigation commenced and 2 years after he filed his note of issue, and where the alleged facts underlying the claim are not new to plaintiff, and as the assertion of such a claim is prejudicial. (*See e.g., Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 23 [1st Dept 2003] [denying motion to amend ad damnum clause made six years after commencement of case to add claim for punitive damages as it would involve different elements and standards of proof and

“potentially subject defendants to a far greater and different dimension of liability than would otherwise have been the case.”)]. In any event, there is no indication that punitive damages is appropriate here. (*See Marinaccio v Town of Clarence*, 20 NY3d 506 [2013] [punitive damages available only “to punish and deter behavior involving moral turpitude”]; *Anderson v Nottingham Vill. Homeowner’s Assn., Inc.*, 37 AD3d 1195 [4th Dept 2007] [amendment of complaint to add punitive damages claim denied as defendants cooperative board of managers’ alleged conduct in failing to repair leaking roof did not rise to level of high degree of moral culpability]).

Accordingly, it is hereby

ORDERED, that plaintiff’s motion to restore is granted and the clerk of the Trial Support Office is directed to restore the action to active status and to place it on the trial ready calendar for the earliest available date; it is further

ORDERED, that plaintiff’s motion to amend the *ad damnum* clause is granted to the extent of quantifying his compensatory damages and on condition that he provide defendants, within 30 days of the date of this order, with all proof supporting such quantification, with leave granted to defendants to move for further discovery if warranted after receipt of plaintiff’s responses; and is denied as to adding a claim for punitive damages; and it is further

ORDERED, that plaintiff’s motion for a trial preference is denied.

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BARBARA JAFFE, J.S.C.

3/28/2019

DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	OTHER
					REFERENCE