

**1695 Church St. Assoc., LLC v Church St., LLC**

2007 NY Slip Op 32621(U)

July 30, 2007

Supreme Court, Suffolk County

Docket Number: 0020068/2005

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 11-13-06 (005)  
12-4-06 (006)  
3-7-07 (007) (008)  
ADJ. DATE 5-2-07  
Mot. Seq. # 005 - MD  
006 - MD  
007 - MotD  
008 - XMotD

-----X  
1695 CHURCH ST. ASSOCIATES, LLC., :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 CHURCH STREET, LLC, JOHN M. :  
 PETROCELLI and JOAN PETROCELLI, :  
 Defendants. :

RICONDA & GARNETT, LLP  
Attorneys for Plaintiff  
753 West Merrick Road  
Valley Stream, New York 11580

DeMARTIN & RIZZO, P.C.  
Attys for Defts/3rd Party Pltfs Petrocelli  
870 West Jericho Turnpike  
Huntington, New York 11743

-----X  
JOHN M. PETROCELLI and JOAN :  
 PETROCELLI :  
 :  
 Third-Party Plaintiffs, :  
 :  
 - against - :  
 :  
 NORTON BROTHERS DUNN, ENGINEERING :  
& SURVEYING, LLP, :  
 Third-Party Defendants.:

L'ABBATE, BALKAN, COLAVITA &  
CONTINI, L.L.P.  
Attorneys for 3<sup>rd</sup> Party Deft Norton Brothers  
1001 Franklin Avenue  
Garden City, New York 11530

CULLEN & DYKMAN BLEAKLEY, LLP  
Attys for Deft Church Street  
100 Quentin Roosevelt Boulevard  
Garden City, New York 11530

Upon the following papers numbered 1 to 80 read on these motions to vacate note of issue; to amend complaint; for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-15; 16-21; 22-38; Notice of Cross Motion and supporting papers 39-48; Answering Affidavits and supporting papers 49-51; 52-67; 68-71; 72-73; Replying Affidavits and supporting papers 74-78; Other 79-80; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (005) by the third party defendant, Norton Brothers Dunn, Engineering and Surveying, LLP, for an order vacating the Note of Issue and Certificate of Readiness filed by plaintiff, 1695 Church St. Associates, LLC, in the above captioned action is denied; and it is further

**ORDERED** that this motion (006) by plaintiff for an order granting it leave to amend the summons and complaint in the above captioned action to add VP Electric, Inc., Michael Meditz and Victor DeRosa as proper party plaintiffs and add J. Petrocelli Contracting, Inc and Norton Brothers Dunn, Engineering & Surveying LLP (“Dunn”) as proper party defendants and modifying the caption bearing index number 20068/05 to properly reflect said amendment is denied; and it is further

**ORDERED** that this motion (007) by third party defendant, Dunn, for an order granting it summary judgment dismissing plaintiff’s complaint in its entirety or, in the alternative, granting partial summary judgment dismissing certain damages claimed by plaintiff as not recoverable, or in the alternative, striking plaintiff’s complaint for its failure to comply with court ordered discovery is decided as follows; and it is further

**ORDERED** that this cross- motion (008) by defendants John M. Petrocelli and Joan Petrocelli for an order granting them summary judgment dismissing plaintiff’s complaint in its entirety or, in the alternative, granting partial summary judgment dismissing certain damages claimed by plaintiff as not recoverable, or in the alternative, striking plaintiff’s complaint for its failure to comply with court ordered discovery is decided as follows.

Plaintiff is the owner of premises located on Church Street in Holbrook, New York. Defendants John and Joan Petrocelli are the owners of the property adjacent to the plaintiff’s premises. In connection with the construction of premises on that property, the Petrocellis utilized the services of J. Petrocelli Construction, Inc. and/or J. Petrocelli Contracting, to oversee the construction. During the summer of 2004, prior to commencement of construction, J. Petrocelli Construction retained third party defendant Dunn to survey the premises and to stake and mark boundaries and to set monuments of the land owned by the Petrocellis. In August of 2004, Dunn completed the work and was paid by J. Petrocelli Contracting. Construction began that fall and in April of 2005, the building was erected. Upon completion, the building encroached upon the eastern boundary of the plaintiff’s premises by several feet.

Plaintiff instituted this action against Church Street LLC<sup>1</sup> and John and Joan Petrocelli. Subsequently, the Petrocellis commenced a third party action against Dunn to recover damages from Dunn by reason of Dunn’s purported negligence, breach of contract and for indemnification. By order of the court (Burke, J.) dated December 8, 2006, this court granted that part of the Petrocellis’ motion which sought an order adjudging that Dunn’s conduct was the proximate cause of the encroachment on the plaintiff’s premises. In that order, the court also directed plaintiff to furnish all documents in response to outstanding discovery demands.

On November 13, 2006, prior to the court’s December 8, 2006 decision, Dunn filed a motion (005), seeking an order vacating note of issue filed by plaintiff, arguing that discovery was not complete. Although the court did not address this specific motion in its December 8, 2006 order, the court did indicate it was declining to sign a stipulation from all counsel vacating the note of issue filed by plaintiff and stated that the action shall remain on the trial calendar subject to the continuing discovery directed there in. Consistent with the court’s prior decision and in view of the court’s decision herein, the third party defendant’s motion for an order vacating the note of issue filed by plaintiff is denied.

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<sup>1</sup>To date, Church Street LLC has not appeared in this action.

Three other motions remain pending before this court. Plaintiff has moved this court (006) seeking leave to amend its complaint to add three additional plaintiffs, VP Electric, Victor DeRosa and Michael Meditz, and two defendants, third party defendant Dunn and J. Petrocellis Contracting, Inc. Both Dunn and the Petrocellis oppose this motion, arguing that motion is without merit. Specifically, Dunn and the Petrocellis argue that the additional plaintiffs sought to be added have no standing to bring this action and that no basis exists for an action brought by plaintiffs against Dunn directly or against J. Petrocellis Contracting, because it had no role in the construction of the building and encroachment.

Dunn and the Petrocellis have both filed a motions (007 and 008) seeking an order granting them summary judgment dismissing plaintiff's complaint, arguing that plaintiff can have no viable claim for damages in that during the course of this litigation it subdivided and sold both the main parcel of property in question as well as the "gore" representing the area encroached upon. Plaintiff sold the main premises to a third party for \$635,750. The Petrocellis defendants purchased the remaining 12 foot strip of land, valued at \$25,000, for \$150,000. Therefore, Dunn and the Petrocellis argue that plaintiff, contrary to suffering damages, has already received a windfall profit of \$125,000 and should be precluded from receiving anymore. In the alternative, Dunn and the Petrocellis argue that plaintiff's damages should be limited to the value the property was decreased by because of the encroachment plus any monies expended in an effort to mitigate damages. Finally, Dunn and the Petrocellis both seek an order striking plaintiff's complaint for failure to comply with still outstanding court ordered discovery.

Plaintiff opposes the motions of Dunn and the Petrocellis, arguing that the measure of damages incurred by plaintiff is in and of itself an issue for the trier of fact. Specifically, plaintiff's counsel asserts that plaintiff did incur costs in addition to the decreased value of the property in that at the time the encroachment was discovered, plaintiff was in negotiations to sell the property. Having been unable to sell the property at that juncture, plaintiff alleges it incurred additional costs associated with operating the building for two years as well as litigation and subdivision costs that it would not have incurred but for the negligence of the defendants and third party defendant.

#### ***Plaintiff's Motion for an Order Granting Leave to Amend its Pleadings***

Absent prejudice or unfair surprise to the defendant, leave to amend a bill of particulars or a pleading should be freely given (*see, Scheuerman v Health & Hosps. Corp. of City of NY*, 243 AD2d 553, 663 NYS2d 123 [2d Dept 1997]; *Volpe v Good Samaritan Hosp.*, 213 AD2d 398, 623 NYS2d 330 [2d Dept 1995]). However, a plaintiff guilty of an extended delay in seeking leave to amend a pleading must establish a reasonable excuse for the delay and submit an affidavit demonstrating the merits of the proposed amendment by a person with direct knowledge of the pertinent facts (*see, Smith v Plaza Transp. Ambulance Serv.*, 243 AD2d 555, 665 NYS2d 513 [2d Dept 1997]; *Kyong Hi Wohn v County of Suffolk*, *supra*; *Raies v Apple Annie's Rest.*, 115 AD2d 599, 496 NYS2d 260 [2d Dept 1985]). "(L)ease should be denied if the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit" (*Leszczynski v Kelly and McGlynn*, 281 AD2d 519, 722 NYS2d 254 [2d Dept 2001]).

Turning to the case at bar, plaintiff has failed to offer a reasonable excuse for the inordinate delay in seeking to amend its complaint (*see, Smith v Plaza Transp. Ambulance Serv.*, *supra*; *Dahrong v Trifon*, 242 AD2d 520, 662 NYS2d 321 [2d Dept 1997]; *Kyong Hi Wohn v County of Suffolk*, *supra*). Furthermore, the purported affidavit of merit submitted by plaintiff fails to establish to this court that

there is merit to the proposed amendments. Specifically, plaintiff has failed to assert what harm was allegedly suffered by the individual share holders of 1695 Church St. Associates, LLC, let alone one that is different from that allegedly suffered by the Corporation. Furthermore, and contrary to the statements made by plaintiff, VP Electric is not a mortgagor of the premises and therefore has no standing to bring this action. Additionally, plaintiff has failed to establish that there is merit to its proposed amendment to name Petrocellis Contracting, Inc. as a defendant. While it may be a corporation that is somehow connected to related to the Petrocellis defendants, that fact alone, does not, in and of itself, make it liable to plaintiff for a wrong allegedly committed by the Petrocellis. Finally, absent privity of contract or proof that plaintiff was a third party beneficiary of the contract, plaintiff has failed to establish the merits of amending the complaint to add Dunn as a party defendant (*see, Morgan v Prospect Park Assoc. Holdings, LP*, 251 AD2d 306, 674 NYS2d 62 [1998]).

Moreover, to allow plaintiff leave to amend its complaint at this juncture, when it has already certified that discovery is complete and the matter has been on the court's trial calendar in excess of seven months, would be highly prejudicial to both the existing defendants and the proposed additional defendants.

For all of the aforementioned reasons, plaintiff's motion for leave to amend its pleadings is denied.

***Dunn and the Petrocellis' Motions for Orders Granting Summary Judgment,  
Partial Summary Judgment And/or Striking Plaintiff's Complaint***

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NYS2d 1062, 601 NYS2d 463 [1993]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Until the burden is met, the opponent of the motion is under no burden to make an evidentiary showing to raise a triable issue of fact (*Romano v St. Vincent's Medical Center*, 178 AD2d 467, 577 NYS2d 311 [2d Dept 1991]). Failure of the movant to make the required showing mandates a denial of the motion regardless of the sufficiency of the opposing papers (*JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, 795 NYS2d 502 [2005]). Moreover, it is well settled that the remedy of summary judgment is appropriate only where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. The competing contentions of the parties must be viewed in a light most favorable to the party opposing the motion (*Marine Midland Bank, NA v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 (2d Dept 1990)).

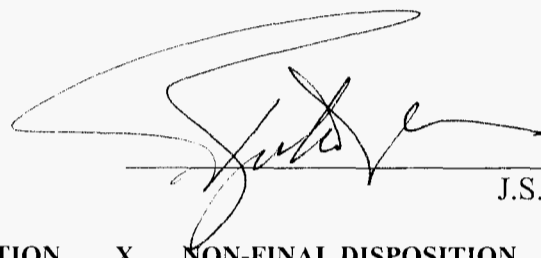
In the case at bar, the court finds that there are issues of fact which prevent the court from granting summary judgment, either wholly or in part, limiting plaintiff's request for damages. While it may be true that ultimately plaintiff is unable to prove that defendants are liable for all of the various damages allegedly suffered as a result of the encroachment, plaintiff has raised sufficient factual questions concerning their existence to warrant a decision being made by the trier of fact and not the court at this juncture. Even third party defendant Dunn concedes that plaintiff has a legitimate claim for some damages in excess of the value of the encroached upon area, namely those losses sustained in connection with subdividing the property. The exact nature and extent of all damages allegedly suffered by plaintiff,

and the parties' respective legal responsibility for payment in that regard are properly reserved for the trier of fact.

Turning to the issue of the third party defendant and the Petrocellis' motion to strike plaintiff's complaint for failure to provide discovery that has been both repeatedly requested and court ordered, the court grants that part of the motions to the extent that plaintiff is required to turn over all outstanding discovery items, including those items previously ordered to be turned over by the December 8, 2006 order of this court, no later than 30 days from the date of this order. If plaintiff fails to completely respond to the discovery requests by that date, plaintiff's complaint shall be stricken.

Therefore, the motion by the third party defendant, Dunn, for an order vacating the Note of Issue and Certificate of Readiness filed by plaintiff is denied; and the motion by plaintiff for an order granting it leave to amend the summons and complaint in the above captioned action is denied; and that part of the motions by third party defendant, Dunn and defendant John and Joan Petrocellis, which seek an order granting them each summary judgment dismissing plaintiff's complaint in its entirety or, in the alternative, granting partial summary judgment dismissing certain damages claimed by plaintiff is denied and that part of the motions by third party defendant, Dunn and defendant John and Joan Petrocellis, which seek an order striking plaintiff's complaint for its failure to comply with court ordered discovery is granted to the limited extent set forth above.

Dated:       JUL 30 2007      

  
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J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION