SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----------x

SUZANNE ROFF-WEXLER,

Plaintiff,

-against-

MORANDI LLC and CHARLES 15 ASSOCIATES,

Defendants.

----------x

Index No. 160031/15
Motion Seq. 001

DECISION & ORDER

SHERRY KLEIN HEITLER, J.S.C.

In this personal injury action, defendants Morandi LLC (Morandi) and Charles 15 Associates (Associates) (collectively, Defendants) move pursuant to CPLR 3025 for an order deeming their proposed amended answer consented to by the plaintiff, Suzanne Roff-Wexler (Plaintiff). In the alternative Defendants move for an order granting them judicial leave to serve amended answers without Plaintiff's consent. Plaintiff opposes, arguing among other things that it cannot consent to Defendants' proposed amendments without first being provided with certain discovery.

Plaintiff alleges that Ms. Wexler fell and was injured on August 20, 2014 on the sidewalk adjacent to the building located at 211 Waverly Place in Manhattan (Building). According to Plaintiff, the Building was owned by defendant Associates at the time of the accident (Exhibit C, ¶ 22):

> That at all times hereinafter mentioned, the defendant Associates, owned a building within the City, County, and State of New York, being known as 211 Waverly Place

Associates' initial response to this allegation, which is contained within its February 29, 2016 answer, was that it did in fact own the Building (Exhibit E, ¶ 1):

> [Associates] admits the allegations contained in paragraphs labeled "TWENTY-FIRST", "TWENTY-SECOND" and "TWENTY-THIRD," of the Plaintiff's Verified Complaint.

[1]

Associates hired new counsel in January of 2017 who served Plaintiff with the amended answers at issue on June 9, 2017. They reflect Associates' current position that it did not own all of the units within the Building at the time of Plaintiff's accident, as follows (Exhibit B, ¶ 5):

> Deny the allegations contained in paragraph 22 of plaintiff's verified complaint, except to admit that on August 20, 2014, and all other times hereinafter mentioned, Charles 15 Associates owned a commercial unit, garage unit and multiple residential units within the building located at 211 Waverly Place (also known as 15 Charles Street), as well as an undivided interest in the common elements of that building.

Defendants' cover letter requested that Plaintiff execute and return a stipulation permitting the amendment within 10 days (Exhibit L):

> To avoid the filing of an unnecessary motion, we ask that you promptly sign and return, within 10 days, the stipulation that is also enclosed to permit the amended answers.

On July 19, 2017, approximately 40 days later, Plaintiff's counsel advised the Defendant that he could not consent to the amendments in light of outstanding discovery.[1]

Defendants argue that because Plaintiff should have stated any objections to the amended answers within 10 days of receipt of same they should be deemed consented to as of June 19, 2017. Plaintiff responds that it has always been willing to entertain Defendants' request but has not received documents from Defendants that it would need before making that determination, namely the Building's Declaration of Condominium and Offering Plan.

DISCUSSION

A defendant seeking to amend its answers more than twenty days after service of its original answer must seek consent from all parties or judicial approval pursuant to CPLR 3025, which in relevant part provides:

> (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

[1] Plaintiff's exhibit 1.

> 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.
>
> (c) Amendment to Conform to the Evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.

"It is well established that leave to amend a pleading [pursuant to CPLR 3025(b)] is freely given 'absent prejudice or surprise resulting directly from the delay.'" *Anoun v City of New York*, 85 AD3d 694, 694 (1st Dept 2011) (quoting *Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). "A party opposing leave to amend 'must overcome a heavy presumption of validity in favor of [permitting amendment].'" *McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012) (quoting *Otis El. Co. v 1166 Ave. of Ams. Condominium*, 166 AD2d 307 [1990]). Courts considering motions to conform pleadings pursuant to CPLR 3025(c) are afforded "the widest possible latitude" in allowing such an amendment (*Murray v New York*, 43 NY2d 400, 405 [1977]) and it would be an abuse of discretion to deny such a request absent "operative prejudice" to the other parties (*Shine v Duncan Petroleum Transport, Inc.*, 60 NY2d 22, 27 [1983]). "It is an abuse of discretion to deny a motion to conform unless the opposing party can allege demonstrable and real surprise or prejudice." *General Electric Co. v A.C. Towne Corp.*, 144 AD2d 1003, 1004 (4th Dept 1988).

There is some caselaw to support Defendants' proposition that a plaintiff who receives an amended answer but does not reject it may be deemed to have consented to the amendment. *See Jordan v Aviles*, 289 AD2d 532, 533 (2d Dept 2001). However, there is no statute, rule, or caselaw that would categorically require a plaintiff to reject an amended answer within 10 days. What is important in this case is that Plaintiff's counsel clearly expressed his concerns about the

proposed amendment in writing within a reasonable time period after receiving same.[2] There is nothing in the record to show that Defendants responded to Plaintiff's concerns. Under these circumstances, I decline to find that Plaintiff consented to Defendants' proposed amendment by omission.

Notwithstanding, the amendment should be permitted as a matter of law. In support of its motion Defendants submit the June 5, 2017 testimony of Associates' vice president of asset management, James Seiler.[3] According to Mr. Seiler, Associates sponsored the conversion of the Building to condominium units in the early 1990's but since then has not sold all of the residential units. Mr. Seiler testified that approximately 40 units in the building continue to be owned by Associates, including residential units, a parking garage, and a commercial unit (Seiler Deposition pp 16-18). Defendant Morandi, according to Mr. Seiler, has operated its business out of the Building's commercial unit since 2006 (*id.* at 34).

In addition to Ms. Seiler's testimony, the veracity of the amended pleadings is supported by government records which are annexed to the moving papers. Defendants have also set forth a persuasive argument as to why the amendment will not cause Plaintiff any prejudice, i.e, that amending their answers to more accurately reflect Associates' ownership interest in the building is immaterial given Plaintiff's testimony that she fell on the sidewalk in front of the commercial unit as opposed to inside one of the residential units.

Plaintiff has however demonstrated a need for important disclosure. In this regard, Plaintiff contends that the Building's Offering Plan requires Associates to relinquish majority control once a certain number of units have been sold. Whether this took place before the accident, during the pendency of this action, or has not yet happened is unclear. And as

---

[2] Plaintiff's exhibit 1.
[3] Moving papers, exhibit J (Seiler Deposition).

Plaintiff's counsel points out, Defendants' amendment may not be ministerial. Nonetheless Plaintiff is entitled to explore these issues through the Declaration of Condominium, Offering Plan, any other related documents, and depositions. These documents are highly relevant to this dispute and are clearly within Defendants' possession. They must be produced.

Accordingly, it is hereby

ORDERED that Defendants' motion is granted; and it is further

ORDERED that Defendants are directed to serve amended answers consistent with the moving papers within 10 days of the date of entry of this decision and order; and it is further

ORDERED that, within 10 days of such service, Plaintiff shall serve Defendants with document requests consistent with those made in its July 19, 2017 letter and in its opposition to this motion; and it is further

ORDERED that Defendants are directed to serve proper and complete responses to such document requests within 20 days of receipt thereof.

This constitutes the decision and order of the court.

DATED: Oct 13, 2017

SHERRY KLEIN HEITLER, J.S.C.