

T-Mobile Northeast LLC v Jomel Assoc., Inc.

2023 NY Slip Op 31676(U)

May 11, 2023

Supreme Court, New York County

Docket Number: Index No. 653339/2014

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH PART 12
Justice

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T-MOBILE NORTHEAST LLC

Plaintiff,

- v -

JOMEL ASSOCIATES, INC.,

Defendant.

INDEX NO. 653339/2014
MOTION DATE 5/11/2023
MOTION SEQ. NO. 004

**DECISION AND ORDER
ON MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167.

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

On October 31, 2014, plaintiff T-Mobile Northeast LLC (plaintiff) filed a summons and complaint seeking a Yellowstone injunction and declaratory relief, injunctive relief, and specific performance from defendant Jomel Associates, Inc. (defendant). Plaintiff now moves for leave to file an amended complaint and an amended reply to defendant's counterclaims, pursuant to CPLR 3025 (b). Defendant opposes.

Oral argument was scheduled for May 11, 2023. Counsel requested to adjourn the motion on consent. To expedite resolution of the motion, the Court deemed it submitted without oral argument.

I. Brief Alleged Facts

Since 1997, plaintiff has rented space on the roof of building owned by defendant for use and maintenance of its telecommunications equipment. The lease has been amended three times and runs through approximately 2037. In 2014, issues arose concerning the conditions on the

subject roof, and defendant sent a notice to cure to plaintiff demanding, *inter alia*, that it repair and stabilize the parapet on the roof.

This action ensued, in which plaintiff seeks a Yellowstone injunction, declaratory relief, injunctive relief, and specific performance. In response, defendant asserted counterclaims in for additional rent owed, maintaining that plaintiff occupied a larger footprint on the roof than was allowed by the parties' lease.

In 2016, Justice Joan Kenney granted the Yellowstone injunction, denied plaintiff's motion to dismiss counterclaims, and ordered that each party shall bear half of the costs necessary to correct the alleged violations and deteriorations on the roof. *See* NYSEC doc. no. 61. In 2018, defendant brought a motion to compel compliance of Justice Kenney's order, which the parties resolved by stipulation detailing the timing and procedures the parties would take to do the repairs. *See* NYSCEF doc. no. 115. In 2020, plaintiff alleges to have submitted an application to the Fire Department of New York to modify its rooftop installation to comply with the fire code, and issues have arisen as to whether defendant is preventing plaintiff from completing such necessary modifications and requisite equipment upgrades.

Plaintiff now seeks to amend its complaint and reply to the counterclaims to eliminate issues that have been made moot by the various court orders and to add additional causes of action and defenses that have accrued during the pendency of the action.

II. Analysis

CPLR § 3025 (b) provides,

A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

Leave to amend a caption should be freely granted in the absence of prejudice or surprise unless the proposed amendment is palpably insufficient or patently devoid of merit. *See MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 (1st Dept 2010). The First Department, Appellate Division has held that, “[the] plaintiff need not establish the merit of its proposed new allegations...but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.” *Id.* at 500 (citations omitted). “The burden of establishing prejudice is on the party opposing the amendment.” *Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 (2014) (citations omitted).

The initial action, commenced in 2014, involved claims that defendant threatened to terminate the lease at issue, withheld the cooperation needed to resolve fire code issues, and neglected the building in which plaintiff had an interest. Following Justice Kenney’s 2016 order, these issues remained largely dormant. Now, plaintiff seeks to enlarge its pleadings to allege a pattern and practice of tenant harassment policies relating to various modernization projects, which arose in 2020, and the purported violation of prior court orders.

The totality of the circumstances presented here, including the proposed additional theories of liability on newly pleaded facts – that arose six years after the commencement of the action – and the almost three-year delay by the plaintiffs in seeking to amend, warrant denial of the motion. Defendant would be substantially prejudiced by permitting the proposed amendment to the complaint, given the amount of time that has elapsed during the pendency of the action. *See Spence v Bear Stearns & Co., Inc.*, 264 AD2d 601, 602 (1st Dept 1999).

However, plaintiff’s proposed amended reply to defendant’s counterclaims is not so prejudicial as to merit denial. Plaintiff seeks to assert an affirmative defense of easement to defendant’s counterclaim for additional rent. As defendant concedes that such counterclaim

survives, the addition of such affirmative defense will not so delay the pendency of the proceeding to cause substantial prejudice.

III. Conclusion

Accordingly, it is hereby

ORDERED that plaintiff's motion for leave to amend is granted in part, as follows: plaintiff's motion for leave to amend to amend its reply to defendant's counterclaims, and to this extent the proposed amended answer in the form asnnexed 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 complaint is denied; and it is further

ORDERED that counsel are directed to e-file a proposed preliminary conference order with respect to all outstanding discovery on or before June 21, 2023. A courtesy copy of such proposed order shall also be e-mailed directly to sfc-part12-clerk@nycourts.gov; and it is further

ORDERED that if counsel are unable to consent to a discovery schedule, counsel shall file a joint letter with the Court via NYSCEF on or before June 21, 2023 requesting a discovery conference and outlining the reasons that an agreement could not be reached. A courtesy copy of such letter shall also be e-mailed directly to sfc-part12-clerk@nycourts.gov.

This constitutes the decision and order of the Court.

5/11/2023

DATE


LESLIE A. STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: