[* 1]

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

PRESENT: LOUIS B. YORK J.S.C. PART 2

Index Number : 102511/2002

FELDMAN, NORMAN

VS.

A.R.J.S. REALTY

SEQUENCE NUMBER : 010

AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION/ORDER.

FILED
JAN 26 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/20/10

LOUIS B. YORK J.S.C.

J.S.C.

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]

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

NORMAN FELDMAN,

Plaintiff,

Index No. 102511//02

-against-

A.R.J.S. REALTY CORP. and TUSHTAN, INC.,

Defendants.

A.R.J.S. REALTY CORP.,

Third-Party Plaintiff

Third-Party Index No.: 591003/05

-against-

SURJIT KUMAR JAIN and SANJAY JAIN,

Third-Party Defendants.

LOUIS B. YORK, J.:

Defendant/Third-Party Plaintiff A.R.J.S. Realty Corp. moves for leave to amend its Summons and Verified Third-Party Complaint to extend its current breach of contract allegation to include Surjit Jain and add a cross-claim for breach of contract against Defendant Tushtan. A March 5, 2009 order of this court denied a previous motion to amend without prejudice. For the reasons below, the court grants the motion.

Third-Party Defendant Sanjay Jain (hereinafter "Manager") is an employee of Tushtan, Inc. (hereinafter "Tushtan") and also managed the store at 149 Orchard Street, Manhattan, which was owned by Defendant/Third-Party Plaintiff A.R.J.S. Realty Corp. (hereinafter "Owner"). The other Third-Party Defendant Surjit Kumar Jain (hereinafter "Guarantor") is Manager's father-in-law and the guarantor of Manager's lease with Owner. Plaintiff Norman Feldman

(hereinafter "Feldman") is the President and sole employee of Electric Burglar Alarm Company, which installs commercial and residential alarm systems. Manager entered into a lease agreement for 149 Orchard Street on March 11, 1999 with Owner. Among other things, during his deposition in connection with the lawsuit, Manager testified that he signed the lease with Owner for 149 Orchard Street on behalf of Tushtan.

Guarantor contacted Feldman on behalf of Manager, who was in need of an alarm system for his new store. Feldman inspected the premises and gave a price estimate as well as a description of where each motion detector would be installed. During inspection, Feldman observed a double-steel door hatch built into the cement on the sidewalk in front of the store. The doors were locked and not opened during inspection.

On November 22, 1999, Feldman arrived at the Orchard Street store location to perform the installation. After installing several motion detectors around the store, he requested the keys to the steel door hatch so that he could install another detector in that area. Feldman retrieved the keys, opened the padlock, and opened both of the double-doors. Each door opened only to about 90 degrees due to how the hinges operated. Moreover, there was no staircase leading to the basement, only a single wooden board or step. Feldman informed Manager that there were no steps to the basement and told him that he would check the depth of the opening to determine what size ladder he would need from his truck. Feldman attempted to test the durability of the board by placing one foot on it and applying pressure. When he put his full weight upon it, the board gave way. As Feldman fell, he grabbed the door frame. The steel door slammed his right hand, partially severing one finger and striking and injuring another. The severed part of Feldman's finger was never reattached.

Following his injury Feldman commenced this lawsuit against Owner in 2002. On September 17, 2004, Owner submitted to the court a verified answer with cross-claims against Tushtan which alleged that any liability arising out of this action is attributable to Tushtan's negligence alone. In July 2005, Owner executed a Substitution of Attorney agreement. Subsequently, Owner brought a third party action against Manager and Guarantor. Third-Party defendants, Guarantor and Manager answered Owner's Third-Party Summons and Complaint in October 2005. In September 2006, Owner submitted an Amended Verified Answer with a cross-claim against Tushtan.

Throughout the above proceedings the parties continued with discovery and Owner filed a note of issue on July 6, 2007. On October 19, 2007 it followed with a motion for summary judgment dismissing the claims and cross-claims asserted against it by Tushtan, Manager and Guarantor. In the same motion, Owner also sought leave to file an amended complaint to include a cause of action for breach of contract against Manager and Guarantor, and cross-claim against Tushtan. On March 5, 2009, this Court granted partial summary judgment for Owner dismissing several of plaintiff's claims against it. However, the Court denied the portion of Owner's motion which sought to amend the complaint because the Amended Third-Party Summons and Complaint were not attached to the papers. This current motion seeks the same relief, and the necessary papers are attached.

Thus, the Court turns to the motion before it. As indicated earlier, in its motion to amend Owner seeks (1) to amend its third-party complaint to extend its current breach of contract allegation to include Guarantor, and (2) to include a cross-claim for breach of contract against Defendant Tushtan for failing to maintain liability insurance in favor of Owner pursuant to the parties' lease agreement. Third-party defendants have opposed the amendment, arguing that

movant failed to submit the affidavit of a party with personal knowledge of the facts. The third-party defendant also asserts that leave should not be granted without appropriate substantiation. See Guzman v. Mike's Pipe Yard, 35 A.D.3d 266, 825 N.Y.S.2d 480 (1st Dep't. 2006). Third-party defendants further argue that the only showing of merit for the claim was third-party plaintiff attorney's moving affirmation.

ANALYSIS

Under CPLR § 3025 (b), leave to amend should be freely given provided there is an appropriate showing of merit, and that this amendment would not prejudice the opposing party. See U. S. Fid. & Guar. Co. v. Delmar Dev. Partners, LLC, 22 A.D.3d 1017, 803 N.Y.S.2d 254 (3rd Dep't 2005). To prevail on this motion, the movants essentially bear the small burden of proposing an amendment that is not patently devoid of merit; the burden is not on the movant to prove the merits of the amendment. Lucido v. Mancuso, 49 A.D.3d 220, 851 N.Y.S.2d 238 (2nd Dep't 2008); Yemin v. Goldberg, 46 A.D.3d 806, 848 N.Y.S.2d 676 (2nd Dep't 2007). An application for leave to amend a pleading pursuant to CPLR 3025(b) is governed by a substantially more permissive standard than that requiring a showing of merit. Lucido, 49 A.D.3d at 222, 851 N.Y.S.2d at 239. If no prejudice or surprise is shown, the application to amend will be granted unless the proposed amendment is palpably insufficient or patently devoid of merit. Id. Further, if the opposition believes there is a sustainable attack on the merits, it should be raised by the opposition on a motion for summary judgment. Id. at 229, N.Y.S.2d at 245. The proposed amendment has merit and is based on the same general facts as the original cause of action against Guarantor and Manager, and easily surpasses the low burden set for it.

In their opposition, third-party defendants argue that Tushtan did not exist at the time of the lease's signing. Thus, they state, Manager could not have signed the lease as an agent of

Tushtan. Third-party defendants rely on documentation from the New York Department of State website, the Division of Corporations Entity Information form, indicating that the signing of the lease preceded the date of incorporation. On the other hand, as Owner points out, Manager stated during his deposition that he signed the lease in question as an agent of Tushtan. Further, Owner annexes the deposition transcript to substantiate its contention. This conflicting evidence creates a genuine issue of fact and should be left for the finder of fact. See generally Andre v. Pomeroy, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 133 (1974)(summary judgment may be proper as a matter of law if facts are uncontested). Therefore, this argument must fail.

Third-party defendants further contend that CPLR § 3025 (b) requires additional or subsequent transactions or occurrences to be within the pleading. Third-party defendants assert in their opposition that the motion must be denied because movants have not included any subsequent transactions or occurrences. Third-party defendants misconstrue the meaning of the text of CPLR § 3025. A party may amend its pleading at any time, *or* supplement it by setting forth additional or subsequent transactions or occurrences. Thus, this argument also lacks merit. Owner is entitled to attempt to amend their pleadings with the permission of the court, or by setting forth any additional, factually different cause of action.

In continuation of their opposition, third-party defendants argue that additional legal expenses involving preparation of an answer to proposed amended complaint, as well as possible additional discovery are sufficient to show that a level of prejudice is present so as to require a denial of leave to amend the complaint. "Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment." Valdes v. Marbrose Owner, Inc., 289 A.D.2d 28,

29, 734 N.Y.S.2d 24 (1st Dep't 2001). While it has not been established the Manager was an agent of Tushtan at the time of the lease signing, it is undisputed that he was an employee of Tushtan. As such, he, Tushtan, and Guarantor are all fully aware of the situation and the defense to this cause of action will amount to essentially the same defense of the underlying cause of action. Thus, the third-party defendants cannot reasonably claim to be prejudiced by the proposed amendment. See Nociforo v. Penna, 42 A.D.3d 514, 840 N.Y.S.2d 396 (2nd Dep't. 2007); Christie's Inc. v. Sherlock, Index No. 602515/2006 (Sup. Ct. N.Y. Cty July 14, 2009) (avail at 242 N.Y.L.J. 31, 2009 N.Y. Misc. LEXIS 2568).

Furthermore, third-party defendants assert that the proposed amendment is on the eve of trial and therefore must not be permitted. In addition, they note the excessive delay of movant in seeking to amend. The amendment does come nearly seven years after the commencement of this action. "Where the application for leave to amend is made long after the action has been certified for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious" Morris v Queens Long Is. Med. Group, P.C., 49 A.D.3d 827, 854 N.Y.S.2d 222 (2nd Dep't 2008). Further, "in exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated... and whether prejudice resulted therefrom." Id.

Counsel's delay is very troubling as this amendment comes seven years into these proceedings and movant has provided no justification for its delay. The Court does note that the parties have proceeded with discovery in general, that movant seeks to amend a third-party complaint served in 2005 rather than 2002, and that counsel made an motion to amend in 2007 which was argued in 2008 and decided in March 2009, shortly before it made this new motion.

Thus, there has been substantial activity in this lawsuit and a prior attempt by movant to address this current issue.

Moreover, the failure to offer an excuse for the delay does not alone bar amending a pleading. See Spitzer v. Schussel, 48 A.D.3d 233, 233, 850 N.Y.S.2d 431, 432 (1st Dep't. 2008); Cherebin v. Empress Ambulance Serv., Inc., 43 A.D.3d 364, 365, 841 N.Y.S.2d 277, 279 (1st Dep't. 2007). Instead, the Court must consider the delay in conjunction with issues of prejudice and judicial economy. Here, the proposed amendment does not prejudice third-party defendants; consequently, the failure of third-party plaintiffs to offer excuse for delay is not dispositive. Oil Heat Inst. v. RMTS Assocs., 4 A.D.3d 290, 294, 772 N.Y.S.2d 313, 317 (1st Dep't. 2004). In light of this lack of prejudice, the fact that the amendment is based on the same general facts and laws as those already alleged, the court exercises its discretion and allows amendment. However, because of the undue and unexplained delay and the financial burden this motion has placed on third-party defendants the court allows the amendment only on the condition that counsel pay $2500.00 to third party defendants in attorney's fees. Moreover, the Court reiterates that the action was commenced in 2002 and it is not in the interest of this Court or the parties to delay matters any further. Therefore, if at any point the amendment does threaten to prolong the Court proceedings or necessitate additional discovery, the Court shall sever the third party action and direct that it proceed independently of the main action.

Based on the above, therefore, it is

ORDERED that Third-Party Plaintiff motion for leave to amend the complaint herein is granted on the condition that movant pay $2500 for attorney's fees to Third-Party Defendants, 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 along with or prior to payment; and it is further

ORDERED that Third-Party Defendants shall serve an answer to the amended complaint within 20 days of the service of this order.

Dated: Jan 20, 2009

Enter:

LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.

LOUIS B. YORK
J.S.C.