

<b>Dollard v WB/Stellar IP Owner, LLC</b>
2012 NY Slip Op 31381(U)
May 21, 2012
Supreme Court, New York County
Docket Number: 117084/2009
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C.  
*Justice*

PART 5

Index Number : 117084/2009  
DOLLARD, ROSE WELSH  
vs  
WB/STELLAR IP OWNERS  
Sequence Number : 006  
AMEND CAL. #36

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2, 3, 4, 5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

MAY 22 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/21/12  
MAY 21 2012

BARBARA JAFFE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X

ROSE WELSH DOLLARD,

Plaintiff,

-against-

WB/STELLAR IP OWNER, LLC and DUANE  
READE, INC.,

Defendants.

-----X

WB/STELLAR IP OWNER, LLC,

Third-Party Plaintiff,

-against-

THE CITY OF NEW YORK,

Third-Party Defendant.

-----X

WB/STELLAR IP OWNER, LLC,

Second Third-Party Plaintiff,

-against-

NEW YORK CITY ECONOMIC DEVELOPMENT  
CORPORATION and FRIENDS OF GREENWICH  
STREET, INC.,

Second Third-Party Defendant.

-----X

Index No. 117084/09

Subm.: 3/13/12  
Motion no.: 006

**DECISION & ORDER**

**FILED**

MAY 22 2012

NEW YORK  
COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

**For plaintiff:**

Alison Keenan, Esq.  
Burns & Harris, Esqs.  
233 Broadway, Ste. 900  
New York, NY 10279  
212-393-1000

**For Friends:**

Timothy J. McGinn, Esq.  
Wilkie Farr & Gallagher LLP  
787 Seventh Ave.  
New York, NY 10019-6099  
212-728-8000

By notice of motion dated January 6, 2012, plaintiff moves pursuant to CPLR 3025 for an order granting her leave to amend her complaint to add second third-party defendant Friends of Greenwich Street, Inc. (Friends) as a direct defendant. Friends opposes.

Plaintiff relies for its motion on a discovery response provided by defendant/third-party plaintiff WB/Stellar IP Owner, LLC, which she asserts establishes that Friends performed work at the location of her accident and should therefore be added as direct defendant. (Affirmation of Alison R. Keenan, Esq., dated Jan. 6, 2012, Exh. C).

Friends asserts that the absence of an affidavit of merit from plaintiff is fatal to the application. (Mem. of Law, dated Jan. 27, 2012).

At oral argument, I permitted plaintiff to submit an affidavit of merit, which she did by letter dated March 13, 2012. In her affidavit, dated March 12, 2012, plaintiff states that on April 13, 2009, she tripped and fell on the sidewalk in front of and/or adjacent to the premises located at 352 ½ Greenwich Street in Manhattan due to a defective condition there, and that she thereby sustained a rotator cuff tear. (Affidavit of Rose Welsh Dollard, dated Mar. 12, 2012).

By letter dated March 15, 2012, Friends maintains that plaintiff's affidavit of merit is insufficient as she fails to set forth any allegation that it was negligent, and observes that the documents relied on by plaintiff merely establish that it performed work at another location three years before the accident. (Letter, dated Mar. 15, 2012).

Pursuant to CPLR 3025(b), a party may amend its pleading at any time by leave of the court, and leave shall be freely given upon such terms as may be just. It is within the court's discretion whether a party may amend its complaint. (*Murray v City of New York*, 43 NY2d 400, 404-405 [1977], *rearg dismissed* 45 NY2d 966 [1978]; *Lanpont v Savvas Cab Corp., Inc.*, 244 AD2d 208, 209 [1<sup>st</sup> Dept 1997]). The factors to be considered are whether the proposed amendment would "surprise or prejudice" the opposing party (*Murray*, 43 NY2d at 405; *Lanpont*, 244 AD2d at 209, 211; *Norwood v City of New York*, 203 AD2d 147, 148 [1<sup>st</sup> Dept 1994], *lv dismissed* 84 NY2d 849), and whether the amendment has merit (*Thomas Crimmins Contracting Co., Inc. v City of New York*, 74 NY2d 166, 170 [1989] ["Where a proposed defense plainly lacks merit, however, amendment of a pleading would serve no purpose but needlessly to complicate discovery and trial, and the motion to amend is therefore properly denied."]; *360 W. 11<sup>th</sup> LLC v ACG Credit Co. II, LLC*, 90 AD3d 552 [1<sup>st</sup> Dept 2011] [court must examine merit of proposed amendment to conserve judicial resources]; *Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1<sup>st</sup> Dept 2003] [same]). The movant must make an evidentiary showing that the amendment has merit. (*Helene-Harrisson Corp. v Moneyline Networks, Inc.*, 6 AD3d 151 [1<sup>st</sup> Dept 2004]).

Here, plaintiff's affidavit of merit sets forth allegation that Friends was negligent and the documents she submits do not establish or even permit the inference that Friends performed any work at the accident location or that if it performed work there, it was defective. Plaintiff has thus failed to demonstrate that her proposed amendment has merit. (*See eg DeLouise v S.K.I. Wholesale Beer Corp.*, 75 AD3d 489 [2d Dept 2010] [motion to amend complaint should not have been granted as plaintiff's motion papers were devoid of factual basis for proposed

amendments]).

Accordingly, it is hereby

ORDERED, that plaintiff's motion for leave to amend her complaint is denied.

ENTER:

  
Barbara Jaffe, JSC

**FILED**

**BARBARA JAFFE**

**MAY 22 2012**

DATED: May 21, 2012  
New York, New York

**MAY 21 2012**

NEW YORK  
COUNTY CLERK'S OFFICE