

<b>Balsamo v Savin Corp.</b>
2007 NY Slip Op 30967(U)
March 28, 2007
Supreme Court, Queens County
Docket Number: 0028145/2004
Judge: Patricia P. Satterfield
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Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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OLIVIA BALSAMO,

Index No: 28145/04

Motion Date: 2/21/07

Motion Cal. No: 3

Plaintiff,

-against-

SAVIN CORP., RICOH CORPORATION,  
and RICOH BUSINESS SYSTEMS, INC.,

Defendants.

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The following papers numbered 1 to 10 read on this motion for an order, pursuant to CPLR 3025, granting plaintiff leave to amend the Summons and Complaint to add a cause of action of constructive discharge.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Affidavit in Opposition-Exhibits.....	5 - 7
Reply Affirmation-Exhibits.....	8 - 10

Upon the foregoing papers, it is ordered that the motion is resolved as follows:

This is an action to recover damages upon claims of breach of contract, failure to pay commissions, and age discrimination brought by plaintiff Olivia Balsamo (“plaintiff”) against defendant Savin Corp. (“Savin”), Ricoh Corporation (“Ricoh Corporation”) and Ricoh Business Systems, Inc. (“Ricoh Business”). Savin is the successor to Ricoh Corporation and Ricoh Business as plaintiff’s employer. The Note of Issue was filed on November 16, 2006; on November 20, 2006, plaintiff submitted her resignation, effective December 11, 2006. Plaintiff now seeks leave to serve an Amended Complaint to assert a constructive discharge cause of action and retaliation.

It is well settled that leave to amend or supplement pleadings "shall be freely given," 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. Adams v. Jamaica Hosp., 258 A.D.2d 604 (2d Dept.1999); East Patchogue Contr. Co. v. Magesty Sec. Corp., 181 A.D.2d 714 (2d Dept. 1992); Nissenbaum v. Ferazzoli, 171 A.D.2d 654 (2d Dept. 1991). See McCaskey, Davies & Assocs. v. New York City Health & Hosps. Corp., 59 N.Y.2d 755 (1983); CPLR 3025(b). Moreover,

“[a] court hearing a motion for leave to amend will not examine the merits of the proposed amendment “unless the insufficiency or lack of merit is clear and free from doubt. In cases where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave should be denied’ (citations omitted).” Ricca v. Valenti, 24 A.D.3d 647 (2d Dept. 2005). See, also, Corman v. LaFountain, \_\_ A.D.3d \_\_, 2007 WL 853177 (2d Dept. 2007).

Defendants oppose the motion to amend on several grounds. First, they contend that the proposed amendment is lacking in merit, which this Court may consider only if the “lack of merit is clear and free from doubt” (Ricca v. Valenti, *supra*); such is not the case here. Second, they contend that this motion to amend the complaint, made three months after the filing of the note of issue, is plaintiff’s attempt to delay the disposition of the matter; however, a delay or lateness in seeking amendment is not fatal. See, Huntington v. Frank Trotta Auto Wreckers, Inc., 257 A.D.2d 647 (2d Dept. 1999)[“Mere lateness, in the absence of prejudice, is not a barrier to amendment”]. This is particularly true, where, as here, a reasonable excuse for the delay – the alleged retaliatory actions and constructive discharge in late 2006– has been shown. See, Dimino v. Rosenfeld, 306 A.D.2d 371 (2d Dept. 2003)[“where there has been an inordinate delay in seeking leave to amend, the plaintiffs must establish a reasonable excuse for the delay and submit an affidavit to establish the merits of the proposed amendment”]; Reape v. City of New York, 272 A.D.2d 533 (2d Dept. 2000)[same]. Indeed, these contentions are strikingly similar to those made in Maloney Carpentry, Inc. v. Budnik, \_\_ A.D.3d \_\_, 830 N.Y.S.2d 262 (2d Dept. 2007), in which the Second Department, stated:

Here, the defendants demonstrated that the proposed amendments have merit, and the plaintiff cannot claim prejudice or surprise since the proposed amendments arise out of the same facts as those underlying the action brought by the plaintiff (citations omitted). Moreover, under the circumstances, the defendants presented a reasonable excuse for the delay in seeking such relief (citations omitted). Accordingly, the Supreme Court providently exercised its discretion in granting the defendants’ motion for leave to amend their answer.

Here, as in Maloney Carpentry, Inc. v. Budnik, because there is no demonstrated prejudice or surprise to defendants, the application is granted. See, Bajanov v. Grossman, 36 A.D.3d 572 (2d Dept. 2007).

Finally, defendants argue that if the amendment is permitted, then they are entitled to discovery on the new claim. This Court agrees. “[T]o prevent substantial prejudice to the defendants, they should be afforded an opportunity to conduct further discovery to adequately prepare for trial ( see 22 NYCRR 202.21[d]; Vargas v. City of New York, 4 A.D.3d 524, 772 N.Y.S.2d 381; Risucci v. Homayoon, 122 A.D.2d 260, 505 N.Y.S.2d 176).” Andre-Long v. Verizon Corp., 31 A.D.3d 353, (2d Dept. 2006).

In sum, plaintiff's motion is granted, and plaintiff is directed to serve a supplemental summons and an amended complaint upon defendants, in the form annexed to the moving papers, within twenty (20) days of service of a copy of this order with notice of entry. Defendants have the statutorily prescribed time to interpose responsive papers. Thereafter, any application for additional discovery shall be made to the Court.

Dated: March 28, 2007

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J.S.C.