

Franciosa v Florida Concept Pools Inc.
2021 NY Slip Op 32256(U)
April 6, 2021
Supreme Court, Westchester County
Docket Number: Index No. 58733/2020
Judge: Terry Jane Ruderman
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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

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ARTHUR FRANCIOSA,

Plaintiff,

-against-

Index No. 58733/2020

FLORIDA CONCEPT POOLS INC.,
LATHAM POOL PRODUCTS INC.

DECISION and ORDER

Motion Sequence No.2

Defendants.

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RUDERMAN, J.

The following papers were considered in connection with the motion by defendant Florida Concepts Pools Inc., i/s/h as Florida Concept Pools Inc., for an order pursuant to CPLR 305 and 1003, dismissing the amended summons and amended complaint:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - E	1
Affirmation in Opposition, Exhibit A	2
Reply Affirmation, Exhibit F	3

Plaintiff Arthur Franciosa commenced this action on August 18, 2020, naming as defendants Florida Concept Pools Inc. and Latham Pool Products Inc., claiming that he had entered into a purchase sale agreement with both defendants for a particular "Pacific Blue" color of fiberglass pool, but was delivered a pool of the wrong color. His causes of action claimed breach of contract, negligence in the sale, supply and delivery of the incorrect pool, and fraud and a violation of General Business Law § 349 (a) as against Florida Concept Pools. Florida Concepts Pools Inc., i/s/h as Florida Concept Pools Inc., filed an answer on October 21, 2020,

with affirmative defenses and a counterclaim asserting that plaintiff's claims against it are frivolous and that it is entitled to damages under 12 NYCRR § 130-1.1.

Following Latham Pool Products's answer filed on December 16, 2020, with cross-claims, plaintiff filed an amended summons and amended complaint on January 4, 2021. The amended complaint added as a defendant Kenneth Lauro Sr., the president of Florida Concepts Pools.

In moving for dismissal, defendant Florida Concepts Pools observes that in amending the complaint, plaintiff persisted in the error of leaving the pluralizing "s" off the word "Concepts" in its name, and further, that plaintiff erroneously termed the new summons an "Amended Summons" rather than a "Supplemental Summons." It argues that plaintiff was not entitled to add Kenneth Lauro Sr. as a defendant as it did, and that plaintiff has not demonstrated a proper basis for a grant of leave to amend the complaint.

However, CPLR 1003 provides in part that "[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once *without leave of court* within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or *within twenty days after service of a pleading responding to it*" (CPLR 1003). Since Latham Pool Products served an answer responding to the original complaint on December 16, 2020, service of a supplemental summons and amended complaint on January 4, 2021, adding Kenneth Lauro Sr. as a party defendant was permissible *without leave* of the court, pursuant to CPLR 1003. Plaintiff's error in terming the uploaded document an "amended" rather than a "supplemental" summons and amended complaint does not necessitate dismissal of the amended complaint. Nor is it necessary or appropriate for the Court to review the merits of the amended complaint.

“CPLR 305 (c) authorizes the court, in its discretion, to ‘allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced’” (*Ober v Rye Town Hilton*, 159 AD2d 16, 19 [2d Dept 1990]). Given that on January 4, 2021, plaintiff had the right to file a supplemental summons and amended complaint adding a party, without leave of court, it cannot be said that any substantial right of Florida Concepts Pools or Kenneth Lauro Sr. would be prejudiced by allowing the filed “amended summons” to be corrected and transformed into “a supplemental summons.”

The movant is not entitled to the dismissal it seeks on the ground that a document that plaintiff had the right to file without leave of court was mis-named; no jurisdictional defect warranting dismissal is presented here.

Accordingly, it is hereby

ORDERED that the motion is denied, and it is further

ORDERED that the pleadings filed as of right on January 4, 2021 shall be deemed a “supplemental summons and verified amended complaint,” and it is further

ORDERED that the caption shall be corrected so as to correctly identify the moving defendant as “Florida Concepts Pools Inc.,” and in all other respects the caption of the action shall be that employed in the January 4, 2021 “supplemental summons and verified amended complaint,” and it is further

ORDERED that the caption as so modified shall now read

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
ARTHUR FRANCIOSA,

Plaintiff,

-against-

Index No. 58733/2020

FLORIDA CONCEPTS POOLS INC., KENNETH
LAURO SR., and LATHAM POOL PRODUCTS INC.

Defendants.
-----X

and the Clerk is directed to modify the caption accordingly, and it is further

ORDERED that the parties shall appear in the Compliance Conference Part of this Court
on a date and in a manner of which they will be notified by that Part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
April 6, 2021


HON. TERRY JANE RUDERMAN, J.S.C.