

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D28415
H/prt

_____AD3d_____

Argued - September 7, 2010

JOSEPH COVELLO, J.P.
FRED T. SANTUCCI
RUTH C. BALKIN
LEONARD B. AUSTIN, JJ.

2010-02034

DECISION & ORDER

Daniel Koenig, respondent, v Action Target, Inc.,
defendant, County of Suffolk, appellant.

(Index No. 14104/08)

Christine Malafi, County Attorney, Hauppauge, N.Y. (Christopher A. Jeffreys of counsel), for appellant.

Grandinette & Serio, LLP, Mineola, N.Y. (Anthony M. Grandinette of counsel), for respondent.

In an action, inter alia, to recover damages for personal injuries, the defendant County of Suffolk appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Jones, Jr., J.), dated January 25, 2010, as granted the plaintiff's motion for leave to amend his complaint to add a cause of action based on General Municipal Law § 205-e predicated upon an alleged violation of Labor Law § 27-a, and denied, as academic, those branches of its cross motion which were for summary judgment dismissing the second, third, and fourth causes of action.

ORDERED that the order is affirmed insofar as appealed from, with costs.

“Leave to amend or supplement pleadings should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment” (*Yemini v Goldberg*, 46 AD3d 806, quoting *Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558, 558; see CPLR 3025[b]; *Bajanov v Grossman*, 36 AD3d 572, 573). Here, the plaintiff demonstrated that the proposed amendment had merit given that an alleged violation of Labor Law § 27-a may serve as a predicate to a cause of action pursuant to General Municipal Law § 205-e (see *Williams v City of New York*, 2 NY3d 352, 367; *Norman v City of New York*, 60 AD3d 830; *Campbell v City of New York*, 31 AD3d 594;

September 21, 2010

Page 1.

KOENIG v ACTION TARGET, INC.

Balsamo v City of New York, 287 AD2d 22, 28), and the appellant could not claim prejudice or surprise since the proposed amendments arose out of the same facts as those underlying the action (see *Fisher v City of New York*, 48 AD3d 303, 304; *Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558; *Huntington v Trotta Auto Wreckers*, 257 AD2d 647). Accordingly, the Supreme Court providently exercised its discretion in granting the plaintiff's motion for leave to amend his complaint.

The appellant's remaining contentions are without merit.

COVELLO, J.P., SANTUCCI, BALKIN and AUSTIN, JJ., concur.

2010-02034

DECISION & ORDER ON MOTION

Daniel Koenig, respondent, v Action Target, Inc.,
defendant, County of Suffolk, appellant.

(Index No. 14104/08)

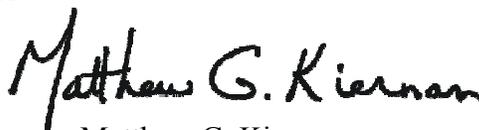
Motion by the appellant on an appeal from an order of the Supreme Court, Suffolk County, dated January 25, 2010, to strike certain portions of the respondent's brief on the ground that they refer to matter dehors the record. By decision and order on motion of this Court dated June 4, 2010, the motion was held in abeyance and referred to the panel of Justices hearing the appeal for a determination upon the argument or submission of the appeal.

Upon the papers filed in support of the motion, the papers filed in opposition thereto, and upon the argument of the appeal, it is

ORDERED that the motion is granted, and those portions of the respondent's brief in footnote 2 and on pages 16, 17, and 30, which refer to matter dehors the record are deemed stricken and have not been considered in the determination of the appeal.

COVELLO, J.P., SANTUCCI, BALKIN and AUSTIN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court