

**Idaho Assoc., LLC v Horizon Global LLC**

2008 NY Slip Op 30098(U)

January 15, 2008

Supreme Court, New York County

Docket Number: 0101670/2005

Judge: Barbara Kapnick

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: **BARBARA R. KAPNICK**

PART 12

Index Number : 101670/2005

IDAHO ASSOCIATES, LLC

vs

HORIZEN GLOBAL LLC

Sequence Number : 002

AMEND

INDEX NO.

101670/05

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on 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**

**FILED**

JAN 18 2008

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 1/15/08

**BARBARA R. KAPNICK** J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

DEFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 12

-----X  
IDAHO ASSOCIATES, LLC, a New York limited  
liability Company,

Plaintiff,

-against-

HORIZON GLOBAL LLC, 423 West Street, LLC,  
BY DESIGN ASSOCIATES, INC., MICHAEL YANKO,  
TRIP BROOKS, DANIEL COBLEIGH a/k/a DAN  
COBLEIGH, DONALD BRODERICK a/k/a DON  
BRODERICK, DENNIS ALFONSO, JOSEPH  
CASTALDO, THOMAS CODY, PSEC PLUMBING &  
HEATING CORP., MICHAEL KARPATOS, PATRICK  
HAN ARCHITECT, "JOHN DOE"; "RICHARD ROE",  
"ABC CORP", "DEF PARTNERSHIP", and "XYZ  
LLC", said parties being presently unknown  
to plaintiff, the parties intended to be  
persons owning, designing, filing plans and  
permits and/or required to file plans and  
permits for demolition with the New York  
City Department of Buildings to demolish  
or in charge of supervising the demolition  
in and about the real property located at  
423 West Street, New York City, New York,  
New York, Block 637, Lot 51 on the New  
York County Tax Map,

Defendants.

-----X  
BY DESIGN ASSOCIATES, INC.,

Third-Party Plaintiff,

-against-

MATRIX CONSTRUCTION COMPANY,

Third-Party Defendant.

-----X  
BARBARA R. KAPNICK, J.:

DECISION/ORDER  
Index No. 101670/05  
Motion Seq. No. 002

**FILED**  
JAN 18 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Third-Party  
Index No. 590300/07

In this action, plaintiff Idaho Associates, LLC seeks to  
recover for damage caused to its properties at 370 and 372 West 11<sup>th</sup>

Street, New York, New York, during the demolition, excavation and construction of the adjacent property at 423 West Street. Plaintiff alleges that defendants failed to properly shore the excavation while conducting pile driving.

Plaintiff now moves for leave pursuant to CPLR § 3025(b) to amend its Complaint in order to assert a claim for strict liability based on the pile driving.

Defendant 423 West Street, LLC opposes the motion on the ground that defendants would be prejudiced if the Court were to allow plaintiff to amend its Complaint to include an entirely new cause of action at this stage of the litigation, since extensive discovery has already been conducted. Defendant Horizon Global also submitted papers in opposition to plaintiff's motion.

Plaintiff argues in reply that it was not in a position at the outset of this action to know the details of the demolition, excavation and construction, including the performance of extensive pile driving and the alleged failure to properly shore the excavation site. Plaintiff further notes that this action is not ready to be placed on the trial calendar since defendant By Design Associates, Inc. only recently commenced a third-party action.

Based on the papers submitted and the oral argument held on the record on October 31, 2007, this Court finds that defendants

have failed to establish that they will be unduly prejudiced if the proposed amendment is granted.

However, defendants alternatively argue that the proposed amendment lacks merit because no New York court has recognized a cause of action for strict liability due to pile driving in an urban area, and plaintiff has not proffered any evidence to support its claim that pile driving caused the alleged damage to plaintiff's structures.

Plaintiff contends that this Court need not at this juncture resolve the legal question of whether or not pile driving should be considered 'inherently dangerous' under New York law, and that plaintiff should not be inhibited in pressing a novel issue or urging a position that can be supported by a good faith argument for an extension or modification of the existing law.

It is well settled that "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]; citation omitted)." Peach Parking Corp. v. 346 West 40th Street, LLC, 42 A.D.3d 82, 86 (1st Dep't 2007).

However, it has also been repeatedly held that

to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated (citation omitted). Therefore, a motion for leave to amend a pleading "must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment" (*Nab-Tern Constructors v City of New York*, 123 A.D.2d 571, 572 [1986]).

Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d 352, 354-355 (1st Dep't 2005). See also, American Theatre for the Performing Arts, Inc., v. Consolidated Credit Corp., 45 A.D.3d 506 (1st Dep't 2007); Pacheco v. Fifteen Twenty Seven Associates, 275 A.D.2d 282 (1st Dep't 2000); Non-Linear Trading Co., Inc. v. Braddis Associates, Inc., 243 A.D.2d 107 (1st Dep't 1998).

In the case of Spano v. Perini Corp., 25 N.Y.2d 11, 15 (1969), the Court of Appeals held that "one who engages in blasting must assume responsibility, and be liable without fault (underlining supplied), for any injury he causes to neighboring property."

Plaintiff contends that pile driving and the failure to shore an excavation site are analogous to blasting because they encompass the same inherent dangers to neighboring properties.

However, a few months before the issuance of the Court of Appeals' decision in Spano v. Perini Corp., supra, the Appellate Division, Third Department, held that "[c]oncrete breaking and pile driving are not inherently dangerous and the great weight of

authority places blasting in the same category." Horn v. State of New York, 31 A.D.2d 364, 367 (3<sup>rd</sup> Dep't 1969). Although the Court of Appeals in Spano v. Perini Corp., supra, subsequently determined that blasting was "inherently dangerous", it did not make any similar finding with respect to pile driving.

The Court of Claims subsequently concluded that "[w]hether piledriving is inherently dangerous and should be placed in the same category as blasting; whether piledriving should be compensable, irrespective of negligence, are questions that must await the presentation of a proper factual situation." Welbilt Corp. v. State of New York, 80 Misc.2d 439, 446 (Ct. Cl. 1975).

Significantly, no reported case in the 23 years since Welbilt Corp. v. State of New York, supra, was decided has found that pile driving is an abnormally dangerous activity.

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

Second Restatement of Torts § 520.


At the outset it is noted that pile driving is a method commonly employed at construction sites in New York City and other urban areas in the State, and thus it is "a matter of common usage".

Moreover, plaintiff has not alleged any facts, let alone submitted any evidentiary proof that could be considered on a motion for summary judgment, to support his novel theory that the risks of pile driving cannot be eliminated by the exercise of reasonable care. Nor has plaintiff made any showing that pile driving conducted with appropriate safeguards is an inappropriate method of construction in an urban area. Therefore, this Court finds that there has been no showing of merit to the proposed amendment.

Accordingly, plaintiff's motion for leave to amend its Complaint to assert a claim for strict liability is denied.

This constitutes the decision and order of this Court.

Dated: January 15, 2008

  
Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK**

**FILED**  
JAN 18 2008  
NEW YORK COUNTY CLERK'S OFFICE