SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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TADEUSZ KOTLARZ,

DCM Part 4

Plaintiff, **Present:**

-against- **HON. ROBERT J. GIGANTE**

DECISION and ORDER

CARMINE TUFANO, BARBARA TUFANO, TUFANO CONSTRUCTION, INC., RICHARD NESSIM, DANIELLE DODY, DRD CONSULTING, PHILIP ROSSOMANDO and TEE JAY CONSTRUCTION, CORP.,

Defendants. **Index No. 13576/04**
Motion No. 083-003

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The following papers numbered 1 to 3 were used on this motion on the 21st day of March, 2007:

	Papers
Notice of Motion (Affidavit in Support)	1
Affirmation in Opposition	2
Reply Affirmation in Support of Motion to Amend Answer	3

Upon the foregoing papers, the motion of defendants Carmine and Barbara Tufano for leave to amend their answer is granted, and the amended answer is deemed served and filed. However, that further branch of their motion which seeks costs and disbursements incurred in connection with the making of this motion is denied.

Carmine and Barbara Tufano, former owners of the defaulting defendant, Tufano Construction, Inc., seek leave to amend their answer pursuant to CPLR 3025(b) in order to assert (1) a counterclaim against plaintiff and based on their execution of an indemnification agreement on or about April 1, 2004 (Tufanos' Exhibit C).

In his January 2, 2007 affidavit in support of the motion, Carmine Tufano avers that on May 29, 2002 and January 28, 2003, he and his wife, Barbara, executed General Agreements of Indemnity in favor of the Atlantic Mutual Companies, Atlantic Mutual Insurance Company, and Centennial Insurance Company to secure the performance of certain construction projects undertaken by Tufano Construction Inc. In pertinent part, these agreements required the Tufanos to hold harmless and indemnify the above sureties from "all liabilities, losses, costs, damages, attorneys fees, disbursements and other expenses which the[y] may sustain by reason of having executed or procured the execution of the accompanying performance bonds" (Tufanos' Exhibit D, para. 6). Thereafter, in September of 2003, Tufano Construction, Inc. entered into a contract for the alteration and improvement of the Sunquam Elementary School in Long Island, New York.

When the Tufanos subsequently sold their interest in Tufano Construction to the plaintiff and defendants Nessim and Rossomando, they entered into a written Indemnification Agreement stating that in consideration for the Tufanos remaining liable under the aforementioned General Agreements of Indemnity, the purchasers, plaintiff, Nessim and Rossomando, would indemnify the Tufanos and hold them harmless from and against all liability which they might incur under said agreements.

It is undisputed that on February 18, 2005, Tufano Construction was declared to be in default of its contract for the Sunquam Project. As a result, numerous subcontractors filed claims for nonpayment totaling $774,920.46 which the sureties were compelled to pay. Insofar as is relevant, these sureties subsequently commenced an action against, *inter alia*, the Tufanos and their former company in the Supreme Court of New York County (*see* Tufanos' Exhibit G), and on December 26, 2006, summary judgment was entered in favor of the sureties with the New York County Clerk (*see* Tufanos' Exhibit J).

In light of the above ruling, the Tufanos now seek to amend their answer in this action to assert counter-and cross claims for indemnification against each of the purchasers under the April 1, 2004 agreement. In the pending action, plaintiff is claiming that he was defrauded by the Tufanos, who are alleged to have funneled business away from Tufano Construction after the sale.

At the outset, the court notes that defendants Nessim and Rossomando have not opposed the motion. Accordingly, the amended answer with cross claims is deemed served and filed as against those defendants.

In opposing the motion, plaintiff asserts that since the Tufanos allowed a default judgment to be entered against them in the New York County action, they must be deemed to have admitted all of the factual allegations of the underlying complaint, which accuses them individually of, e.g., the misapplication of trust funds, fraud, and the wilful filing of an intentionally exaggerated mechanic's lien. Thus, plaintiff argues that the subject indemnification agreement is void as against public policy to the extent that it purports to indemnify the Tufanos for damages flowing from their intentional misdeeds.

Leave to amend a pleading is freely granted absent prejudice or surprise resulting directly from any delay in asserting the proffered claim (CPLR 3025[b]; McCaskey, Davies & Assoc., v. New York City Health & Hosps. Corp., 59 NY2d 755). Here, it is the party opposing the motion who must overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the purported claims (*see* Non- Linear Trading Co. v. Braddis Assoc., 243 AD2d 107, 116; Daniels v. Empire-Orr, Inc., 151 AD2d 370). While the determination of whether to allow an amendment is committed to the sound discretion to the court (*see* Sewkarran v. DeBellis, 11 AD3d 445), where the proposed amendment is clearly lacking in merit, the application must be denied (*see* Davis v. Morson, 286 AD2d 584).

In this case, any claim for indemnification against the purchasers was technically premature prior to the entry of judgment in the New York County action (see, County of Monroe v Raytheon Co., 156 Misc. 2d 445). Hence, the motion is not the product of undue delay. This case has not yet been certified as ready for trial, and discovery remains outstanding. Moreover, in opposing the motion, plaintiff does not maintain that the facts alleged by the Tufanos are "obviously unreliable or insufficient" to support the proposed amendment (Daniels v. Empire-Orr, Inc., 151 AD2d at 371). Rather, plaintiff has effectively interposed an "affirmative defense" to the proposed counterclaim. This is a matter that is better left for

resolution at trial or on a motion for summary judgment (*id*. at 372). Accordingly, it is

ORDERED, that the motion of defendants Carmine Tufano and Barbara Tufano for leave to amend their Answer is granted, and it is further

ORDERED, that an Amended Answer in the form annexed to the moving papers is deemed served and filed, and it is further

ORDERED, that the affected parties shall have 30 days from the date of the service upon them of a copy of this Order with Notice of Entry within which to serve a responsive pleading, and it is further

ORDERED, that the movants' request for costs and disbursements related to the making of this motion is denied.

Dated: June 26, 2007 E N T E R,

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Robert J. Gigante, JSC