

<b>Barton v 157 Chambers Dev. Owner, LLC</b>
2009 NY Slip Op 31690(U)
July 28, 2009
Supreme Court, New York County
Docket Number: 114150/07
Judge: Carol Robinson Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Edmead  
Justice

PART 35

Paul Barton  
- v -  
157 Chambers  
Development, E + A I

INDEX NO. 114150/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 7  
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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff's motion for leave to amend the third amended complaint and to compel discovery is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within 20 days of entry on counsel for defendant.

This constitutes the decision and order of the Court.

**FILED**  
JUL 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/28/09

[Signature]  
**HON. CAROL EDMEAD** 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):

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----x  
PAUL BARTON,

Plaintiff,

Index No.: 114150/07

-against-

DECISION

157 CHAMBERS DEVELOPMENT OWNER, LLC,  
ARTISAN LOFTS DEVELOPMENT OWNER LLC,  
TRIBECA ASSOCIATES LLC, PAVARINI  
MCGOVERN LLC and 137 READE STREET  
CONDOMINIUM,

Defendants.

-----x  
CAROL ROBINSON EDMEAD, J.:

**FILED**  
JUL 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**FACTUAL BACKGROUND**

Plaintiff moves, pursuant to CPLR 3025, for leave to amend the third verified amended complaint to add causes of action for gross negligence, abuse of process, breach of fiduciary duty and contempt, and to compel discovery.

This action arises out of a construction accident that occurred on August 20, 2007. Defendants are involved in renovating a 15-17-story building, and while renovating the building, a concrete block fell through the skylight of the adjacent property. Plaintiff is the owner of the adjacent property, a combined commercial and residential condominium unit. Plaintiff leased the unit, and, allegedly, the tenant was injured when the concrete block fell through the skylight.

After the incident, and against plaintiff's wishes, defendants placed a wooden structure over the skylight to prevent further damage, which allegedly blocked all light from the unit, resulting in the tenant's alleged inability to use the premises.

Plaintiff asserts that a cause of action for gross negligence is appropriate, based on the fact that defendants did not have a site safety program or trained site safety manager at the renovation project, as mandated by Title I of the Rules of the City of New York, Ch. 26, or a construction site safety manager, pursuant to the Administrative Code of the City of New York § 27-1009 (d).

All defendants, except for Tribeca Associates LLC, conceded liability prior to the filing of the instant motion. Defendants argue that there were numerous levels of protection in place at the site, including eye bolts epoxied to the concrete sections that were to be cut, exterior scaffolding erected, planking installed on adjacent property roofs, and chutes installed to re-direct any falling debris back into the job site.

It is noted that plaintiff had initially pled a cause of action for gross negligence, but withdrew that cause of action when the court permitted him to amend the complaint to add a cause of action for negligence. Also, the issue of adding a cause of action for contempt was resolved by motion sequence number 008.

**DISCUSSION**

CPLR 3025 (b) states that

"A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

It is well settled that leave to amend should be freely given, absent prejudice or surprise to the opposing party. *Sheet v Liberty Alliance, LLC*, 37 AD3d 170 (1<sup>st</sup> Dept 2007). However, prior to allowing such amendment, the court must ensure that the amended allegations establish a *prima facie* cause of action. *Tapps of Nassau Supermarkets, Inc. v Linden Blvd., L.P.*, 269 AD2d 306 (1<sup>st</sup> Dept 2000). This is especially true in situations such as the case at bar, in which plaintiff is seeking to amend his verified complaint for the third time, two years after the action was initiated.

Plaintiff's motion to amend the complaint to add a cause of action for gross negligence is denied.

"[G]ross negligence contemplates conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing. It is clear that [defendants'] conduct amounted to no more than ordinary negligence at most, and did not demonstrate such a reckless disregard for the rights of others as to constitute intentional wrongdoing [internal quotation marks and citations omitted]."

*Obremski v The Image Bank, Inc.*, 30 AD3d 1141, 1142 (1<sup>st</sup> Dept 2006).

Gross negligence differs, not only in kind, but in degree, from claims of ordinary negligence. *Colnaghi, USA v Jewelers Protection Services, Ltd.*, 81 NY2d 821 (1993). The acts complained of as constituting gross negligence must demonstrate a total, almost absolute, lack of regard for the safety of others (*Sommer v Federal Signal Corp.*, 79 NY2d 540 [1992]), not merely acts that unintentionally cause injury due to ordinary negligence.

In the case at bar, plaintiff is asserting that the lack of an on-site safety manager is, in and of itself, so demonstrative of a lack of regard for the safety of others that that fact alone evinces gross negligence, regardless of any other safety precautions defendants may have taken. The court disagrees.

A site safety manager is responsible for performing functions delineated in the Department of Buildings' Manual for Site Safety Programs (1 RCNY 26-01 [g] [3]), which include inspecting the construction site to monitor compliance with safety rules and regulations, maintaining safety records, and coordinating safety meetings. Generally, site safety managers do not have the authority to control the manner of work performed. *Hughes v Tishman Construction Corp.*, 40 AD3d 305 (1<sup>st</sup> Dept 2007); New York City Administrative Code § 28-BC 3310. Further, a site safety manager's function is only to alert the responsible parties of a dangerous situation, not to remedy that situation

himself.

Plaintiff has failed to allege any facts that would indicate that the presence, or lack of presence, of a site safety manager would have prevented the accident from occurring, nor has plaintiff supplied any judicial authority for the proposition that the failure to have an on-site safety manager constitutes gross negligence. Moreover, plaintiff has not indicated any precautions or safety measures mandated by statute or regulation that defendants failed to take that demonstrate a total lack of regard for the safety of others.

The testimony evinced during discovery indicates that defendants did set into place various levels of protection in order to insure the safety of others. Unfortunately, those safety measures were unavailing in the instant matter. However, to constitute "gross negligence," there must be some fact supporting the allegation that defendants failed "to use even slight care, or [engaged in] conduct that is so careless as to show complete disregard for the rights and safety of others." *Gentile v Garden City Alarm Company, Inc.*, 147 AD2d 124, 131 (2d Dept 1989). Such is not the case at bar. For this reason, plaintiff's motion for leave to amend the complaint to add a cause of action for gross negligence, based on the lack of an on-site safety manager, is denied.

Plaintiff's motion for leave to amend the complaint to add a

cause of action for abuse of process, based on defendants' defense of the instant action, is denied. Allegations of abuse of process "are not properly part of a supplemental pleading, but should more appropriately be raised in an independent action." *Dashew v Cantor*, 104 AD2d 477, 477 (2d Dept 1984); CPLR 3025.

Plaintiff's motion for leave to amend the complaint to add a cause of action for breach of fiduciary duty is denied.

Plaintiff's sole allegation for amending the pleadings to include a cause of action for breach of fiduciary duty appears in paragraph 4 (b) of the instant motion, in which plaintiff states:

"defendant Condo's president and managing agent have admitted that they failed to fulfill their fiduciary duties to protect the safety of plaintiff and the Condo."

The only support for this allegation is the deposition testimony of Joseph I. Rosenzweig, a member of the condominium board, who said that it was fair to say that the condominium has a duty of care to protect the property of the condominium from outside adverse influences. Ex. X.

The facts of the case indicate that the condominium board entered into a license agreement with the adjacent property owner to allow installation of protection at the premises. There is no evidence whatsoever that the board acted beyond the scope of its authority in entering into such an agreement, or that the agreement was entered into in bad faith.

"The courts will not substitute their judgment for that of a cooperative's board of directors and

shareholders, as long as the corporate action is authorized, in furtherance of the cooperative's legitimate interests, and taken in good faith."

*1050 Tenants Corp. v Lapidus*, 39 AD3d 379, 382 (1<sup>st</sup> Dept 2007); *Levine v Greene*, 57 AD3d 627 (2d Dept 2008) (applying the same standard to condominiums).

For the above-stated reasons, plaintiff's motion for leave to amend the complaint to add a cause of action for breach of fiduciary duty is denied.

Plaintiff's motion to compel discovery is similarly denied as premature. At a conference with the court on March 30, 2009, it was indicated that all discovery would have to wait until the present motion was decided, and, for the most part, plaintiff has failed to assert that defendants have refused to comply with his discovery requests.

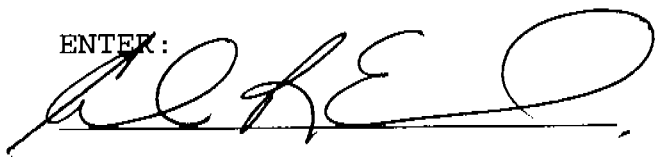
Lastly, in his attorney's affirmation, plaintiff requests that defendants' affirmative defenses be dismissed. However, such request does not appear as part of the motion itself, and, consequently, will not be addressed by the court.

**CONCLUSION**

Based on the foregoing, plaintiff's motion for leave to amend the third amended complaint and to compel discovery is denied.

Dated: July 28, 2009

ENTER:



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**

JUL 30 2009

COUNTY CLERK'S OFFICE  
NEW YORK