

Resetarits Constr. Corp. v Norfolk S. Ry. Co.
2023 NY Slip Op 35209(U)
April 13, 2023
Supreme Court, Erie County
Docket Number: Index No. 808585/2022
Judge: Timothy J. Walker
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STATE OF NEW YORK
SUPREME COURT : ERIE COUNTY

RESETARITS CONSTRUCTION CORPORATION,

Plaintiff,

- VS -

NORFOLK SOUTHERN RAILWAY COMPANY,
and WNY GALBO, INC.

Defendants.

**COMMERCIAL DIVISION
DECISION AND ORDER
Index No.: 808585/2022**

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **LIPSITZ GREEN SCIME CAMBRIA LLP**

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WALKER, J.

Plaintiff has applied (Motion No. 1, Doc No. 11) for an order granting it leave to file and serve an amended complaint (Doc No. 4). Philadelphia Indemnity Insurance Company (“Philadelphia”) has applied (Motion No. 2, Doc No. 18) for an order granting it permission to intervene. For the reasons that follow, both motions are granted.

MOTION TO AMEND

"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" (*DiGiacco v. Grenell Island Chapel*, 210 AD3d 1466 [4th Dept 2022] [citing *Uhteg v. Kendra*, 200 A.D.3d 1695, 1699[4th Dept 2021]; *see also Greco v. Grande*, 160 AD3d 1345 [4th Dept 2018]). "A court should not examine the merits or legal sufficiency of the proposed amendment unless the proposed pleading is clearly and patently insufficient on its face" (*id.*, citing *Matter of Clairol Dev., LLC v. Village of Spencerport*, 100 AD3d 1546 [4th Dept 2012]; *see generally Great Lakes Motor Corp. v. Johnson*, 156 AD3d 1369, 1371[4th Dept 2017]).

Furthermore, "[m]ere lateness is not a barrier" to a motion to amend a pleading (*Greco*, at p. 1346, citing *Edenwald Contr. Co. v. City of New York*, 60 NY2d 957, 959 [1983]). Indeed, "[w]here no prejudice is shown, the amendment may be allowed during or even after trial" (*Loomis v. Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, *rearg. denied* 55 NY2d 801).

The proposed amended complaint seeks a determination as to whether the termination of the contract ("Contract") between Plaintiff and Defendant, Norfolk Southern Railway Company ("Norfolk") was "for convenience" and/or whether it was "wrongful." It sets forth facts that did not exist at the time Plaintiff filed its original complaint on July 26, 2022 (Doc No. 2), and which arose after the initial pleading stage ended (namely, on October 20, 2022 when Plaintiff filed its Reply to Norfolk's counterclaims) (Doc No. 9). These new facts raise legally justiciable issues between Plaintiff and Norfolk.

The Fourth Department has held that a convenience termination bars a counterclaim for costs relating to curing any alleged contractor default (*see e.g. Paragon Restoration Group*,

Inc. v. Cambridge Square Condominiums, 42 AD3d 905 [4th Dept 2007]) ("[w]here [defendant] elects to terminate for convenience . . ., whether with or without cause, it cannot counterclaim for the cost of curing any alleged default").

Similarly, a wrongful termination vitiates a claim for cure damages (*Fruin-Colnon Corp. v. Niagara Frontier Authority*, 180 AD2d 222 [4th Dept 1992] [wrongfully terminated contractor cannot be held liable for damages incurred correcting defective work]; *East Empire Construction Inc v. Borough Const. Group LLC*, 200 AD3d 1 [1st Dept 2021] [affirmative defense seeking offsets for cure damages properly dismissed where termination was wrongful]).

At this stage, the court "should not examine the merits or legal sufficiency of the proposed amendment unless the proposed pleading is clearly and patently insufficient on its face" (*id.*, citing *Matter of Clairol Dev., LLC v. Village of Spencerport*, 100 AD3d 1546, 1546 [4th Dept 2012]; see generally *Great Lakes Motor Corp. v. Johnson*, 156 AD3d 1369, 1371 [4th Dept 2017]).

Here, Plaintiff seeks to add claims that are typical in a construction case relating to contract termination. The determination of this issue impacts the rights and obligations between Plaintiff and Norfolk, even though they may also impact Philadelphia's bond obligations.

Norfolk has alleged Plaintiff is liable in "an amount greater than \$75,000" for completion and cure costs (Doc No. 8, at ¶ 121). The proposed amendments to the complaint include allegations relating to both a convenience termination and a wrongful termination which, if credited by a fact finder, would tend to defeat Norfolk's counterclaim in full. If Plaintiff is successful in proving that the termination was wrongful or "for convenience," it may be entitled to damages.

Likewise, a motion to amend may only be denied where the opposing party has suffered prejudice (*DiGiacco v. Grenell Island Chapel*, 210 AD3d 1466 [4th Dept 2022] [citing *Uhteg v. Kendra*, 200 AD3d 1695, 1699 [4th Dept 2021]; *see also Greco v. Grande*, 160 AD3d 1345 [4th Dept 2018]). Norfolk does not allege that it will be prejudiced in the event the motion is granted.

MOTION TO INTERVENE

Philadelphia is entitled to intervene as of right in this action pursuant to CPLR § 1012. Alternatively, it has demonstrated that it should be permitted to intervene pursuant to CPLR § 1013. “Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action” (*Yuppy Puppy Pet Prods., Inc. v. Street Smarts Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010]).

“Upon a timely motion, a nonparty is permitted to intervene as of right in an action involving property where the nonparty ‘may be affected adversely by the judgment’” (*Jones v. Town of Carroll*, 158 AD3d 1325, 1326 [4th Dept 2018]). Further, “after considering ‘whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party,’ a court may, in its discretion, permit a nonparty to intervene when the nonparty’s ‘claim or defense and the main action have a common question of law or fact’” (*id.* at 1327; *see also* CPLR 1013). In *Jones*, the nonparty sought leave to intervene **after** the court’s decision on summary judgment motions (*id.* at 1327). However, even where the action is not fully determined, and “even if a motion to intervene is made after judgment, a court is not precluded from granting such relief in appropriate circumstances” (*id.* at 1328, citing *Auerbach v. Bennett*, 64 AD2d 98, 105 [2nd Dept 1978]). “In examining the timeliness of a motion to

intervene, courts do not engage in mere mechanical measurements of time, but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party” (*id.* at 1328; *see also Yuppie Puppy Pet Prods., Inc. v. Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010]). Even though the intervenor in *Jones*, “did not seek to intervene until several years after it knew its interest in the property may be implicated in the dispute,” the appellate court concluded “that the court did not abuse its discretion in granting the motion inasmuch as [intervenor’s] intervention will not delay resolution of the action and defendants will not suffer prejudice” (*id.* at 1328; *see also Poblocki v. Todoro*, 55 AD3d 1346, 1347 [4th Dept 2008]). Furthermore, the intervenor in *Jones* did “not seek to assert any new claims or to conduct extensive additional discovery” (*id.* at 1328).

Philadelphia’s intervention at this time will not delay the resolution of this action, nor will it delay or duplicate discovery efforts; discovery has yet to commence.

DECLARATORY JUDGMENT

The “general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain disputed jural relation either as to present or prospective obligations” (*Thome v. Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009]). As Professor Siegel remarked, “the declaratory judgment action has been employed as a way to resolve a relatively unique dispute where the plaintiff is unable to find among the traditional kinds of action one that will enable her to bring it to court” (*id.* at 100).

When considering a motion to dismiss a declaratory judgment claim for failure to state a cause of action, “the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled

to a declaration favorable to him” (*id.* at 11, citing *Fillman v. Axel*, 63 AD2d 876 [1st Dept 1978]). Doing so, courts consider “whether ‘the declaration will have the immediate and practical effect of influencing defendants’ conduct” (*id.* at 11; *see also M&A Oasis, Inc. v. MTM Assocs., L.P.*, 307 AD2d 872 [1st Dept 2003]).

Likewise, there must be a real dispute between the adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect (*Hernandez v. State of New York*, 173 AD3d 105, 109-110 [3rd Dept 2019], citing *Chanos v. MADAC, LLC*, 74 AD3d 1007, 1008 [2nd Dept 2010]). “A controversy is said to exist where the plaintiff asserts rights which are actually challenged by the defendant” (*id.*). Simply put, a party is not required to wait until its liability is established in an underlying action before it can bring a declaratory action (*see Hudson Ins. Co. v. AK Const., LLC*, 92 AD3d 521 [1st Dept 2012]).

Norfolk commenced an action against Philadelphia in Federal Court for breach of contract, seeking damages “in excess of \$75,000” (Doc No. 27, at ¶ 46). Norfolk alleges that it is entitled to recover from Philadelphia “the full cost of completing and repairing the scope of work embodied in the Construction Contract, all costs incurred making repairs and corrections to the work performed by Plaintiff, together with any damages allowed under the Contract including, but not limited to, attorneys’ fees and expenses, plus interest at the maximum legal rate and the costs of this action” (*id.*, at ¶ 47). Norfolk seeks a declaration that Philadelphia perform its obligations under the Performance Bond, and an award for all costs it incurred to complete the scope of work embodied in the Contract (*id.*, at “Wherefore Clause” [1] and [2]). Norfolk alleges that Plaintiff failed to complete the Contract; Plaintiff’s defaults under the Contract were not and could not be cured; and Plaintiff breached the Contract (Doc No. 27, at ¶¶ 36, 40, and 41).

Here, Philadelphia's legal interests turn upon a determination of the dispute between Plaintiff and Norfolk. In particular, whether Norfolk's constructive and/or express termination of the Contract was justified. If termination was not justified, or deemed one "for convenience," then Plaintiff cannot be liable to Norfolk for any alleged costs to complete (*Tishman Const. Corp. v. City of New York*, 228 AD2d 292, 293 [1st Dept 1996]).

Such determination is inextricably intertwined with Norfolk's claim on the Performance Bond (*see e.g. Gulf Ins. Co. v. Fid. & Deposit Co. of Maryland*, 16 Misc. 3d 1116(A) (Sup Ct, NY County 2007)). The central issues in this case are whether Norfolk improperly removed Plaintiff from the worksite, whether its subsequent termination of the Contract was for convenience or otherwise and, if the latter, whether it was wrongful. If Norfolk's termination of was one for convenience or wrongful, then its counterclaim cannot proceed (nor would Philadelphia be liable to Norfolk under the Performance Bond).

Accordingly, it is hereby

ORDERED, that Plaintiff's motion, and Philadelphia's motion, are hereby granted.

This constitutes the Decision and Order of this court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by the Court shall not constitute notice of entry.

Dated: April 13, 2023
Buffalo, New York



HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice