

**Oldcastle Precast, Inc. v Steiner Bldg. NYC, LLC**

2020 NY Slip Op 31297(U)

April 20, 2020

Supreme Court, New York County

Docket Number: 651491/2019

Judge: O. Peter Sherwood

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

**PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM**

*Justice*

**OLDCASTLE PRECAST, INC.  
N/K/A OLDCASTLE INFRASTRUCTURE, INC.,**

**INDEX No.: 651491/2019**

**MOT. DATE: 9/4/2019**

**Plaintiff,**

**MOT. SEQ. No.: 001**

**-against-**

**DECISION + ORDER ON  
MOTION**

**STEINER BUILDING NYC, LLC and  
KENT STEINER, LLC,**

**Defendants.**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62 were read on this motion to/for AMEND COMPLAINT

Plaintiff Oldcastle Precast, Inc. n/k/a Oldcastle Infrastructure, Inc. (“Oldcastle”) moves to amend its Verified Complaint under CPLR § 3025 (b). Plaintiff seeks to amend its complaint to withdraw its claims for lien foreclosure and Goods Sold and Delivered, to add a claim for unjust enrichment, and to add a claim of trust fund diversion as against all present defendants and new defendants Douglas C. Steiner (“Mr Steiner”), NYC Steiner Studios Expansion Fund II, LLC (“Expansion Fund”), and placeholders John Does 1 through 5 (Pl. Br. at 3–4 [NYSCEF Doc. No. 18]).

Leave to amend a pleading pursuant to CPLR § 3025 “shall be freely given,” in the absence of prejudice or surprise (*see e.g. Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354 [1st Dept 2005]). Mere lateness in seeking such relief is not in itself a barrier to obtaining judicial leave to amend (*see Ciarelli v Lynch*, 46 AD3d 1039 [3d Dept 2007]). Rather, when unexcused lateness is coupled with significant prejudice to the other side, denial of the motion for leave to amend is justified (*see Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 958 [1983]). Prejudice in this context is shown where the nonmoving party is “hindered in the preparation of his case or has

been prevented from taking some measure in support of his position” (*Loomis v Civetta Corinno Const. Co.*, 54 NY2d 18, 23 [1981]).

In order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated (*Thompson, supra*, 24 AD3d at 205; *Zaid, supra*, 18 AD3d at 355). Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*see Aerolineas Galapagos, S.A. v Sundowner Alexandria*, 74 AD3d 652 [1st Dept 2010]; *Thompson, supra*, 24 AD3d at 205). Thus, a motion for leave to amend a pleading must be supported by an affidavit of merit or other evidentiary proof (*Delta Dallas Alpha Corp. v S. St. Seaport Ltd. Partnership*, 127 AD3d 419, 420 [1st Dept 2015]).

As the party seeking the amendment, plaintiff has the burden in the first instance to demonstrate their proposed claims’ merits, but defendants, as the parties opposing the motion, “must overcome a presumption of validity in the moving party’s favor, and demonstrate that the facts alleged in the moving papers are obviously unreliable or insufficient to support the amendment” (*Peach Parking Corp. v 346 W. 40th St. LLC*, 42 AD3d 82, 86 [1st Dept 2007]). Where there has been extended delay in seeking leave to amend, the party seeking to amend a pleading must establish a reasonable excuse for the delay (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 [1st Dept 2003]).

In support, plaintiff argues defendants will not be prejudiced by this new complaint because this motion is in compliance with CPLR § 3025 and discovery obtained has necessitated this amendment (Pl. Br. at 4–5; *see Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 23; *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; *see e.g. Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st Dept 2007]).

In opposition, defendants argue that plaintiff’s motion to amend must fail as: (i) the complaint cannot state a claim against proposed defendant Expansion Fund because, as a lender, it is not a statutory party against whom a Lien Law claim can be made (Def. Br. at 7–11; *see e.g. ALB Contracting Co., Inc. v York-Jersey Mortg. Co.*, 60 AD2d 989 [4th Dept 1978]; *compare Price Trucking Corp. v AAA Environmental, Inc.*, 111 AD3d 1315 [4th Dept 2013], *with Local No. 4, Int’l Assn. of Heat & Frost & Asbestos Workers v Buffalo Wholesale Supply Co., Inc.*, 49 AD3d 1276 [4th Dept 2008]); (ii) the complaint cannot state a claim against proposed defendant Mr. Steiner because Steiner was never the owner of the Subject Premises at issue according to a

June 8, 2016 lease which shows Kent Steiner, LLC as the Premises' lessee (Steiner Aff., Ex. A [NYSCEF Doc. No. 43]); (iii) the complaint fails to state a claim for diversion of trust funds as it lacks requisite CPLR § 3016 (b) specificity (Def. Br. 13–18); and (iv) the complaint fails to state a claim for the proposed unjust enrichment claim because unjust enrichment is a quasi-contract claim that cannot be asserted in actions arising out of contract, as here (*id.* at 18–19; *Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790 [2012]).

Plaintiff's motion to amend its complaint should be denied. First, plaintiff has failed to state a trust fund diversion claim as to proposed defendant Douglas Steiner as the complaint fails to allege that he is a statutory trustee. Defendants, through documentary evidence, have shown that Mr. Steiner was not the owner of the subject premises but, rather, Kent Steiner, LLC was a lessee for a term of years (Steiner Aff., Ex. A). Although plaintiff tries to argue in reply that Mr. Steiner is an officer, director, or agent "of such trustee" who may be held liable for misappropriation of trust funds, no specific allegation to that effect is made in plaintiff's proposed amended complaint (Pl. Br., Ex. 8 Proposed Amended Complaint [NYSCEF Doc. No. 26]). Consequently, the addition of defendant Douglas Steiner is denied.

Further, plaintiff has failed to state a trust fund diversion claim as to proposed defendant Expansion Fund as the Expansion Fund is merely a lender and, thus, not a statutory trustee (*Utica Sheet Metal Corp. v J.E. Schechter Corp.*, 47 Misc2d 290, 292). While plaintiff argues that the Expansion Fund *could* be considered a statutory trustee if it is found the contractor here assigned its right of payment to the lender as security for a loan, plaintiff concedes in its reply that it has not received discovery showing that such is the case (Pl. Reply at 9–10 [NYSCEF Doc. No. 62]; *Aspro Mech. Constr. v Fleet Bank*, 1 NY3d 324, 330 [2004]). Consequently, the addition of defendant Expansion Fund is also denied.

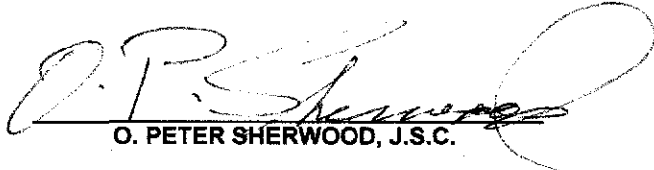
Plaintiff's proposed amended complaint does state meritorious claims for unjust enrichment and for trust diversion as against defendants Steiner Building NYC, LLC and Kent Steiner, LLC. As to the former claim, an unjust enrichment cause of action may be pleaded in the alternative to a breach of contract claim as plaintiff argues in its reply. As to the latter, while defendants argue that the amended complaint fails to state a trust diversion claim with requisite specificity as to individual defendant and as to the specifics of the claim, defendants cited case law do not address trust fund diversion claims but, instead, fraudulent misrepresentation claims. Further, defendants rely on a motion to dismiss standard as to the trust diversion claim; as this is

a motion to amend, the plaintiff is given the benefit of every inference and the question at hand is not whether a plaintiff has alleged a claim but whether it can.

Consequently, plaintiff's motion to amend complaint is **DENIED** as the proposed complaint fails to state a claim against proposed defendants Mr. Steiner and the Expansion Fund. However, as plaintiff's proposed complaint does include meritorious claims, plaintiff may submit an amended complaint in compliance with this order.

This shall constitute the decision and order of the Court.

4/20/2020  
DATE

  
O. PETER SHERWOOD, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
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