Domen Holding Co. v Aranovich
2004 NY Slip Op 30373(U)
July 15, 2004
Supreme Court, New York County
Docket Number: 123182/00
Judge: Alice Schlesinger

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

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DOMEN HOLDING CO., a Partnership,

Plaintiff,

-against-

Index No. 123182/00
Motion Seq. No. 04

IRENE S. ARANOVICH, ET AL.,

Defendants.

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SCHLESINGER, J.:

This is an action by the landlord, Domen Holding Co. ("Domen"), seeking ejectment of tenants Irene S. Aranovich and Jorge Aranovich and their roommate Geoffrey Warren Sanders, for alleged nuisance caused by Sanders. Defendant Irene Aranovich has moved herein for leave to amend her answer pursuant to CPLR 3025(b) to add a counterclaim for attorneys' fees. Plaintiff Domen vigorously opposes the motion. Defendants Jorge Aranovich and Sanders, who represent themselves, take no position. For the reasons set forth below, defendant's motion is granted.

The Standard for Leave to Amend

CPLR 3025(b) provides in pertinent part that: "Leave [to amend] shall be freely given upon such terms as may be just . . . ." The court should allow the amendment absent prejudice or surprise which the movant's delay in asserting the claim causes the non-moving party. See Edenwald Contractins Co. v. City of New York, 60 NY2d 957, 958 (1983); Fahev v. County of Ontario, 44 NY2d 934, 935 (1978). Prejudice, in this context, is "some special right lost in the interim, some change *of* position or some significant trouble or expense that could have been avoided had the original pleading contained what

the amended one wants to add." A.J. Pegno Const. Corp. v. City of New York, 95 AD2d 655, 656 (1st Dep't 1983), quoting Siegel, NY Prac § 237 p 289 (1st ed).

Additionally, the court must determine that the proposed amendment has some merit. However, the standard for merit is "demonstrably different from the standards applied to either a CPLR 3211 motion to dismiss or a CPLR 3212 motion for summary judgment." Daniels v. Empire-Orr, Inc., 151 AD2d 370, 371 (1st Dep't 1989). As explained in Daniels, to determine whether the proposed pleading has merit, the *court* applies a *two*-part test:

> First, the proponent must allege legally sufficient facts to establish a prima facie cause of action or defense in the proposed amended pleading . . . . The next step is for the nisi prius court to test the pleading's merit. . . . The merit of a proposed amended pleading must be sustained, however, unless the alleged insufficiency or lack of merit is clear and free from doubt.

Id. Finally, the decision whether to grant a motion to amend is committed significantly to the court's discretion. See Murray v. City of New York, 43 NY2d 400, 404-05 (1977).

Defendant's Proposed Amendment

In the instant action, defendant proposes amending her answer to add a counterclaim for attorneys' fees. She argues that she did not delay in asserting the counterclaim, since she was barred from originally asserting such a counterclaim by a federal prohibition levied against her counsel. Some background is necessary on this point.

In 1974 Congress enacted the Legal Services Corporation Act ("Act") and thereby created a federally funded agency to provide legal counsel to those litigants who would otherwise be unable to afford it. See 42 USC 2996 *et seq.* In the Omnibus Consolidated

Rescissions and Appropriations Act of 1996, Congress promulgated new restrictions on recipients of Legal Services Corporation ("LSC") monies. Amongst other restrictions, is a bar against recipients claiming or collecting attorneys' fees. See § 504(a)(13), Pub L 104-134, 110 Stat 1321; see also 45 CFR 1642.

Since the commencement of this action in 2000, defendant has been represented by MFY Legal Services ("MFY"). In 2000 when MFY appeared and answered on behalf of defendant, it was receiving federal funding through LSC and it was thus barred from including a counterclaim for attorneys' fees in the original answer. However, on January 1, 2003, MFY ceased receiving LSC funding to be free from the restrictions. Thereafter, defendant made the instant motion to amend.

Plaintiff contends that the over one-year delay between MFY's relinquishment of LSC funds and the motion to amend is excessive and prejudicial. However, defendant counters, and this Court agrees, that defendant did move to amend within a reasonable time. On January 1, 2003 this case was pending at the Court of Appeals on plaintiffs appeal from the Appellate Division's affirmance of this Court's grant of summary judgment to the defendant, which had dismissed the action. In fact, it was not until November 24, 2003 that the Court of Appeals decided the appeal and reinstated the action. See Domen Holding Co. v. Aranovich, 1 NY3d 117 (2003). Defendant moved to amend on February 4, 2004, which was a reasonable time after the November 2003 decision, particularly considering that the parties first attempted to resolve the issue informally.

Further, and most importantly here, any alleged delay has not resulted in prejudice to the non-moving party. Although, plaintiff maintains that it has been prejudiced by defendant's delay in asserting the counterclaim, it has failed to demonstrate actual

prejudice. Plaintiff contends that, had the attorneys' fees claim been included in defendant's original answer, plaintiff might have followed a different procedural course after this Court dismissed the action. This speculative claim, however, does not rise to the level of prejudice necessary to deny a 3025(b) motion. Plaintiff has not presented any case law to persuasively support its claim of prejudice. Plaintiff has not lost a legal right. See A.J. Pegno Const., 95 AD2d at 656. Moreover, "[p]rejudice, of course, is not found in the mere exposure of the [plaintiff] to greater liability." Loomis v. Civetta Corinno Const. Corp., 54 NY2d 18, 23 (1981).

Plaintiff also argues that the delay in asserting the counterclaim has caused surprise, and that is reason enough for this Court to deny the motion. To support this argument, plaintiff insists that defendant had the opportunity to reserve her right to assert an attorneys' fees claim, and she failed to do so. Plaintiffs argument is faulty in two respects. First, defendant was not able to reserve her right to claim attorneys' fees. Congress forbids LSC recipients not only from collecting attorneys' fees, but also from *seeking* attorneys' fees, stating that: "None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity that *claims* (or whose employee claims), or collects and retains, attorneys' fees . . ." See § 504(a)(13), Pub L 104-134, 110 Stat 1321 (1996) (emphasis added). Since MFY was still receiving funding until January 1, 2003, defendant could not reserve her right before that date, as LSC could interpret that action as seeking attorneys' fees in violation of LSC regulations. See 45 CFR 1642.3. Secondly, a seasoned landlord such a Domen is surely aware of the reciprocal right to attorneys' fees granted to tenants by Real Property Law § 234 (see below), and thus should not have been surprised by the defendant's counterclaim for those fees.

In addition to the absence of prejudice or surprise to the plaintiff caused by any delay in defendant's assertion of the counterclaim, the counterclaim for attorneys' fees has merit. In the lease agreement between Domen and Aranovich, Domen provided for itself a right to seek attorneys' fees in any action on the lease. Pursuant to Real Property Law § 234 a tenant has a reciprocal right to seek attorneys' fees if the lease provides the landlord with that right.[1] This statute gives the tenant, defendant Aranovich, a legal right to seek attorneys' fees in this action.

Plaintiff responds to this claim by arguing that since the action was commenced while MFY was bound by the LSC restrictions, those restrictions apply to the entire litigation. While citing no case law to support its position, plaintiff heavily relies on the legislative intent as evidenced by the House Appropriations Committee Report, as well as the Conference Committee Report. See HR Rep No. 104-196, 104th Cong, 1st sess at 78 (1995); Conference Committee Report, HR Rep No. 104-378, 104th Cong, 1st sess (1995). Yet neither of those Reports discusses this specific controversy: whether a recipient who stops accepting LSC funding after appearing in an action continues to be bound by LSC restrictions. The Reports speak solely to "recipients" or "grantees" of LSC monies, meaning entities currently receiving LSC funds.

Also relevant to this decision are the opinions of LSC itself. A federal agency is given considerable respect and deference in the manner in which it interprets its own governing regulations. See Ford Motor Credit Co. v. Milhollin, 444 US 555, 566 (1980); Bowles v. Seminole Rock & Sand Co., 325 US 410, 413-14 (1945). Congress has charged LSC with the duty to enforce compliance with the Act "to insure uniform and consistent

[1] Section 234 provides in pertinent part: "Whenever a lease of residential property shall provide that in any action . . . the landlord may recover attorneys' fees . . . there shall be implied in such lease a covenant by the landlord to pay *to* the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant."

interpretation and application of the Act, and to prevent a question of whether the Act has been violated from becoming an ancillary issue in any case undertaken by a recipient." 45 CFR § 1618.1.

Significantly, attached as Exhibit B to defendant's moving papers is a March 1, 2004 letter (which was originally solicited by plaintiffs counsel *in* this case) written by the LSC Office of Legal Affairs. In the letter, LSC counsel states that "there is no controlling authority obligating a former LSC recipient to adhere to LSC's attorneys' fees restrictions." The letter affixes an August 7, 2003 letter written by the LSC Office of Compliance and Enforcement, in response to a complaint filed by the defendant in Marin Family Action, et. al. v. Town of Corte Madera, CA 174793, Marin County Superior Court, under circumstances remarkably similar to the circumstances here.

In Marin, Legal Aid of Marin ("LAM") and/or Legal Aid of North Bay ("LANB") filed an action on behalf of plaintiffs against the Town while LAM/LANB was a recipient of LSC funds. LAM/LANB did not request attorneys' fees when the action was commenced in 1997. At or about the end of 2000, while the litigation was ongoing, LAM/LANB ceased to be a recipient due to a reconfiguration of its program, but it continued its representation of the plaintiff. In July 2002, about 18 months after it ceased being a recipient, LAM/LANB filed a motion requesting attorneys' fees for *all* its efforts in the litigation. The court granted the motion and the Town filed a complaint with LSC which was determined by the August 7, 2003 letter.

LSC concluded that the claim for attorneys' fees was "not inconsistent with the LSC Act, regulations or other applicable law." LSC explained that the attorneys' fees restrictions promulgated in the Appropriations Resolution and codified at 45 CFR § 1642.3 are "limited in their applicability to the activities of 'recipients', meaning a grantee or contractor receiving

financial assistancefrom LSC under42 USC§ 2996e(a)(1)." LSC noted that Congress had specified a list of restrictions that survive the grant relationship, and noted further that Congress did not include the attorneys' fees restriction in that list. LSC then concluded as follows:

> Here, there is no such statutory, regulatory, or contractual authority obligating a former recipient to adhere to LSC's attorneys' fees restrictions. Absent such authority, LSC is unable to conclude that LAM/LANB claim for attorneys' fees, after it ceased to be a recipient, or sub-recipient, of LSC funds violated the LSC Act, regulations, or other applicable authority.[2]

Plaintiff staunchly disputes the LSC's analysis and conclusions, describing the letter as a "non-binding opinion letter" which puts forth a "self-serving and antithetical interpretation of the statute." (Plaintiff's Memorandum of Law at 17.) The Court is not persuaded by plaintiff's arguments.

Based on the opinion letters authored by LSC and the governing law and regulations, this Court finds that the defendant is not barred from asserting a counterclaim for attorneys' fees at this time simply because her counsel was once a recipient of LSC monies. Therefore, since the proposed counterclaim is not lacking in merit the Court will permit the amendment.

However, the Court declines to determine the extent of the award at this time. Attorneys' fees are awarded to the prevailing party, who is determined upon the "ultimate outcome of the controversy." Elkins v. Cinera Realty, Inc., 61 AD2d 828, 828 (2d Dep't

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[2] Defendant also relies on LSC External Opinion, #EX-2003-1005 dated March 20, 2003, and directed to all LSC Porogram Executive Directors regarding attorneys' fees. In the opinion, the LSC Office of Legal Affairs states that if a client leaves an LSC funded recipient, the recipient is allowed to provide its time records to the **new** private counsel to facilitate a claim for attomcys' fees if the client is the legal owner of the fees sought (which appears to be the case here based on Real Property Law §234).

1978); see also Mosesson v. *288198* West End Tenants Corp., 294 AD2d 283 (1st Dep't 2002). Since, at this early stage of the litigation, discovery has yet to begin and the prevailing party is yet to be determined, it is unnecessary for this Court to determine the specific issue whether defendant, once released from LSC restrictions, may recover attorneys' fees related to the period when its attorneys were recipients of LSC funds. The motion before the Court is simply for leave to amend the answer, not for a determination of the extent or the amount of those attorneys' fees.

Plaintiff also argues that defendant's motion should be denied because defendant has wrongfully included in her answer an objection in point of law alleging failure to state a cause of action. Plaintiff argues that once the Court of Appeals modified the lower court's decision granting summary judgment to the defendant and remanded the action for trial on the merits, it was conclusively determined that plaintiff has, in fact, stated a cause of action. Relying on principles of *res judicata* and collateral estoppel, plaintiff claims that defendant is barred from re-asserting the objection in point of law in her proposed amended answer.[3] Thus, plaintiff contends, the proposed pleading lacks merit and the defendant's motion should be denied.

However, the case law plaintiff cites does not support this contention. On the contrary, the cited cases simply reaffirm that, absent surprise or prejudice, the motion should be freely granted. See, e.g., Hartford Casualty Ins. Co. v. Vengroff Williams & Assocs., Inc., 306 AD2d 435 (2d Dep't 2003) (cited at p. 5 of Plaintiffs Memorandum of Law). As explained above, the plaintiff has not established prejudice. Failure to state a cause of action is a general non-waivable defense, the maintenance of which causes no legal harm to the plaintiff. Moreover, there is no support for the claim that repleading even

[3] Although *res judicata* and collateral estoppel only apply to final judgments, the same principle applies to decisions within the procedural history of a single action through the judicially created doctrine of "law of the case." See Siegel, *NY* Prac § 448 (3d ed).

a meritless objection in point of law can undermine the legal merit of the entire proposed amended answer.

Plaintiff also adds that the motion should be denied because defendant's proposed amended answer wrongfully continues to include a counterclaim for breach of warranty of habitability. Plaintiff claims that since this Court severed defendant's original counterclaim for breach of warranty of habitability and transferred the claim to Civil Court, the claim cannot now be brought before this Court. However, this Court's rationale for severing the counterclaim was that, since the original action had been dismissed on summary judgment, the defendant would need a forum to litigate the warranty of habitability counterclaim. Given that the case has been remanded, this Court is now a proper forum for defendant to litigate the counterclaim. There is no demonstrated risk that defendant will litigate that claim in both Civil Court and Supreme Court, as plaintiff contends.

Conclusion

Defendant has established her right to amend her answer to include a counterclaim for attorneys' fees. Plaintiff has not established any prejudice or surprise caused by defendant's delay in asserting the claims sufficient to defeat the proposed amendment. Plaintiffs speculative claim that it might have sought a different procedural course had it known of the claim earlier does not constitute prejudice, and plaintiff has not provided any cases to the contrary.

Also, there has not been a showing that defendant's proposed amended answer is plainly devoid of legal merit. Defendant, as a tenant, has a statutory right to seek attorneys' fees from her landlord, Since defendant's counsel is no longer a recipient of LSC funding, counsel is not barred by federal restrictions from seeking attorneys' fees on defendant's behalf pursuant to RPL § 234, at least prospectively from the date that MFY ceased

receiving LSC funding, and any right to seek attorneys' fees retroactively need not be determined at this time.

Accordingly it *is* hereby

ORDERED that the defendant's motion to amend the answer herein is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry *thereof.*

This constitutes the decision and order of this Court.

Dated: July 15, 2004

JUL 15 2004

J.S.C.

ALICE SCHLESINGER

FILED

JUL 22 2004

COUNTY CLERK'S OFFICE