

201 Water St. LLC v DCHM

2021 NY Slip Op 31422(U)

April 27, 2021

Supreme Court, New York County

Docket Number: 650601/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

201 WATER STREET LLC,
Plaintiff,

- v -

DCHM, A JOINT VENTURE BETWEEN, DANYA CEBUS
CONSTRUCTION, LLC, HUDSON MERIDIAN
CONSTRUCTION GROUP, LLC

Defendant.

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INDEX NO. 650601/2019
MOTION DATE 05/04/2020, 05/22/2020, 11/02/2020
MOTION SEQ. NO. 002 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 59, 60, 61, 62, 63

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99, 100, 101, 102, 103

were read on this motion to/for DISQUALIFY COUNSEL.

201 Water Street LLC's (201 Water) motion (Mtn. Seq. No. 002) to consolidate this action with the Kings County action captioned Board of Managers of the 51 Jay Street Condominium v 201 Water Street LLC, Index No. 500191/2020 (the Kings County Action) is denied because the two actions raise disparate issues and share only one common party, the motion to consolidate is denied. DCHM a Joint Venture LLC i/s/h/a DCHM, a Joint Venture between Danya Cebus Construction, LLC (Danya Cebus) and Hudson Meridian Construction Group, LLC's (DCHM) motion (Mtn. Seq. No. 003) seeking leave to file an amended answer with counterclaims is granted because leave to amend must be freely granted in the absence of prejudice or surprise,

and no prejudice or surprise from the proposed amendment will ensue. Finally, DCHM's motion (Mtn. Seq. No. 004) to disqualify Morrison Cohen LLP (**Morrison Cohen**) from representing 201 Water in this action pursuant to 22 NYCRR 1200.27 [NY Disciplinary Rule 5-108]) based on Morrison Cohen's prior representation of Danya Cebus in the formation of the joint venture and in the drafting of the CMA (hereinafter defined) is granted because Morrison Cohen's representation is substantially related to the instant action and 201 Water's interests in this action are materially adverse to Morrison Cohen's former client.

Relevant Factual Background

DCHM, a general contractor, was retained by 201 Water, a real estate developer, pursuant to a Construction Management Agreement (the **CMA**; NYSCEF Doc. No. 45) dated May 6, 2014 to convert the property located at 51 Jay Street, Brooklyn, New York into condominiums (the **Project**). After certain disputes arose between DCHM and 201 Water, the parties entered into an Agreement with Mutual Releases (the **AMR**; NYSCEF Doc. No. 45 at 169-181) dated May 4, 2018. The AMR terminated the CMA and released DCHM "from the supervision, coordination and execution of all remaining punch list work and completion of work items as of the date of termination" (except for certain designated warranty work listed in Exhibit C thereto, as discussed below) (*id.*, AMR, ¶¶ 2, 10). In the instant action, 201 Water contends that DCHM breached its contractual obligations with respect to the items expressly exempted in the AMR, e.g., shower waterproofing, replacement of shower drain strainers, production of some plumbing fixtures, and production of documentation needed to obtain the final certificate of occupancy (*id.*).

In its complaint, 201 Water alleged three causes of action for: (1) breach of contract (i.e., the AMR), (2) promissory estoppel, and (3) negligence. By decision dated December 12, 2019 (the **Prior Decision**), this court dismissed the second and third causes of action for promissory estoppel and negligence, respectively, and that part of the first cause of action for breach of contract with respect to liquidated damages only (NYSCEF Doc. No. 42). Thus, at issue are DCHM's obligations under the AMR.

A year after this action was commenced, and after the court issued the Prior Decision, the Board of Managers of Jay Street (**BOM**), the current owners of the condominium, commenced the Kings County Action, against 201 Water, among others, alleging that:

[t]hrough the Condominium's Offering Plan (the "Offering Plan"), [201 Water] made certain representations and assurances with respect to the Building's design, quality, and condition in order to lure prospective purchasers into paying millions of dollars for each of the Condominium's units. However, upon occupying their respective Units, purchasers began experiencing a flurry of construction defects and other conditions that deviated materially from the representations made in the Offering Plan, and that in many cases violated applicable laws, ordinances and/or codes.

(NYSCEF Doc. No. 34, ¶ 2).

DHCM is *not* a named defendant in the Kings County Action, which involves claims against 201 Water and others for breach of contract (Offering Plan), fraud in the inducement, breach of fiduciary duty, and several claims for constructive fraudulent conveyance (NYSCEF Doc. No. 34). The complaint in the Kings County Action alleges issues with, among other things, toilet installation, window leaks, poor application of carpeting and wallpaper, excessive noise infiltration, improper bathtub installation, an unfinished common area lounge, boiler failure, exterior façade defects, deteriorating sidewalks, roofing issues, terrace railing deviations,

firestopping deficiencies, damages woodboards, non-code compliant “Exit” signs, lack of HVAC duct installation and various sewer, gas line and electrical system issues (NYSCEF Doc. No. 34).

Morrison Cohen represented Danya Cebus in the formation of the DCHM joint venture between Danya Cebus and Hudson Meridian Construction Group LLC (**Hudson Meridian**) and also allegedly played a material role in drafting the CMA on behalf of DCHM in connection with the Project.

Discussion

I. The Motion to Consolidate is Denied

For the court to order consolidation, there must be both common questions of law and fact and no prejudice of a substantial right to the opposing party (*Fisher 40th & 3rd Co. v Welsbach Elec. Corp.*, 266 Ad2d 169, 170 [1st Dept 1999]). Consolidation is not appropriate here. In this action, 201 Water alleged that DCHM breached the AMR, which agreement resolved most of the issues between 201 Water and DCHM with respect to work on the Project, save for a discreet number of reserved issues with respect to shower waterproofing, replacement of shower drain strainers, production of some plumbing fixtures, and documentation needed to obtain the final certificate of occupancy. In the Kings County Action, the BOM alleges that 201 Water was aware of a multitude of issues with the property and concealed all of these defects in order to induce the purchase of units, which alleged fraud and concealment has nothing to do with DCHM. To the extent that 201 Water previously alleged a claim for negligence against DCHM in this action, this claim was dismissed pursuant to the Prior Decision (*see* NYSCEF Doc. No. 42).

Furthermore, the two actions do not involve the same parties. 201 Water is the only common party in both actions (as a plaintiff in this action, and as a defendant in the Kings County Action). Indisputably, consolidating the two action would significantly delay and prolong discovery and resolution of *this* action by substantially expanding the scope of the issues to be litigated herein. There is little risk of inconsistent verdicts given the difference in the claims involved. Under these circumstances, consolidation is simply not warranted.

II. The Motion to Amend is Granted

CPLR §3025(b) requires that unless a proposed amendment is palpably insufficient, leave to amend should be freely granted in the absence of prejudice or surprise to the non-moving party (CPLR § 3025[b]; *McCaskey, Davies and Assocs., Inc. v New York City Health & Hosp. Corp.*, 59 NY2d 755 [1983]). The addition of the proposed counterclaims for (i) breach of contract (AMR) and (ii) money owed (NYSCEF Doc. No. 54) will not cause undue delay to discovery in this action. Nor can it be said to be a surprise as the original pleading already asserted 201 Water's alleged breach of the AMR as an affirmative defense (*compare e.g.*, NYSCEF Doc. No. 53, ¶¶ 23, 25, *with* NYSCEF Doc. No. 54, ¶¶ 31-43). Thus, the motion must be granted.

III. The Motion to Disqualify Plaintiff's Counsel is Granted

Finally, the motion to disqualify Morrison Cohen from representing 201 Water in this action pursuant to 22 NYCRR 1200.27 must also be granted. The right to be represented by counsel of one's choosing is a "valued right which should not be abridged absent a clear showing that disqualification is warranted" (*Eisenstadt v Eisenstandt*, 282 AD2d 570, 570 [2d Dept 2001]). The question of disqualification generally lies within the sound discretion of the court (*Columbus*

Constr. Co., Inc. v Petrillo Bldrs. Supply Corp., 20AD3d 383, 383 [2d Dept 2005]). The New York Code of Professional Responsibility precludes attorneys “from representing any client with interests adverse to a former client on matters substantially related to the prior representation” (*Reem Contracting Corp. v Resnick Murray St. Assocs.*, 43 AD3d 369, 370-71 [1st Dept 2007]).

It is not disputed that Morrison Cohen represented Danya Cebus in the formation of the DCHM joint venture between Danya Cebus and Hudson Meridian for purposes of managing the Project. This joint venture is the very same entity that Morrison Cohen is now materially adverse to in this action and the dispute arises out of the same Project. Morrison Cohen’s attempt to distinguish its role in negotiating the CMA from the AMR fails. The CMA is also at issue in this action. Put another way, Morrison Cohen must be disqualified because the issues in this litigation arise from and are substantially related to Morrison Cohen’s prior representation of one of the joint venture partners in the Project whose interests are adverse to Morrison Cohen’s proposed client in this action (*Reem Contracting*, 43 AD3d at 371). Under these circumstances, disqualification is required.

Accordingly, it is

ORDERED that the plaintiff’s motion (seq. no. 002) for consolidation is denied, and it is further

ORDERED that the defendant’s motion (seq. no. 003) to amend its answer is granted, and the proposed amended answer and counterclaims in the form annexed to the moving papers are hereby deemed served, and it is further

ORDERED that the defendant's motion (seq. no. 004) to disqualify counsel for the plaintiff is granted and Morrison Cohen LLP is hereby disqualified from representing plaintiff in this matter, and it is further

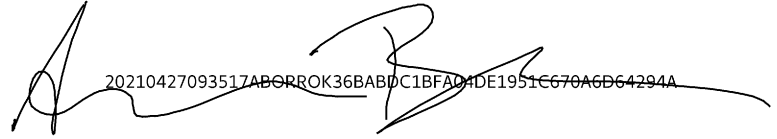
ORDERED that counsel for the movant, within 21 days after the entry of this order, shall serve a copy of this order with notice of entry upon counsel for all other parties and upon plaintiff; and it is further

ORDERED that all deadlines in this action are extended from this date until 30 days after service of a copy of this order with notice of entry upon counsel for all parties and upon plaintiff, who shall, within said period, retain another attorney in place of the attorney named above; and it is further

ORDERED that the new attorney retained by plaintiff shall serve upon all parties a notice of appearance and file same with the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and the Clerk of the Part within said 30-day period; and it is further

ORDERED that such filing with the Clerk of the General Clerk's Office and the Clerk of the Part 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); and it is further

ORDERED that counsel are directed to appear for a remote conference in Part 53, 60 Centre Street, on June 16, 2021, at 12 P.M.


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4/27/2021

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE