MRC 56 Corp. v Weeks-Lerman Group, LLC
2024 NY Slip Op 31627(U)
May 7, 2024
Supreme Court, New York County
Docket Number: Index No. 650201/2018
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** *Justice* **PART 36**

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MRC 56 CORP., Plaintiff,

- v -

THE WEEKS-LERMAN GROUP, LLC, Defendant.

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INDEX NO. 650201/2018

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163

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

Defendant The Weeks-Lerman Group, LLC moves, pursuant to CPLR 3025, for leave to serve a second amended answer and amended counterclaims. For the reasons set forth below, the motion is denied.

On January 15, 2018, plaintiff MRC 56 Corp. commenced this action asserting two causes of action for breach of contract against defendant related to an asset purchase agreement (the "APA") the parties had executed in August 2010 (NYSCEF Doc. No. 1, *complaint* ¶ 1). Defendant answered the complaint on March 10, 2018 (NYSCEF Doc. No. 12) and later served an amended answer dated April 4, 2018, that asserts a single counterclaim for breach of contract (NYSCEF Doc. No. 14). Plaintiff served a reply and then an amended reply to the counterclaim (NYSCEF Doc. Nos. 15 and 18). Plaintiff then moved for summary judgment on its complaint and for summary judgment dismissing defendant's sole counterclaim asserted in the amended answer (NYSCEF Doc. No. 19). Five days after service of the motion, defendant served a second amended answer in which defendant asserted four counterclaims: (1) breach of sections 1.4 and 6.3(a) of the APA; (2) breach of a "Closing Bill of Sale, Assignment and Assumption Agreement" dated December 19, 2014 ("Closing Contract"); (3) fraudulent inducement predicated upon allegedly false representations in sections 3.10 and 3.20 of the APA, which allegedly induced defendant into entering into the APA; and (4) fraudulent inducement predicated upon allegedly false representations in sections 3.10 and 3.20 of the APA, which allegedly induced defendant into entering into the Closing Contract (NYSCEF Doc No. 35). In response, plaintiff served a notice rejecting service of the second amended answer the same day based on defendant's failure to seek leave of court or plaintiff's consent to the amendment by stipulation (NYSCEF Doc. No. 36). Two weeks later, defendant cross-moved for summary judgment on the issue of plaintiff's liability on the first and second counterclaims asserted in the second amended answer (NYSCEF Doc. No. 39). In a decision and order dated July 3, 2019, the court (Ling-Cohan, J.) denied the motion and cross-motion on the first counterclaim pleaded in the amended answer (NYSCEF Doc. No. 72 at 22). The court also noted that defendant had served a second amended answer in violation of CPLR 3025(a) and "is dismissed" (*id.* at 24).

The court (Ling-Cohan, J.) subsequently denied defendant's motion and plaintiff's cross-motion to renew and/or reargue its July 3, 2019 decision and order (NYSCEF Doc. Nos. 142-143).

On July 18, 2019, plaintiff served and filed a notice of issue and certificate of readiness stating that discovery was complete (NYSCEF Doc. No. 76). Defendant now moves, pursuant to CPLR 3025, for leave to serve a second amended answer and amended counterclaims. Plaintiff opposes the motion.

It is well settled that "'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'" (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [citation omitted]) or is not "palpably insufficient" (*Smith v Founders Entertainment LLC*, 216 AD3d 417, 417 [1st Dept 2023]). "Mere lateness is not a barrier" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983] [internal citation and quotation marks omitted]). Indeed, leave to amend may be granted on the eve of, during, and even after trial (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Murray v New York*, 43 NY2d 400, 405 [1977], *rearg denied* 45 NY2d 966 [1978]; *Reyes v City of New York*, 63 AD3d 615, 616 [1st Dept 2009], *lv denied* 13 NY3d 710 [2009]), so long as the opposing party is not significantly prejudiced (*Edenwald Contr. Co.*, 60 NY2d at 959]; *Loomis v Civetta Corrino Constr. Corp.*, 54 NY2d 18, 23 [1981], *rearg denied* 55 NY2d 801 [1981] [stating that prejudice requires a showing that the party opposing the amendment "has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position"]). It is within the court's discretion to grant a motion to amend (*Ferrer v Go N.Y. Tours Inc.*, 221 AD3d 499, 500 [1st Dept 2023]). "Where, however, an action has long been certified as ready for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious" (*Clarkin v Staten Is. Univ. Hosp.*, 242 AD2d 552, 552 [2d Dept 1997]).

Under these precepts, defendant's motion for leave to serve a second amended answer and amended counterclaims is denied. Defendant first attempted to serve a second amended answer pleading counterclaims for breach of contract and fraudulent inducement in May 2018. Plaintiff rejected service of the second amended answer citing defendant's failure to obtain leave of court or plaintiff's prior consent, and an amended answer served without compliance with the requirements in CPLR 3025(b) is a nullity (see *Khedouri v Equinox*, 73 AD3d 532, 533 [1st Dept 2010] [service of an amended complaint more than 20 days after the defendant's service of an answer and without leave of court deemed a nullity]; *Walden v Nowinski*, 63 AD2d 586, 586 [1st Dept 1978] ["[t]he amended answer, served without requisite leave, was a nullity"]). Undeterred, defendant cross-moved for summary judgment on the second amended answer. Even after the court's determination that defendant had failed to comply with CPLR 3025(b), defendant still did not move for leave to amend. Thus, the only operative pleading on defendant's part is its original amended answer dated April 4, 2018, in which defendant pleaded a single counterclaim for breach of contract.

"Where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay" (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 [1st Dept 2003] [internal quotation marks and citation omitted]). Here, defendant has not proffered an excuse for its years-long delay in its moving papers. Defendant has been

aware of the proposed counterclaims since 2018 when it attempted to raise them in an improperly served second amended answer (see *Schucht v Innovative Biodefense, Inc.*, 217 AD3d 703, 704 [2d Dept 2023] [unexplained four-year delay where the plaintiff was aware of the facts from the commencement of the action]). Defendant moved for leave to amend four years after plaintiff filed a note of issue and after discovery has been tailored to the breach of contract claims and counterclaim (see *Panasia Estate, Inc. v Broche*, 89 AD3d 498, 498 [1st 2011] [denying motion to amend where discovery had been tailored to the theories of liability asserted in the amended complaint, determinations on summary judgment motions had been made, and the filing of the note of issue was imminent]). Defendant has never moved to vacate the note of issue, nor has it claimed to have sought any discovery related to its proposed fraud counterclaims. As such, defendant has failed to proffer any explanation for its inactivity during this lengthy period (see *Schelchere v Halls*, 120 AD3d 788, 788 [2d Dept 2014] [denying motion to amend "given the plaintiffs' extensive and unexplained delay in seeking to amend their complaint based on facts that were known to them since the onset of the litigation"]; *Spence v Bear Stearns & Co.*, 264 AD2d 601, 602 [1st Dept 1999] [denying motion to amend given the plaintiff's "inexcusable delay of 6 1/2 years in seeking to amend, to add the new theory of liability ... and the lack of any evidentiary showing of merit"]). More importantly, defendant's delay in moving for relief has caused significant prejudice to plaintiff in the preparation of its case (see *Pecora v Pecora*, 204 AD3d 611, 612 [1st Dept 2022]; *Nationstar Mtge., LLC v Fuller*, 182 AD3d 531, 531 [1st Dept 2020]).

Defendant, for the first time in reply, attributes its delay in moving for relief to the reassignment of the action from Justice Ling-Cohan, plaintiff's failure to "restore" the action to an unspecified "calendar" for a future appearance, and the temporary procedures implemented in Supreme Court, New York County on March 17, 2020, that restricted court filings to essential applications in response to the COVID-19 pandemic (NYSCEF Doc. No. 145; *see also* Admin Order of Chief Admin Judge of Cts AO/78/20). These arguments are wholly unpersuasive as filings for non-essential applications resumed on May 4, 2020 (*see* Admin Order of Chief Admin Judge of Cts AO/87/20). Furthermore, defendant, equally, could have requested a court conference once the matter had been reassigned upon Justice Ling-Cohan's retirement in 2020.

Moreover, defendant has failed to demonstrate the merit to the proposed counterclaims for fraudulent inducement grounded upon the special facts doctrine. Generally, "[t]he legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt" (*Ferrer*, 221 AD3d at 500). "An amendment is devoid of merit where the allegations are legally insufficient" (*Reyes v BSP Realty Corp.*, 171 AD3d 504, 504 [1st Dept 2019]). As is relevant here, a cause of action for fraud requires a misrepresentation or material omission of fact that was false and known to be false by plaintiff, that plaintiff made the misrepresentation or omission to induce defendant to rely on it, defendant's justifiable reliance, and resulting damages (see *Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016]). Fraud must be pleaded with particularity under CPLR 3016(b). Here, the proposed pleading fails to set forth the circumstances constituting the wrong in detail (see *Davis v Siben & Siben, LLC*, 211 AD3d 681, 682 [2d Dept 2022]; *Non-Linear Trading Co. v Braddis Assocs.*, 243 AD2d 107, 116 [1st Dept 1998]; *cf. A.N. Frieda Diamonds, Inc. v Kaminski*, 122 AD3d 517, 517 [1st Dept 2014]). The proposed second amended answer contains only vague, conclusory allegations that merely recite the elements for a fraud cause of

action, which is insufficient (see *Meiterman v Corporate Habitat*, 173 AD3d 593, 594 [1st Dept 2019]). In addition, the proposed amended second answer fails to plead nonconclusory facts from which fraudulent intent may be inferred (see *Fried v Lehman Bros. Real Estate Assoc. III, L.P.*, 156 AD3d 464, 465 [1st Dept 2017], *lv denied, lv dismissed* 31 NY3d 1137 [2018]). Thus, defendant has failed to demonstrate the arguable merit to its proposed second amended answer.

Furthermore, a party invoking the special facts doctrine must establish that "the material fact was information peculiarly within the knowledge of one party and that the information was not such that could have been discovered by the other party through the exercise of ordinary intelligence" (*LMM Capital Partners, LLC v Mill Point Capital, LLC*, 224 AD3d 504, 508 [1st Dept 2024] [internal quotation marks and citation omitted]). The proposed amended second answer fails to plead any nonconclusory facts from which it may be inferred that defendant could not have discovered the rate notices and negative balances issued by the Division of Unemployment Insurance of the New York State Department of Labor through the exercise of ordinary intelligence (see *New York City Waterfront Dev. Fund II, LLC v. Pier A Battery Park Assocs., LLC*, 206 AD3d 565, 567 [1st Dept 2022]).

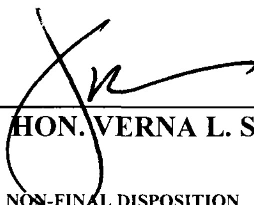
Last, defendant failed to furnish the court with a "proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading" (CPLR 3025[b]). The proposed pleading submitted on the application purports to show the changes made to its prior second amended answer, but as discussed earlier, service of this answer was a nullity. Because defendant has not offered a proposed amended second answer showing the changes made to its amended answer from April 2018, the motion must be denied on this ground, as well (see *Wiltz v New York Univ.*, 217 AD3d 521, 522 [1st Dept 2023]). Accordingly, it is

ORDERED that the motion brought by defendant The Weeks-Lerman Group, LLC for leave to serve a second amended answer and amended counterclaims is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant.

This constitutes the decision and order of the court.

May 7, 2024



HON. VERNA L. SAUNDERS, JSC

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**