# James v. Government of St. Lucia, 2009 NY Slip Op 50700(U) (N.Y. Sup. Ct. 4/16/2009), 2009 NY Slip Op 50700 (N.Y. Sup. Ct., 2009)





2009 NY Slip Op 50700(U)

JOHN JAMES, Plaintiff,

v.

THE GOVERNMENT OF SAINT LUCIA, ANTHONY BRYAN SEVERIN, MICHAEL BARTLETT, Defendants.

5418/07.

Supreme Court of the State of New York, Kings County.

Decided April 16, 2009.

Plaintiff was represented by Okechukwu A. Duru, Esq. of Duru Associates, PLLC.

Defendants the Government of Saint Lucia and Anthony Bryan Severin were represented by Roger V. Archibald, Esq. of Roger Victor Archibald, PLLC.

JACK M. BATTAGLIA, J.

Recitation in accordance with CPLR 2219 (a) of the papers considered on the motion of defendants The Government of Saint Lucia and Anthony Bryan Severin for an order, pursuant to CPLR 3025, granting them leave to serve an amended answer to Plaintiff's Verified Complaint; and Plaintiff's motion for an order, pursuant to CPLR 3212, granting him summary judgment "for the relief requested in the within Complaint":

Defendant Government of Saint Lucia is the owner of real property at 438 East 49th Street, Brooklyn, improved with a building known as Helenites Centre, a "cultural center and meeting place for Saint Lucians living in New York and for Saint Lucian organizations." (See order dated October 12, 2006 of the Hon. Gloria M. Dabiri in The Government of Saint Lucia v Michael Bartlett, Supreme Court, Kings County, Index No. 16710/05, at 2.) The Government first took title to the property on or about December 3, 1999 on transfer from a not-for-profit corporation, Helenites Association of Saint Lucia.

With a deed dated April 29, 2003, signed by then Ambassador Earl Stephen Huntley, the Government transferred title to the property to defendant Michael Bartlett. Mr. Bartlett obtained a loan of $150,000 that was used to satisfy a tax lien that had been filed against the property, with repayment of the loan secured by a mortgage on the property. It was agreed that the Government would make monthly interest payments on the loan until repayment of the principal due two years later, and that Mr. Bartlett would reconvey title to the Government when the loan was



repaid.

On April 29, 2005, the Government repaid the loan. The funds for repayment came from plaintiff John James, pursuant to a Memorandum of Agreement dated April 27, 2005 between him and "The Government of Saint Lucia By Permanent Mission of Saint Lucia to the United Nations", signed on behalf of the Government by its then Ambassador, Julian R. Hunte. The Government agreed to sell the property to Plaintiff for $550,000 "as soon as title is acquired from Mr. Michael P. Bartlett." Plaintiff's deposit of $158,400 would satisfy the existing mortgage. In October 2005, Plaintiff paid an additional $15,923.85 to the Government, to be used for the payment of unpaid taxes; that amount would be "deducted from the sale price of the Helenites Centre, to be sold to Mr. John James when title of the property is regained by the Government of Saint Lucia." (Letter dated October 6, 2005 from Dr. The Hon. Julian R. Hunte to John James.)

As is apparent, despite the Government's repayment of the loan secured by the mortgage on the property, Mr. Bartlett did not reconvey title to the Government. In May 2005, the Government commenced an action against Mr. Bartlett, and in October 2006, with a motion for summary judgment, obtained an order "directing [Mr. Bartlett] to execute the documents necessary to transfer title to the subject property" to the Government. (See order dated October 12, 2006 of the Hon. Gloria M. Dabiri, at 14.) Mr. Bartlett did not comply until March 9, 2007.

Meanwhile, on February 14, 2007, Plaintiff commenced this action against the Government, its then Ambassador, Anthony Bryan Severin, and Mr. Bartlett. The Verified Complaint alleges two causes of action, one for specific performance of the agreement to sell the property to Plaintiff, the other for money damages "including but not limited to out of pocket costs and expenses, loss of interest, loss of profits, loss of tax deductions, and attorney's fees."

A Notice of Appearance dated March 26, 2007 on behalf of the Government and the Ambassador was served by Thaeddeus J. McGuire, Esq., as was an Answer dated April 20, 2007, signed by Mr. McGuire as attorney for those Defendants. In addition to denials and admissions directed to the allegations of the Verified Complaint, the Answer alleges an Affirmative Defense of "Impossibility":

"That although the Court made the decision granting Plaintiff's motion for summary judgment on October 12, 2005 [sic], the defendant, MICHAEL BARTLETT, did not execute the Transfer [sic] documents until March 9, 2007. Because of a change in Government, a new Ambassador has not yet been appointed to record the deed." (Answer, FOURTH.)

Defendant Michael Bartlett has apparently not appeared in the action, but he was served with the pending motions.

The deed from Bartlett to the Government was eventually recorded on December 3, 2007. Shortly thereafter, on December 19, Plaintiff moved for summary judgment. Instead of responding, the Government and Ambassador Severin filed a notice of removal to the United



States District Court for the Eastern District of New York pursuant to 28 USC 1441 (d), which permits removal of actions brought against foreign states. Plaintiff moved for remand to Supreme Court, and on September 24, 2008 the motion was granted. (See James v Government of Saint Lucia, 2008 U.S. Dist. LEXIS 91750 [EDNY].)

The Government and Ambassador Severin now move, pursuant to CPLR 3025 (b), for leave to serve an amended answer to the Verified Complaint. Plaintiff cross-moves, pursuant to CPLR 3212, for summary judgment, apparently limited to his cause of action for specific performance, and, pursuant to Part 130 of the Uniform Rules of Court (22 NYCRR 130-1.1), for sanctions and costs.

The proposed Amended Answer submitted with the motion contains the same denials and admissions as the current Answer, but would assert three Affirmative Defenses in place of the single Affirmative Defense in the current Answer.

"FOURTH: Statute of Frauds. The Agreement referenced by the Complaint appears to have been negotiated and signed by one Julian R. Hunte, who had no written authorization from Her Majesty's Government of Saint Lucia to do so; therefore, if he did so, he did so in contravention of General Obligations Law Section 5-703.

FIFTH: This Court lacks personal jurisdiction over the Defendants because service of process was not made upon the High Court of Saint Lucia.

SIXTH: Impossibility. The Agreement referenced by the Complaint cannot, as a matter of law, pursuant to the Constitution and laws of Saint Lucia, be granted specific performance by Her Majesty's Government, nor can Her Majesty's Government grant to Plaintiff any monies pertaining thereto."

Defendants subsequently submitted a "Second Proposed Amended Answer," which was purportedly verified by Nicholas Octave Frederick, Attorney General and Minister of Justice for the Government of Saint Lucia, on January 6, 2009. As Plaintiff properly points out, there is no basis without leave of court for submission of an alternative version of the proposed amended answer. The alternative version differs from that previously submitted with the motion by denying allegations of the Verified Complaint that had been admitted in the Answer and would have remained admitted by the proposed Amended Answer. As such, however, the proposed Amended Answer would be confusing, if not inconsistent in its provisions.

It is now clear that the Government does not dispute that the Memorandum of Agreement with Plaintiff was signed by its then Ambassador, or that the Ambassador received from Plaintiff the amounts alleged. The Government does dispute that the Memorandum of Agreement can be enforced against it, or that the Government can be required to respond in damages, as is evident from the proposed

Affirmative Defenses of statute of frauds and "impossibility." If the Court grants leave for those alleged defenses to be asserted, without also permitting amendment of



prior admissions that could be read as admitting that an enforceable agreement exists, unnecessary confusion and dispute may result.

"Generally, [i]n the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit." (Sampson v Contillo, 55 AD3d 591, 592 [2d Dept 2008] [internal quotation marks and citations omitted].) The opposing party bears the burden of showing prejudice or surprise (see Hickey v Hutton, 182 AD2d 801, 802 [2d Dept 1992]), but, as will appear, the allocation of burden as to the "sufficiency" and "merit" of the proposed amendment, or the lack thereof, is not entirely clear.

"Prejudice requires that the [opposing party] has been hindered in the preparation of his case or been prevented from taking some measure in support of his position'." (RCLA, Inc. v 50-09 Realty, LLC, 48 AD3d 538, 539 [2d Dept 2008] [quoting Loomis v Civetta Corinno Constr. Corp., 54 NY2d 18, 23 (1981)].) Here, Plaintiff argues prejudice as resulting solely from the passage of time, and the resulting delay in his receiving the remedies he seeks with this Verified Complaint. But that is not the kind of prejudice that will defeat the rule of liberality in the amendment of pleadings.

The papers filed on the pending motions do not explain the apparent absence of activity in the case from February 2007, when it was filed, until December 2007, when Plaintiff first moved for summary judgment, prompting Defendants' removal to federal court. Even though the deed executed by Mr. Bartlett in March was not recorded until December, there is no reason apparent to the Court for that impeding any progress in the litigation. The Government owned the property again in March, whether or not constructive notice was provided through recordation later.

The delay resulting from the ten months in federal court was at least partially due to Plaintiff's ultimately successful motion for remand, and can hardly be laid at Defendants' door. Since remand and the making of the pending motions last Fall, adjournments were provided on the agreement of the parties, in part directed to the possibility of settlement. No note of issue has been filed, and apparently no depositions or other disclosure has taken place (see Leclaire v Fort Hudson Nursing Home, Inc., 52 AD3d 1101, 1102 [3d Dept 2008].)

Recently, in Lucido v Mancuso (49 AD3d 220 [2d Dept 2008]), the Second Department addressed the allocation of burdens under the "palpably sufficient or patently devoid of merit" standard, which sometimes appears as "lack of merit . . . clear and free from doubt" (see id. at 226.) Rejecting "[s]everal recent cases stat[ing] that the party seeking leave to amend must make some evidentiary showing' of merit" (see id. at 227), the court states instead that "a plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance" (see id.) "Cases . . . that place the burden on the pleader to establish the merit of the proposed amendment . . . are no longer to be followed." (Id. at 229.) "If the opposing party wishes to test the merits of the proposed

added cause of action or defense,



that party may later move for summary judgment upon a proper showing (see CPLR 3212)." (Id.)

Further enforcing the distinction between a "motion to dismiss on legal insufficiency" and a motion for summary judgment (see id. at 227), the court states that "palpably insufficient as a matter of law or . . . totally devoid of merit" "means that, in the case, for example, of a motion for leave to amend a complaint by adding a new cause of action, the motion for leave to amend will be denied, in the absence of prejudice or surprise, only if the new cause of action would not withstand a motion to dismiss under CPLR 3211 (a) (7)." (See id. at 225.) "Similarly, where the lack of merit of a proposed defense is clear and free from doubt, a motion for leave to amend an answer to raise that defense should be denied." (Id. at 226; see also CPLR 3211[b] [motion to dismiss defense].) "On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged . . . as true, accord [the pleader] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Noonan v City of New York, 9 NY3d 825, 827 [2007] [quoting Leon v Martinez, 84 NY2d 83, 87-88 (1994)].)

Less than three months after Lucido v Mancuso (49 AD3d 220), the Second Department stated that "a plaintiff must meet his or her burden of demonstrating that the proposed amendments to the complaint were not palpably insufficient or patently devoid of merit," and that there the plaintiffs' motion to amend was properly denied because of, among other things, "the plaintiffs' failure to show that the proposed amendments were not palpably insufficient or patently devoid of merit." (See Zelenik v MSI Constr., Inc., 50 AD3d 1024, 1025 [2d Dept 2008].) Interestingly, Lucido was cited in support of these statements, and three of the justices on the later panel were on the panel that decided Lucido.

A week later, a panel that included none of the justices who sat on either of the two earlier panels cited Lucido for the rules that "a plaintiff seeking leave to amend a complaint is not required to establish the merit of the proposed amendment in the first instance [and] the legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt." (See Benyo v Sikorjak, 50 AD3d 1074, 1076 [2d Dept 2008] [quoting Lucido v Mancuso, 49 AD3d at 227].)

Any apparent discrepancy in these decisions can be reconciled by a rule that requires the proponent of an amended pleading to make a showing that "the facts as alleged" in the proposed amended complaint or answer "fit within [a] cognizable legal theory" as a cause of action or defense, as the case may be (see Noonan v City of New York, 9 NY3d at 827), but does not require the proponent to make any evidentiary showing that the amendment has merit. The opposing party may submit affidavits to "demonstrate[] that a material fact alleged by [the pleader] is not a fact at all' and that no significant dispute exists regarding it'." (See Pechko v Gendelman, 20 AD3d 404, 406-07 [2d Dept 2005] [quoting Guggenheimer v Ginzburg, 43 NY2d 268, 275 (1977)].)

Here, again, the moving Defendants' proposed amended answer would assert three

Affirmative Defenses, that is, lack of personal jurisdiction, statute of frauds, and "impossibility." Defendants' Answer, however, does not assert either the jurisdictional or statute of frauds defense, and Defendants did not move for dismissal of Plaintiff's Verified Complaint on either ground. The failure to assert the jurisdictional defense (see CPLR 3211 [a] [8]) or the statute of frauds defense (see CPLR 3211 [a] [5]) in either the Answer or a pre-answer motion constitutes a waiver of the respective defenses (see CPLR 3211 [e].)

Nonetheless, a statute of frauds defense may be added to an answer where leave is granted to so amend the pleading pursuant to CPLR 3025 (b). (See Mackenzie v Croce, 54 AD3d 825, 826-27 [2d Dept 2008]; Long Island Title Agency v Frisa, 45 AD3d 649, 649 [2d Dept 2007].) Generally, "defenses waived under CPLR 3211 (e) can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025 (b) so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay." (Nunez v Mousouras, 21 AD3d 355, 356 [2d Dept 2005] [quoting Endicott Johnson Corp. v Komik Indus., 249 AD2d 744, 744 (3d Dept 1998)].)

Here, no prejudice or surprise has been demonstrated, nor can the proposed statute of frauds defense be deemed "palpably insufficient or patently devoid of merit." (See Sampson v Contillo, 55 AD3d at 592.) Defendants allege that Ambassador Julian R. Hunte, who signed the Memorandum of Agreement for the sale of 438 East 49th Street, "had no written authorization from Her Majesty's Government of Saint Lucia to do so," and he did so "in contravention of General Obligations Law Section 5-703." (Second Proposed Amended Answer, First Affirmative Defense.) The cited statute requires, with exceptions not applicable here, that the conveyance of any interest in real property be "subscribed by the person" making the conveyance "or by his lawful agent, thereunto authorized by writing." (See General Obligations Law 5-703 [1].) The statute applies to conveyances of government-owned real property, with the writing requirement appropriately adapted. (See 121-129 Broadway Realty, Inc. v City of Schenectady, 17 AD2d 1016, 1017 [3d Dept 1962].)

The proposed defense of lack of personal jurisdiction, however, must be deemed "palpably insufficient or patently devoid of merit." (See Sampson v Contillo, 55 AD3d at 592.) "While permission to amend an answer is to be freely given pursuant to CPLR 3025 (b), the waiver of a jurisdictional defense cannot be nullified by a subsequent amendment to a pleading adding the missing affirmative defense." ( McGowan v Hoffmeister, 15 AD3d 297, 297 [1st Dept 2005]; see also Iacovangelo v Shepherd, 5 NY3d 184, 186-87 [2005]; Naccarato v Kot, 124 AD2d 365, 366 [3d Dept 1986].)

Some pause is due, however, because of the basis of the Government's proposed jurisdictional defense. The defense would allege lack of personal jurisdiction "because service of process was not made upon the High Court of St. Lucia" (Second Proposed Amended Answer, Second Affirmative Defense), which, according to the moving Defendants, was required by the Foreign Sovereign Immunities Act (see 28 USC 1608.) Indeed, Judge Frederic Block in the Eastern District "agree[d] with St. Lucia that service did not comply with the requirements of

FSIA, assuming that St. Lucia has designated its High Court to receive process." (See James v Government of Saint Lucia, 2008 U.S. Dist. LEXIS 91750, at * 8.)

Assuming, however, that federal law would govern here, Judge Block concluded further that "St. Lucia waived the defense of improper service by not raising it in its answer." (See id.) The result is mandated by Federal Rule of Civil Procedure 12 (h) (1), which provides that a jurisdictional defense is waived "if it is not made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15 (a) to be made as a matter of course." (See id.; see also Transaero, Inc. v La FuerzaAerea Boliviana, 162 F3d 724, 729-30 [2d Cir 1998].) As to the exception for amendments made "as a matter of course," here too New York law would lead to the same result for amendments permitted "without leave of court." (See CPLR 3025 [a]; Iacovangelo v Shepherd, 5 NY3d at 186-87.)

Characterized as "impossibility," the moving Defendants would add to their answer a defense that the Memorandum of Agreement "cannot, as a matter of law, pursuant to the Constitution and laws of St. Lucia, be granted specific performance by Her Majesty's Government, nor can Her Majesty's Government grant to Plaintiff any monies pertaining thereto." (Second Proposed Amended Answer, Third Affirmative Defense.) Although, as already discussed, an evidentiary showing is not required, the moving Defendants submit two "Affidavits" of Nicholas Octave Frederick, the Attorney General and Minister of Justice for Saint Lucia, and General Frederick's verification of the Second Proposed Answer. The Court notes that the statements of General Frederick are not shown to be in admissible form. (See CPLR 2309 (c); Real Property Law 301, 301-a; Pra III, LLC v Gonzalez, 54 AD3d 917, 918 [2d Dept 2008].) But no specific objection has been made by Plaintiff. (See Matter of MBNA Am. Bank v Stehly, 19 Misc 3d 12, 13-14 [App Term, 2d Dept 2008].)

The moving Defendants cite no authority for the proposition that if the law of a foreign state would render the contract of that state void or unenforceable, performance of the contract would be deemed "impossible" within the scope of a defense to either an action for specific performance or damages for breach. (See 22A NY Jur Contracts 393 et seq, 408 et seq.) The moving Defendants make no distinction generally (nor does Plaintiff) between the claim asserted against the Government and the claim against the individual Defendant.

Both the moving Defendants and Plaintiff fail to address any provisions of New York law (see Real Property Law 10; Matter of Willis, 68 Misc 2d 1, 2 [Surr Ct, Kings County 1971]) or federal law (see Foreign Missions Act, 22 USC 4301 et seq) that might affect the capacity of a foreign government to own and transfer real property here.

Under these circumstances, and given the legal complexities that can arise with respect to the transactions of foreign governments, it cannot be said that the proposed defense is "palpably insufficient or patently devoid of merit" (see Lucido v Mancuso, 49 AD3d at 222.)

Turning to Plaintiff's cross-motion, "in order to establish that he is entitled to summary



judgment on his claim for specific performance, [he] must demonstrate that he was ready, willing and able to perform pursuant to the

contract of sale on the original law day or, if time was not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter . . ., and, in accordance therewith, must show that he possessed the financial ability to complete the purchase." (See Gindi v Intertrade Intl. Ltd., 50 AD3d 575, 575-76 [1st Dept 2008]; see also Dairo v Rockaway Blvd. Prop., LLC, 44 AD3d 602, 602 [2d Dept 2007].) "The plaintiff must make this showing regardless of whether the defendant was able to convey the property in accordance with the terms of the contract." (Id.)

Here, Plaintiff "failed to show that [he] properly demanded performance of a contract to purchase real property on a specific day," and "also failed to show that [he] had the requisite ability to perform the contract." (See Decatur [2004] Realty, LLC v Cruz, 30 AD3d 367, 367 [2d Dept 2006]; see also Weiss v Feldbrand, 50 AD3d 673, 674 [2d Dept 2008]; Main St. Xata, Ltd. v Valine Realty Corp., 47 AD3d 688, 688-89 [2d Dept 2008]; Marcantonio v Picozzi, 46 AD3d 522, 523-24 [2d Dept 2007].)

In any event, Plaintiff has chosen to move for summary judgment in response to a motion for leave to amend the answer, and to attempt to make his prima facie showing with Defendants' admissions in the Answer originally served. Whether or not the cross-motion is now jurisdictionally premature in light of the Court's ruling on the motion for leave to amend (see CPLR 3212 [a]; Kline v Town of Guilderland, 289 AD2d 741, 741 [3d Dept 2001]; see also Enriquez v Home Lawn Care & Landscaping, Inc., 49 AD3d 496, 497 [2d Dept 2008]), Plaintiff's showing does not address the issues as joined with the service of the amended pleading. The Court notes, in addition, that generally a buyer under a contract for sale of real property may obtain benefit-of-the-bargain damages only with a showing that the seller "failed to perform, in bad faith, or willfully disregarded the contract." (See Musick v 330 Wythe Ave. Assocs., LLC, 41 AD3d 675, 676 [2d Dept 2007].)

The moving Defendants' motion for leave to serve an amended answer is granted to the extent that, within thirty (30) days after the date of this order, the moving Defendants may serve an amended answer in the form of the Second Proposed Amended Answer, but without an affirmative defense of lack of personal jurisdiction.

Plaintiff's cross-motion for summary judgment is denied, with leave to renew.