

**Atlantic Specialty Ins. Co. v Bay Ridge Auto. Co.,
LLC**

2018 NY Slip Op 33285(U)

December 18, 2018

Supreme Court, New York County

Docket Number: 652833/2017

Judge: Barry Ostrager

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

-----X
 ATLANTIC SPECIALTY INSURANCE COMPANY,

Plaintiff,

- v -

BAY RIDGE AUTOMOTIVE COMPANY, LLC D/B/A BAY RIDGE
 FORD, BICOM NY, LLC D/B/A JAGUAR LAND ROVER
 MANHATTAN, BNF PARTNERS NY LLC, KINGS AUTOMOTIVE
 HOLDINGS, LLC D/B/A KINGS CHRYSLER DODGE JEEP RAM,
 WHITE PLAINS AUTO COMPANY, LLC D/B/A WHITE PLAINS
 NISSAN, GARY FLOM, VENJAMIN NILVA, ALEXANDER
 BOYKO

Defendants.
 -----X

INDEX NO. 652833/2017

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION AND ORDER

HON. BARRY R. OSTRAGER:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178

were read on this motion to/for

AMEND PLEADINGS

HON. BARRY R. OSTRAGER:

This action involves Defendants' purported breach of a General Indemnity Agreement under which they agreed to reimburse and indemnify Plaintiff Atlantic Specialty Insurance Company ("ASIC") for any and all losses incurred in connection with ASIC's issuance of a lease bond. Specifically, Defendant BICOM NY, LLC ("BICOM") operated a retail car dealership and entered into a lease agreement with non-party Georgetown Eleventh Avenue Owners, LLC ("Georgetown") for its dealership space. In order to secure the lease, BICOM provided a lease bond to ensure payment of rent in the event of a default. ASIC issued the bond on BICOM's behalf and Defendants executed the General Indemnity Agreement to further ensure payment to ASIC.

BICOM defaulted on rent and the lease bond and ASIC commenced this action for breach of contract against the indemnitors under the General Indemnity Agreement.

Plaintiff moved for summary judgment against indemnitors BNF Partners NY LLC, Kings Automotive Holdings, LLC, White Plains Auto Company, LLC, Gary Flom, and Veniamin Nilva. Plaintiff's motion for summary judgment as to indemnitor Alexander Boyko was withdrawn on consent following the filing of opposition papers that raised a clear issue of material fact. Specifically, Boyko asserted in opposition that he never signed the General Indemnity Agreement and that the signature on the document that purports to be his was, in fact, forged.

On May 31, 2018, this Court granted summary judgment against the non-Boyko Defendants and directed the Clerk to enter judgment in favor of ASIC in the amount of \$1,900,000.

Pending before the Court is Plaintiff's motion for leave to amend the complaint to assert causes of action sounding in fraudulent inducement and fraudulent misrepresentation against Defendants Flom and Nilva. Plaintiff argues that Flom and/or Nilva, or someone at their direction, fraudulently executed Boyko's name on the General Indemnity Agreement, thereby inducing ASIC to accept the General Indemnity Agreement and to issue the lease bond.

Defendants Flom and Nilva argue in opposition that the proposed amendment is barred by res judicata. Defendants assert that Plaintiff knew of the potential fraud allegations when Boyko filed his opposition papers prior to oral argument on the motion. Thus, Plaintiff had the opportunity to withdraw its motion for summary judgment and continue with discovery prior to filing an amended complaint to assert allegations for fraud.

“Leave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay.” *McCaskey, Davies & Assoc. v. New York City Health & Hosps. Corp.*, 59 N.Y.2d 755, 757 (1983). Here, while the better practice would have been for Plaintiff to withdraw its summary judgment motion entirely before seeking leave to amend, denial of Plaintiff’s application would result in substantial injustice.

First, res judicata only “precludes a party from litigating a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter.” *Matter of Josey v. Goord*, 9 N.Y.3d 386, 389 (2007). Here, Plaintiff seeks to litigate claims of fraud in the *same* action between the parties, involving different factual issues that were unknown to Plaintiff until days before oral argument on an already pending summary judgment motion. Thus, principles of res judicata are inapplicable.

Second, denial of Plaintiff’s motion to amend its claims and adjudicate the potentially meritorious fraud allegations would potentially deprive Plaintiff of its ability to be made whole by judgments grounded only in breach of contract. The Bankruptcy Code provides that a debt for money obtained by false pretenses, a false representation, or actual fraud is not dischargeable in bankruptcy proceedings. 11 U.S.C. § 523(a)(2)(A). Thus, if Defendants ultimately file for bankruptcy—and Plaintiff successfully proves its claims for fraud—then Plaintiff may still be made whole because of the Bankruptcy Code’s discharge exception for fraud. “The various exceptions to discharge in § 523(a) reflect a conclusion on the part of Congress that the creditors’ interest in recovering full payment of debts in these categories outweighs the debtors’ interest in a complete fresh start.” *Cohen v. de la Cruz*, 523 U.S. 213, 222 (1998) (internal quotations omitted). Thus, this Court’s interests in adjudicating issues on the merits and providing Plaintiff a fair opportunity to be made whole weigh heavily in favor of granting the motion to amend.

Accordingly, it is hereby

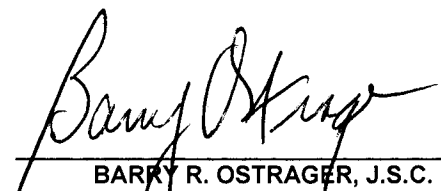
ORDERED that Plaintiff's motion for leave to amend the complaint is granted; it is further

ORDERED that Plaintiff is directed to e-file the amended complaint by December 21, 2018; it is further

ORDERED that Defendants answer the amended complaint within twenty days thereafter; and it is further

ORDERED that the parties appear for a status conference in Room 232 on January 22, 2019 at 9:30 a.m.

12/18/2018
DATE


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE