

Rent Stabilization Assn. of N.Y.C., Inc. v McKee

2023 NY Slip Op 34358(U)

December 4, 2023

Supreme Court, New York County

Docket Number: Index No. 155789/2018

Judge: Leslie A. Stroth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LESLIE A. STROTH PART 12

Justice

-----X

RENT STABILIZATION ASSOCIATION OF N.Y.C., INC.,

Plaintiff,

- v -

MICHAEL MCKEE, TENANTS POLITICAL ACTION
COMMITTEE, INC., MET COUNCIL, INC. D/B/A
METROPOLITAN COUNCIL ON HOUSING, AND REAL
RENT REFORM CAMPAIGN

Defendant.

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INDEX NO. 155789/2018

MOTION DATE 10/03/2023,
10/03/2023

MOTION SEQ. NO. 009 010

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 009) 216, 217, 218, 219, 220, 222, 225

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

The following e-filed documents, listed by NYSCEF document number (Motion 010) 211, 212, 213, 214, 215, 221, 223, 224

were read on this motion to/for RENEWAL

This is a defamation action brought by plaintiff Rent Stabilization Association of N.Y.C., Inc. (plaintiff) arising out of statements made by defendant Michael McKee (McKee) on May 18, 2018, when he testified as a witness before the New York City Council.

Defendants McKee, Tenants Political Action Committee, Inc. (Tenants PAC), and Met Council Inc. d/b/a Metropolitan Council on Housing (Met Council) (together, defendants) move pursuant to CPLR 2221 for leave to renew their motions for leave to file an amended answer and counterclaims, previously denied by court order dated July 6, 2022 (the prior order). Additionally, Met Council moves pursuant to CPLR 2221 for leave to renew defendants' motion to vacate the note of issue, which the Court also denied in the prior order (motion sequence no. 003).

I. Motion to Renew¹

Defendants had moved pursuant to CPLR 3025 (b) for an order granting them leave to file first amended answers and counterclaims, based on the retroactive application of legislative amendments to the anti-strategic lawsuit against public participation (anti-SLAPP) law (motion sequence nos. 004, 005). *See* Civil Rights Law § 70-a. The relevant amendments to the anti-SLAPP law were enacted on November 10, 2020 and enable litigants to seek additional damages, such as costs and attorneys' fees. On the premise that the motions to amend would be granted, defendants also moved to vacate the note of issue.

The Court denied the motions, holding that the “defamatory statements were uttered long before the pertinent statutes were amended, and given the binding weight of authority against defendants on the issue of retroactivity here...I am bound to hold that defendants’ proposed amendments are palpably without merit.” *See* NYSCEF doc. no. 125 at 2, citing *Kurland Assocs. PC v Glassdoor Inc.*, 205 AD3d 545, 545 (1st Dept 2022); *Robbins v 315 West 103 Enterpr., LLC*, 205 AD3d 551, 552 (1st Dept 2022); *Gottwald v Sebert*, 203 AD3d 488-489 (1st Dept 2022). The Court further denied defendants’ motion to vacate the note of issue, holding that the “...failure to demonstrate why the note of issue should be vacated beyond the assumption that its motion to amend would be granted, the motion to vacate has no merit.” *Id.* at 3.

Defendants now move pursuant to CPLR 2221 (e) for leave to renew the prior motions to amend and the motion to vacate, arguing that the Court of Appeals superceded the authority on

¹ With few exceptions, a motion for leave to reargue must be made to the judge who signed the underlying order unless they are unavailable. *See* CPLR 2221 (a). As this matter was reassigned upon Justice Jaffe’s retirement to Justice Leslie A. Stroth, this motion is properly before this Court for determination. *See C & N Camera & Elecs. Inc. v Public Serv. Mut. Ins. Co.*, 210 AD2d 132, 133 (1st Dept 1994) (it was proper for new justice presiding in the part to hear reargument motion).

which the Court previously relied.² Specifically, in the prior order, the Court relied upon *Gottwald v Sebert*, 203 AD3d 488-489 (1st Dept 2022), which held that the anti-SLAPP amendments could not be applied to an action brought before their effective date. On an appeal decided following the entry of the prior order, the Court of Appeals affirmed the proposition that the amendments do not have a retroactive effect. *See Gottwald v Sebert*, 40 NY3d 240, 258 (2023). However, the Court of Appeals created an exception, holding that when an existing action is continued “beyond the effective date of the amendments,” the amendments to New York’s anti-SLAPP law apply. *Id.* at 258- 259.

A motion for leave to renew “shall demonstrate that there has been a change in the law that would change the prior determination” and “shall contain reasonable justification for the failure to present such facts on the prior motion.” CPLR 2221 (e) (2); (3). “A motion for leave to renew is the appropriate vehicle for seeking relief from a prior order based on a change in the law.” *Dinallo v DAL Elec.*, 60 AD3d 620, 621 (2d Dept 2009). Further, “[a] clarification of the decisional law is a sufficient change in the law to support renewal.” *Id.*; *see also Puello v City of New York*, 118 AD3d 492 (1st Dept 2014) (affirming grant of motion to renew where intervening decision “provided a clarification of the decisional law” [citations omitted]).

Here, defendants submit a clarification of the caselaw relied upon in the prior order, namely, *Gottwald v Sebert*, 40 NY3d 240, 258 (2023). As the prevailing Court of Appeals matter was decided following the entry of the prior order, the Court is satisfied by the justification proffered by movant in support of this motion. Moreover, while plaintiffs oppose the underlying relief sought by defendants, they concede that *Gottwald* (40 NY3d 240) explained the retroactive

² In motion sequence 010, McKee and Tenants PAC join in the arguments made by Met Council in its motion to renew its motion to amend (motion sequence 009) and incorporate by reference the facts, circumstances, and legal precedent set forth by Met Council. The motions are consolidated herein for disposition.

application of the 2020 amendments to Civil Rights Law § 70-a. Therefore, defendants' motions to reargue their motions to amend are granted.

II. Motion to Amend

Turning to the merits of defendants' renewed motions to amend, 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 should be freely granted in the absence of prejudice or surprise unless the proposed amendment is palpably insufficient or patently devoid of merit. *See MBLA 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).

Defendants argue that the new controlling precedent establishes that they may seek costs, attorneys' fees and other damages pursuant to *See* Civil Rights Law § 70-a; *see also Gottwald v Sebert*, 40 NY3d 240 at 258. In opposition, plaintiff asserts that it will be prejudiced by permitting defendants' proposed amendments because resolution of the action, which has been pending for five years, will be additionally prolonged. Plaintiff points out that the note of issue has been filed since December 12, 2020, almost three years ago, and summary judgment motions are currently pending before the Court. However, plaintiff does not address the merits of defendants' proposed counterclaims.

As noted above, and as acknowledged by plaintiff, “[d]efendants could – under certain circumstances – have a prospective claim for costs, attorneys' fees and/or damages from the 2020 effective date of the amendments forward.” *See* Roth Affirmation in Opposition at 3, ¶ 5. Given

the unanticipated change in the law and defendants potential recourse under same to recover under newly permissible counterclaims, defendants have established that their proffered amendments are "...not palpably insufficient or clearly devoid of merit." See *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 (1st Dept 2010). In turn, plaintiff have failed to demonstrate sufficient prejudice to defeat the liberal amendment standard. Therefore, plaintiffs may amend their answer to include counterclaims pursuant to Civil Rights Law § 70-a.³

III. Vacate the Note of Issue

The Court next considers Met Council's renewed motion to vacate the note of issue.

Pursuant to 22 NYCRR 202.21 (e):

Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect...

A "note of issue should be vacated where it is based upon a certificate of readiness that incorrectly states that all discovery has been completed." *Matos v City of New York*, 154 AD3d 532, 533 (1st Dept 2017). However, where a motion to vacate the note of issue is timely, the movant is "required only to demonstrate why the case [is] not ready for trial, and [is] not required to establish that additional discovery [is] necessary because unusual or unanticipated circumstances [have] developed subsequent to the filing of the note of issue." See *Cioffi v S.M. Foods, Inc.*, 178 AD3d 1003, 1004, (2d Dept 2019), quoting *Jacobs v Johnston*, 97 AD3d 538, 538 (2d Dept 2012).

Met Council argues that if it is permitted to file its proposed first amended answer and counterclaims, plaintiff will need to file a responsive pleading. As such, the statement in the

³ However, McKee and Tenants PAC's motion to the extent that they seek to add a 13th affirmative defense that plaintiff's claims are barred by Civil Rights Law § 70-a and 76-a, because they fail to address that request in their affirmation in support or reply. Further, the Court of Appeals in *Gottwald* (40 NY3d 240) did not consider affirmative defenses, but, rather, evaluated the retroactive application of claims pursuant to Civil Rights Law § 70-a. Therefore, the Court denies the portion of defendants' motion with respect to the addition of a proposed additional affirmative defense.

certificate of readiness that all pleadings have been served will be incorrect. In response, plaintiff maintains that given the advanced stage of this action, any newly arising claims or potential claims should proceed in a separate action. In the alternative, plaintiff also contends that even if the Court is inclined to allow defendants leave to renew their motion to amend, vacating the note of issue is unnecessary as no additional discovery would be required.

Met Council's motion to vacate the note of issue is granted. Contrary to the certificate of readiness, all pleadings have not been served. Accordingly, as the certificate of readiness contains a material incorrect assertion, the note of issue shall be vacated. *See Gomes v Valentine Realty LLC*, 32 AD3d 699, 700 (1st Dept 2006); *Lopez v Bendell*, 206 AD3d 515, 516 (1st Dept 2022). However, to avoid any additional delay, the responsive pleadings and any subsequent dispositive motions addressed to the counterclaims shall proceed in tandem with the pending summary judgment motions. Further, the note of issue shall be re-filed on or before February 1, 2024, with any dispositive motions to be filed within 60 days thereof.

IV. Conclusion

Accordingly, it is

ORDERED that the motion of Michael McKee, Tenants Political Action Committee, Inc., and Met Council Inc. d/b/a Metropolitan Council on Housing for leave to renew their motions to amend their answers to include counterclaims is granted; and it is further

ORDERED that, upon renewal, the Court vacates its prior order, dated June 26, 2022, and grants, in part, the motions of Michael McKee, Tenants Political Action Committee, Inc., and Met Council Inc. d/b/a Metropolitan Council on Housing for leave to file an amended answer as follows: leave is granted to include counterclaims, and to this extent the proposed first amended

answers 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 complaint to add a 13th affirmative defense is denied as to Michael McKee and Tenants Political Action Committee, Inc. and such affirmative defense is stricken; and it is further

ORDERED that the plaintiff shall answer the first amended answers and counterclaims or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the motion Met Council Inc. d/b/a Metropolitan Council on Housing for leave to renew its motion to vacate the note of issue is granted; and it is further

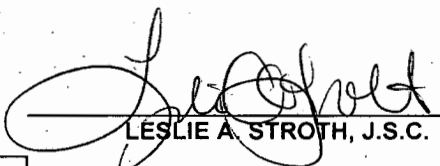
ORDERED that, upon renewal, the Court vacates its prior Order, dated June 26, 2022, and grants the motion to vacate the note of issue; and it is further

ORDERED that the note of issue shall be filed on or before February 1, 2024, with any dispositive motions relating to the newly added counterclaims to be filed within 60 days thereof; and it is further

ORDERED that movants shall serve and file notice of entry within 20 days of the date of this decision and order.

The foregoing constitutes the decision and order of the Court.

12/4/2023
DATE


LESLIE A. STROTH, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE