

**Board of Mgrs. of the Hudson Tower Condominium  
v Legacy Bldrs./Devs. Corp.**

2023 NY Slip Op 30302(U)

January 30, 2023

Supreme Court, New York County

Docket Number: Index No. 161904/2019

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 161904/2019

THE BOARD OF MANAGERS OF THE HUDSON TOWER CONDOMINIUM,

MOTION DATE 03/17/2022

Plaintiff,

MOTION SEQ. NO. 001

- v -

LEGACY BUILDERS/DEVELOPERS CORP., JOHN BENNARDO, HERITAGE BUILDERS/DEVELOPMENT CORP., ZS HOLDINGS LLC

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 56

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

Upon the foregoing documents, and after oral argument which took place on November 15, 2022, where Michael R. Gordon, Esq. appeared for Plaintiff the Board of Managers of the Hudson Tower Condominium ("Plaintiff") and Eric Porter, Esq. appeared for Defendants Legacy Builders/Developers Corp. ("Legacy"), John Bennardo, Heritage Builders/Development Corp., and ZS Holdings, LLC (collectively "Defendants"), Defendants motion seeking leave to Amend their Answer is granted in part and denied in part.

I. Factual and Procedural Background

This action arises out of an allegedly derailed construction project. Plaintiff is the board of managers of a Manhattan condominium located at 350 Albany Street, New York, New York (the "Building") (NYSCEF Doc. 1 at ¶¶ 1-2). Plaintiff contracted with Defendant Legacy to renovate and refurbish the lobby of the Building (id. at ¶ 2). In sum and substance, Plaintiff alleges that Legacy abandoned the project and left the building lobby in disarray, caused substantial delay

to the project, and forced Plaintiff to find a new contractor (*id.*). Plaintiff commenced this action December 10, 2019, alleging breach of contract, unjust enrichment, fraud in the inducement, fraud, abuse of the legal process, and willful exaggeration of a mechanic's lien (*id.*). On February 18, 2020, Defendants filed their Answer with affirmative defenses (NYSCEF Doc. 6).

After the initial pleadings were filed, both Plaintiff and Defendants proceeded to change attorneys multiple times. Plaintiff changed attorneys on March 9, 2020 and again on November 18, 2020 (NYSCEF Doc. 8 and 9). Defendants changed attorneys on February 24, 2021 (NYSCEF Doc. 11). While a request was made for a preliminary conference on November 30, 2021, no further action was taken according to the NYSCEF docket until Defendants filed the instant motion on March 11, 2022 (NYSCEF Docs. 13-14).

Defendants seek leave to amend their Answer to allege two new counterclaims for breach of contract and unjust enrichment (NYSCEF Doc. 16). Defendants seek leave to allege that Plaintiff breached the contract by failing to pay Legacy payments due and owing under the Contract, and that Legacy incurred additional costs due to delays caused by Plaintiffs (*id.*). Defendants further allege that Plaintiff failed to pay Legacy at least \$243,381.06 memorialized in payment applications 6 and 7, which were dated November 27, 2018, and January 14, 2019 (*id.* at ¶ 18). Defendants allege that Legacy provided additional construction and renovation services to Plaintiff beyond the scope of the contract; however they do not provide details on what those services entailed (*id.* at ¶ 20). Defendants base their proposed unjust enrichment cause of action on these purported services and materials which were provided "beyond the scope of the contract."

Plaintiff opposes Defendants' motion on various grounds (NYSCEF Docs. 23-49). Plaintiff states that Defendants' delay of over two years in seeking leave to amend warrants denial. Plaintiff argues that they will be prejudiced by the proposed amended Answer because Eric Clark ("Clark"),

the individual who supervised Defendants' work on behalf of Plaintiff is no longer in Plaintiff's employ. Finally, Plaintiff argues that Defendants' proposed amendments are barred pursuant to the terms of the contract.

In reply, Defendants argue that delay alone is insufficient to deny their motion, especially when the case is still far from trial. Defendants argue that the prejudice Plaintiff alleges is insufficient since Plaintiff will still need to communicate with Clark to prosecute their various claims and, if he is not cooperative, he may be subpoenaed. Plaintiff further argues that Defendants misconstrue the terms of the contract and that their claims are not patently devoid of merit.

## II. Discussion

Leave to amend pleadings is freely granted in the absence of prejudice if the proposed amendment is not palpably insufficient as a matter of law (*Mashinsky v Drescher*, 188 AD3d 465 [1st Dept 2020]). A party opposing a motion to amend must demonstrate that it would be substantially prejudiced by the amendment, or the amendments are patently devoid of merit (*Greenburgh Eleven Union Free School Dist. V National Union Fire Ins. Co.*, 298 AD2d 180, 181 [1st Dept 2002]). Delay alone is not sufficient to deny leave to amend (*Johnson v Montefiore Medical Center*, 203 AD3d 462 [1st Dept 2022]). A party opposing leave to amend "must overcome a heavy presumption of validity in favor of [permitting amendment]" *McGhee v Odell*, 96 AD3d 499, 450 [1st Dept 2012]). Additional discovery, extended litigation, and increased liability exposure does not result in prejudice warranting denial of a motion seeking leave to amend, especially where significant discovery is outstanding (*St. Nicholas W. 126 L.P. v Republic Investment Company, LLC*, 193 AD3d 488 [1st Dept 2021]).

While Plaintiff is correct that Defendants waited two years after filing their Answer to seek leave to amend, this delay is insufficient to deny Defendants' motion. Indeed, as the First

Department has recently held, there is no finding of unreasonable delay where a plaintiff has not filed a note of issue or a case has not been certified as trial ready (*Johnson v Montefiore Medical Center*, 203 AD3d 462, 463 [1st Dept 2022]). Further, where a motion to amend does not cause an extended delay, Defendants do not need to proffer a reasonable excuse for the delay (*id.* citing *Oil Heat Inst. Of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d 290, 293 [1st Dept 2004]). Even if a reasonable excuse was required, the circumstances of this case excuse Defendants' delay. Counsel for both Plaintiff and Defendants have been changed multiple times since commencement of this action. Moreover, counsel for Defendants first attempted to stipulate amending their Answer, but counsel Plaintiff, after asking to review the proposed amendment, purportedly took months to respond to counsel for Defendants (NYSCEF Docs. 15 and 17-18). Defense counsel also switched firms and took this case with him, which also provides an excuse for his delay. As such, the delay in seeking leave to amend is reasonable.

Similarly, Plaintiff's arguments regarding prejudice are unavailing. Plaintiff argues it is prejudiced because it can "no longer direct Clark to drop what he is doing and spend time on this matter, as he has a new employer" (*see* NYSCEF Doc. 49). Plaintiff also argues it is prejudiced because it can no longer direct Clark "to assist Plaintiffs in responding to Defendants' discovery demands...review documents and other materials...sit in on depositions and assist with questioning, and ultimately help prepare the case for trial." (*Id.*). However, as held by the First Department, additional discovery, extended litigation, and increased liability is insufficient to deny leave to amend (*St. Nicholas W. 126 L.P. v Republic Investment Company, LLC*, 193 AD3d 488 [1st Dept 2021]). Indeed, the prejudice at this point is entirely hypothetical as there is no evidence that Mr. Clark is not cooperating with Plaintiffs in prosecuting their case. In any event, it would be an unworkable rule to bar a party from seeking leave to amend simply because one party to the

litigation no longer employs someone who may be useful in prosecuting or defending their case, especially when employment of certain individuals is almost always outside an opposing party's control.

However, Plaintiff is correct that some of Defendants' allegations are patently devoid of merit and therefore leave to amend is only partially granted. An amendment is devoid of merit where allegations are legally insufficient (*Reyes v BSP Realty Corp.*, 171 AD3d 504 [1st Dept 2019] citing *Mosaic Caribe, Ltd. V AllSettled Group, Inc.*, 117 AD3d 421, 422 [1st Dept 2014]).

Defendants' second cause of action alleges unjust enrichment. To the extent this counterclaim seeks damages that are governed by Defendants' breach of contract claim, the unjust enrichment counterclaim is barred as a matter of law (*Pappas v Tzolis*, 20 NY3d 228 [2012]). Defendants correctly asserts that an unjust enrichment claim can extend beyond a claim for services that were owed pursuant to an agreement. (*Ashwood Capital, Inc. v OTG Management, Inc.*, 99 AD3d 1, 10 [1st Dept 2012]). However, Defendants proposed allegations are palpably insufficient. Defendants only allege unjust enrichment as to "additional work, labor, services and materials" that Legacy provided Plaintiff "beyond the scope of the Contract." There is no evidence, nor any specificity, as to what "additional work, labor, services and materials" were provided, or how they fall beyond the scope of the contract. Further, the contract states that Defendants were required to provide notice and receive approval from the Architect before conducting any additional work (*see* NYSCEF Doc. 24 at § 15.1.5). The parties also agreed in §5.03 of the Rider that "The Architect's judgment in determining the amount of Extra Work performed shall be reasonable and shall be final and shall be accepted as binding by both Owner and Contractor." Therefore, to the extent Legacy provided additional services without the Architect's approval, and now seeks compensation for those additional services, those claims are barred by the terms of the contract

and are without merit. Thus, the second cause of action shall be stricken from Defendants' proposed Answer as it is conclusory, vague, non-specific, barred by the terms of the contract, and therefore palpably insufficient and patently devoid of merit.

However, Defendants are granted leave to file a proposed amended Answer with their first counterclaim. Plaintiff argues that to the extent Defendants seek to assert a counterclaim for damages based on delay, those damages are barred by §14.3.2.3 of the contract which states there shall be "no monetary adjustment for delays hereunder." A "no damages for delay" clause will be unenforceable where it is alleged there is bad faith, willful, malicious, or grossly negligent conduct, the delays were unanticipated, or the delays resulted from a breach of a fundamental obligation of the contract (*see Bovis Lend Lease (LMB), Inc. v Lower Manhattan Development Corp.*, 108 AD3d 135, 147 [1st Dept 2013]; *Commercial Elec. Contractors, Inc. v Pavarini Const. Co., Inc.*, 50 AD3d 316, 317 [1st Dept 2008]). At this stage, all Defendants must do is show that their pleadings are not patently devoid of merit. Defendants allege that the delays were caused by Plaintiff's failure to (1) respond to Legacy's repeated request for millwork designs; (2) provide drawings; (3) provide information related to incomplete designs and (4) fired Legacy to avoid having to pay sums owed to Legacy (NYSCEF Doc. 16 at ¶¶ 6-22). Thus, it is possible that Defendants may prove Plaintiff's conduct rendered the "no damages for delay" clause unenforceable. The claim for damages related to delays is not patently devoid of merit for purposes of this motion seeking leave to amend.

Plaintiff also argues that because the payment requisition 6 was only partially certified by the Architect and payment requisition 7 was never certified by the architect, Plaintiff is not required to pay the amounts sought by Defendants in those payment requisitions. Plaintiff is correct that the payment process envisaged by the contract states that the architect was to review payment requests,

certify the requests the architect felt was appropriate, and then Plaintiff was to pay Defendants' based on the amounts certified (*see* NYSCEF Doc. 24 at § 9 of the General Conditions). However, § 9 of the Contract also expressly contemplates disputes regarding the architect's decision regarding a certification for payment, and specifically states that when there is a dispute regarding the architect's decision about payment certification, the party may submit a claim pursuant to § 15 (*see* § 9.5.2 ["when either party disputes the architect's decision regarding a Certificate for Payment under 9.5.1, in whole or in part, that party may submit a Claim in accordance with Article 15"] ). In §15.1.2, the parties agreed that they would commence all "Claims and causes of action against the other and arising out of or related to the contract...in accordance with the requirements of the binding dispute resolution method selected in the Agreement."

In § 6.2, titled "Binding Dispute Resolution", the parties agreed that any claim not resolved by mediation will be resolved through "litigation in a court of competent jurisdiction." Further, § 9.7, titled "failure of payment" states that "[i]f the architect does not issue a certificate for payment, through no fault of the contractor...or if the Owner does not pay the Contractor within seven days...the Contractor may...stop the Work until payment of the amount owing has been received." As such, the contract also contemplates a situation where a failure to pay grants the Contractor the right to cease work. Thus, based on the contract provisions provided to the Court, Defendants claims are not "patently devoid of merit" merely because the architect did not certify all of the amount requested. Rather, the parties expressly agreed that in the event a dispute over payment certification could not be resolved, the parties could proceed to have the dispute resolved by litigation. This is precisely the case at bar, and therefore Plaintiff's arguments on this motion for leave to amend a pleading are without merit.

Accordingly, it is hereby,

ORDERED that the Defendants' motion for leave to amend their Answer is granted, in part, as follows: leave is granted to amend the Answer to include the proposed first counterclaim and to this extent the proposed amended complaint in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the Answer is denied with respect to the proposed second counterclaim and that cause of action is stricken; and it is further

ORDERED that the plaintiff shall serve a reply to the counterclaims in the Amended within 20 days from the date of said service; and it is further

ORDERED that within ten (10) days of entry, counsel for Defendants shall serve a copy of this Decision and Order with notice of entry on Plaintiff.

This constitutes the Decision and Order of the Court.

1/30/2023

DATE

*Mary V Rosado*

HON. MARY V. ROSADO, 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