

**163 Chrystie Realty LLC v DRK Chrystie LLC**

2020 NY Slip Op 30328(U)

January 13, 2020

Supreme Court, New York County

Docket Number: 656239/2018

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK

PART IAS MOTION 53EFM

Justice

-----X

163 CHRYSTIE REALTY LLC,
Plaintiff,

INDEX NO. 656239/2018

MOTION DATE 01/13/2020

MOTION SEQ. NO. 001

- v -

DRK CHRYSTIE LLC, NEXUS BUILDING DEVELOPMENT
GROUP, INC.,

DECISION + ORDER ON
MOTION

Defendant.

-----X

NEXUS BUILDING DEVELOPMENT GROUP, INC., DRK
CHRYSTIE LLC

Third-Party
Index No. 565701/2019

Plaintiff,

-against-

J.C. CONTRACTING OF WOODSIDE CORP., KINETIC
DESIGN CONSULTANT LLC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26,
27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, and for the reasons set forth on the record (01.13.20), 163
Chrystie Realty LLC's (163 Chrystie) motion for leave to amend the Verified Complaint
pursuant to CPLR § 3025 (b) is granted, 163 Chrystie's motion for sanctions pursuant to 22
NYCRR § 130-1.1 (a) is denied, and Nexus Building Development Group, Inc. (Nexus) and
DRK Chrystie LLC's (DRK) motion for preclusion pursuant to CPLR § 3042 (c) and CPLR §
3126 is denied.

### Background

This action involves damage allegedly sustained at the residential apartment building owned by 163 Chrystie located at 163 Chrystie Street in New York City as a result of demolition and construction work performed by Nexus at the adjoining property located at 165 Chrystie Street, which is owned by DRK. 163 Chrystie alleges that Nexus and DRK's work caused the 163 Chrystie Street property to lean visibly to the North and resulted in cracks in the foundation walls and masonry walls, misleveling and sloping of the floors, misalignment of windows and door frames, and other structural damage.

163 Chrystie commenced this action by filing a summons and complaint on December 14, 2018, alleging that it suffered loss of rental value, loss of market value of the property, and other economic losses, and seeking to recover a sum of not less than \$4 million. The complaint also seeks an additional \$202,599 for Nexus and DRK's alleged breach of a certain Access Agreement, pursuant to which 163 Chrystie granted DRK a limited, temporary, and non-exclusive license to install scaffolding and other equipment during construction, which was to be completed by January 29, 2017. The complaint alleges that the work was not completed until October 2018, and that 163 Chrystie is entitled to monthly access fees of \$1,000 per affected apartment for each month after January 29, 2017, for a total of \$189,000, as well as \$8,599 in lost rent.

Nexus and DRK filed a Verified Answer and affirmative defenses on February 15, 2019. Nexus and DRK subsequently filed a third-party complaint against their contractors on August 16, 2019. Third-Party Defendant J.C. Contracting of Woodside Corp. filed an answer with

affirmative defenses on October 4, 2019. Third-Party Defendant Kinetic Design Consultants LLC filed an answer with affirmative defenses, counterclaims, and crossclaims on November 5, 2019. 163 Chrystie's motion for leave to amend and motion for sanctions and Nexus and DRK's motion for preclusion are now before the court.

### **Motion for Leave to Amend**

A motion for leave to amend a pleading pursuant to CPLR § 3025 should be freely granted unless the amendment would result in prejudice or surprise to the nonmoving party or the proposed amendment is patently lacking in merit or insufficient as a matter of law (CPLR § 3025 [b]; *McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]). To establish prejudice sufficient to warrant denial of leave to amend, a defendant must show "some indication that the defendant has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position" (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [2011] [citations omitted]).

In its motion for leave to amend, 163 Chrystie seeks to add two causes of action: (1) a third cause of action for strict liability pursuant to Section 3309 *et. seq.* of the NYC Building Code, and (2) a fourth cause of action for nuisance. The proposed amendment would not result in surprise to the defendants because the parties discussed the proposed amendments during the status conference on August 12, 2019 and it is reflected in the status conference order (NYSCEF Doc. No. 18), and the plaintiffs agreed to wait until the defendants filed their third-party complaint before making the instant motion for leave to amend. The proposed amendment would not result in any prejudice to the defendants as this case is in its early stages of discovery. Document production

has not been completed and no depositions have been taken. In addition, the proposed amendment does not raise any new factual allegations. The defendants have failed to show that they would be hindered in any way in the preparation of their case or from taking any measure in support of their position.

To the extent that Nexus and DRK argue that 163 Chrystie's motion for leave to amend should be denied because this case should not have been assigned to the Commercial Division, this argument conflates two separate issues. Whether this matter was properly assigned to the Commercial Division is a separate issue from whether 163 Chrystie should be granted leave to amend. Accordingly, the motion for leave to amend is granted.

### **Motion for Sanctions**

A court in a civil action is authorized to award the reasonable attorneys' fees incurred by a party as a result of the opposing party's frivolous conduct (22 NYCRR § 130-1.1 [a]). Conduct is frivolous for the purposes of a motion for sanctions if (i) it is completely meritless, (ii) it is done to delay or prolong the litigation or to harass or injure another party, or (iii) asserts false material statements of fact (*id.* § 130-1.1 [c]).

In this case, 163 Chrystie argues that the court should impose sanctions on Nexus and DRK based on their conduct in declining to stipulate to allow 163 Chrystie to amend the complaint and requiring 163 Chrystie to bring a motion for leave to amend. The court does not agree that sanctions are appropriate. The CPLR sets forth the circumstances under which a pleading may

be amended as of right (CPLR § 3025 [a]). To wit, “[a] party may amend [his or her] pleading once without leave of the court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it” (*id.*). This is not one of those circumstances. The legislature determined that in all other cases, a party may only amend his or her pleading “by leave of the court or by stipulation of all parties” (CPLR § 3025 [b]). Just because leave to amend should be freely granted, that does not mean that a defendant must agree to it in every situation. Declining to consent to leave to amend is not the kind of frivolous, sanctionable conduct that would warrant an award of attorneys’ fees under these circumstances. Accordingly, the motion for sanctions is denied.

### **Cross-Motion to Preclude**

Pursuant to CPLR § 3126, if a party refuses to obey a discovery order or willfully fails to disclose relevant information that should have been disclosed, the court may impose any penalties as are just under the circumstances. Appropriate penalties may include, among other things: (1) an order deeming the issues to which the evidence is relevant to be resolved, (2) an order precluding the use of the evidence at trial, or (3) an order striking the pleadings, staying the proceedings, or dismissing the action (CPLR § 3126 [1]-[3]). The First Department has observed, however, that preclusion is a drastic remedy and is only warranted where, in the court’s determination, a party’s failure to comply with a discovery order is willful, deliberate, and contumacious (*Holliday v Jones*, 36 AD3d 557, 557-58 [1st Dept 2007]).

In this case, Nexus and DRK argue that 163 Chrystie has willfully and deliberately refused to provide substantive responses to the Defendants’ First Set of Interrogatories. The information

sought includes the names of witnesses with knowledge of information relevant to 163 Chrystie's claims for property damage and breach of contract, the computation of each category of damages alleged including diminution of value, and the existence, custodian, location, and general description of relevant documents, including any insurance agreements. Not only are Nexus and DRK entitled to this information (*see* Commercial Division Rule 11-a [b]), but 163 Chrystie's refusal to provide appropriate interrogatory responses is also extremely prejudicial to Nexus and DRK's defense.

In addition, Nexus and DRK argue that 163 Chrystie has deliberately refused to provide responsive documents with respect to items 1-14, 24, 25, 27-30, 33, 34, 36, 37, and 45 of Defendants' Demands for Document Production. Again, Nexus and DRK are entitled to any responsive documents, to the extent that they exist, with respect to the forgoing items, which are critical to their defense of this action. However, there is no evidence that 163 Chrystie's failure to produce substantive responses to the Defendants' First Set of Interrogatories and responsive documents with respect to the above items of Defendants' Demands for Document Production was sufficiently willful, deliberate, and contumacious to warrant the drastic remedy of preclusion. Nexus and DRK's motion for preclusion is therefore denied.

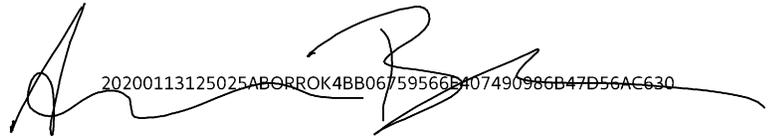
Accordingly, it is

ORDERED that 163 Chrystie Realty LLC's motion for leave to amend the complaint is granted; and it is further

ORDERED that 163 Chrystie Realty LLC's motion for sanctions is denied; and it is further

ORDERED that Nexus Building Development Group Inc. and DRK Chrystie LLC's motion for preclusion is denied.

1/13/2020  
DATE

  
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ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: