

Marc Straus, LLC v Charles Schmitt Architects

2020 NY Slip Op 34005(U)

December 2, 2020

Supreme Court, New York County

Docket Number: 655575/2017

Judge: Gerald Lebovits

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

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

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM

Justice

-----X

INDEX NO. 655575/2017

MARC STRAUS, LLC,

MOTION SEQ. NO. 002

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

CHARLES SCHMITT ARCHITECTS,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion for LEAVE TO AMEND PLEADINGS.

Carnelutti & Altieri Esposito Minoli PLLC, New York, NY (Alexander Tripp of counsel), for plaintiff.

Lewis Brisbois Bisgaard & Smith LLP, New York, NY (Kevin L. Spagnoli of counsel), for defendant.

Gerald Lebovits, J.:

Plaintiff, Marc Straus, LLC, owns a Manhattan art gallery. Plaintiff hired defendant, Charles Schmitt Architects, to provide architectural-design services for plaintiff's planned renovation of the gallery space. Plaintiff, dissatisfied with the results of defendant's work, later sued defendant for breach of contract and professional malpractice.

Plaintiff now moves under CPLR 3025 for leave to amend its complaint a second time.¹ Plaintiff seeks (i) to add the gallery building's owner, Roman Realty, LLC, as an additional plaintiff; (ii) to add further allegations supporting its existing causes of action relating to defendant's alleged failure to provide adequate design-related services; and (iii) to expand the scope of those causes of action to include claims that defendant failed to supervise properly the construction contractor carrying out the gallery renovations. The motion is granted in part and denied in part.

DISCUSSION

Absent prejudice or surprise to an opposing party, a motion to amend a pleading should be freely granted unless the amendment is patently insufficient or lacking in merit. (*Letterman v Reddington*, 278 AD2d 868, 868 [4th Dept 2000].)

¹ Plaintiff previously amended its complaint as of right. (*See* NYSCEF No. 3.)

Plaintiff's request to add Roman Realty as an additional plaintiff in the action is granted. Admittedly, as defendant emphasizes, the contract underlying this case was not signed by and does not refer to Roman Realty. (*See* NYSCEF No. 41.) Plaintiff contends that Roman Realty is nonetheless in privity with Charles Schmitt (thus enabling Roman Realty to pursue claims in this action) because it was acting as Charles Schmitt's undisclosed principal. (*See* NYSCEF No. 47 at 2-3.) That characterization of Roman Realty, though, cannot be squared with the allegations of the proposed second amended complaint. In particular, the proposed complaint alleges that defendant dealt with plaintiff "as agent for Roman Realty," that "[i]n all Schmitt's dealings with Roman Realty, Schmitt dealt with it as a principal contracting party," and that "[i]n entering into the [c]ontract, Schmitt understood . . . that Roman Realty and Marc Straus, LLC, were its clients; and that Schmitt would be dealing with Marc Straus, LLC, and Roman Realty directly" and through an agent. (NYSCEF No. 34 at ¶¶ 14, 16, 27.)

By the same token, these allegations indicate that Roman Realty was at a minimum an intended third-party beneficiary of the agreement between plaintiff and defendant. Indeed, that agreement encompassed, among other things, preparation of design drawings for an extension of the third floor of the building and an addition of a fourth floor (*see id.* at ¶ 19). As an intended third-party beneficiary, Roman Realty can sue on that contract. And Roman Realty would not be barred by the economic-loss doctrine from pursuing a related malpractice claim against defendant. (*See Ralston Purina Co. v Arthur G. McKee & Co.*, 158 AD2d 969, 970 [4th Dept 1990].) Nor does this court perceive any prejudice to defendant from adding a second plaintiff to pursue the existing causes of action. Plaintiff therefore may amend its complaint to add Roman Realty as a plaintiff.

Plaintiff's request to amplify its allegations about defects in defendant's design drawings, and in defendant's interactions with plaintiff and with the New York City Department of Buildings regarding those drawings (*see* NYSCEF No. 34 at ¶¶ 29, 33, 34, 35, 38 [proposed second amended complaint]), is granted. The proposed new allegations merely expand on the complaint's existing discussion of the (alleged) problems with the design drawings. And defendant does not identify any prejudice that would result from the addition of these new allegations.

Plaintiff's request to expand the scope of its breach-of-contract and malpractice causes of action to include construction-supervision-related claims—and to quintuple the claimed damages accordingly—is denied. The written contract between plaintiff and defendant carefully defines the "scope of services" under the contract, the compensation for those services, and "[a]dditional [e]xpenses *not* included in the [a]rchitectural fee," including the "services of a licensed contractor." (NYSCEF No. 41 at 1, 2 [emphasis added].) Plaintiff's opening brief, although stating that the proposed complaint seeks "to set forth in greater detail . . . Schmitt's role in the substandard construction," does not address the fact that defendant's obligations under the written contract did not encompass any role in the construction project itself (as opposed to preparing project designs). (NYSCEF No. 30 at 5.)

On reply, plaintiff asserts that the proposed second amended complaint sufficiently alleges a separate *oral* component to the contract, under which defendant would take on

responsibility for supervising the work of plaintiff's construction contractor. (*See* NYSCEF No. 47 at 4-6.) But plaintiff previously provided defendant a verified interrogatory response stating that "there was no oral modification of the Contract." (*See* NYSCEF No. 43 at 13 [response], 25 [verification].) That response is difficult to reconcile with plaintiff's present assertion that the full contract between it and defendant included not only the written agreement but also a wide-reaching oral agreement.

Additionally, the written agreement between the parties expressly states that the \$20,000 fee owed to defendant is for the particular design-related services itemized in that agreement. (*See* NYSCEF No. 41 at 1.) Plaintiff's proposed complaint does not identify any additional consideration that it paid to defendant in exchange for defendant taking on the significant additional responsibility of acting as construction manager/supervisor.

Moreover, defendant persuasively argues that it would be prejudiced in having to defend now against construction-supervision-related claims due to significant progress (or even by now completion) of the construction project since the filing of the complaint in the summer of 2017. (*See* NYSCEF No. 46 at 11.) Plaintiff's only response to this argument seems that defendant could obtain redress for that prejudice through some sort of spoliation claim. (*See* NYSCEF No. 47 at 8.) But that response does not address defendant's basic point that permitting this amendment would cause it prejudice to begin with.

Taking these points together, this court concludes that plaintiff should not be permitted to significantly expand the scope of its causes of action (and claimed damages) against defendant to encompass construction-supervision-related claims. That aspect of plaintiff's motion for leave to amend is denied.

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion under CPLR 3025 seeking to add Roman Realty as a plaintiff is granted; and it is further

ORDERED that the branch of plaintiff's motion under CPLR 3025 seeking to amplify the allegations supporting plaintiff's design-related claims is granted as described above; and it is further

ORDERED that the branch of plaintiff's motion under CPLR 3025 seeking to add construction-supervision-related claims is denied; and it is further

ORDERED that plaintiff shall serve and file a second amended complaint in a form consistent with this order by December 21, 2020, and shall serve and file a copy of this order with notice of its entry along with the second amended complaint; and it is further

ORDERED that defendant shall file a second amended answer to that complaint by January 15, 2021; and it is further

ORDERED that the parties shall appear for a telephonic status conference on January 27, 2021.


HON. GERALD LEBOVITZ
J.S.C.

12/2/2020
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input 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