

**Etheridge v Port Auth. of N.Y. & N.J.**

2010 NY Slip Op 30942(U)

April 16, 2010

Supreme Court, New York County

Docket Number: 112111/08

Judge: Judith J. Gische

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SCANNED ON 4/21/2010  
[\* 1]  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. JUDITH J. GISCHE

4/20/10

PRESENT: \_\_\_\_\_ J.S.C. \_\_\_\_\_  
Justice

PART 10

Index Number : 112111/2008  
ETHERIDGE, DARRELL  
vs.  
PORT AUTHORITY  
SEQUENCE NUMBER : 002  
AMEND SUPPLEMENT PLEADINGS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

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

motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.

FILED  
APR 21 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/16/10

HON. JUDITH J. GISCHE J.S.C.  
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 STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X

DARRELL ETHERIDGE,

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK  
AND NEW JERSEY,

Defendant.  
-----X

**Decision/Order**

Index No.: 112111/08

Seq. No. : 002

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):

**Papers**

	Numbered
Pltf's motion [amend] w/JJF affirm in support, exhs	1
Def's TNA affirm in opp	2
4/1/10 SFO	3

**FILED**  
APR 21 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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

In this Labor Law action, plaintiff seeks recovery for personal injuries he allegedly sustained when he fell from a ladder at Tower 1 of the World Trade Center on September 14, 2007. Plaintiff moves for an order granting plaintiff leave to:[1] amend the Verified Complaint so as to add 1 WTC, LLC and Tishman Construction Corporation as defendants, [2] amend the caption to include these additional defendants, [3] serve the Supplemental Summons and Amended Complaint and [4] awarding plaintiff its costs in making this motion (CPLR §§ 305 [c], 3025 [b], 1003). Defendant The Port Authority of New York and New Jersey ("Port Authority") opposes the motion.

In the absence of prejudice or surprise resulting directly from the delay, leave to amend a pleading is freely given, pursuant to CPLR § 3025(b) (Fahey v. County of Ontario, 44 NY2d 934 [1978]). Moreover, leave should be granted when the denial of the motion would create a greater prejudice than granting it (Murray v. City of New York, 43 NY2d 400 [1977]; Adams Drug Co. v. Knobel, 129 AD2d 401 [1st Dept 1987]). However, an order allowing the amendment should not be granted without considering the validity of the claim sought to be asserted. Thus, "the sufficiency or meritoriousness of a proposed pleading or matter" should be resolved at the outset "to obviate the possibility of needless time consuming litigation" (Sharapata v. Town of Islip, 82 AD2d 350, 362 *aff'd* 56 NY2d 332 [1982]). The moving party is required to show that it the new claims have a colorable basis (NAB Construction Corp. v. Metropolitan Transportation Authority, 167 AD2d 301 [1st Dept 1990]).

Plaintiff claims that it only learned of the potential liability of 1 WTC, LLC and Tishman Construction Corporation after Port Authority disclosed documentation, via January 4, 2010, response indicating that the owner of the subject premises is 1 WTC LLC and that the subject general contractor is Tishman Construction Corporation. In opposition, Port Authority contends that granting the instant motion would prejudice it by causing it to incur additional expenses. Moreover, the Port Authority claims that plaintiff has been dilatory insofar as this action has been pending for almost 2 years.

The court grants plaintiff's motion to amend. Plaintiff has colorable claims against the parties it seeks to bring into this action which are within the statute of limitations, and plaintiff has a reasonable excuse for its delay in bringing the motion. In its opposition, the Port Authority has failed to demonstrate any prejudice. The Port

Authority does not explain how the additional expenses it will incur incident to the addition of the new parties will be overly burdensome. Moreover, the Port Authority has failed to show that plaintiff's delay in making this motion has diminished its defense of this action, to wit, the Port Authority was in possession of the names of the new parties (see generally Jacobson v. McNeil Consumer & Specialty Pharmaceuticals, 68 AD3d 652 [1st Dept 2009]). Here, fact discovery is still being conducted, the deadline to file a note of issue has not yet passed and a trial date has not been set yet.

While leave to amend is granted, that portion of plaintiff's motion seeking costs must be denied. The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as under 22 NYCRR 130-1.1. While the defendant's arguments were rejected by the court, the court cannot say that they were frivolous within the meaning of the court rule. Nor is the defendant's failure to stipulate to the requested relief a basis to award plaintiff its costs.

### **Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that plaintiff's motion is granted only to the extent that: [1] plaintiff may amend the Verified Complaint so as to add 1 WTC, LLC and Tishman Construction Corporation as defendants; [2] the caption in this action is hereby amended to include these additional defendants and shall read as follows:

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

-----X  
DARRELL ETHERIDGE,

Index No.: 112111/08

Plaintiff,

-against-

THE PORT AUTHORITY OF NEW YORK  
AND NEW JERSEY, 1 WTC, LLC and  
TISHMAN CONSTRUCTION CORPORATION,

Defendants.  
-----X

[3] Plaintiff shall serve the Supplemental Summons and Amended Complaint in the form submitted to the court on this motion (Exhibit "F") on: [a] 1 WTC, LLC and Tishman Construction Corporation within the next 60 days; [b] appearing counsel within the next 20 days; and [c] on the County Clerk within the next 20 days; and it is further

**ORDERED** that plaintiff's motion is otherwise denied.

In light of this decision, the status conference previously scheduled for April 22, 2010 is cancelled; the parties shall appear for a status conference on June 23, 2010 at 9:30 a.m. at Part 10, 60 Centre Street.

Plaintiff's time to file note of issue is extended to June 24, 2010.

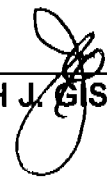
Any requested relief not expressly addressed herein has nonetheless been considered by the court and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
April 16, 2010

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.



**FILED**  
APR 21 2010  
NEW YORK  
COUNTY CLERK'S OFFICE  
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