

**Galdamez v Biordi Constr. Corp.**

2009 NY Slip Op 32237(U)

September 23, 2009

Supreme Court, New York County

Docket Number: 107984/05

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan, Justice

Part 36

OSCAR GALDAMEZ, SLAWOMIR PALECKI and TOMASZ SZYMKIEWICZ, individually and on behalf of all other persons similarly situated who were employed by BIORDI CONSTRUCTION CORP. and/or and other entities affiliated with or controlled by BIORDI CONSTRUCTION CORP. with respect to the Public Works Projects mentioned in the Complaint,

Plaintiffs,

-against-

BIORDI CONSTRUCTION CORP., FRANK BIORDI and JOHN DOE BONDING COMPANIES 1 THROUGH 3,

Defendants.

INDEX NO. 107984/05

MOTION SEQ. NO. 005

**FILED**

SEP 30 2009

COUNTY CLERK'S OFFICE

NEW YORK

The following papers, numbered 1 - 4 were considered on this motion to for leave to file a late jury demand:

PAPERS

NUMBERED

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

1, 2  
3  
4

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion by defendants for an order, pursuant to CPLR 4102, granting defendants leave to file a late demand for a jury trial, is denied for the reasons set forth below.

CPLR 4102(a) provides that a party served with a note of issue not containing a demand for a jury trial, may demand a jury trial by serving each party with such demand and filing it within 15 days after service of the note of issue. *Downing v Downing*, 32 AD2d 350, 351 (1st Dep't 1969).

Defendants seek leave to serve a late jury demand, pursuant to CPLR 4102(e), which provides that, within the court's sound discretion, "[it] may relieve a party from the effect of failing to comply with

this section if no undue prejudice to the rights of another party would result.” CPLR 4102(e); *see also Downing*, 32 AD2d at 351.

Defendants contend that the motion should be granted for the following reasons: (1) defendants included a demand for a jury trial in their answer and plaintiffs ignored such demand; (2) defendants “operated under the assumption that, given the complexity of the case involved, . . . that the case would be tried before a jury” (Joseph M. Labuda Affirmation ¶ 17); and (3) plaintiffs would not be prejudiced because plaintiffs have been in possession of substantial discovery for a number of years, plaintiffs’ counsel specializes in these types of cases, and the presentation of this case to a jury does not raise any additional issues.

The motion for leave to serve a late jury demand is denied. The note of issue in this case was filed on February 8, 2008, *more than one year* before this motion was made for leave to serve a late jury demand. Courts have consistently found even less time to be an inordinate delay. *See Joseph v Exxon Corp.*, 83 AD2d 549, 549 (2d Dep’t 1981) (order which denied leave to file a jury demand *nunc pro tunc* affirmed where delay was over three months); *Fils v Diener*, 59 AD2d 522, 522 (2d Dep’t 1977) (abuse of discretion to grant leave to serve a late jury demand when application not made until five months after the note of issue was served); *Zelvin v Pagliocca*, 32 AD2d 561, 561 (2d Dep’t 1969) (improvident exercise of discretion where delay was four and one half months). Additionally, a firm trial date was apparently set in January 2009, *more than three months* prior to this motion being made.

This is not a situation where shortly after the note of issue was filed – but still after the 15-day deadline for filing a demand for a jury trial had passed – defendants noticed plaintiffs’ lack of a jury demand, or realized their own mistake or inadvertence in failing to request one, and promptly moved for leave to file a demand for a jury trial. *See A.S.L. Enters., Inc. v Venus Labs., Inc.*, 264 AD2d 372, 373 (2d Dep’t 1999); *see also Beck v 200 Wyndham Assocs.*, 61 AD2d 804, 804 (2d Dep’t 1978) (demand for a jury trial was six days late and showed a clear intention to proceed as a jury trial; thus,

abuse of discretion not to allow leave to file a jury demand *nunc pro tunc*). Defendants had ample opportunity to request leave to serve a demand for a jury trial, rather than waiting approximately one month before the trial was set to commence.

Notwithstanding defendants' assertion that they relied on the complexity of the case and their anticipation that plaintiffs would include a jury demand since defendants requested one in their answer, such arguments are unpersuasive. CPLR 4102 clearly states that a demand for a jury trial shall be made in the note of issue and any other party may request one, if not requested by the party filing the note of issue, by serving a demand within 15 days of the filing of the note of issue. Therefore, despite defendants' request for a jury demand in the answer, such request was not a valid demand, as the procedure set forth in the CPLR does not allow for a demand to be requested in that fashion. Moreover, it is not plaintiffs' obligation to request a jury trial for defendants, but rather defendants' responsibility to check the note of issue to ensure that such a demand is made, or to serve a demand within 15 days, as provided in CPLR 4102(a). Any blame directed at plaintiffs by defendants is inappropriate.

Further, in their opposition papers, plaintiffs have demonstrated that they would suffer undue prejudice if the motion is granted. As defendants have noted, the issues in the case are of a complex nature, and any change in the type of trial would likewise change trial strategy and trial preparation. Plaintiffs have prepared for trial under the assumption that this case would be heard as a bench trial and additional, time-consuming preparation would be necessary if this case must now proceed as a jury trial. Plaintiffs contend that "[a]s trial of this action involves complex issues of prevailing wage laws, third-party beneficiary breach of contract claims, shareholder liability, class-action representative testimony, and burden-shifting, trying this case by a jury would require far greater trial preparation and far more days of trial than would a bench trial." James Emmet Murphy Affirmation in Opp'n ¶ 9.

Since this action was commenced in 2005, the trial shall proceed promptly, and the granting of defendants' request would only cause further delay, especially in light of defendants' continued pattern

of delay tactics throughout the entirety of this case, as discussed in prior orders of this Court and the Appellate Division, First Department. *See Galdamez v Biordi Constr. Corp.*, 50 AD3d 357, 357 (1st Dep't 2008); Court's Orders dated October 17, 2006 and June 29, 2006.

Accordingly, it is

ORDERED that defendants' motion for leave to file a jury demand is denied; and it is further

*J* ORDERED that this case is referred to the Trial Support Office to restore this case to the Part 40 Trial calendar forthwith; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order with notice of entry, upon all parties.

Dated: 9/23/09

  
DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST

NON-FINAL DISPOSITION

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Cross-Motion:     Yes     No

Upon the foregoing papers, it is ordered that this motion by defendants for an order, pursuant to CPLR 4102, granting defendants leave to file a late demand for a jury trial, is denied for the reasons set forth below.

CPLR 4102(a) provides that a party served with a note of issue not containing a demand for a jury trial, may demand a jury trial by serving each party with such demand and filing it within 15 days after service of the note of issue. *Downing v Downing*, 32 AD2d 350, 351 (1st Dep't 1969). Defendants seek leave to serve a late jury demand, pursuant to CPLR 4102(e), which provides that, within the court's sound discretion, "[it] may relieve a party from the effect of failing to comply with

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