

SHORT FORM ORDER

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**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 16

ANGELA RUBINO,

Plaintiff,

INDEX NO.: 004891/2003
MOTION DATE: 06/14/2004
MOTION SEQUENCE: 01 & 02

- against -

KALVIN C. VOGT,

Defendant.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed.....1
Notice of Cross Motion, Affidavit, Affirmation & Exhibits Annexed.....2
Affidavit in Opposition & Exhibits Annexed.....3

The plaintiff, Angela Rubino, moves pursuant to CPLR §§ 3025(b) and 1003, to amend her complaint to add K & B Developers, Inc. as a defendant. Rubino also moves to compel production of tax returns from 2000 through 2003 belonging to both the current defendant, Calvin Vogt, and the proposed defendant, K & B Developers, pursuant to CPLR §3124. Defendant Vogt cross moves to dismiss the complaint, pursuant to CPLR §3211(a)(7), for failure to state a claim. The defendant also requests that the plaintiff be ordered to produce a comprehensive list of monies that she claims to have paid to either Vogt or K & B Developers, pursuant to CPLR §3124. In addition, the defendant requests that Rubino's signed deposition transcript be returned to the defendant, along with the information requested in the transcript. If the plaintiff refuses to produce the information, the defendant requests, pursuant to CPLR §3126, that the plaintiff be precluded from testifying about such materials. This court's determination is as follows.

I. Motion to Amend Complaint

Plaintiff commenced this action against the defendant, Vogt, for breach of contract. Rubino alleges that she contracted with Vogt to do various home improvement jobs to her home, and that he breached the contract by not completing the work. Vogt has claimed that Rubino did not contract with him as an individual; rather he claims that she contracted with his company, K & B Developers. Therefore, Vogt argues that he is not liable to Rubino as an individual because he was not a party to the contract. Because of Vogt's assertion that K & B Developers was the true party contracted with, Rubino seeks to amend her complaint to add K & B Developers as a defendant.

According to the CPLR §3025, a party may amend a pleading at any time by leave of the court or by stipulation of all the parties. CPLR §3025(b). This subsection also specifies that such leave should be given freely by the court. *Id.* The Advisory Committee Notes on this subsection explain that the intention of this subsection was to give the court wide discretion when deciding a motion to amend. Advisory Committee Notes, CPLR §3025. When read together, this implies that there is a presumption that the amendment will be granted.

Since the proposed amendment is to add a party, CPLR §1003 also applies. This section states that parties may be added at any stage of the action by leave of the court or by stipulation of the parties. CPLR §1003. Since leave is to be freely given to amendments in general under CPLR §3025(b), it is assumed the same standard should apply to amendments to add parties. Courts have interpreted these sections of the CPLR, and have determined that leave should be granted unless the proposed amendment is completely without merit, prejudices the opposing parties, or surprises the opposing parties due to the delay in the amendment. Moon v. Clean Channel Communs., Inc., 307 AD2d 628, 629 (3d Dept 2003).

While leave to amend a pleading should be freely granted, the court will also consider the reasons why the amendment should not be granted as stated by the Moon court. The amendment is not completely without merit because the current defendant, Vogt, claims that the proposed party, K & B Developers, is the one the plaintiff contracted with. In addition, this court finds the proposed amendment does not prejudice the opposing party nor is it a surprise for K & B Developers to be included in the action, because the controversy over individual or corporate liability has become a dominant issue in this case.

After reviewing the documents in support of and in opposition to the motion to amend,

the court has determined that the proposed amendment should be granted.

II. Motion to Compel Production of Tax Returns

Because it is unclear as to whom Rubino contracted with, she seeks to have both the current and proposed defendant produce tax returns from 2000 through 2003. She believes the documents will show which party actually received the payments for the contracted work. She asserts that this will in turn prove who was the real party to the contract.

In general, disclosure of tax returns is disfavored due to their confidential nature. Roth v. American Colonial Ins. Co., 159 AD2d 370 (1st Dept 1990). However, if the tax returns are found to be indispensable, material, necessary, and sufficiently related to the litigation then the court may order the tax returns to be produced. Nanbar Realty Corp. v. Pater Realty Co., 242 AD2d 208, 209 (1st Dept 1997); see also, Briton v. Knotts Hotel Corp., 111 AD2d 62 (1st Dept 1985). Courts have found that the material and necessary element should be construed liberally in order to prevent delay in a case and promote justice. Allen v. Crowell-Collier Publishing Co., 21 NY2d 403, 406 (1968). In addition, the party requesting the tax returns must show that the information contained in the returns is not available from other sources. Briton, supra; Gordon v. Grossman, 183 AD2d 669, 670 (1st Dept 1992).

Because the production of tax returns is disfavored, the analysis begins with the presumption that the tax returns will not be produced. However, if it is shown that the tax returns are indispensable, material, necessary, sufficiently related to this action and not available from other sources, then this court will order their production. After reviewing the relevant documents and considering the dichotomy between corporate or individual liability, this court has concluded that there is a sufficient showing of the elements needed for the court to order the tax returns to be produced. The plaintiff claims that the tax returns are necessary for the court to determine which party received the funds paid by the plaintiff. While defendant's individual tax return may not show the information that Rubino asserts, a comparison of the business with his individual returns may. The tax returns will show the total income of both Vogt and K & B Developers, and although there will be no item listed as "money received from Rubino" on Vogt's tax return, the tax returns will show where the income earned from home improvements is credited. Any wholly unrelated material may be redacted.

III. Motion to Dismiss

In its cross motion to dismiss the complaint for failure to state a claim pursuant to CPLR

3211(a)(7), defendant argues that because he has produced a signed contract dated August 17, 2001, between K & B Developers and the plaintiff, that he, as an individual, should not be a party to the lawsuit since he, as an individual, was not a party to the contract. Although Vogt has signed the contract, he signed it as a representative for K & B Developers, as indicated below the signature line. In addition, this contract clearly states that the client is Mrs. Rubino and that the work will be done by K & B Developers.

In her complaint, Rubino alleges a cause of action for breach of contract. In order to sufficiently state a claim for a breach of contract, the plaintiff's complaint must allege 1) the terms of the existing contract, including good consideration, 2) performance on the part of the plaintiff, 3) breach by the defendant, and 4) damages sustained by the plaintiff. 22A NY Jur2d Contracts §432. When deciding a motion to dismiss, it is well established that the pleadings are to be liberally construed, meaning that there is no need to use specific wording. CPLR §3026; Leon v. Martinez, 84 NY2d 83, 87 (1994). In addition, all allegations of the complaint must be assumed to be true. DePan v First Nat'l Bank, 98 AD2d 885 (3rd Dept 1983).

Following the abovementioned guidelines, plaintiff has sufficiently alleged a cause of action for breach of contract. By providing a copy of an alleged contract between herself and Mr. Vogt dated October 29, 2001, along with copies of checks paid to Vogt, she has satisfied the first two elements. In addition, the plaintiff has alleged that the defendant breached the contract by not completing the work, and has alleged specific harm which was caused by this breach. The only element at issue is whether the unsigned contract is a sufficient allegation when the defendant has produced a different signed document. Since the allegations of the complaint are to be assumed true, this court must consider the plaintiff's contract to be the actual contract for purposes of this motion. In addition, since the plaintiff claims that the August 17, 2001 contract supplied by the defendant is a fabrication, then as to defendant's contract there is clearly an issue of fact for this court to decide.

IV. Motion to Compel

The defendant has also moved pursuant to CPLR § 3124 to compel the production of a list of monies allegedly paid by the plaintiff to either defendant. If the plaintiff refuses to produce the list, the defendant requests that the plaintiff be prohibited from testifying about the alleged payments, pursuant to CPLR § 3126. Under CPLR §3124, a party can be ordered to comply with a discovery request if they have failed to respond to a legitimate discovery request

made by the opposition. CPLR §3124. The general guidelines for what must be produced are outlined in CPLR §3101. That sections states that generally there must be full disclosure of all matter material and necessary in the prosecution or defense of an action. CPLR §3101.

Therefore, a request for anything which may be material and necessary in the prosecution or defense of an action is a legitimate request. CPLR §3126 governs the sanctions available when a party does not comply with disclosure. This section states that a court can sanction a party if that party refuses to obey an order for disclosure, or if the party willfully fails to disclose something which the court feels should have been produced. CPLR §3126. Subsection (2) of the same section, specifies sanctions which may be imposed. The subsection states that a court can prohibit testimony if the party fails to provide full disclosure. CPLR §3126(2).

In order to reach a decision on this issue, the court must first determine if the list and other information should be disclosed, i.e. that the request was legitimate. The court finds that the list of monies paid by the defendant is essential to the breach of contract claim because the plaintiff must show as an element of her cause of action that she performed. This list of payments is directly relevant and thereby necessary to the case. It is also relevant to the issue of whether the contract was for labor only.

In addition, the court also orders that the plaintiff return a signed copy of the deposition transcript to the defendant in order for the defendant to have the opportunity to properly prepare for trial. The court is without specific knowledge of what information was requested during the transcript, therefore, it is difficult to order the production of such materials because the court can not make a determination that they are truly relevant to the case. However, this court will order that the plaintiff produce such materials, or if the plaintiff objects to the production, then the plaintiff must provide a response to the discovery request. Although the court has the authority to impose sanctions, the court is unwilling at this time, to impose sanctions on the plaintiff for failure to disclose the list, and other materials. If the plaintiff refuses to produce the list and other materials in a reasonable about of time after this order, the court will reconsider the possibility of sanctions against the plaintiff.

V. Conclusion

On the basis of the foregoing, it is

ORDERED that the plaintiff's motion to amend the complaint to add K & B Developers as a defendant is granted, and plaintiff's motion to compel disclosure of tax returns of Vogt and

K & B is granted. The amended complaint in the form annexed to the moving papers is deemed served as of the date of this order. Defendant shall serve an answer or otherwise move in twenty (20) days. It is also

ORDERED that the defendant's motion to dismiss is denied, however the defendant's motion to compel production of a list of money paid by the plaintiff to the defendants, and information requested at the plaintiff's deposition is granted. In addition, this court orders that plaintiff return a signed copy of her deposition transcript to the defendant. Such production shall be complete within twenty (20) days of the date of this order.

The trial of this matter shall appear on the court's calendar for August 23, 2004, at 9:30 A.M.

Dated: July 12, 2004


J.S.C.

ENTERED

JUL 15 2004

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**