

**Airflex Indus., Inc. v Fifth @ 42nd LLC**

2008 NY Slip Op 30792(U)

March 19, 2008

Supreme Court, New York County

Docket Number: 0601851/2006

Judge: Eileen Bransten

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

PRESENT: HON. EILEEN BRANSTEN  
*Justice*

PART 3

Index Number : 601851/2006  
AIRFLEX INDUSTRIAL  
vs.  
FIFTH @ 42ND  
Sequence Number : 001  
AMEND SUPPLEMENT PLEADINGS

INDEX NO. 601851/06  
MOTION DATE 11-9-07  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

s motion to/for Amend counterclaims

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1</u>
<u>2,3</u>
<u>4</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

MAR 20 2008

NEW YORK  
COUNTY CLERK

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

Dated: 3-19-08

Eileen Bransten  
J.S.C.

Check one:  FINAL DISPOSITION  **HON. EILEEN BRANSTEN**  
NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 3

-----X  
AIRFLEX INDUSTRIAL, INC.,

Plaintiff,

-against-

FIFTH @ 42<sup>ND</sup> LLC,

Defendant.

-----X

[and three third-party actions]

-----X

PRESENT: EILEEN BRANSTEN, J.

Index No. 601851/06  
Motion Date: 11-9-07  
Motion Seq. No.: 01

**FILED**  
MAR 20 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

This action arises from a dispute between plaintiff Airflex Industrial, Inc. and defendant-counterclaimant Fifth @ 42<sup>nd</sup> LLC relating to a construction project. Defendant moves pursuant to CPLR 3025(b) for leave to amend its counterclaims against plaintiff and to assert a claim against two of plaintiff's principals, Frederick Fogelman and Jonathan Fogelman, for willful exaggeration of the mechanic's lien that has been filed against defendant.

Background

The court derives the following factual allegations from the complaint:

Defendant owns real property located at 505 Fifth Avenue, New York, New York. Plaintiff is in the business of fabricating and installing specialty metal products for high-end construction projects.

In July 2004, defendant's agent and construction manager, Pavarini-McGovern LLC ("Pavarini"), approached plaintiff to submit a bid to provide the exterior metal panel wall system, together with other miscellaneous metal, for a construction project at the defendant's property. Pavarini accepted plaintiff's bid for the project on behalf of defendant, and on August 24, 2004, the parties entered into a contract for, among other things, the fabrication and installation of the panel wall system. The lump sum price listed in the contract was \$2,040,000.

After entering into the contract, plaintiff produced and submitted shop drawings to Pavarini, defendant, and the "Design Team," which consisted of the architect and the structural engineer. The shop drawings demonstrated, among other things, how plaintiff intended to construct the panel wall system to meet the requirements of the set of plans and specifications for the project dated August 9, 2004 ("Contract Documents"). Pavarini, defendant, the Design Team, and Gordon H. Smith Corporation, an exterior wall consultant, approved the shop drawings.

In late March 2005, when plaintiff arrived on the project site to begin its work pursuant to Pavarini's directions, the project was not ready for plaintiff to commence work. Prior to plaintiff's arrival, defendant's surveyor, Lovell & Belcher, set marks and benchmarks to indicate the required location of the face of the panel wall system. Pavarini directed plaintiff to construct its panel wall system so that the face of it matched the marks and benchmarks that Lovell & Belcher set. Using those marks and benchmarks, and as required pursuant to the contract, plaintiff conducted a field survey to measure the distance from the required face of the panel wall system to the concrete shear walls that formed a vertical surface and to the framed walls that formed each floor of the project

(collectively, "Structural Elements"). Upon conducting this field survey, plaintiff found materially different field conditions than those specified in the Contract Documents.

The field survey revealed that the Structural Elements were improperly located, thereby rendering it impossible for plaintiff to install its panel wall system pursuant to the Contract Documents or its approved shop drawings. The condition and location of the Structural Elements, as constructed, allegedly required plaintiff to perform extensive extra work in order to install the panel wall system properly.

Plaintiff claims to have promptly informed Pavarini of the deficiencies in the Structural Elements and gave notice that plaintiff would have to revise extensively the panel wall system over and above the work under the contract in order to overcome the Structural Elements. Plaintiff then received directions to devise and implement a solution so as to allow plaintiff to install the face of its panel wall system at the marks and benchmarks set by Lovell & Belcher while accommodating the location of the Structural Elements. Plaintiff also received directions to perform extra work on the project in order to accommodate defendant's tenant and meet the target date of August 15, 2005 for the issuance of a temporary certificate of occupancy. Plaintiff submitted revised shop drawings to Pavarini, defendant, and the Design Team. Pavarini, defendant, the Design Team, and the Exterior Wall Consultant approved the revised shop drawings, and plaintiff was informed of this approval on June 30, 2005.

Defendant directed and authorized plaintiff to proceed with the extra work that consisted of, among other things, the design, fabrication, and installation of a revised mounting system and

overtime, acceleration, and other additional costs. Defendant repeatedly promised to pay plaintiff for the extra work. In consideration for plaintiff performing the extra work, defendant ceased paying plaintiff pursuant to the terms of the contract, and instead began paying plaintiff on a weekly basis. Plaintiff repeatedly informed defendant that its weekly payments were insufficient and that additional payments were necessary to fully compensate plaintiff for the extra work. On December 20, 2005, defendant ceased its weekly payments to plaintiff. Since that time, defendant has repeatedly refused to pay plaintiff for the extra work.

Plaintiff Airflex Industrial, Inc. brings four causes of action against defendant, namely: (1) foreclosure of its mechanic's lien against the property; (2) quantum meruit; (3) unjust enrichment; and (4) breach of contract. Plaintiff seeks \$4,513,576, plus interest, for each cause of action.

In its answer, defendant Fifth @ 42nd LLC asserts four counterclaims against its former subcontractor. The first three counterclaims are for breach of contract and the fourth counterclaim seeks to void plaintiff's mechanic's lien pursuant to Lien Law § 39 because of willful exaggeration and an award of damages pursuant to Lien Law § 39-a. Defendant contends that it has complied with plaintiff's contract in every respect and, in fact, was forced to pay plaintiff a total of \$2.7 million, because plaintiff claimed that it could not pay its labor force to complete the job properly and threatened to walk off the job.

#### Analysis

Defendant now seeks to amend its counterclaims against plaintiff and to add the Fogelmans as counterclaim-defendants. Defendant's attorney contends that discovery has revealed that a

substantial portion of the additional \$4.5 million plaintiff seeks to recover is for monies allegedly due and owing to the Fogelmans, individually, as financing costs associated with advances the Fogelmans purportedly made in 2006 to alleviate plaintiff's cash flow problems. Defendant maintains that the Fogelmans did not make these advances to benefit the project, and costs incurred as a result of these advances were wrongfully included in the lien that plaintiff filed. Defendant now seeks to amend its counterclaims to assert additional factual allegations in support of its claim against plaintiff for willful exaggeration of the lien and also to assert this claim against the Fogelmans, individually, under a corporate veil-piercing theory.

Plaintiff first contends that defendant has failed to submit sufficient evidence in support of its motion.

A motion for leave to amend pleadings "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 (Yankee Stadium)*, 123 A.D.2d 571, 572-573 (1st Dept. 1986); *see also Marinelli v. Shifrin*, 260 A.D.2d 227, 229 (1st Dept. 1999). An attorney's affirmation is acceptable if "the attorney has personal knowledge of the facts upon which the motion is based [citation omitted]." *Davidowitz v. Dixie Assocs.*, 59 A.D.2d 659 (1st Dept. 1977); *see also Parametric Capital Mgt., LLC v. Lacher*, 33 A.D.3d 376, 376 (1st Dept. 2006).

Defendant submits initial and reply affirmations of its attorney, the proposed Verified Answer and Amended Counterclaims,\* plaintiff's responses to interrogatories, and other documentary evidence obtained during discovery that reveal new facts giving rise to this application. As defendant's attorney was involved in discovery for this case, he has personal knowledge of the documents that plaintiff produced and which give rise to new facts forming the basis of this motion. Although defense counsel's initial affirmation does not state the material facts supporting the proposed amended counterclaims, his reply affirmation details the facts and circumstances that motivated this motion. From plaintiff's responses to interrogatories and the financial documents that plaintiff and its certified public account produced, defendant asserts that a substantial portion of the \$4,513,576 lien that plaintiff filed consists of interest on personal loans that the Fogelmans made to plaintiff in 2006.

Plaintiff next contends that the defendant cannot show that it would be successful on a claim under sections 39 and 39-a of the Lien Law against the Fogelmans individually.

Under New York law, on a motion for leave to amend pleadings, "the proponent must allege legally sufficient facts to establish a prima facie cause of action or defense in the proposed amended pleading." *Daniels v. Empire-Orr, Inc.*, 151 A.D.2d 370, 371 (1st Dept. 1989). When the proposed amendment "clearly lacks merit and serves no purpose but to needlessly complicate discovery and trial," the motion to amend should be denied. *Katechis v. Our Lady of Mercy Med. Center*, 36

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\* Although the defendant's proposed amended pleading is labeled as "verified," in fact, no verification is attached thereto.

A.D.3d 514, 516 (1st Dept. 2007). However, “[t]he merit of a proposed amended pleading must be sustained . . . unless the alleged insufficiency or lack of merit is clear and free from doubt.” *Daniels*, 151 A.D.2d at 371. Moreover, the facts that the proponent alleges and relies upon in making its motion need not be proven at this stage. *Id.*

Section 39-a of the Lien Law states, in pertinent part:

Where in any action or proceeding to enforce a mechanic’s lien upon a private or public improvement the court shall have declared said lien to be void on account of willful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor.

Such exaggeration occurs when a lien is filed “without justification” and is inflated in a way and to an extent that cannot be explained as “a mere inaccuracy or honest mistake in setting the amount of the lien.” *Strongback Corp. v. N.E.D. Cambridge Ave. Dev. Corp.*, 32 A.D.3d 793 (1st Dept. 2006). Here, plaintiff filed the notice of lien and is the lienor. In order for defendant to reach the Fogelmans, the court would have to pierce plaintiff’s corporate veil.

“Generally, piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury [citations omitted].” *Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993). “[T]he corporate veil can be pierced where there has been, *inter alia*, a failure to adhere to corporate formalities, inadequate capitalization, use of corporate funds for personal purpose, overlap in ownership and directorship, or common use of office space and equipment.” *Forum Ins.*

*Co. v. Texarkoma Transp. Co.*, 229 A.D.2d 341, 342 (1st Dept. 1996); *see also M&A Oasis, Inc. v. MTM Assocs., L.P.*, 307 A.D.2d 872 (1st Dept. 2003) (concluding that the lower court “properly refused to add [an individual defendant to the veil-piercing claim] in the absence of any allegations that [the individual] was doing business in his individual capacity, shuttling his personal funds in and out of [the company] without regard to corporate formalities and to suit his own convenience [citation omitted]”).

Defendant alleges in its proposed amended counterclaims that the Fogelmans exercised complete dominion and control over all aspects of plaintiff’s operations; that plaintiff’s corporate funds and the Fogelmans’ personal funds have been co-mingled; and that advances and loans made by the Fogelmans to their company in 2004, 2005 and 2006 are unsecured, have no interest rate and no specific repayment terms. *See Verified Answer and Amended Counterclaims*, ¶¶ 100-103. It is further alleged that, through their domination and control over the company, the Fogelmans caused plaintiff to file the mechanic’s lien in a willfully exaggerated amount for each of their respective individual benefits, and that they knew that the mechanics lien was being wilfully exaggerated because it includes an amount in excess of \$680,000 in “financing” costs incurred by each of the Fogelmans individually. *Id.*, ¶ 107. In addition, the documentary evidence that defendant Fifth @ 42nd obtained during discovery appears to indicate that the Fogelmans together have loaned hundreds of thousands of dollars to plaintiff, but that plaintiff has executed only one promissory note in the amount of \$107,000 payable to Jonathan Fogelman. The absence of other promissory notes for the remaining funds advanced by the Fogelmans lends support to defendant’s

corporate-veil piercing theory, and thus the court finds that defendant has sufficiently alleged its claim to pierce the corporate veil. Further analysis of the merits of this claim is unnecessary and would be improper at this stage. *Daniels*, 151 A.D.2d at 372.

Finally, plaintiff argues that adding the Fogelmans as parties at this stage of the action would be highly prejudicial.

Provided that the moving party's amendment has merit, then "[l]eave to amend pleadings . . . is to be freely given, absent prejudice or surprise [citations omitted]." *Cherebin v. Empress Ambulance Serv., Inc.*, 43 A.D.3d 364, 365 (1st Dept. 2007). "Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.'" *Cherebin, supra*, quoting *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981), *rearg denied* 55 N.Y.2d 801 (1981). In addition, the prejudice must be "traceable not simply to the new matter sought to be added, but also to the fact that it is only now being added.' There must be 'some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add.'" *A.J. Pegno Constr. Corp. v. City of New York*, 95 A.D.2d 655, 656 (1st Dept 1983).

Plaintiff has not demonstrated that there will be prejudice or surprise in the event that the court grants defendant's motion to amend the pleading. The case is still in its early stages. Discovery is not yet complete, and in fact, the parties executed a stipulation dated October 2, 2007 extending discovery due to the filing of two third-party actions, and yet another third-party action

was commenced on March 12, 2008. In addition, defendant could not have included the content of the proposed amendments in its original answer, because it was not until discovery began that defendant learned of the pertinent new facts and documentary evidence.

Because the amendment is properly supported, not completely lacking in merit, and there will be no surprise or prejudice, the court grants defendant's motion for leave to amend its answer and counterclaims.

Accordingly, it is

ORDERED that the court grants defendant Fifth @ 42<sup>nd</sup> LLC's motion for leave to amend its counterclaims and to add Jonathan and Frederick Fogelman as additional counterclaim defendants, and the defendant is granted leave to file and serve an amended answer in the form annexed to the moving papers, with a proper caption and signed verification, within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the caption of the main action is hereby amended as follows:

*Airflex Industrial, Inc. v. Fifth @ 42<sup>nd</sup>, LLC*

Index No. 601851/06  
Page 11

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AIRFLEX INDUSTRIAL, INC.,

Plaintiff,

-against-

Index No. 601851/06

FIFTH @ 42<sup>ND</sup> LLC,

Defendant,

-against-

FREDERICK FOGELMAN and JONATHAN  
FOGELMAN,

Additional Counterclaim Defendants.

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;and it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption; and it is further

ORDERED that counsel for all parties who have appeared in this action are directed to appear for a status conference on **May 13, 2008 at 9:30 a.m.** in Rm. 442 at 60 Centre Street.

Dated: March 19, 2008

**FILED**  
MAR 20 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:

  
Hon. Eileen Bransten