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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. Justice

PART 48

Index Number : 106791/2008
LIVATHINOS, SPYRIDON
vs
VAUGHAN, ROBERTA F.
Sequence Number : 008
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

"This motion is decided in accordance with the annexed decision and order of the Court."

FILED
MAY 31 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/30/13

_____, J.S.C.
JEFFREY K. OING
J.S.C.

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: IAS PART 48

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Spyridon Livathinos,

Plaintiff,

- against -

Roberta F. Vaughan, individually and as president of Trinity Stewart Associates, Inc., The Trinity Stewart Condominium and 8 Warren Realty Corp.,

Defendants.

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Index No.: 106791/08

Mtn. Seq. No. 008

DECISION AND ORDER

James S. Vaughan,

Plaintiff,

- against -

Roberta F. Vaughan, Trinity Stewart Associates, Inc., 8 Warren Realty Corp., and Spyridon Livathinos,

Defendants.

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Index No.: 104519/09

Sypridon Livathinos,

Plaintiff,

- against -

Roberta F. Vaughan and 287 Realty Corp.,

Defendants.

----------x

Index No.: 32529/08
(Orig. Kings County)

JEFFREY K. OING, J.:

Plaintiff Spyridon Livathinos moves pursuant to CPLR 3025 for leave to amend the complaint in the first and third captioned actions and to amend the answer in the second captioned action.

It is well settled that leave to amend the pleadings under CPLR 3025(b) is to be freely given and denied only where there is prejudice or surprise resulting from the delay to the opposing party, or if the proposed amendment is "palpably improper or insufficient as a matter of law" (McGhee v Odell, 96 AD3d 449 [1st Dept 2012][quotation and citation omitted]). The party opposing leave to amend must overcome a heavy presumption in favor of the proposed amendment. Mere delay, without more, is not sufficient to defeat a motion for leave to amend (Kocourek v Booz Allen Hamilton Inc., 85 AD3d 502, 504 [1st Dept 2011]). Rather, "[p]rejudice requires some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (Id., citing Cherebin v Empress Ambulance Serv., Inc., 43 AD3d 364, 365 [1st Dept 2007] [quotation omitted]). Ultimately, whether to grant leave to amend is within the sound discretion of the court deciding the motion (Surgical Design Corp. v Correa, 31 AD3d 744, 745 [2d Dept 2006]).

Here, the motion to amend is unquestionably brought at a late juncture; in fact, plaintiff's note of issue in this case was due to be filed on April 11, 2013, the same date as the instant motion was made returnable in the Motion Submissions Part. Moreover, this action was initially commenced in 2008 - some five years ago - and plaintiff, thus, had ample time to move

for the requested relief. Nevertheless, courts have granted motions for leave to amend even after a Note of Issue had been filed; comparatively, the length of delay in this case - though substantial - is not sufficient to deny amendment on that basis unless that lateness is also coupled with significant prejudice to the other side.

In arguing against leave to amend, defendants contend that, among other things, the motion is procedurally defective because it is not accompanied by a certificate of merit and plaintiff's moving papers fail to give any excuse for the delay in seeking an amendment. Plaintiff, in turn, contends that defendants' argument that an affidavit of merit is required relies on "outdated law," citing the Second Department decision in Lucido v Mancuso, 49 AD3d 220, 224-9 (2d Dept 2008) (Ptf. Reply Aff., ¶¶ 25-26). The Court in Lucido thoroughly examined the history of CPLR 3025 and held that cases "involving CPLR 3025(b) that place the burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed. No evidentiary showing of merit is required under CPLR 3025(b)" (Id.). While the First Department has not directly addressed the issue, it did cite Lucido with approval in MBIA Ins. Corp. v Greystone & Co., Inc., explaining that "[o]n 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 clearly devoid of merit" (74 AD3d 499, 500 [1st Dept 2010]). The defendant in MBIA Ins. Corp., in fact, raised the same argument regarding an affidavit of merit. The Court rejected it and held that "the proposed amendment was supported by a sufficient showing of merit through the submission of an affirmation by counsel, along with a transcript of relevant deposition testimony" (MBIA Ins. Corp., 74 AD3d at 499).

Likewise, here, plaintiff has met his burden to show that the preferred amendment is not palpably insufficient or patently devoid of merit. Here, the Court notes that although the only support offered by plaintiff in its initial notice of motion was an affirmation of counsel, plaintiff did provide additional support for its amendment in the form of certain deposition testimony in his reply papers. Considering all these papers together, the proposed amendment is sufficiently supported. Defendants have failed to establish any legitimate claims of prejudice. The proposed amended complaint merely seeks to add legal theories on which plaintiff seeks to proceed based on previously disclosed facts. Moreover, the underlying facts have already been the subject of significant discovery. To the extent that limited depositions may need to be conducted of plaintiff with respect to certain new claims, it does not constitute prejudice to the defendants. The law is clear that the need for

additional discovery or an extension of time to prepare a defense does not constitute prejudice sufficient to justify the denial of a motion to amend the pleadings (Jacobson v McNeil Consumer & Specialty Pharms., 68 AD3d 652 [1st Dept 2009]).

Accordingly, it is

ORDERED that plaintiff's motion for leave to amend the complaint herein is granted, and the amended complaint 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 hereof, and it is further

ORDERED that the defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/30/13

HON. JEFFREY K. OING, J.S.C.