

Chowdhury v Parvez

2021 NY Slip Op 30502(U)

February 23, 2021

Supreme Court, Kings County

Docket Number: 504546/2016

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 504546/2016
Motion Date: 2-8-21
Mot. Seq. No.:5, 7

-----X
MOHAMMED CHOWDHURY,

Plaintiff,

-against-

DECISION/ORDER

MOHAMMED M. PARVEZ, 114A LINDEN, INC. AND
SOLOMAO DRESDNER,

Defendants.

-----X

114A LINDEN, INC.,

Defendant-Third Party Plaintiff,

-against-

THE SECURITY TITLE GUARANTEE
CORPORATION OF BALTIMORE,

Third Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF as item numbers 100-123, 128-142, 144-162, 164-167, were read on these motions:

Defendants 114A Linden, Inc. and Solomao Dresdner ("the Linden defendants") move for an order pursuant to CPLR 3025(b) granting them leave to file and serve the Second Amended Verified Answer with Counterclaims in the form annexed hereto as Exhibit "A" (**Mot. Seq. No. 5**).

Plaintiff cross-moves for an order dismissing the original counterclaim of the Linden defendant pursuant to CPLR 3215(c) due to the Linden defendants' failure to initiate proceedings to enter a default judgment against plaintiff on the counterclaim within one year of plaintiff's default in answering the counterclaim. The plaintiff also opposed the Linden defendants' motion

for leave to serve and file a Second Amended Verified Answer with Counterclaims (**Mot. Seq. No. 7**). The two motions are consolidated for disposition.

Mot. Seq. No. 7:

The Court will first address Mot. Seq. No. 7. In their answer which was served in 2017, the Linden defendants asserted a single counterclaim that alleged as follows: “The filing of a lis pendens by Plaintiff on the subject property is a cloud on title causing monetary damages to 114 in an amount to be determined by the Court but not less than \$1,000,000.00.” The plaintiff has not served a reply to the counterclaim and to date, the Linden defendants have not moved for a default judgment on the counterclaim.

When a defendant asserting a counterclaim fails to initiate proceedings to enter a default judgment within one year after a party’s default in failing to answer a counterclaim, the counterclaim is deemed abandoned pursuant to CPLR 3215(c) and should be dismissed unless the defaulting party demonstrates that he or she has a reasonable excuse for failing to timely move for a default judgment and that the counterclaim has merit, (*see Giglio v. NTIMP, Inc.*, 86 AD3d 301, 307, 926 NYS2d 546; *Mint Factors v. Goldman*, 74 AD2d 599, 599, 424 NYS2d 513). Here, since the Linden defendants have not demonstrated a reasonable excuse for the delay in seeking a default judgment on the counterclaim or that the counterclaim has merit, plaintiff’s motion is **GRANTED**.

The Linden defendants’ contention that the plaintiff waived his right to the dismissal of the counterclaim pursuant to CPLR 3215(c) is without merit. The essence of a waiver is the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it (*see Johnson v. Zerbst*, 304 U.S. 458, 464–465, 58 S.Ct. 1019, 82 L.Ed.

1461; *People v. Harris*, 61 N.Y.2d 9, 17, 471 N.Y.S.2d 61, 459 N.E.2d 170; *City of New York v. State of New York*, 40 N.Y.2d 659, 669, 389 N.Y.S.2d 332, 357 N.E.2d 988; *Matter of Georgetown Unsold Shares, LLC v. Ledet*, 130 A.D.3d 99, 12 N.Y.S.3d 160). The waiver ‘must be clear, unmistakable and without ambiguity’ (*Matter of Civil Serv. Empls. Assn. v. Newman*, 88 A.D.2d 685, 686, 450 N.Y.S.2d 901 [1982], *affd.* 61 N.Y.2d 1001, 475 N.Y.S.2d 379, 463 N.E.2d 1231 [1984]).

While a party’s conduct may act as a waiver of his or her right to the dismissal of a pleading pursuant to CPLR 3215(c), such as where the party litigates the claims that are the subject matter of the pleading or engages in discovery concerning the claims alleged in the pleading (*see Gilmore v. Gilmore*, 286 A.D.2d 416; *Sutter v. Rosenbaum*, 166 A.D.2d 644, 645 [1990]; *Myers v. Slutsky*, 139 A.D.2d 709, 710 [1988]), the Linden defendants failed to demonstrate such a waiver by the plaintiff in his case. The Linden defendants claim that the plaintiff has actively litigated this action and has engaged in discovery but it was not clearly or unmistakably demonstrated that any of the activities or discovery was related to the counterclaim as opposed to the claims and defenses asserted in the action in chief.

Mot. Seq. No. 5:

Pursuant to CPLR 3025(b), leave to amend a pleading “shall be freely given.” A party seeking leave to amend a pleading is not required to make a showing of merit in the proposed amendment (*see Astro Air Corp. v. L.D. Wenger Constr. Co.*, 178 A.D.3d 765, 766, 111 N.Y.S.3d 909; *Brannigan v. Christie Overhead Door*, 149 A.D.3d 892, 53 N.Y.S.3d 106; *Lucido v. Mancuso*, 49 A.D.3d 220, 229, 851 N.Y.S.2d 238). Courts should grant leave to amend “[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave ... unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Lucido v.*

Mancuso, 49 A.D.3d at 222, 851 N.Y.S.2d 238; *see Brannigan v. Christie Overhead Door*, 149 A.D.3d at 892, 53 N.Y.S.3d 106).

Since the first counterclaim alleged in the Linden defendants' proposed amended answer is identical to the counterclaim in the Linden defendants' original answer, which has been dismissed, it is palpably insufficient.

The second counterclaim is not patently insufficient or devoid of merit and there would be no prejudice or surprise to the plaintiff if the Linden defendants' motion were allowed to assert this counterclaim.

To the extent the Linden defendants seek an award for use and occupancy in the third counterclaim, although the Linden defendants sought this relief in the related summary proceedings, apparently, the claim was voluntarily withdrawn while the matter was pending in Housing Court. Where, as here, a claim is discontinued upon a party's motion, the discontinuance is deemed without prejudice under CPLR 3217(c) unless the moving party requests or the court orders otherwise (see CPLR 3217(c) ["Unless otherwise stated in the notice, stipulation or order of discontinuance, the discontinuance is without prejudice"]). Thus, the third counterclaim was not demonstrated to be patently insufficient or devoid of merit and it would not prejudice or surprise the plaintiff if the Linden defendants' motion were allowed to assert this counterclaim.

Accordingly, it is hereby

ORDERED that plaintiff's motion to dismiss the counterclaim alleged by the Linden defendants in their original answer is **GRANTED**; and it is further

ORDERED that the Linden defendants' motion to serve an amended answer alleging additional counterclaims is **GRANTED** to the extent indicated above and the Linden defendants may serve an amended answer alleging the second and third counterclaims in their proposed amended answer provided an amended answer is served within 30 days hereof.

This constitutes the decision and order of the Court.

Dated: February 23, 2021



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020