

UMH ECM Corp v Donovan

2020 NY Slip Op 31740(U)

June 5, 2020

Supreme Court, Broome County

Docket Number: EFCA2019003080

Judge: Eugene D. Faughnan

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At a Submitted Motion Term of the Supreme Court of
the State of New York held in and for the Sixth
Judicial District at the Broome County Courthouse,
Binghamton, New York, on the 8th day of May, 2020.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

UMH ECM CORP,

Plaintiff,

DECISION AND ORDER

vs.

Index No. EFCA2019003080
RJI No.

JOHN P. DONOVAN, JOHN DOE, and JANE DOE,

Defendants.

EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court upon the motion of Plaintiff UMH ECM Corp. for an Order, pursuant to CPLR 1024 and CPLR 3025(b), to amend the papers and proceedings in this action to insert “Susan Scalici” in place of “Jane Doe” and directing that all subsequent proceedings be amended accordingly. Plaintiff’s Notice of Motion was filed on February 5, 2020 and was initially given a return date of March 6, 2020. The Court determined to adjourn the motion to May 8, 2020, and it was designated as “on submission” due to Court closures necessitated by the coronavirus outbreak.

In support of the motion to amend, Plaintiff submitted an attorney affirmation dated February 5, 2020, with the following Exhibits: A) copy of the original Summons with Notice dated October 3, 2019; B) copy of the affidavit of service of the Summons with Notice dated

October 9, 2019 showing service of the Summons with Notice on John P. Donovan by substituted service on Susan Scalici on October 8, 2019; C) copy of the judgment entered in the Broome County Clerk's Office on December 3, 2019 against John P. Donovan; D) copies of bank records for a Bank of America account ending in 7026 listing John P. Donovan and Susan D. Scalici as joint account holders, and E) copies of bank records for a Bank of America account ending in 3319 listing John P. Donovan and Susan D. Scalici as joint account holders. The attorney affirmation on this motion argues that the Defendants "John Doe" and "Jane Doe" are "fictitious persons representing unidentified individuals whom (sic) received and retained a portion of Defendant, John P. Donovan's monthly income." Plaintiff contends that Susan D. Scalici improperly utilized funds from the joint accounts and it "now seeks to amend the prior pleadings in the action to add Susan Scalici as a named defendant and causes of action for fraudulent conveyance under New York's Debtor and Creditor Law." However, the motion papers did not include a proposed Amended Summons or Complaint. No opposition papers were received by the Court. Nevertheless, the Court must still determine the sufficiency of the papers submitted in support of the motion.

CPLR 3025(b) addresses motions to amend pleadings and states that "leave shall be freely given" and "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." It is within the sound discretion of the trial court to decide whether to permit the filing of an amended pleading, and "absent a clear abuse of that discretion, will not be lightly cast aside." *Cowsert v. Macy's E., Inc.*, 74 AD3d 1444, 1444 (3rd Dept. 2010), *quoting Gersten-Hillman Agency v. Heyman*, 68 AD3d 1284, 1289 (3rd Dept. 2009). Until 2017, the Third Department required that the movant make a "sufficient evidentiary showing to support the proposed claim." *Cowsert v. Macy's E., Inc.*, 74 AD3d at 1445. However, with the case of *NYAHS A Servs., Inc., Self-Ins Trust v. People Care, Inc.*, 156 AD3d 99 (3rd Dept. 2017), the Third Department determined to follow precedent in the other three Departments, and held that "no evidentiary showing of merit is required under CPLR 3025(b)." *NYAHS A*, 156 AD3d at 102, *quoting Lucido v. Mancuso*, 49 AD3d 220, 229 (2nd Dept. 2008). "Thus, the rule on a motion for

leave to amend a pleading is that the movant need not establish the merits of the proposed amendment and, “[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit.” *NYAHS v. People Care, Inc.*, 156 AD3d at 102, quoting *Lucido v. Mancuso*, 49 AD3d at 222; *Gulfstream Anesthesia Consultants, P.A. v. Cortland Reg. Med. Ctr., Inc.*, 165 AD3d 1430 (3rd Dept. 2018); *Green Tree Servicing, LLC. v. Feller*, 159 AD3d 1246, 1247 (3rd Dept. 2018).

Notwithstanding the unambiguous language requiring that the proposed amended pleading be attached, there are cases holding that “failure to submit proposed amended pleadings with [the] original moving papers ... [is] a technical defect”, which the Court can overlook pursuant to CPLR 2001, if the proposed amendments are clearly described in the moving papers. *Medina v. City of New York*, 134 AD3d 433, 433 (1st Dept. 2015); see, *Mater of Cooper v. Annucci*, 2020 NY App. Div LEXIS 2412 (3rd Dept. 2020) citing *Putrelo Constr. Co. v. Town of Marcy*, 137 AD3d 1591 (4th Dept. 2016); see, *Hodson v. Cipes*, 2013 NY Misc. LEXIS 5063 (Sup. Ct. Westchester County 2013); *Jiminez v. Shippy Realty Corp.*, 163 Misc2d 121, 123 (Sup. Ct. Westchester County 1994); Cf. *Loehner v. Simons*, 224 AD2d 591 (2nd Dept. 1996); *Branch v. Abraham & Strauss Dept. Store*, 220 AD2d 474 (2nd Dept. 1995); *Dragon Head LLC v. Elkman*, 102 AD3d 552 (1st Dept. 2013); *Graham v. City of New York*, 2015 NY Misc LEXIS 3356 (Sup. Ct. Bronx County 2015). CPLR 3025 (c) permits pleadings to be amended before or after judgment to conform to the evidence.

Here, Plaintiff failed to attach a proposed Amended Summons or Complaint to the motion. However, the attorney affirmation in support of the motion describes the amendments that are being proposed. Specifically, Plaintiff seeks to add Susan Scalici as a named defendant, and to add a cause of action for fraudulent conveyance under the New York’s Debtor and Creditor Law. Plaintiff contends that after Default Judgment was obtained against Donovan and after information subpoenas were served, Plaintiff learned that Donovan has two bank accounts, jointly held with Scalici. Plaintiff asserts that the deposits made into those two accounts were

from Donovan's assets alone, but that withdrawals from the two accounts were used personally by Scalici. Donovan was ultimately rendered insolvent, and Plaintiff cannot execute on its Default Judgment against Donovan. Plaintiff alleges that the conveyances were made by Scalici with the intent to secrete the money and defraud creditors.

This case was commenced by the filing of a Summons with Notice on October 4, 2019 which stated that "[t]he nature of this action is goods and services, breach of contract, statement of account, fraudulent conveyance, and attorney's fees." It also stated that the amount sought is \$39,536.78 for a period covering January 19, 2019 through February 24, 2019 and April 20, 2019 through July 20, 2019. Those were the dates that Donovan was admitted as a resident of the Plaintiff nursing home. Judgment was taken on the Summons with Notice and Affidavit of Facts constituting the claim, the default and the amount due. There was no complaint filed in light of the Affidavit of Facts and the default.

The Summons with Notice which was filed in this case did include a claim for fraudulent conveyance, which is the cause of action that Plaintiff is seeking to assert at this point. The original Summons with Notice listed John Doe and Jane Doe. CPLR §1024 provides a mechanism whereby unknown parties may be named, "if the actual defendants are 'adequately described and would have known, from the description in the complaint, that they were the intended defendants.'" *Lebowitz v. Fieldston Travel Bureau, Inc.*, 181 AD2d 481, 482 (1st Dept. 1992), quoting *Tobin v. St. Paul's Lutheran Evangelical Church*, 136 Misc2d 801, 803 (Sup. Ct. NY County 1987); *Wendover Fin. Servs. v. Ridgeway*, 93 AD3d 1156 (4th Dept. 2012). Here, although there were no particular details as to who was being referenced as "John Doe" and "Jane Doe", such is the nature of a bare Summons with Notice. However, the Court finds that the description of the claim in the Summons with Notice, which included fraudulent conveyance was broad enough to encompass the "John Doe" and "Jane Doe" defendants.

Again, bearing in mind that the movant does not need to establish the merits of the amendments, the Court's inquiry is limited to review as to prejudice or surprise to the defendant,

or whether the proposed amendments are palpably insufficient or devoid of merit. Here, the proposed amendment does not change the theory of recovery, because fraudulent conveyance was listed in the initial Summons with Notice. Although the theory of liability against Donovan is different than that against Scalici, the proposed inclusion of Scalici does not change the fact that fraudulent conveyance was already raised in the Summons with Notice, and the underlying facts concerning the treatment and services provided to Donovan by Plaintiff nursing home. Given that the proposed amendment is confined to matters which were raised in the initial Summons with Notice, there is no prejudice to Scalici. *See, Gulfstream Anesthesia Consultants, P.A. v. Cortland Reg. Med. Ctr., Inc.*, 165 AD3d 1430. Nor is there any surprise to Scalici as she did receive the Summons with Notice by virtue of the fact it was given to her as substituted service on Donovan. The evidence also shows that the proposed amendments are neither palpably insufficient, nor palpably devoid of merit.

CONCLUSION

Based upon the foregoing, the Court will grant the Plaintiff's motion to amend the papers and proceedings in this action, pursuant to CPLR 3025(b) to include Susan Scalici in place of "Jane Doe". However, as this is being done after judgment has already been entered against Donovan, per the authority in CPLR 3025 (c), the Court further directs that Plaintiff file a Complaint, more fully detailing the claims against Scalici, and that the Amended Summons and Complaint be served upon her.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: June 5, 2020
Binghamton, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice