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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich

PART 54

0115311/2001

400 EAST 51ST STREET, LLC
vs
FIFTY FIRST BEEKMAN

INDEX NO. 115311/01

MOTION DATE 6/3/04

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

SEQ 2

AMEND SUPPLEMENT PLEADINGS

The following papers, numbered 1 to 5 were read on this motion to/for amend pleading

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	4-5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision and Order.

FILED

AUG - 5 2004

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 7/31/04

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54

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400 EAST 51ST STREET LLC,

Plaintiff,

-against-

Index No. 115311/01

FIFTY FIRST BEEKMAN CORP., ROSE ASSOCIATES, INC., PAUL J. HERMAN, MIDTOWN PRESERVATION, INC., KATHLEEN NEEDHAM INOCCO, and JOHN DOES #1-10,

DECISION and ORDER

Defendants.

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FIFTY FIRST BEEKMAN CORP., and MIDTOWN PRESERVATION, INC.,

Third-Party Plaintiffs,

-against-

ALEXICO MANAGEMENT GROUP, INC., NISO BAHAR, IZAK SENBAHAR, RASAT ARBAS, GAMA HOLDINGS, INC., SIMON ELIAS, HRH CONSTRUCTION CORP., PETER PALAZZO, ROBERT CONROY, FRANK ROSS, JR., HARRY WEIDMYER, BREEZE CONTRACTING CORP., and JOHN DOES #1-10,

Third-Party Defendants.

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BREEZE CONTRACTING CORP., ALEXICO MANAGEMENT GROUP, INC., NISO BAHAR, IZAK SENBAHAR, RESAT ARBAS, and SIMON ELIAS,

Second Third-Party Plaintiffs,

-against-

FLEET TRUCKING, INC.,

Second Third-Party Defendants.

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BREEZE CONTRACTING CORP., ALEXICO MANAGEMENT GROUP, INC., NISO BAHAR, IZAK SENBAHAR, RESAT ARBAS, and SIMON ELIAS,

Third Third-Party Plaintiffs,

-against-

CIVETTA COUSINS, JV.,

Third Third-Party Defendants.

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HRH CONSTRUCTION CORPORATION, PETER PALAZZO, ROBERT CONROY, FRANK ROSS, JR., and HARRY WEIDMYER,

Fourth Third-Party Plaintiffs,

-against-

CIVETTA COUSINS, JV.,

Fourth Third-Party Defendants.

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HON. SHIRLEY WERNER KORNREICH, J.:

I. FACTUAL AND PROCEDURAL BACKGROUND:

According to the allegations in the Complaint, plaintiff is developing three contiguous parcels of real property on 51st Street near First Avenue, to be known as 400 East 51st Street, New York, New York. It is plaintiff's intention to build a 32-story high rise condominium on the property to be known as the "Grand Beekman," featuring retail space on the ground floor, 88 luxury residential units upstairs, and 26 storage units.

On the land acquired by plaintiff there was, inter alia, a six-story building ("the six-story building") immediately next to and to the west of a 12-story co-op building ("the co-op") owned by defendant Fifty First Beekman Corp. ("51st Beekman"). On June 7, 2000 plaintiff contracted

with third-party defendant Breeze Contracting Corp. ("Breeze") to demolish the six-story building. By purchase order dated August 10, 2000, Breeze, in turn, subcontracted the demolition job to second third-party defendant Fleet Trucking, Inc. ("Fleet"). As the work progressed, 51st Beekman began complaining that its co-op's wall was being destabilized by plaintiff's demolition work. 51st Beekman alerted the Department of Buildings, which issued a stop-work order, effectively shutting down plaintiff's project on or around July 25, 2001. See Proposed Amended Verified Complaint, appended to Notice of Motion as Exhibit F.

On or around August 10, 2001, plaintiff sued 51st Beekman and affiliated entities for its damages, alleging that the defects in defendants' co-op wall had antedated plaintiff's demolition activities, so that plaintiff's enterprise had been shut down through no fault of its own. See Exhibit A to plaintiff's Notice of Motion. On October 5, 2001, defendants 51st Beekman and Midtown Preservation, Inc. ("Midtown") commenced a third-party action against certain of plaintiff's project developer principals, including plaintiff's construction manager HRH Construction Corp. ("HRH") and Breeze. It was the theory of the third-party plaintiffs that the third-party defendants had caused the wall of their adjoining building to become unstable through improper demolition techniques, as well as through their failure to brace, stabilize and weatherproof the wall.

In July 2002, Breeze and assorted other third-party defendants commenced a second third-party action against Fleet for contractual indemnification, and/or for Fleet's alleged breach of the defense-and-indemnification provisions of its purchase order agreement. See Exhibit D to Notice of Motion. In October 2002, a fourth third-party action for indemnification – not at issue here -- was commenced by HRH et al. against Civetta Cousins, JV.

II. DISCUSSION:

Plaintiff now moves to amend its Verified Complaint to add Breeze and Fleet as direct parties defendant, and to assert against them causes of action sounding in (1) contractual indemnification, and (2) breach of contract, in that "[i]f and in the event that Breeze or Fleet caused, in whole or in part, any damage to the Co-op's building['s] western wall and facade, then Breeze and Fleet have breached their respective contracts and are liable to Plaintiff for all resulting damages, including delay damages." See Exhibit F to Notice of Motion. Breeze has not opposed plaintiff's motion. Fleet, on the other hand, argues (a) that plaintiff should not be allowed to add a theory that contradicts its original hypothesis that plaintiff's work was not at fault, (b) that lateness is a barrier to any amendment, (c) that Fleet would be prejudiced by having to defend against a new theory, and (d) that plaintiff's claim of "breach of contract" is really a theory of "negligence" in disguise, as to which the statute of limitations has run.

Under CPLR §3025(b), leave to amend a pleading should be freely given, absent significant prejudice or surprise to the non-moving party. See McCaskey, Davies and Associates, Inc. v. New York City Health and Hospitals Corp., 59 N.Y.2d 755 (1983); Prote Contracting Co., Inc. v. Board of Education of the City of New York, 249 A.D.2d 178 (1st Dept. 1998). Lateness alone is not a barrier to amendment, absent a showing of significant prejudice. See Edenwald Contracting Co. v. City of New York, 60 N.Y.2d 957, 959 (1983); Abdelnabi v. New York City Transit Authority, 273 A.D.2d 114 (1st Dept. 2000); Hospital for Joint Diseases v. James Katsikis Environmental Contractors, Inc., 173 A.D.2d 210 (1st Dept. 1991).

To establish that it will be "prejudiced" in a way that should bar a pleading amendment, a defendant must demonstrate that it will be hindered in the preparation of its case, or that it has

been or will be prevented from taking some measure[s] in support of its defense. See Loomis v. Civetta Corinno Construction Corp., 54 N.Y.2d 18, 23 (1981), rearg. den. 55 N.Y.2d 801 (1981); Abdelnabi v. New York City Transit Authority, supra; Mark G. v. Sabol, 169 Misc.2d 242 (Sup. Ct., N.Y. Co. 1996). Fleet has made no such showing of "prejudice" in the case at bar, complaining only that it expects its defense expenses to increase as a result of the amendment. Neither this -- nor the possibility that the measure of damages that Fleet might ultimately be required to pay might turn out to be greater than originally anticipated because of the proposed amendment -- constitutes cognizable "prejudice." Indeed, plaintiff's proposed claims essentially replicate the claims already asserted against Fleet in Breeze's second third-party action, against which Fleet must already prepare a defense.

Defendant does not explain why this case should pose an exception to the well-established rule that pleading in the alternative is permitted, even if the theories advanced are inconsistent. See CPLR §3014. Moreover, the record contains an adequate prima facie basis for the amendment. See, e.g., Hospital for Joint Diseases v. Katsikis Contr., supra.

Finally, there is no precedent for dismissing as time-barred a properly-pleaded breach of contract claim on the ground that it is "really" a "negligence" claim in disguise. Significantly, Fleet does not deny the existence of the contract documents that govern its relationship with plaintiff, its contractual duty to plaintiff, or even plaintiff's right to hold Fleet liable under the breach of contract and third-party beneficiary theories being propounded by plaintiff. All of these claims may be brought within six years from the date of accrual. Accordingly, it is

ORDERED that plaintiff's motion pursuant to CPLR §3025 for leave to amend its verified complaint to assert direct causes of action for contractual indemnification and breach of

contract against third-party defendants Breeze and Fleet herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendants shall serve an answer to the amended complaint within 20 days from the date of said service.

The foregoing constitutes the Decision and Order of the Court.

Date: July 21, 2004
New York, New York

SHIRLEY WERNER KORNREICH