

Valdez v 1828 Richmond Terrace, LLC

2024 NY Slip Op 34618(U)

December 18, 2024

Supreme Court, Kings County

Docket Number: Index No. 529642/2022

Judge: Devin P. Cohen

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**Supreme Court of the State of New York
County of Kings**

Index Number 529642/2022
Seqs. 001-003

Part LLIM

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

ENRIQUE VALDEZ,

Plaintiff,

against

1828 RICHMOND TERRACE, LLC AND CPS
CONTRACTING COMPANY, INC.,

Defendants.

1828 RICHMOND TERRACE LLC AND CPS CONTRACTING
COMPANY, INC.,

Third-Party Plaintiff,

against

PENTICO GROUP NYC, INC.,

Third-Party Defendant.

Papers Numbered	
Notice of Motion and Affidavits Annexed	<u>1-3</u>
Order to Show Cause and Affidavits Annexed	<u> </u>
Answering Affidavits	<u>4-6</u>
Replying Affidavits	<u> </u>
Exhibits	<u>Var.</u>
Other	<u> </u>

Upon the foregoing papers, third-party defendant Pentico Group NYC, Inc. (Pentico)'s motion to amend its answer (Seq. 001), defendants 1828 Richmond Terrace, LLC (Richmond) and CPS Contracting Company, Inc. (CPS)'s cross-motion to amend their answer (Seq. 002),¹ and plaintiff's cross-motion for sanctions (Seq. 003) are decided as follows:

¹ Richmond and CPS filed a purported "notice of withdrawal without prejudice" on September 26, 2024, after oral argument and after decision was reserved on this motion. Although a party generally has the right to withdraw a motion at any time before its submission (2 Carmody-Wait 2d § 8:9), allowing a party to withdraw a motion while it is *sub judice* opens the door to successive motions where counsel has effectively been coached by the colloquy between counsel and the court. Therefore, Richmond and CPS are not permitted to withdraw their motion and it will be decided on the merits here.

Procedural Posture and Factual Background

Plaintiff commenced this action to recover for damages he claims to have sustained on September 30, 2022 when he fell from a scaffold (*see* complaint). It is uncontested that the premises where plaintiff allegedly fell, 270 19th Street, Brooklyn, NY, is owned by defendant Richmond and that defendant CPS was hired as the contractor.

Analysis

As an initial matter, a cross-motion can only be served on a moving party (CPLR 2215). Therefore, defendants Richmond's and CPS's cross-motion is procedurally improper. Additionally, Pentico's motion seeks to amend its third-party answer to assert an affirmative defense of fraud predicated on treatment plaintiff received, but Pentico does not have any direct claims against it by the plaintiff. Therefore, fraud would not constitute a meritorious defense to the claims in the third-party complaint.

Amendment

On the merits, leave to amend pleadings pursuant to CPLR 3025 (b) is generally liberally granted. However, that general rule is limited by certain circumstances—permission to amend is “committed to the broad discretion of the trial court” and the proposed amendments must be adequately plead (*Vorobichik v Greenpoint Goldman SM, LLC*, 164 AD3d 866, 866 [2d Dept 2018]). In particular, fraud must be plead “in detail,” or “with particularity,” whether as a cause of action or as a defense (CPLR 3016 [b]; (*Matter of Clarke v Wallace Oil Co., Inc.*, 284 AD2d 492, 492–93 [2d Dept 2001]). “The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation . . . and damages” (*Eva Chen Fine Jewelry, Inc. v Recovery Racing IX, LLC*, 222 AD3d 840, 842 [2d Dept 2023]).

Defendant and third-party defendant have failed to plead the elements of fraud with particularity. The defendants' proposed amendment is not based on any indication that the plaintiff *individually* made false or misleading representations. Moreover, the defendants do not claim to have justifiably relied on any such misstatements; indeed, the fact that defendants are actively litigating this matter indicates that they are *not* relying on any statements plaintiff has made about his alleged accident. Therefore, defendants' proposed amendment states neither a viable cause of action nor an affirmative defense of fraud (*see Vorobichik*, 164 AD3d at 866–867).

Moreover, there is no logical correspondence between the allegations contained in a RICO complaint (which at this stage are still only allegations) and the actual facts of this plaintiff's accident. Defendants do not provide any particular and specific allegations that *this* plaintiff, in *this* action, committed fraud. Instead, defendants' claim that the RICO suit, in which this plaintiff is not named or mentioned, provides these defendants with a "good faith basis" for believing that this accident was staged. This argument does not logically follow.

Defendants also do not provide a justifiable excuse for delay in filing a motion to amend. The RICO complaint is predicated on a long history of alleged wrongdoing by the RICO defendants. The fact that these accusations were more recently memorialized in a RICO complaint does not excuse defendant's delay in asserting its affirmative defenses once the plaintiff served his expert disclosures, or in a timely way thereafter. Moreover, the RICO complaint does not constitute new facts or evidence sufficient to warrant defendants' request to amend its pleadings, as that complaint is merely a vehicle for allegations.


This decision is made based on the motions, papers, and arguments before the court, and does not reflect the court's assessment of any matters not currently at bar, including the merits of any pending Federal RICO action or any duly commenced claim for fraud.

Conclusion

Pentico's motion to amend (Seq. 001) and Richmond's and CPS's cross-motion to amend (Seq. 002) are denied. Plaintiff's cross-motion for sanctions (Seq. 003) is also denied, as it appears that Pentico's, Richmond's, and CPS's arguments, though unsuccessful, are not evidence of actions rising to the level of sanctionable conduct.

This constitutes the decision of the court.

December 18, 2024
DATE



DEVIN P. COHEN
Justice of the Supreme Court