

**Szpakowski v Shelby Realty, LLC**

2007 NY Slip Op 34388(U)

January 8, 2007

Supreme Court, New York County

Docket Number: 123412/00

Judge: Louis B. York

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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**  
**PRESENT: Hon. LOUIS B. YORK** **PART 2**  
**Justice**

-----X  
**MAREK SZPAKOWSKI and AGNES SZPAKOWSKI,**  
Plaintiff,

-against-

**SHELBY REALTY, LLC, FORTHRIGHT DEV. CO., LLC and METROPOLITAN HOTELS,**  
Defendants,

Index No. 123412/00  
Motion Date \_\_\_\_\_  
Motion Seq. No. 003  
Motion Cal. No. \_\_\_\_\_

-----X  
**SHELBY REALTY, LLC,**  
Third-Party Plaintiff,

-against-

**STEPHEN R. BRIGHENTI and JONATHAN P. ZAMBETTI,**  
Third-Party Defendants,

**FILED**  
JAN 11 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**SHELBY REALTY, LLC,**  
Second Third-Party Plaintiff,

-against-

**CITY CLUB HOTEL, LLC,**  
Second Third-Party Defendant.

-----X  
The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for Summary Jgmt. Lieu of Complaint

NUMBERED  
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_  
  
Answering Affidavits — Exhibits \_\_\_\_\_  
  
Repeating Affidavits \_\_\_\_\_

| PAPERS  
| \_\_\_\_\_  
| \_\_\_\_\_  
| \_\_\_\_\_

**Cross-Motion:** [ ] Yes [ ] No

This is a motion after trial to amend the answer of the co-defendant Forthright

Development Company, LLC (“Forthright”) to add the defense of the Workers’ Compensation Law as a bar to the claim of the plaintiff. After the granting of the motion, Forthright further moves that the Court grant summary judgment dismissing the action against it.

This action was commenced in November of 2000. The complaint seeks recovery for injuries suffered by plaintiff as a result of a fall from a scaffold at a construction site.

Partial summary judgment on liability was awarded against defendant Forthright on April 7, 2004. In addition, summary judgment was also awarded against co-defendant Shelby Realty, LLC’s (“Shelby”) claim for indemnification.

The first trial on damages resulted in a mistrial. The second took place in November of 2004 and a verdict was rendered against defendant on November 19, 2004. A Decision and Order was rendered by the Court on August 5, 2005. As a result of an arithmetic error, the Order and Decision (which included a new trial of the Court’s upward modification on pain and suffering was not stipulated to) was amended on October 17, 2005.

Forthright’s previous request by Order to Show Cause for identical relief as is sought here resulted in this Court’s declining to sign it on July 11, 2006. Rather than seeking the signature of an Appellate Division justice on the Order to Show Cause, Forthright moves by Notice of Motion to amend its answer to assert the Workers’ Compensation Law as a complete defense to plaintiff’s claim against it. The basis of the Workers’ Compensation

defense is that Forthright, as a member of and manager of plaintiff's employer, along with its co-manager, Shelby Realty, LLC and the City Club Hotel, LLC ("City Club") entered into a joint venture with the City Club for the renovation of the hotel property. As a joint venture, it claims that it is entitled to the same protection against plaintiff's claims as City Club is under §11 of the Workers' Compensation Law. Therefore, argues plaintiff, like City Club, it is immune from liability against it by plaintiff and as a manager of the Hotel, it claims immunity from the claim of indemnity by Shelby Realty as a result of the joint venture.

At no time in the Answer, during the extensive discovery process, the pre-trial motions or the post-trial motions for upward and downward modifications, was the Workers' Compensation defense raised. Plaintiff's and the co-defendant's negotiation strategies and their trial preparation, including trial strategy was never given notice of this new defense. Therefore, its pre and post-trial negotiations and strategy were never given an opportunity to take it into account. There is not a scintilla of information that such a defense was contemplated. Now, more than six years after this action was commenced and the post-trial motion that has been ruled on by the Court, Forthright first raises this issue. No explanation for the delay is proffered. If this isn't prejudicial to the plaintiff and the Court itself at this point, then I don't know what is. It has been consistently held that a movant must "show extraordinary circumstances to justify such an amendment by submitting affidavits which set forth the recent change of circumstances" (*Sweeney v Prucell Const. Corp.*, 20 AD3d 812

[4<sup>th</sup> Dept]). Granting such a motion at this stage would be an improvident exercise of discretion (*Shanahan v Shanahan*, 92 AD2d 566 [2d Dept 1983]). (Motion too late where the case was already on the trial calendar).

Even if the Court granted permission to amend, the subsequent motion for summary judgment would be denied. CPLR 3212 (a) allows 120 days from the filing of the Note of Issue. Extension is permitted for good cause shown. No reasons are given for the delay. In denying a late motion for summary judgment, the Court of Appeals held, even though it was conceded that the motion clearly had merit, too much of the Court's time is wasted by deadlines that are simply ignored (*Brill v City of New York*, 2 NY3d 648, 652 [2004]); Accord, *Perini Corp. V City of New York*, 16 AD2d 37 [1<sup>st</sup> Dept 2005]).

Finally, rather than a joint venture, this Court, by prior decision entered on April 19, 2004, decided that Forthright was retained by Metropolitan Hotels as a general contractor, and went on to award partial summary judgment. That is the law of the case.

Accordingly, it is

**ORDERED** that the motion to amend Forthright's answer and to vacate the award of partial summary judgment to the plaintiff and co-defendant Shelby Realty for indemnification is denied; and it is further

**ORDERED** that the prong of the motion to award summary judgment in favor of Forthright is denied with \$50 motion costs against Forthright in favor of plaintiff Marek

Szpakowski and additional \$50 motion costs against Forthright and in favor of Shelby Realty, LLC.

Dated: 1/8/07

Enter:

*Loy*

Louis B. York, J.S.C.

**LOUIS B. YORK  
J.S.C.**

**FILED**  
JAN 11 2007  
NEW YORK  
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