

<b>Ramirez v Sister Strength Hous. Dev. Fund Co., Inc.</b>
2020 NY Slip Op 31040(U)
March 4, 2020
Supreme Court, Bronx County
Docket Number: 33029/2018
Judge: Lucindo Suarez
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Mtn. Seq. # 2

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 19

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UBER JOSUE RAMIREZ,

Plaintiff,

- against -

Index No.: 33029/2018

SISTER STRENGTH HOUSING DEVELOPMENT  
FUND COMPANY, INC., SISTER STRENGTH  
ASSOCIATES, L.P., THE YOUNG WOMEN'S  
CHRISTIAN ASSOCIATION OF BROOKLYN and  
DJM NYC, LLC

Defendants.

**DECISION and ORDER**

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DJM NYC, LLC,

Third-Party Plaintiff,

- against -

GRT CONSTRUCTION CORP.,

Third-Party Defendant.

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PRESENT: Hon. Lucindo Suarez

The issue presented in Third-Party Defendant GRT Construction Corp.'s ("GRT") motion seeking leave to amend its answer to interpose counterclaims is whether said counterclaims lacks merit. This court finds that GRT failed to demonstrate a factual foundation for its proposed counterclaims rendering same meritless, therefore, requiring a denial of the instant motion.

Pursuant to CPLR §3025(b), a party may amend a pleading at any time by leave of court.

A request to amend is determined in accordance with the general considerations applicable to such motion, including the statute's directive that leave "shall be freely given upon such terms as may be just." *See* CPLR §3025(b); *see also Kimso Apts., LLC v. Gandhi*, 24 N.Y.3d 403, 23 N.E.3d 1008, 998 N.Y.S.2d 740 (2014). New York State Courts have consistently recognized that absent prejudice or surprise, courts are free to permit the amendment of pleadings. *Id.*

The party opposing a motion to amend a pleading must overcome a presumption of validity in the moving party's favor and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment. *See Peach Parking Corp. v. 346 W. 40th St., LLC*, 42 A.D.3d 82, 835 N.Y.S.2d 172 (1st Dep't 2007). The determination of whether to allow such an amendment is reserved for the court's discretion. *Eighth Ave. Garage Corp. v. H.K.L. Realty Corp.*, 60 A.D.3d 404, 875 N.Y.S.2d 8 (1st Dep't 2009). Where a court concludes that an application to amend a pleading clearly lacks merit, leave is properly denied. *Id.*

The underlying personal injury action was commenced by Plaintiff to redress injuries he sustained while he was employed by GRT at a construction site. Defendant/Third-Party Plaintiff DJM NYC, LLC ("DJM") was the general contractor of the construction site and it entered into a contract with GRT to perform subcontracting waterproofing work. Said contract required that GRT procure insurance and name the owner of the construction site and DJM as additional insured.

According to GRT, in 2016, DJM recommended that GRT meet with its insurance broker, Ovation Risk Planners, Inc., ("Ovation") in order to assist GRT to procure proper insurance for its contemplated subcontractor work. GRT then decided to avail itself of the insurance policy that Ovation offered through Admiral Insurance Company. Ultimately, Admiral Insurance

Company disclaimed insurance coverage in the underlying action.

The crux of GRT's allegations revolves around DJM's purported representations that Ovation was an experienced and expert insurance broker. GRT claims that it reasonably relied upon said representations, which caused it to be fraudulently induced into procuring insurance coverage that was inadequate for the subcontracting work it was required to perform. As a result, GRT now seeks leave to amend its answer to interpose counterclaims sounding in contribution, fraud, negligence, common law indemnification, and breach of implied covenant of good faith and fair dealing.

In opposition, DJM argues that GRT's request for leave to amend its answer to assert said counterclaims should be denied because they are palpably insufficient and devoid of merit. DJM contends the contract between it and GRT placed the onus upon GRT to procure adequate insurance coverage. Further, it argued that the subject contract did not require that GRT use a specific insurance brokerage firm, and the fact that GRT voluntarily chose to use Ovation's insurance brokerage services cannot give rise to a fraud claim.

This court finds that GRT's counterclaims for contribution, negligence, and common law indemnification lack merit as there was no factual showing that DJM had notice or constructive notice of the dangerous conditions that caused Plaintiff's injuries, nor that it actually exercised supervision and/or control over the means and methods of Plaintiff's injury-producing work. Likewise, this court finds that GRT's fraud counterclaim lacks merit.

The fact that GRT chose to heed DJM's recommendations to use Ovation's insurance brokerage services without independently verifying that the insurance policy it procured was adequate for its purposes was done at its own peril and does not give rise to a fraud claim. There were no facts presented that DJM was involved in any respect with GRT's decision making

process when it ultimately chose its insurance policy. Furthermore, this court finds that if it was to allow GRT's fraud counterclaim to proceed it would essentially shift GRT's contractual burden to procure insurance coverage upon DJM, which would significantly undermine the parties' contractual intent.

Lastly, this court finds that GRT failed to proffer any facts that DJM breached the subject contract, thus, GRT cannot factually sustain a breach of implied covenant of good faith and fair dealing claim. Therefore, this court finds that GRT's proposed counterclaims lacks merit, hence, its application for leave to amend its answer must be denied.

Accordingly, it is

ORDERED, that GRT's motion seeking leave to amend its answer is denied.

This constitutes the decision and order of the court.

Dated: March 4, 2020



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Lucindo Suarez, J.S.C.

**LUCINDO SUAREZ, J.S.C.**