

Mendez v Dorville
2023 NY Slip Op 35207(U)
September 27, 2023
Supreme Court, Bronx County
Docket Number: Index No. 802569/2022E
Judge: Alison Y. Tuitt
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX-----X
CAROLINA F. MENDEZ,

Plaintiff,

-against-

JECKSON DORVILLE and MICHAEL B. PADILLO,
Defendants.
-----XIndex No.: 802569/2022E

HON. ALISON Y. TUITT:

The following two motions, and cross motion, are decided in this same Order: Motion by Plaintiff (Seq #3), pursuant to CPLR 3211, to dismiss Defendants' "counterclaims 2 - 8 upon the ground of the litigation privilege", and for related relief; the Motion by Plaintiff (Seq #4), pursuant to CPLR 3025(b), for leave to amend the Complaint, and for related relief; and the Cross Motion by Defendants to amend the caption to remove the name of Defendant MICHAEL B. PADILLO, and to strike causes of action as against him, and for related relief.

This is an action, sounding in breach of contract, whereby Plaintiff seeks the return of \$47,500 down payment made for the purchase of Defendant's house.

PARTIES/ ALLEGED FACTS

On September 20, 2021, the parties entered into a contract whereby Defendant JECKSON DORVILLE agreed to sell his house located at 3126 Jerome Avenue, Bronx, New York, and Plaintiff CAROLINA F. MENDEZ agreed to purchase it, for the price of \$949,000.00.

Pursuant to their written "Residential Contract of Sale", the Plaintiff made the down payment in the sum of \$47,500.00. This money was initially held in escrow by DORVILLE's attorney, Defendant MICHAEL B. PADILLO i/s/h/a MICHAEL

B. PADILLO. However, Plaintiff's application for an FHA mortgage loan was denied because the "Property fails FHA self sufficiency test".

Thereupon, a dispute arose as to whether DORVILLE was entitled to keep the down payment as liquidated damages or return the down payment to MENDEZ.

On or about February 16, 2022, Plaintiff commenced this action, sounding in breach of contract, seeking the return of the \$47,500 down payment.

Defendants made a pre-Answer motion (Seq #1) to dismiss the Complaint, pursuant to CPLR 3211 (a)(1), and for related relief, which was decided by this Court's Order dated September 30, 2022. Thereby, this Court denied Defendants' motion to dismiss the Complaint, determining that there were issues of fact "as to whether Plaintiff requested from Defendant an extension of time to obtain a mortgage under the terms of the real estate contract and whether or not Defendants extended Plaintiff's time to obtain a mortgage".

Also, therein, the Court ordered that Defendant MICHAEL B. PALILLO deposit the \$47,500 with the Clerk of Bronx County; and that, upon so doing, MICHAEL B. PALILLO, and his firm, MICHAEL B. PALILLO, P.C., would be relieved and discharged from all further obligations and responsibilities herein, and that Plaintiff's Complaint as against them would be dismissed with prejudice.

On or about October 24, 2022, MICHAEL B. PALILLO deposited the sum of \$47,500.00, representing the contract down payment, with the Bronx County Clerk.

In addition, Defendant DORVILL was ordered to interpose his Answer within 30 days from the service of said Order with Notice of Entry. (See Order, at NYSCEF Doc No 42).

On or about October 19, 2022, Defendant DORVILLE, by his Counsel, MICHAEL B. PALILLO, P.C., filed his initial Answer to the Complaint, asserting eight Counterclaims.

APPLICABLE LAW/ ANALYSIS

----(Motion Seq #4) Amend Complaint/Caption

Plaintiff moves, pursuant to CPLR 3025(b), for leave to amend her initial Complaint, and for related relief; and Defendants cross move for leave to amend the caption to remove the name of Defendant MICHAEL B. PADILLO, and to strike causes of action as against him, and for related relief.

CPLR R 3025 "Amended and supplemental pleadings" provides as follows:

"(a) Amendments Without Leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

(b) Amendments and Supplemental Pleadings by Leave. 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. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading".

In support of the motion for leave to amend, Plaintiff's submissions include the initial Complaint, the Plaintiff's first proposed Amended Complaint (NYSCEF Doc No 78); the Plaintiff's last proposed Amended Complaint filed May 3, 2023 (NYSCEF Doc No 158); as well as the transcript of oral argument on Defendants' pre-Answer motion (Seq#1) to dismiss the Complaint.

Defendants cross move to amend the caption to remove the name of Defendant MICHAEL B. PADILLO, and to strike the Second and Third causes of action in the Complaint -- to the extent that they are asserted as against him.

In this regard, MICHAEL B. PADILLO now evidences that he deposited the \$47,500.00 with the Bronx County Clerk; and, thus, this action was dismissed as against him, pursuant to Court's Order dated September 30, 2022.

In addition, in response to Plaintiff's motion to amend the Complaint, Defendants indicate that they do not oppose amendment, but essentially seek to preserve their rights with respect thereto -- stating that, while "Plaintiff has every right to amend his complaint, ... that does not preclude a motion to strike references in his complaint." (NYSCEF Doc No 157). Defendants' objections include that JACKSON DORVILLE should not be referred to herein in the Complaint as "Detective", but should be referred to as Defendant.

In response, Plaintiff tenders a revised proposed Amended Complaint wherein Plaintiff attempts to address the Defendants' concerns. Therein, Plaintiff omits the name of MICHAEL B. PADILLO in the caption as Defendant; "crosses out" the reference to "Detective" DORVILLE, and writes "Defendant" over it; and attempts to revise the Third, and Fourth, causes of action, to remove reference to MICHAEL B. PADILLO. Plaintiff even adds the sentence: "This amended complaint does not state a cause of action against the former defendant Michael O. Palillo". (NYSCEF Doc No 158).

"It is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party (see CPLR 3025 [b])" (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]).

Therefore, Defendants' Cross Motion for leave to amend the caption, and strike the Plaintiff's Second and Third causes of action, and for related relief, are granted to the extent that the caption shall be amended to remove MICHAEL B. PADILLO as a party defendant; and, that, any portions of Plaintiff's causes of action that are, or may be deemed to be, asserted as against MICHAEL B. PADILLO i/s/h/a MICHAEL B. PADILLO, are struck.

Plaintiff's Motion for leave to amend the pleadings is granted to the extent that the pleadings may be amended in the manner set forth in the *last* proposed Amended Complaint, dated May 3, 2023, except that Plaintiff shall further revise it to correct typographical errors such as those in the caption and Index No.; and shall omit references to "Detective" DORVILLE (instead of just crossing out the word "Detective"), and substitute the word "Defendant" in the place of the word "Detective".

The amendment of the pleadings shall be effectuated by Plaintiff's filing, and serving, a Supplemental Summons and Verified Amended Complaint, together with a copy of this Order, within forty-five (45) days from the date of the entry of this Order. (See CPLR R 305 "Summons; supplemental summons, amendment"; and CPLR §3012(a) "Service of pleadings").

The new caption in this case shall read as follows:

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

-----X
CAROLINA F. MENDEZ,

Plaintiff,

-against-

JECKSON DORVILLE,

Defendant.
-----X

Index No.: 802569/2022E

Defendant shall file and serve his Answer to the Amended Complaint within twenty (20) after the service of the said Amended Complaint.

Thereafter, Plaintiff shall file and serve her Reply to any Counterclaims therein within twenty (20) days after service of said Amended Answer.

----(Motion Seq #3) Defendants' Counterclaims

With respect to Defendants' initial Answer, dated October 17, 2022, Plaintiff moves, pursuant to CPLR 3211, to dismiss Defendants' Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Counterclaims, upon the ground of the "litigation privilege", and for related relief.

In response, Defendants withdraw their Fourth, Sixth, Seventh, and Eighth Counterclaims.

Thus, there remain 3 Counterclaims in Defendants' initial Answer, namely, Defendants' Second, Third, and Fifth Counterclaim.

However, Defendants' initial Answer will be superseded by Defendant DORVILLE's Answer to the Amended Complaint, as set forth herein.

In this regard, Courts have held that: "Once plaintiff served the amended complaint, the original complaint was superseded, and the amended complaint "became the only complaint in the action"" (*Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 99 [1st Dept 2012]).

Therefore, Plaintiff's Motion to dismiss the remaining Counterclaims in Defendants' initial Answer, is denied, without prejudice to the making of any appropriate motions, if warranted, after issue is joined. (*See also* CPLR R 3212 [a])). However, the parties are encouraged not to engage in unnecessary motion practice.

CONCLUSION

Accordingly, Plaintiff's Motion (Seq #4) for leave to amend the pleadings; and the Defendants' Cross Motion for leave to amend the caption to remove the name of Defendant MICHAEL B. PADILLO, and to strike any portions of Plaintiff's causes of action that are asserted as against him, are granted to the extent set forth herein.

Plaintiff's Motion (Seq #3) to dismiss Defendants' Counterclaims in their initial Answer, is denied, without prejudice, as set forth herein.

The parties are encouraged to meet and confer, and make a good faith effort to resolve this matter expeditiously.

This constitutes the decision and order of this Court.

Dated: 9/27 2023


HON. ALISON Y. TUITT, J.S.C.