

247 W 139 LLC v Hames
2019 NY Slip Op 31684(U)
June 13, 2019
Supreme Court, New York County
Docket Number: 159279/2018
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

247 W 139 LLC,

Plaintiff,

- v -

INDEX NO. 159279/2018

MOTION DATE _____

MOTION SEQ. NO. 001

WANDA HAMES, FELICIA LOGAN, ANNETTE
COLEMAN, and MELANIE RIDOCK,

Defendants.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to amend.

Plaintiff moves pursuant to CPLR 3025(b) for an order granting it leave to issue a supplemental summons and file an amended complaint to add Patricia Graham as an additional defendant. Plaintiff also moves pursuant to CPLR 3124 and 3126 for orders compelling defendants to comply with its discovery demands, and imposing sanctions for their non-compliance. Defendant Hames opposes.

I. RELEVANT BACKGROUND

On October 5, 2018, plaintiff filed its verified complaint alleging, as pertinent here, the following:

Plaintiff owns the premises located at 247 West 139th Street in Manhattan. After the property's former owner, a non-party limited liability company, of which Hames is a member, failed to make payments under its mortgage, which Hames guaranteed, a foreclosure proceeding was initiated. By order dated April 4, 2012, another justice of this court appointed a receiver to

whom all security deposits and rent collected were to be turned over, and all tenants were to pay their rent and those without valid leases were to surrender possession.

After the appointment and before entry of the judgment of foreclosure, the building's former owner entered into leases executed by Hames, with defendants Logan and Ridock for apartments 2D and 2B, respectively. Notwithstanding the lease and the Division of Housing and Community Renewal records reflecting Logan's residence, rent for apartments 2D and 2C was tendered by defendant Coleman. Neither Logan nor Coleman occupy either apartment. Rather, Hames combined the two apartments into one, which she occupies.

On June 3, 2014, a judgment of foreclosure and sale was entered ordering that the premises be sold at a public auction. Plaintiff purchased the building on March 5, 2018.

Plaintiff advances six causes of action: (1) a judgment declaring that Hames, Logan, and Coleman have no valid lease for apartments 2C and 2D and that their occupancy of the units was fraudulently obtained; (2) ejectment of Hames, Logan, and Coleman from apartments 2C and 2D; (3) a judgment declaring that Ridock has no valid lease for apartment 2B and that her occupancy was fraudulently obtained; (4) ejectment of Ridock from apartment 2B; (5) unjust enrichment; and (6) fraud against Hames. (NYSCEF 1).

II. MOTION TO AMEND

A. Contentions

1. Plaintiff (NYSCEF 10)

Plaintiff seeks to add Graham as a defendant because, on April 10, 2013, she entered into a lease for apartment 3C with the building's former owner which was signed by Hames. (NYSCEF 12). In plaintiff's proposed amended complaint, plaintiff adds two causes of action for a declaratory judgment and ejectment against Graham, nearly identical to those as advanced

against Ridock. (NYSCEF 18). Plaintiff contends that the amendments are sufficiently meritorious as Graham's lease was entered into under the same circumstances as those of Logan and Ridock, and that as the additional causes of action and facts concerning Graham are virtually identical to those of Ridock, defendants suffer no prejudice or surprise.

In support, plaintiff submits the affidavit of its managing member who attests to the facts underlying Graham's tenancy and the proposed additional causes of action. (NYSCEF 11).

2. Hames (NYSCEF 22)

In opposition, Hames submits her affidavit in which she states that the proposed amendments lack merit as Graham has occupied apartment 3C for over 19 years, and plaintiff has accepted rent checks from her. She also maintains that plaintiff offers no excuse for failing to name Graham when it filed the original complaint, that Graham and the other defendants, having resided in the building for more than six months, are entitled to remain in occupancy given their "SRO Rent Stabilization rights," that the original summons and complaint are not attached to plaintiff's moving papers, and that the proposed amended complaint is "incomplete, incomprehensible and not a final version."

3. Reply (NYSCEF 26)

In reply, plaintiff reiterates its earlier arguments, and contends that the rent stabilization code does not protect defendants as they are not "hotel-stabilized tenants."

B. Analysis

Parties may be added at any stage of the action by leave of court." (CPLR 2003) and pursuant to CPLR 3025(b) "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court." A motion for leave to amend a pleading 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. (CPLR 3025; *Crossbeat N.Y., LLC v LIIRN, LLC*, 169 AD3d 604, 604 [1st Dept 2019], quoting *CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC*, 146 AD3d 60, 65 [1st Dept 2016]; *Cruz v Brown*, 129 AD3d 455, 456 [1st Dept 2015], quoting *Miller v Cohen*, 93 AD3d 424, 425 [1st Dept 2012] [“movant need not establish the merit of the proposed new allegations, but must simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit”]).

Plaintiff’s proposed additional causes of action, all of which arise from the same facts and circumstances as those advanced against defendants, are not palpably without merit as Graham’s lease was entered into after the building was appointed a receiver. At this stage, no other showing is required and Hames fails to establish that she is prejudiced by the amendment. (*See Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008] [“If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing”]; *see also MBIA 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]).

Hames offers no authority for the proposition that the original summons and complaint must be filed along with a motion to amend, and plaintiff’s “redlined” version of the amended complaint complies with the mandate of CPLR 3025(b) that a motion to amend “be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.” Additionally, that plaintiff failed to include Graham as a defendant in the original complaint is not relevant, absent prejudice or surprise.

III. MOTION TO COMPEL AND STRIKE

Plaintiff contends that Hames's answer, affirmative defenses, and counterclaim should be stricken as she has willfully failed to comply with discovery demands. Likewise, plaintiff contends that all defendants should be precluded from offering evidence as to the documents requested and not produced.

Hames, in opposition, argues that her affirmative defenses have merit and that plaintiff offers no basis to dismiss them. She does not oppose an order requiring the production of documents as she has provided or will provide plaintiff with responsive documents.

In reply, plaintiff observes that it has been unable to schedule depositions and that as Hames does not oppose an order requiring the production of documents, its motion should be granted.

While CPLR 3126 permits a court to, *inter alia*, issue an order striking pleadings upon a party's failure to obey an order of disclosure or a willful failure to disclose information, the drastic remedy of striking a pleading is generally considered unwarranted absent a motion to compel compliance with discovery demands and/or a showing that the other party's failure to obey discovery orders is willful or contumacious. (*See Michaluk v New York City Health and Hosps. Corp.*, 169 AD3d 496 [1st Dept 2019] [“(s)ince defendant never sought to compel disclosure or to have preclusionary language added to any of the parties' compliance orders, its motion to dismiss ... was premature given the lack of evidence that plaintiffs' delay in conducting the deposition was willful, contumacious or due to bad faith”]; *W&W Glass, LLC v 1113 York Ave. Realty Co. LLC*, 83 AD3d 438 [1st Dept 2011] [“there appear to be no prior motions by plaintiff to compel disclosure, rendering any motion to strike the answer pursuant to CPLR 3126 premature in this case.”]; *Double Fortune Prop. Investors Corp. v Gordon*, 55 AD3d

406 [1st Dept 2008] [as plaintiff responded to discovery requests, proper course was for defendant to move to compel further discovery rather than moving to strike complaint]; *see also Pehzman v Dept. of Educ. of City of New York*, 95 AD3d 625 [1st Dept 2012] [striking of answer is ultimate penalty that may be imposed only upon extreme conduct]; *Palmenta v Columbia Univ.*, 266 AD2d 90 [1st Dept 1999] [striking answer inappropriate absent clear showing that failure to comply was willful, contumacious, or in bad faith, which moving party must affirmatively establish]; *Commerce & Indus. Co. v Lib-Corn, Ltd.*, 266 AD2d 142 [1st Dept 1999] [striking of pleading “not a sanction to be routinely imposed whenever a party fails to comply with *any* item of discovery”] [emphasis in original]).

The record reflects that the parties have not had a preliminary conference, and thus, plaintiff’s motion is granted to the extent that the parties are to appear for a preliminary conference to resolve all outstanding discovery issues.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff’s motion for leave to amend the complaint is granted; it is further

ORDERED, that within 30 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry and the amended complaint upon all parties who have appeared in the action; it is further

ORDERED, that a supplemental summons and amended complaint shall be served, in accordance with the Civil Practice Law and Rules, upon the additional party in this action within 30 days after service of a copy of this order with notice of entry; it is further

ORDERED, that the action shall bear the following caption:

247 W 139 LLC,

Plaintiff,

- v -

WANDA HAMES, FELICIA LOGAN, ANNETTE COLEMAN, MELANIE RIDOCK, and PATRICIA GRAHAM,

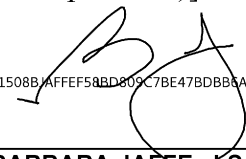
Defendants.

; it is further

ORDERED, that plaintiff's motion to compel is granted to the extent that the parties are directed to appear for a preliminary conference on September 25, 2019 at 2:15 pm at 60 Centre Street, Room 341, New York, New York, and is otherwise denied; it is further

ORDERED, that plaintiff's counsel shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the party being added pursuant hereto; and it is further

ORDERED, that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

20190613131508B/AFFFEF58BD809C7BE47BDBB8A362046EAC5AA

BARBARA JAFFE, J.S.C.

6/13/2019
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 checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE