Everest Scaffolding, Inc. v Flag Waterproofing & Restoration, Co.
2016 NY Slip Op 32337(U)
November 29, 2016
Supreme Court, New York County
Docket Number: 161353/2014
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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EVEREST SCAFFOLDING, INC.,

Index No.
161353/2014

Plaintiff,

- v -

DECISION and ORDER

Mot. Seq. 002

FLAG WATERPROOFING & RESTORATION, CO., INC. and ANTHONY COLOA, JR.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Everest Scaffolding, Inc. ("Everest" or "plaintiff") commenced this action on November 14, 2014 for breach of contract, account stated and *quantum meruit*, seeking to recover $50,220.76 allegedly owed for work, labor, and materials provided to defendants Flag Waterproofing & Restoration, Co., Inc. ("Flag") and Anthony Coloa, Jr. ("Coloa") (collectively, "defendants"), pursuant to six written agreements to provide scaffolding in connection with Flag's waterproofing and restoration of various properties in New York.

Plaintiff now moves for an order, pursuant to CPLR 3025, granting plaintiff leave to amend the caption to add Sato Construction Co., Inc. ("Sato") as a defendant. Plaintiff also seeks sanctions and motion costs pursuant to N.Y. Court Rule 130-1.1.

Plaintiff submits that attorney affirmation of Stephen J. Sassoon, Esq., sworn to on November 25, 2015, annexing the following exhibits: (a) the complaint; (b) a copy of this court's Decision and Order, dated July 8, 2015, denying plaintiff's motion for default judgment, denying defendants' cross motion to dismiss plaintiff's complaint, and granting defendants permission to serve a late answer; (c) defendants' memorandum of law in opposition to plaintiff's motion for default and in support of defendants' cross-motion to dismiss; (d) email correspondence between Sassoon and defendants' counsel, dated September 10, 2015, requesting that defendants enter a stipulation adding Sato to the caption; and (e) email

correspondence between Sassoon and defendants' counsel, dated October 7, 2015, requesting responses to plaintiff's document requests.

In opposition, defendants submit the attorney affirmation of Alex Leibson, Esq., and an accompanying memorandum of law. Defendants argue that a motion to amend the caption is not the proper procedural device to add a new party. Defendants further argue that the entity that plaintiff seeks to add—Sato Construction Co, Inc. d/b/a Flag Waterproofing & Restoration, Co., Inc.—has never been served with process and any claims that Everest may have had against it are time barred. Finally, Defendants argue that plaintiff has no legal or factual basis for including Flag and Coloa in the proposed amended caption.

Plaintiff argues that defendants failed to establish any prejudice to them in the amendment adding Sato to the caption and that this is an instance of a misnomer, as defendant Flag is a licensed assumed name for Sato according to the New York Certificate of Incorporation for Sato. Plaintiff points to defendants' memorandum of law in opposition to plaintiff's motion for default, which defendants submitted on behalf of "Defendants Sato Construction Co., Inc., d/b/a Flag Waterproofing & Restoration, Co., Inc. ("Sato-Flag")". In their previous memorandum, defendants further acknowledged that service on Flag should be deemed effectuated on Sato: "Recognizing the practical reality that Everest likely intended to serve Sato-Flag and that the service made on November 25 will be deemed service on Sato-Flag, any technical default in responding to the Verified Complaint should be excused and Sato-Flag must be permitted its valid defenses."

A party may amend his or her pleading, or supplement it at any time by leave of court, and leave shall be freely given upon such terms as may be just. CPLR § 3025(b). Furthermore, pursuant to CPLR 305(c), "[a]t any time, in its discretion and upon such terms as it deems just, the court may allow any summons to be amended, if a substantial right of a party against whom the summons is issued is not prejudiced." Such amendment of a summons is justified "where there is some apparent misdescription or misnomer on the process actually served which would justify the conclusions that the plaintiff issued the process against the correct party, but under a misnomer, and that the process fairly apprised the entity that plaintiff intended to seek a judgment against it." *Medina v. City of New York*, 167 A.D.2d 268, 269–70 (1st Dept. 1990). It is well established that an application to amend the caption to reflect the true name of the defendant should be granted where the designated entity was the intended subject of the law suit, knew or should have known of the existence of the litigation against it, and will not be prejudiced thereby. *See, e.g.*, *Fink v. Regent Intern. Hotels, Ltd.*, 234 A.D.2d 39 (1st Dept. 1996); *National Refund and Utility Services, Inc. v. Plummer Realty Corp.*, 22

A.D.3d 430 (1st Dept. 2005); *Rodriguez v. Dixie N.Y.C., Inc.*, 26 A.D.3d 199 (1st Dept. 2006). Here, defendants have acknowledged that Flag is a licensed assumed name for Sato, and that plaintiff contracted with Sato Construction Co., Inc. d/b/a Flag Waterproofing & Restoration, Co., Inc. between the years of 2006 and 2010. Defendants were clearly aware of the action and not prejudiced by plaintiff's failure to include Sato in the caption. Accordingly, plaintiff's motion to amend the caption is granted.

Pursuant to 130 of the Uniform Rules for the New York State Trial Courts, a court, in its discretion, may award costs and impose sanctions for frivolous conduct in a civil action or proceeding. 22 NYCRR § 130-1.1(c). Sanctions for frivolous conduct may be ordered either upon a motion or upon the court's own initiative, yet the attorney to be sanctioned must be afforded a reasonable opportunity to be heard. 22 NYCRR 130-1.1(a), (d); *Miller v. Cruise Fantasies, Ltd.*, 74 A.D.3d 919 (2d Dept. 2010). Plaintiff argues that counsel for defendants have displayed a complete lack of cooperation and caused unnecessary motion practice, citing defendants' refusal to enter a stipulation to add Sato to the caption. Defendants were not required to enter into such stipulation and plaintiff has not otherwise demonstrated that defendants engaged in frivolous conduct within the meaning of 22 NYCRR 130.101(c). Plaintiff's motion for sanctions and motion costs is therefore denied.

Wherefore, it is hereby,

ORDERED that plaintiff's motion for leave to amend the caption is granted; and it is further

ORDERED that the action shall bear the following caption:

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

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EVEREST SCAFFOLDING, INC.,

Plaintiff,

-against-

FLAG WATERPROOFING & RESTORATION, CO., INC., ANTHONY COLOA, JR., and SATO CONSTRUCTION CO., INC.,

Defendants.

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and it is further

ORDERED that plaintiff's motion for sanctions and costs is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: NOVEMBER 29, 2016

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EILEEN A. RAKOWER, J.S.C.