

Old Crompond Rd., LLC v County of Westchester
2018 NY Slip Op 34258(U)
October 18, 2018
Supreme Court, Westchester County
Docket Number: Index No. 57579/2016
Judge: Sam D. Walker
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

-----x
OLD CROMPOND ROAD, LLC,

Plaintiffs

-against-

COUNTY OF WESTCHESTER,

Defendants.
-----x

DECISION AND ORDER

Index No. 57579/2016
Motion Sequence 1 & 2

The following papers were considered on the defendant's motion to dismiss, pursuant to CPLR 3211(a)(7) and the plaintiff's cross-motion to amend the complaint:

Notice of Motion/Affirmation/Exhibits A-F	1-8
Memorandum of Law in Support	9
Notice of Cross-Motion/Affidavit/Exhibits 1-6	10-17
Memorandum of Law in Opposition	18
Affirmation in Opposition to Cross-Motion/Exhibits G-J	19-23
Memorandum of Law in Opposition to Cross-Motion	24
Reply Affirmation	25

Upon the foregoing papers, it is ordered that the motion is granted.

The plaintiff, Old Crompond Road, LLC ("OCR") filed this action on May 27, 2016, alleging two causes of action against the defendant, County of Westchester (the "County").

The first cause of action alleges that in or about 2007, OCR was designated and approved to develop and construct a twenty-six unit Affordable Affirmatively Furthering Fair Housing ("AFFH") project on Old Crompond Road, Yorktown Heights, New York.

The project was part of the County's plan to develop 750 units to satisfy its requirements per a stipulation of settlement in a federal law suit and that the County agreed to perform and pay for certain site work and infrastructure required by the project; to have county contractors market the project, find and vet qualified purchasers for the units, and to otherwise aid in the financing, sale and closing of the units. OCR alleges that the County agreed that only three bedroom units were to be constructed.

OCR alleges that, on April 17, 2013, in fulfillment of its construction obligation, the County contracted with Bradhurst Construction ("Bradhurst") to perform the site work, with a scheduled completion date of six months and that OCR was a third-party beneficiary of such contract. OCR asserts that the work took substantially longer due to inexcusable delays by Bradhurst and was not completed until the fall of 2014. OCR alleges that despite numerous requests for the County to take actions to insure Bradhurst complied with the contract, the County failed to take action and such failure resulted in a two-year delay and consequential damages in excess of \$250,000.00.

OCR alleges in the second cause of action that the County breached the contract related to the marketing and financing of affordable housing units built in Yorktown Heights. OCR alleges that, despite the promises and representations of the County and its Housing Action Counsel "(HAC)" as to the availability of qualified purchasers and available financing for closings commencing December 2013, such purchasers could not easily be found, or if found could not qualify for financing and/or could not meet HUD requirements. Therefore, the project still had three units unclosed as of August 2015 and the length of time between contract and closing was inordinate and greater than provided or estimated.

OCR alleges that the delay was due to the County's misrepresentations as to available purchasers, incompetent administration of the process, the inadvisability of all of the units having three bedrooms or a combination thereof. OCR contends that as a result of the County's breach of contract and misrepresentations, it was forced to incur excess carrying costs and loss of use of the proceeds of sales for up to two years and reduced sales prices in excess of \$350,000.00.

The County, now files this motion for dismissal of the complaint against it due to failure to state a claim, arguing that the plaintiff fails to identify the breached provision of any alleged contract; that plaintiff is not a third-party beneficiary to the Bradhurst contract; that even if the plaintiff was a third-party beneficiary to the Bradhurst contract, the County is not the proper defendant; that there is no enforceable contract between the parties for marketing and/or financing the finished units; and any claims based upon representations outside the four corners of the sale agreement, are barred by the merger clause.

In opposition, OCR filed a cross-motion seeking an order pursuant to CPLR 3025[c] to serve and file an amended complaint to conform the pleadings to the proof. OCR asserts that the complaint sets forth valid causes of action. As set forth in the affidavit of Neil DeLuca, a member of OCR contends that the County chose to fulfil its obligation to provide certain infrastructure improvements to and for the proposed development, through Bradhurst, the County provided a critical path time line for completion of the work by early December 2013, and OCR scheduled its construction of the twenty six affordable units to coincide with that completion date, so as to be able to commence sales of the units by January 2014. OCR argues that its claim is that the

County failed in its obligation to complete the construction on time and part of the problem was its failure to enforce its contract with Bradhurst or to have effective enforcement provisions in the contract. OCR asserts that, to the extent that the complaint is unclear on this point, it has submitted a proposed amended complaint, which clarifies the position.

OCR also states that it was under the impression that the marketing consultant designated by the County to market and sell the twenty six units, was an agency of the County, but later discovered in discovery that it is an independent entity. Therefore, the allegations as to the failure to adequately market and process applicants for closing alleged an incorrect connection between HAC and the County. However, OCR contends that the County is still liable for improper and delayed marketing and processing of applicants because it had an obligation to certify that the designated Marketing Consultant was qualified and experienced and an obligation to monitor the Marketing Plan of the consultant. OCR argues that the County did not comply with its obligations under the County Marketing Plan, as contained in a tripartite sales agreement among OCR, the County and a division of HAC.

OCR further asserts that the proposed amended complaint clarifies that the first cause of action alleges the County's non-performance of its agreement and not the non-performance of the Bradhurst contract and specifies a correct theory of liability with regard to HAC. OCR alleges that the amendment is timely and proper and contends that there is no prejudice to the County, since the facts which support the amended pleading are already known to the defendant and the note of issue has not been filed.

Discussion

Rule 3211 of the Civil Practice Law and Rules provides, in relevant part that, “[a] party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that:

(7) the pleading fails to state a cause of action...”

(N.Y. Civ. Prac. L. & R. 3211[a] [7]).

Under CPLR 3211(a)(7), initially “[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law....” (see *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]). On a motion to dismiss for failure to state a cause of action, the court must view the challenged pleading in the light most favorable to the non-moving party, and determine whether the facts as alleged fit within any cognizable legal theory (see *Brevtman v Olinville Realty, LLC*, 54 AD3d 703 [2d Dept 2008]; see also *EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, [2005]; *Leon v Martinez*, 84 NY2d 83 [1994]).

Thus, a motion to dismiss pursuant to CPLR 3211 (a) (7) will not succeed if, taking all facts alleged as true and affording them every possible inference favorable to the nonmoving party, the complaint states in some recognizable form any cause of action known to law (see *Leon v Martinez*, supra; *Fisher v DiPietro*, 54 AD3d 892 [2d Dept 2008]; *Shava B. Pac., LLC v Wilson. Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, [2d Dept 2006]). “Indeed, a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied ‘unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it’”. (*Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 683 [2d Dept 2012]).

Here, OCR has filed a cross-motion seeking to amend the complaint pursuant to CPLR 3025[c] to conform the pleading to the proof and has submitted an amended complaint in that regard.

“Leave to conform a pleading to the proof pursuant to CPLR 3025[c] should be freely granted absent prejudice or surprise resulting from the delay” (*Worthen-Caldwell v Special Touch Home Care Services, Inc.*, 78 AD3d 822 [2d Dept 2010][citations omitted]). In determining whether such a motion should be granted, the court “should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom” (*Id.* @ 823). ‘Additionally, “[t]he legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt”’ (*Lucido v Mancuso*, 49 AD3d 220, 227 [2d Dept 2008]).

Therefore, a plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment (*Id.*). ‘The court need only determine whether the proposed amendment is “palpably insufficient” to state a cause of action or defense, or is patently devoid of merit”’ (*Id.* @ 245). If the opposing party wishes to test the merits of the proposed cause of action, that party may later move for summary judgment (*Id.*).

Here, there is no discernable prejudice to the County in an amendment of the complaint as proposed and the County did not claim any prejudice. Further, the Court does not find the proposed amended complaint to be palpably insufficient to state a cause of action or patently devoid of merit. Taking all facts alleged as true and affording them every possible inference favorable to the nonmoving party, the amended

complaint states in some recognizable form a cause of action known to law. It has not been shown that a material fact as claimed by the pleader to be one is not a fact at all and no significant dispute exists regarding it. The County has already filed a motion for summary judgment, which the Court will decide when it is fully submitted. Therefore, the Court grants OCR's cross-motion and denies the County's motion to dismiss based on the amended complaint.

Accordingly, based on the foregoing, it is

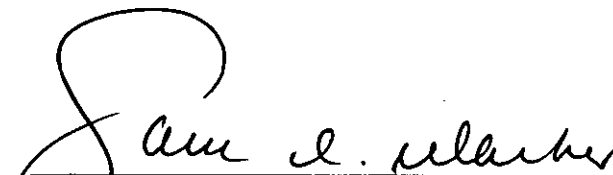
ORDERED that the defendant's motion to dismiss is denied, and it is further

ORDERED that the plaintiff's motion for leave to serve and file an amended complaint is granted.

The plaintiff shall serve and file the amended verified complaint within twenty days of the entry of this Decision and Order.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
October 18, 2018



HON. SAM D. WALKER, J.S.C.