Summit Rest. Repairs & Sales, Inc. v New York City Dept. of Educ.
2019 NY Slip Op 33457(U)
November 21, 2019
Supreme Court, New York County
Docket Number: 651845/2012
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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SUMMIT RESTAURANT REPAIRS & SALES, INC.,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

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INDEX NO. 651845/2012

MOTION DATE 07/11/2019, 07/18/2019

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 203, 204, 205

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 138, 139, 140, 141, 196, 197, 198, 199, 200, 201, 202, 206, 208, 209, 210

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

Upon the foregoing documents and for the reasons set forth on the record (11/21/2019), New York City Department of Education's (**DOE**) motion (seq. no. 005) to amend its answer pursuant to CPLR 3025 to assert the defenses of (i) collateral estoppel and res judicata is granted, Summit Restaurant Repairs & Sales, Inc.'s (**Summit**) cross motion to file a supplemental complaint is denied, and Summit's motion (seq. no. 006) to consolidate this action with the action known as *Board of Education of the City School District of the City of New York v Summit Restaurant Repairs & Sales, Inc.* (Index No. 451569/2018) is denied without prejudice to renewal as set forth below.

RELEVANT FACTUAL BACKGROUND

Summit commenced this action on May 30, 2012 alleging three breach of contract causes of action for (1) alleged money owed for work performed, (2) lost profits based on allegations of wrongful termination, (3) punitive damages, and alleging a single cause of action for (4) account stated, seeking a total of $19 million in damages on the breach of contract claims and $848,395.65 on the account stated claim (NYSCEF Doc. No. 1). Summit also filed an Article 78 proceeding (the **Petition**) to challenge the June 22, 2012 decision of the Dispute Resolution Officer (**DRO**), which is now discontinued with prejudice (NYSCEF Doc. Nos. 126, 133). The DOE also commenced a separate action against Summit (the **DOE Action**) alleging four causes of action for violation of NY State Finance Law §§ 189(1)(a), 189(1)(b), 189(1)(g) and (189(1)(h), which was assigned to and is currently pending before the Hon. Debra James (NYSCEF Doc. No. 141).

Discovery in the instant action is now virtually complete, including expert discovery, which was scheduled to be completed by August 26, 2019 (Shea Reply Affirm., ¶ 6, NYSCEF Doc. No. 175). Note of Issue is scheduled to be filed on December 11, 2019 (NYSCEF Doc. No. 211). Little to no discovery has taken place in the DOE Action.

DOE seeks to amend its answer to add the affirmative defenses of res judicata and collateral estoppel based on the stipulation of discontinuance filed by Summit with respect to its Petition. Summit seeks to supplement its complaint to add causes of action for (i) fraudulent inducement (proposed fifth cause of action), (ii) fraud (proposed sixth cause of action), (iii) breach of the implied covenant of good faith and fair dealing (proposed eighth cause of action, and (iv)

promissory estoppel (proposed ninth cause of action). Summit also seeks to consolidate this case with the DOE Action.

Motion Sequence 005

Leave to amend under CPLR § 3025 (b) is committed to the sound discretion of the trial court (*Colon v Citicorp Inv. Servs.*, 283 AD2d 193, 193 [1st Dept 2001], citing *Edenwald Contr. Co. v New York*, 60 NY2d 957, 959 [1983]). Leave to amend pleadings should be freely given unless there is prejudice or surprise resulting from the delay to the opposing party or if the proposed amendment is "palpably improper or insufficient as a matter of law" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]).

With respect to DOE's motion to amend, there can be no prejudice or surprise as DOE timely moved for leave to amend its answer to add the affirmative defenses of collateral estoppel and res judicata, which affirmative defenses flow directly from the discontinuance with prejudice of the Petition that was filed by Summit, within one week of said discontinuance on June 26, 2019. Nor is the amendment palpably improper or insufficient as a matter of law because "a stipulation of discontinuance with prejudice without reservation of right or limitation of the claims disposed of is entitled to preclusive effect under the doctrine of res judicata" (*Mooney v Manhattan Occupations, Physical and Speech Therapies, PLLC*, 166 AD3d 957 [2d Dept 2018] [quotation and citation omitted]). Here, Summit executed a stipulation of discontinuance with respect to the Petition, without reserving any rights or limiting the causes of action disposed of. To wit, the stipulation of discontinuance unambiguously provides:

> IT IS HEREBY STIPULATED AND AGREED by and between the undersigned attorneys of record for the parties to this special proceeding, that whereas no party hereto is an infant, incompetent person for whom a committee has been appointed or conservatee, and no person not a party has an interest in the subject matter of the action, the above-captioned special proceeding, and all cross-claims, counterclaims and third-party actions, if any, be and the same hereby are discontinued with prejudice, and without costs to any party as against the other

(NYSCEF Doc. No 133).

Here, the discontinuance of the Petition means that the DRO's decision, which was the subject of the Petition and is at issue in this action, ***may be*** conclusive and binding on the parties, and DOE is entitled to assert that as a defense in this action. Without passing on the validity of DOE's affirmative defense, the proposed amendment is certainly not "palpably improper" as a matter of law. In addition, and significantly, there will be no delay of the proceedings as a result of DOE's proposed amendment as no additional discovery is required if DOE is permitted to assert its affirmative defenses at this time. Accordingly, the motion to amend DOE's answer is granted.

The same cannot be said with respect to Summit's proposed amendment which seeks to assert four additional causes of action after the close of fact discovery. Here, substantial prejudice and surprise would follow from the proposed amendment. Moreover, Summit submitted its notice of claim with respect to its DOE claims on March 30, 2012. This is the only notice of claim Summit has submitted in this action. Summit's notice of claim asserts only a breach of contract claim and the proposed new fraud claims are not in the notice of claim. Thus, Summit's time to comply with mandatory notice of claim requirements is long past and any such claims would be untimely – i.e., palpably improper as a matter of law (Education Law § 3813; General Municipal Law § 50[e]). The cross motion to amend the complaint is, therefore, denied. For the avoidance of doubt, notwithstanding the foregoing, to the extent that the evidence adduced at trial shows a

breach of the covenant of good faith and fair dealing that is implied in ***every*** contract, Summit may move to conform the pleadings to the proof as of right and proceed on a breach of the implied covenant theory. Summit does not need to amend or supplement its complaint to do so and such claim would not be barred by its notice of claim since the notice of claim provides DOE notice of Summit's breach of contract claims.

Motion Sequence 006

Summit argues that, here, consolidation is proper because both actions arise from the same set of facts and center on the contract dispute between Summit and DOE. Notably, however, discovery in the DOE Action has not yet begun. Thus, in opposition, DOE maintains that consolidation would result in unnecessary delay and that, in any event, the discovery in the DOE Action is "discrete from the discovery in the 2012 Action" as "it will be centered primarily on Summit's [alleged] fraud related to [certain] refrigeration issues, and DOE expects it to be voluminous" (Def. Opp. Memo., p. 3, NYSCEF Doc. No. 196). DOE also argues that the two actions raise different issues of law. With respect to the latter, DOE argues:

> Plaintiffs motion to consolidate should also be denied because the Actions present different questions of law. While the 2012 and 2018 Actions arise from the same requirements contract, they allege different violations. Summit's 2012 Action alleges breach of contract for work performed, lost profits, and punitive damages, whereas the DOE' s 2018 Action alleges fraudulent billing for refrigerants and testing of carbon dioxide under the New York False Claims Act. ... The legal questions are wholly separate and relate to the falsity of invoices, the number of violations, and thus, the Actions contain different causes of actions to be determined as different questions of law

(Def. Opp. Memo., p. 11, NYSCEF Doc. No. 196).

Summit maintains that any outstanding discovery in the DOE action should be narrow and limited because DOE's claims against it are improper and barred by a prior decision of Hon.

Charles Ramos (NYSCEF Doc. No. 200). In support of this contention, Summit's counsel read the transcript from Justice Ramos in a 2016 motion to amend into the record. Interestingly, in that colloquy, Justice Ramos specifically directed the DOE to file a separate action out of concern over the potential disruption and delay to this 2012 action requiring that discovery in this action be completed within 6 months. In addition, inasmuch the scope of discovery in the DOE Action is front of Justice James, this court will not overstep. Justice James will decide the discovery which is appropriate in the DOE Action which is in Justice James' docket. Finally, Justice James denial of Summit's motion to dismiss is not an appropriate issue for this court to address (*see* NYSCEF Doc. 209*)*.

CPLR 602(a) provides that:

> When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

A motion for consolidation is generally addressed to the sound discretion of the trial court and absent a showing of substantial prejudice to the non-moving party, a consolidation motion should be granted where common questions of law and fact exist (*RCN Constr. Corp. v Fleet Bank*, N.A., 34 AD3d 776, 777 [2d Dept 2006]). However, as the First Department has held, "[e]ven where there are common questions of law or fact, consolidation is properly denied if the actions are at markedly different procedural stages and consolidation would result in undue delay in the resolution of either matter" (*Abrams v Port Auth. Trans-Hudson Corp.*, 1 AD3d 118, 119 [1st Dept 2003]). *Abrams* is on point here: there, a motion was made to consolidate an action placed on the trial calendar with an action that had barely advanced to discovery. The trial court denied

the motion and the First Department affirmed, reasoning that denial of consolidation was appropriate since consolidation would delay resolution of both actions. The same rationale applies here and is even more compelling as the instant action has been pending in this court since 2012. It should not be delayed any further. If the parties do timely complete discovery in the DOE action such that a note of issue is filed before trial in this case, the court will consider anew an application to consolidate the two actions for trial. The court simply cannot delay resolution of this 2012 action if that discovery cannot be quickly completed.

Accordingly, it is

ORDERED that the defendant's motion (seq. 005) for leave to amend its answer is granted, and the amended answer in the proposed form annexed to the moving papers (NYSCEF Doc. No. 134) shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the cross motion for leave to amend the complaint is denied; and it is further

ORDERED that the motion (seq. 006) to consolidate is denied without prejudice.

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11/21/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE