

Olek, Inc. v Merrick Real Estate Group Inc.

2023 NY Slip Op 33718(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 652181/2017

Judge: Nancy M. Bannon

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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. NANCY M. BANNON PART 42

Justice

-----X

OLEK, INC.,

Plaintiff,

- v -

MERRICK REAL ESTATE GROUP INC., 12 E 72ND LLC,
JANSONS ASSOCIATES, INC.

Defendants.

-----X

INDEX NO. 652181/2017

MOTION DATE 10-12-23

MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217

were read on this motion to/for EXTEND - ORDER.

This action to, *inter alia*, recover damages for breach of contract and to foreclose on a mechanic's lien on property located at 12-14 East 72nd Street in Manhattan was commenced in 2017, the Note of Issue was filed on June 13, 2019, and the matter was scheduled for trial on June 20, 2023. Two motions concerning plaintiff's experts were recently filed by defendants Merrick Real Estate Group, Inc. and 12 E 72nd LLC (MOT SEQ 005, 007). The defendants also attempted to conduct post-note discovery by serving a Notice to Admit dated September 27, 2023, without any showing of unusual or unanticipated circumstances. See 22 NYCRR 202.21(d).

By an order dated April 15, 2021, the court granted a prior motion by the plaintiff pursuant to Lien Law § 17 to extend the duration of the Notice of Pendency filed November 17, 2017, and granted a cross-motion by the defendant pursuant to CPLR 3211(a)(1), (4), (7) and (10) to dismiss the complaint to the extent of dismissing the third cause of action, for unjust enrichment, and otherwise denied the motion. The court expressly found that "the plaintiff demonstrates good cause to extend the Notice of Pendency for an additional period of three years. See CPLR 6513; Knopf v Sanford, 110 AD3d 502 (1st Dept. 2013); L & L Painting Co.,

Inc. v Columbia Sussex Corp., 225 AD2d 670 (2nd Dept. 1996)” and expressly denied dismissal of the fourth cause of action, for foreclosure of the lien. The court also noted that the cross-motion was untimely to the extent it sought relief pursuant to CPLR 3211(a)(1) and (a)(4). The underlying factual and procedural background is set forth in more detail in that order.

The plaintiff now moves, for a second time, pursuant to Lien Law §17 to extend the duration of the Notice of Pendency for an additional three years (MOT SEQ 007). The defendants oppose the motion and again cross-move pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the fourth cause of action and to cancel the Notice of Pendency. The defendants seek, in the alternative, leave to amend their answer pursuant to CPLR 30125(b) to add a 14th affirmative defense based on New York City Administrative Code § 20-386, which requires home improvement contractors to be licensed.

The instant motion is granted and the instant cross-motion is denied for the reasons set forth in the court’s order dated April 15, 2021, and because plaintiff demonstrates further “good cause” and the instant cross-motion is even more untimely than the prior cross-motion, being made after the scheduled trial date. The cross-motion to dismiss is also barred under the principle of law of the case.

“The doctrine of law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned.” Martin v City of Cohoes, 37 NY2d 162, 165 (1975). The doctrine applies to “legal determinations that were necessarily resolved on the merits in [a] prior decision” (Baldasano v Bank of N.Y., 199 AD2d 184, 185 [1st Dept. 1993]), and, as relevant here, “to the same questions presented in the same case” (RPG Consulting, Inc. v Zormati, 82 AD3d 739, 740 [2nd Dept. 2011], citing People v Evans, 94 NY2d 499, 502 [2000]; see Matter of McGrath v Gold, 36 NY2d 406, 413 [1975]).

To the extent that the defendants are attempting to reargue their prior cross-motion, the motion is untimely as made well more than 30 days after entry of the prior order. See CPLR 2221(d)(3). In any event, re-argument would be denied since plaintiff has not shown that the court overlooked or misapprehended any facts or relevant law that were presented to it in connection with the prior motion. See CPLR 2221(d)(2); William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 (1st Dept 1992). The purpose of a motion to reargue is not “to serve as a vehicle to

permit the unsuccessful party to argue once again the very questions previously decided” (Pro Brokerage, Inc. v Home Ins. Co., 99 AD2d 971 [1st Dept. 1984] *quoting* Foley v Roche, 68 AD2d 558 [1st Dept. 1979]) “or to present arguments different from those originally asserted.” Matter of Setters v AI Props. and Dev. (USA) Corp., 139 AD3d 492 (1st Dept. 2016) *quoting* William P. Pahl Equip. Corp. v Kassis *supra* at 27.

The defendant’s request for the alternate relief of leave to amend their answer pursuant to CPLR 3025(b) is also denied. It is well settled that leave to amend is to be freely given absent prejudice or surprise resulting directly from the delay and where the evidence submitted in support of the motion indicates that the amendment may have merit. *See* McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp., 59 NY2d 755 (1983); 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552 (1st Dept. 2011). However, here, the proposed amendment, to add an affirmative defense based on Admin. Code § 20-386, is sought six years after commencement of the action, three years after the Note of Issue was filed, and even after the scheduled June 2023 trial date, without explanation or excuse for the delay in seeking that relief. Notably, the statute is not a newly enacted one as it was signed into law 55 years ago, in 1968, by then Mayor John Lindsay. The defendants’ papers are silent as to their reason for their late discovery of the statute, and counsel offered nothing more at oral argument in that regard. As to the merits of the proposed amendment, the papers do not clearly show that the plaintiff falls within the definition of “home improvement contractor” on this project within the meaning of the statute, which defines “home improvement contract” as an “agreement between a contractor and an owner.” The plaintiff, a subcontractor, had a contract with defendant Merrick Real Estate Group, Inc., the general contractor on the project. Furthermore, to allow the proposed amendment at this juncture would result in further delays and litigation, as the plaintiff would have to be afforded an opportunity to respond to the additional affirmative defense, and the trial date would be further adjourned. The plaintiff correctly argues that it would be prejudiced by the late amendment and that, had that defense been asserted earlier, it would have litigated and conducted discovery in a different manner, to include that issue and refute that defense.

Any relief not expressly granted herein is denied.

Accordingly, upon the foregoing documents and after oral argument, it is

ORDERED that the plaintiff’s motion to extend the duration of the Notice of Pendency originally filed on November 9, 2017, and extended by order of this court dated April 15, 2021, is granted; and it is further

ORDERED that the Notice of Pendency filed against the real property located at 12-14 East 72nd Street, New York, N.Y., described as Block 1386, Lot 62, in the Office of the County Clerk of New York County on or about November 9, 2017, and extended by order of this court dated April 15, 2021, is hereby extended for a period of three years as measured from November 9, 2023; and it is further

ORDERED that this order shall be filed, recorded, and indexed by the County Clerk of New York County against the aforementioned property; and it is further

ORDERED that the defendants’ cross-motion to dismiss is denied, and it is it further

ORDERED that the parties shall appear for a settlement conference in Trial Part 40 on October 18, 2023, at 9:30, a.m., as previously scheduled.

This constitutes the Decision and Order of the court.


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10/12/2023
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE