

US Concrete, Inc.-NYC Div. v Rinaldi Group, LLC

2023 NY Slip Op 32152(U)

June 29, 2023

Supreme Court, New York County

Docket Number: Index No. 156191/2020

Judge: David B. Cohen

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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. DAVID B. COHEN

PART 58

Justice

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INDEX NO. 156191/2020

US CONCRETE, INC.-NYC DIVISION, THROUGH ITS
WHOLLY OWNED SUBSIDIARY, USC-KINGS, LLC,

MOTION SEQ. NO. 002

Plaintiff,

- v -

THE RINALDI GROUP, LLC, QBE INSURANCE
CORPORATION, 120-122 WATER STREET, LLC, CARBEN
CONSTRUCTION INC A/K/A CASTLE INDUSTRIES, S & V
CAPITAL HOLDING CORP., MODERNFOLD/STYLES INC.,
VALUE RELEVANT METER ENGINEERING SERVICES,
PLLC, QUALITY FACILITY SOLUTIONS CORP., NYS
DEPARTMENT OF TAXATION AND FINANCE, NYC
DEPARTMENT OF FINANCE, NYC OFFICE OF
ADMINISTRATIVE TRIAL HEARINGS, JOHN DOES 1-100,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65,
66, 67, 68, 69, 70, 71, 72, 73, 76, 77, 78

were read on this motion to/for DISMISSAL.

In this mechanic’s lien action, defendants The Rinaldi Group, LLC (Rinaldi) and QBE Insurance Corporation (QBE) (collectively, defendant movants) move, pursuant to CPLR 1003, for an order dismissing the complaint. Plaintiff opposes the motion, and cross-moves to amend its complaint.

Factual and Procedural Background

This Court assumes familiarity with the facts and allegations in this case as set forth in the Court’s decision and order entered on January 30, 2023 (NYSCEF Doc No. 46). Briefly, plaintiff was a subcontractor on a construction project located at 122 Water Street in Manhattan, of which Rinaldi was the general contractor. After plaintiff filed a mechanic’s lien, QBE discharged that lien by filing a bond. Plaintiff commenced this action in August 2020 seeking to be paid under

the bond. Defendant movants joined issue by their answer dated September 18, 2020, denying all substantive allegations of wrongdoing and asserting various affirmative defenses (Doc No. 6).

In May 2022, defendant movants moved to dismiss the complaint, arguing that plaintiff failed to join several additional lienholders as necessary parties (Doc Nos. 27-28). Plaintiff opposed the motion and cross-moved to either consolidate the action with another action pending in Supreme Court or to amend its complaint by adding such additional lienholders (Doc Nos. 33-34). By decision and order of January 30, 2023, defendant movants' motion was denied, and plaintiff's cross-motion was granted to the extent that it was given leave to amend its complaint (Doc No. 46).

Shortly thereafter, plaintiff filed its amended complaint (Doc No. 49). Defendant movants move to dismiss the amended complaint, arguing that plaintiff again failed to join a necessary party, one that it knew was necessary when it previously sought to amend its complaint initially (Doc Nos. 61-62). Plaintiff opposes the motion and cross-moves to amend its complaint for a second time to include the missing necessary party, nonparty Engineered Devices Corporation (Doc Nos. 69-70). Defendant movants oppose the cross-motion, contending that plaintiff's proposed amended complaint still does not join all necessary parties (Doc No. 72).

Legal Analysis and Conclusions

Plaintiff's Cross-motion for Leave to Amend

“As a general rule, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court” (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks and citations omitted]; *see* CPLR 3025). With regard to prejudice, the party

opposing amendment bears the burden of establishing such prejudice (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]).

Here, plaintiff's proposed amendment is not patently without merit, given that defendant movants concede that Engineered Devices is an additional lienholder and a necessary party to this action. Plaintiff simply forgot to include Engineered Devices when it previously amended its complaint to add other additional lienholders. "CPLR 3025(b) contemplate[s] the correction of scrivener's errors, . . . where the court's jurisdiction is unaffected and the opposing party suffered no prejudice" (*Matter of Tsoumpas 1105 Lexington Equities, LLC v 1109 Lexington Ave. LLC*, 189 AD3d 524, 525 [1st Dept 2020] [affirming grant of leave to amend to correct minor errors]; *see Lopez v No Kit Realty Corp.*, 254 AD2d 155, 156 [1st Dept 1998] [granting plaintiff leave to add additional defendant because it was "simply a corrective amendment"]). Plaintiff's error in failing to name Engineered Devices in its amended complaint is the type of error that the statute was meant to address.

Defendant movants have also not established that they would be prejudiced by plaintiff's proposed amendment. Although a second amendment of the complaint to join additional necessary parties will likely extend the duration of this action, "[p]rejudice does not occur . . . because a defendant has to expend additional time preparing its case" (*Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654 [1st Dept 2009] [citation omitted] [finding no prejudice where no depositions had occurred and note of issue filing deadline roughly nine months from date of motion to amend]; *accord O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83, 89 [1st Dept 2017]). "Additionally, there is no prejudice to [defendant movants] because the litigation is still in its initial phase" (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 505 [1st Dept 2011];

cf. Guzman v Americare, Inc., 209 AD3d 489, 490 [1st Dept 2022] [affirming denial of leave to amend where matter was in “late stage” of litigation]).

Therefore, plaintiff’s cross-motion seeking leave to amend its complaint is granted (*see Yu Tian Li v Louie & Cahn Rest.*, 170 AD3d 424, 425 [1st Dept 2019] [affirming grant of leave to amend because proposed pleading did not prejudice defendant and was not patently insufficient or devoid of merit]).

Defendant Movants Motion to Dismiss

With plaintiff granted leave to amend, defendant movants’ motion to dismiss must be denied, because it was based on plaintiff’s purported pleading error in failing to join a necessary party (*see id.* [affirming dismissal of motion to dismiss after granting leave to amend complaint]).

Accordingly, it is hereby:

ORDERED that the motion to dismiss by defendants The Rinaldi Group, LLC and QBE Insurance Corporation is denied; and it is further

ORDERED that plaintiff’s cross-motion for leave to amend the complaint herein is granted; and it is further

ORDERED that plaintiff is directed to file the supplemental summons and amended complaint on NYSCEF within 10 days of the entry of this order; and it is further

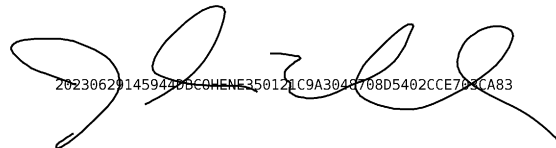
ORDERED that the supplemental summons and amended complaint once filed shall be deemed served upon service of a copy of this order with notice of entry upon defendants The Rinaldi Group, LLC and QBE Insurance Corporation which have already appeared in the action; and it is further

ORDERED that the supplemental summons and amended complaint shall be served in accordance with the Civil Practice Law and Rules, upon Engineered Devices Corporation within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Case* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the parties shall appear for an in-person status conference at 71 Thomas Street, Room 305, on August 29, 2023, at 10:00 a.m., unless the parties provide a stipulation by 3:00 p.m. the day before in accordance with the Part rules.



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6/29/2023

DATE

DAVID B. COHEN, 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