

**De Leon v Betterliving Sunrooms**

2008 NY Slip Op 31573(U)

June 10, 2008

Supreme Court, Albany County

Docket Number: 0087852/0071

Judge: Joseph C. Teresi

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.

STATE OF NEW YORK  
SUPREME COURT  
IRIS PONCE DE LEON,

COUNTY OF ALBANY

---

Plaintiff,

-against-

**DECISION and ORDER**  
**INDEX NO. 8785-07**  
**RJI NO. 0108092966**

BETTERLIVING SUNROOMS and RICK YEAGER,

Defendants.

---

Supreme Court Albany County All Purpose Term, May 30, 2008  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Serrins & Associates, LLC  
*Attorneys for Plaintiff*  
233 Broadway, 18<sup>th</sup> Floor  
New York, NY 10279

Girvin & Ferlazzo, P.C.  
Jonathan E. Hansen, Esq.  
*Attorneys for Defendants*  
20 Corporate Woods Blvd.  
Albany, NY 12211

**TERESI, J.:**

By a Notice of Motion defendants seek leave to amend their Answer [CPLR §3025(b)].

Plaintiff opposes the motion.

This is an action seeking money damages for alleged discrimination against the plaintiff on the basis of her pregnancy and gender and alleged failure to accommodate her temporary disability. The action was filed on November 2, 2007. Service was accomplished on November 16, 2007. Defendants' Answer was served on December 28, 2007. On April 1, 2008, defendant

requested that plaintiff's counsel consent to a stipulation for defendants to file an Amended Answer. Plaintiff's counsel declined that request. Plaintiff has now brought on this motion seeking leave of the Court to serve an Amended Answer.

Defendants maintain that the Amended Answer makes "minor changes" in four of the thirty-nine numbered paragraphs, for the purpose of ensuring the most accurate account of the facts on behalf of the defendants. The defendants are not seeking to add or modify any affirmative defense.

The amendments to the Answer deny allegations in the Complaint which had been previously admitted. Ninety (90) days have elapsed since the service of the Answer (December 28, 2007) until defendants' counsel contacted plaintiff's counsel to request a stipulation to allow them the amendments.

More specifically, paragraph eleven of defendants' Answer stated that the defendants "admit that plaintiff had represented that she would return to her full-time possession on April 3, 2007." Defendants wish to change that so that those allegations are denied. Plaintiff maintains that changing this admission to a denial prejudices the plaintiff and eliminates direct evidence in support of the plaintiff's claims.

Defendants further propose to change the Answer in respect to paragraph five of the Answer. Defendants had previously in their Answer admitted that two managers supervise plaintiff during her employment at the defendants' place of business. The proposed amendment seeks to revise that position to assert that plaintiff's other manager, Gary Polacinski, did not supervise the plaintiff. Plaintiff maintains that this changes facts of the case without any explanation demonstrating the need or rational to do so.

Defendants seek to change paragraph fifteen of the Answer which had admitted that “plaintiff’s request to resume active employment . . . was denied.” The proposed amendment to Answer seeks to allege that the defendant took no action against the plaintiff which plaintiff asserts strengthens the defendants’ seventh affirmative defense that any harm to the plaintiff was a direct and approximate result of her own actions.

The Court notes that the motion in this case is supported by an Attorney’s Affidavit only. There is no affidavit submitted by anyone with personal knowledge of the facts to substantiate the changes sought in the Amended Answer or to provide the Court with any factual basis for those changes, or a rational basis why those denials or admissions were not made in the original Answer. A selected portion of plaintiff’s deposition transcript does not establish a factual basis for all the proposed changes in the Answer.

The case law is clear. Leave to amend pleadings shall be freely given absent prejudice or surprise resulting directly from the delay. CPLR 3025(b); Fahey v. County of Ontario, 44 NY2d 934, 935. Here discovery is substantially completed with the depositions of the parties having been conducted. As for any amendment to a pleading where a leave of the Court is required, such a motion must be accompanied by an affidavit from one with knowledge of the underlying facts not by an attorney lacking such knowledge. Dougherty v. Wade Lupe Construction Company, Inc., 98 AD2d 868, 869 (Third Dept., 1983). Such an affidavit is also necessary to explain the necessity and to excuse a reason for such an amendment. Polak v. Schwenk, 115 AD2d 142, 143 (Third Dept., 1985); Agway Inc. v. North Clymer Farm Service Inc., 291 AD2d 818, 820 (Fourth Dept., 2002).

Here, defendants’ attempt to deny factual allegations of the complaint and other facts

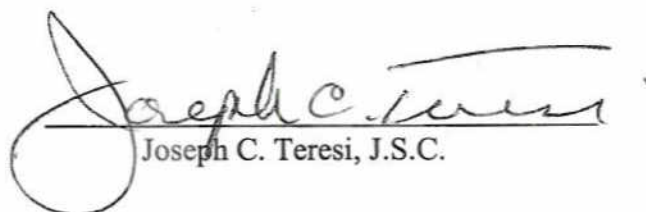
which had originally been admitted. This results in prejudice to plaintiff and does not satisfy the predicate requirement of an affidavit of a person with knowledge to support the granting of the motion.

Based upon the record before the Court, the Court is constrained to deny defendants' Motion without costs.

All papers, including this Decision and Order are being returned to the attorneys for the plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: June 10, 2008  
Albany, New York



Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion dated May 6, 2008 with attached Affirmation of Jonathan E. Hansen, Esq. dated May 6, 2008 with attached Exhibits A - C.
2. Affirmation in Opposition to the Motion of Ann MacAdangdang, Esq. dated May 20, 2008 with attached Exhibits 1 - 4.
3. Reply Affirmation of Jonathan E. Hansen, Esq. dated May 29, 2008 with attached Exhibits A and B.