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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ PART _____

Justice

Index Number : 116450/2008

BRYANT, JOHN LANDRUM

VS.

CHRISTOPHER HYLAND, INC.

SEQUENCE NUMBER : 005

AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

otion to/for _____

_____ | No(s). _____

_____ | No(s). _____

_____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

FILED

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____
FOR THE FOLLOWING REASON(S): _____

Dated: _____

_____, J.S.C.
CYNTHIA S. KERN

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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JOHN LANDRUM BRYANT and PATRICIA BAUMAN,

Plaintiffs,

Index No. 116450/08

-against-

DECISION/ORDER

CHRISTOPHER HYLAND, INC. and CHRISTOPHER HYLAND,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Notice of Cross Motion and Answering Affidavits	
Affirmations in Opposition to the Cross-Motion	
Replying Affidavits	2
Exhibits	3

Defendants' motion for an order pursuant to CPLR §§3025(b) and (c) granting them leave to amend their second amended verified answer to include a counterclaim for quantum meruit and for an order pursuant to CPLR §§5001(b) and (c) setting October 29, 2008 as the date by which interest should be computed for entry of judgment is denied in part and granted in part for the reasons set forth below.

The relevant facts are as follows. Plaintiff commenced the instant action sounding in breach of contract to recover damages stemming from defendants' work on certain drapery in plaintiffs' apartment. The scope of said work was outlined in a contract signed by both plaintiffs

and defendants. In their answer, defendants brought a counterclaim against plaintiffs for breach of contract attempting to recover the contract price. Defendants, however, did not bring a counterclaim for quantum meruit. A jury trial of this action began before this court on May 24, 2011 and the jury rendered its verdict on June 3, 2011 in favor of defendants. Specifically, the jury awarded to defendants $100,479.10 under that portion of the verdict sheet that required the jurors to "[s]tate the amount of damages defendants incurred as a result of plaintiffs' repudiation of the contract."

It is well-settled that pursuant to CPLR 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit. On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or devoid of merit." *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted). Although CPLR 3025 permits the court, either "during or after trial," to amend pleadings to conform to the evidence adduced at trial, it will not be permitted if undue prejudice results or if the evidence was not adduced at trial in the first place. *See Rothstein v. City of New York*, 194 A.D.2d 533 (2d Dept 1993).

In the instant case, defendants' motion for leave to amend their second verified amended answer, post-verdict, to add a counterclaim for quantum meruit is denied as the proposed amendment is a surprise that would prejudice plaintiffs and is devoid of merit. The requested amendment is a surprise as defendants presented no evidence at trial that they expected to receive anything beyond the contract balance. While defendants point to e-mails and trial testimony that perhaps support an assertion that defendants did more work than they expected to under the

contract, there is a big difference between doing more work than expected under the contract and expecting payment for that additional work under a claim for quantum meruit. Furthermore, neither party's attorney mentioned a quantum meruit claim in their closing arguments at trial, the court gave no jury instructions regarding a claim for quantum meruit and the verdict sheet made no mention of such a claim. It was only after the jury awarded damages for "additional work" that defendants raised the issue of asserting a counterclaim for quantum meruit. The surprise of this new claim is prejudicial to plaintiffs in that they have not made an effort to obtain discovery regarding the elements of a quantum meruit claim and were not able to offer testimony, other evidence, arguments or cross-examination at the trial regarding such claim.

Additionally, defendants' claim for quantum meruit is devoid of merit. The elements of a claim for quantum meruit are: (1) the performance of services in good faith; (2) the acceptance of services by the person to whom they are rendered; (3) an expectation of compensation; and (4) the reasonable value of the services. *See Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 (1st Dept 2011). Additionally, defendants must show that there is no contract that governs the subject matter of the services that form the basis for the quantum meruit claim. *See Baumberger Capital v. Canaan Partners*, 235 A.D.2d 216 (1st Dept 1997) (holding that plaintiff is precluded from seeking damages under the quasicontractual theory of quantum meruit given the existence of a contract governing the relationship between the parties.) In the instant case, defendants' claim of quantum meruit has no basis as they cannot make out the elements of such a claim. First, there is no evidence that defendants had an expectation of compensation for their additional work. While there exists evidence they completed additional work, defendants have not shown that they expected additional payment above and beyond the contract price. Second, there is no evidence that defendants are able to reasonably value the additional services performed. The

jury's calculation of the amount of damages it awarded to plaintiff regarding the additional work performed was speculative, and thus, insufficient to determine the reasonable value of the additional work performed. Further, the design work that is the basis of defendants' quantum meruit claim is within the subject matter of the existing contract between the parties, and is thus governed by that contract. *See Baumberger Capital*, 235 A.D.2d 216.

Finally, that part of defendants' motion seeking an order pursuant to CPLR §§5001(b) and (c) setting October 29, 2008 as the date by which interest should be computed for entry of judgment is granted. Pre-verdict interest accrues from the later of "the earliest ascertainable date the cause of action existed" and "the date [the damages were] incurred." CPLR §5001(b). October 29, 2008 is the date from which interest should be computed for entry of judgment because that is the earliest ascertainable date the cause of action existed and it is also the date defendants damages were incurred due to plaintiffs' repudiation. As demonstrated by the jury's verdict, plaintiffs wrongfully repudiated the contract when they forwarded an e-mail to defendants on October 29, 2008, cancelling the contract. Thus, pre-judgment interest on the breach of contract claim must be computed from October 29, 2008.

Accordingly, that part of defendants' motion for an order pursuant to CPLR §§3025(b) and (c) granting them leave to amend their second amended verified answer to include a counterclaim for quantum meruit is denied and that part of defendants' motion for an order pursuant to CPLR §§5001(b) and (c) setting October 29, 2008 as the date by which interest should be computed for entry of judgment is granted. This constitutes the decision and order of the Court.

Date: 11/18/11

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.