

**Lexington Ins. Co. v Victaulic Co.**

2010 NY Slip Op 30557(U)

March 12, 2010

Supreme Court, New York County

Docket Number: 0110512/2008

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_

PART 10

*Justice*

Index Number : 110512/2008  
**LEXINGTON INSURANCE**  
 vs.  
**VICTAULIC**  
 SEQUENCE NUMBER : 001  
 AMEND SUPPLEMENT PLEADINGS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

**FILED**

MAR 17 2010

NEW YORK COUNTY CLERK'S OFFICE

MAR 12 2010

Dated: March 12, 2010

J. Gische  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X

Lexington Insurance Company a/s/o  
Pan Am Equities, LLC and  
Huguenot Hill Development, LLC.,

Plaintiff (s),

**-against-**

Victaulic Company and Maximum Fire  
Protection, Inc.,

Defendant (s).

-----X

**DECISION/ ORDER**  
Index No.: 110512-2008  
Seq. No.: 001

**PRESENT:**  
Hon. Judith J. Gische  
**J.S.C.**

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Pltf n/m amend complaint w/MS affirm, ehs . . . . .	1
Maximum opp w/EF affirm . . . . .	2
Victaulic opp w/EM affirm . . . . .	3
Pltf reply w/MS affirm . . . . .	4

**FILED**  
MAR 17 2018  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

This is a property damage action brought by the Lexington Insurance Company as subrogee of its insured Pan Am Equities LLC and Huguenot Hill Development, LLC (collectively "plaintiff"). Defendants ("Victaulic") and ("Maximum") have separately answered the complaint. Presently before the court is plaintiff's motion to serve an amended complaint adding a third claim. Victaulic and Maximum separately oppose the motion on the basis that the claim is time barred.

## **Arguments**

Plaintiff has asserted negligence, products liability, breach of express and implied warranties and other claims against the defendants. According to the complaint, Victaulic defectively designed, manufactured, assembled etc. a PVC pipe that was used in a sprinkler pipe system installed at the subject premises located at 80 Old Boston Post Road, New Rochelle, New York ("building"). Maximum installed the sprinkler pipe system in the building.

Plaintiff claims the sprinkler system burst and water flowed into the living room and gym area of Unit number 1 in the building. According to plaintiff this happened not once, not twice, but three times. The first incident reportedly occurred on July 26, 2006 and the second incident allegedly occurred on August 8, 2006. Plaintiff now seeks to add a third cause of action for the loss that reportedly occurred on November 21, 2006. Plaintiff argues that the third loss claim relates back to the already asserted causes of action because the new claim arises from the same transactions or occurrences asserted in the original complaint and, therefore, the new claim is not time barred.

Victaulic and Maximum each argue that the new claim is time barred because the alleged incident took place more than three years prior to it being asserted and the claim does not benefit from the "relation back" provision in CPLR 203 [f] because it is an entirely new incident, unrelated to the incidents alleged in the original complaint.

## **Discussion**

Leave to amend and supplement pleadings should be freely given upon such terms as may be just as a matter of discretion in the absence of prejudice or surprise

[\* 4]

(CPLR § 3025 [b]; Stroock & Stroock & Lavan v. Beltrami, 157 A.D.2d 590 [1<sup>st</sup> Dept., 1990]). A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading (CPLR 203 [f]). The statute of limitations for a products liability action is three (3) years, running from the date of injury (CPLR 214[5]; Victorson v. Bock Laundry Machine Co., 37 NY2d 395 [1975]). The statute of limitation is the same for a negligence action.

The basis for the proposed amended complaint is that the third incursion of water is just another in a series of occurrences arising from the manufacture of a defective pipe used in a sprinkler system installed at the premises. The new claim plaintiff seeks to assert, based upon the November 21, 2006 incursion of water, would be time barred had the negligence and products liability claims against the defendants not been timely commenced. Here, however, the original complaint gives each defendant notice that plaintiff contends the PVC pipe was defectively manufactured, assembled, etc. and that the sprinkler system was negligently installed (compare, B.B.C.F.D., S.A. v. Bank Julius Baer & Co. Ltd., 62 A.D.3d 425 [1<sup>st</sup> Dept 2009]). It is exactly the same pipe and system identified in the original complaint. Therefore, the new damages claims relate back to the same transactions, occurrences, or series of occurrences to be proved on the original claims (Village of St. Johnsville v. Travelers Indemnity Company, 93 AD2d 932 [3<sup>rd</sup> Dept 1983]; Murphy v. General Motors Corp., 55 AD2d 486 [3<sup>rd</sup> Dept 1977]). It is as if the new cause of action was timely interposed (Pendleton v. City of New York, 44 AD3d 733 [2<sup>nd</sup> Dept 2007]).

\* 5]

Other arguments presented by defendants, that plaintiff has not offered any explanation for why it did not make this motion sooner, or that defendants will be prejudiced by allowing the amendment at this late date, are ineffective against plaintiff's motion to amend for two reasons. First, the preliminary conference was held October 15, 2009 and this motion was brought December 16, 2009. Discovery is not yet completed and the note of issue is not due until May 28, 2010. Thus, this motion was made fairly early in the life of this case. The fact that defendants have to defend against further damages claims against them is not "prejudice." Stroock & Stroock & Layan v. Beltramini, 157 A.D.2d 590 (1<sup>st</sup> Dept., 1990). Consequently, since the new claim for damages is not time barred, but relates back, and leave to amend and supplement pleadings should be freely given, in the absence of prejudice or surprise, plaintiff's motion to serve the proposed complaint is granted. The amended complaint may be served.


**Conclusion**

Plaintiff's motion pursuant to CPLR 3025 [b] is granted. Plaintiff may serve the proposed complaint.

Any relief not expressly addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
March 12, 2010

So Ordered:   
Hon. Judith J. Gische, J.S.C.

**FILED**  
MAR 17 2010  
NEW YORK  
COUNTY CLERK'S OFFICE