[* 1] SCANNED ON 1/7/2011

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

PRESENT: MADDEN Justice

PART 11

INDEX NO. 100254/07

MOTION DATE

MOTION SEQ. NO. 4

MOTION CAL. NO.

MICHAEL TOLEDO

- V -

~~NY~~ NY TIMES BUILDING

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 ~~is~~ and cross-motion are decided in accordance with the annexed Memorandum Decision + Order.

FILED

JAN 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: January 3, 2011

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 11

----------X INDEX NO. 100254/07

MICHAEL TOLEDO and ILSA TOLEDO,

Plaintiffs,

-against-

NEW YORK TIMES BUILDING, LLC and AMEC CONSTRUCTION MANAGEMENT GROUP,

Defendants.

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NEW YORK TIMES BUILDING, LLC and AMEC CONSTRUCTION MANAGEMENT GROUP,

Third-Party Plaintiff

-against-

BENSON INDUSTRIES, INC.,

Third-Party Defendant

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JOAN MADDEN, J.:

In this action to recover damages for the injuries allegedly sustained by plaintiff Michael Toledo ("Toledo") as the result of a workplace accident, third-party defendant Benson Industries, Inc. ("Benson") moves for an order (1) pursuant to CPLR 3025(b) permitting it to amend its third-party answer complaint to assert a counterclaim for contribution against defendant/third-party plaintiff AMEC Construction Management Group ("AMEC") and an affirmative defense of breach of the implied duty of good faith and fair dealing, (2) pursuant to CPLR 3217 nullifying the voluntary stipulation of discontinuance of the action against AMEC entered into without the consent or permission of Benson. Defendants/third-party plaintiffs AMEC and New York Times Building LLC ("NYTB") oppose the motion and cross move for order stating that the NYTB's settlement plaintiffs was reasonable and precluding Benson from challenging their settlement with plaintiffs. Benson opposes the cross motion.

Background

In this action, plaintiffs sued to recover for damages under Labor Law §§ 240(1), 241(6), and 200. Toledo was employed by Benson, the curtain wall subcontractor, pursuant to an agreement with AMEC, the Construction Manager on the Project to renovate the New York Times Building owned by NYTB.

Toledo was injured on December 27, 2006, while attempting to move a crate containing curtain walls, which measured five feet (in height) by thirteen feet (width). While the record is somewhat unclear as to the details surrounding the accident, the parties do not dispute that Toledo, an ornamental iron worker, was injured and that he and three other employees were attempting to move the crate when Toledo slipped or tripped on a piece of plywood and/or an iron bar. It is also undisputed that there was debris around the crate and that it was the work of AMEC laborers to remove the debris. Eddie Gonzales, Toledo's supervisor, called the shop steward to have AMEC send laborers and was told that there were none available until the end of the day. As Benson needed the curtain wall to continue its work, Toledo and other employees cleared a path through the debris through which they intended to move the curtain wall. One end of the crate was on a steel framed dolly and they attempted to place the other end on a similar dolly. When they were unable to lift the crate onto the dolly to their satisfaction, Gonzalez attempted to do so by using a jack. Toledo and the other workers leaned their bodies against the crate and apparently moved it several inches at which point Toledo tripped and slipped over plywood and/or an iron bar which had been under one dolly and loosened with their efforts.

Defendants/third-party plaintiffs moved for summary judgment dismissing the complaint. Plaintiffs did not oppose the motion for summary judgment insofar as it sought to dismiss the Labor Law § 240(1) claim, but opposed the dismissal of its claims under Labor Law §§ 241(6)

and 200. By decision and order dated August 17, 2009, this court dismissed the section 240(1) claim, and the Labor Law § 200 claim against NYTB. However, it denied summary judgment as to the Labor Law § 241(6) claim, finding that there was evidence that Toledo was injured based on the failure to keep passage ways and work areas free of debris in violation of State Industrial Code 12 NYCRR 23-1.7 (e)(1)(2). The court also found issues of fact as to whether AMEC knew or should have known about the accumulation of debris, and whether AMEC's failure to schedule the removal of the debris prior to the time that the crate needed to be moved was negligent, and therefore found that AMEC was potentially liable under Labor Law § 200.

The court also granted defendants/third-party plaintiffs' motion for summary judgment on their claim for contractual indemnification against Benson based on the indemnification provision contained in Article 5 of AMEC's contract with Benson,[1] conditioned on

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[1]Article 5 with Benson which stated, in relevant part, that:

> To the fullest extent permitted by law, Subcontractor (i.e. Benson) shall indemnify, defend and save harmless the Owner (i.e. NYTB), the Contractor (i.e. AMEC)... and their respective partners, parents, affiliates, agents, officers, employees and anyone else acting for or on behalf of any of them (herein collectively Indemnitees) harmless from and against all liability, damages, loss, claims, demands, and actions of any nature whatsoever which arise out of or are connected with, or are claimed to arise out of or be connected with the performance of Work by the Subcontractor, or any act or omission of Subcontractor....Without limiting the generality of the foregoing, such defense and indemnity includes all liability, damages, loss, claims, demands or actions on account of personal injury, death, or property loss to any Indemnitee, any Indemnitee's employees, agents, contractors or Subcontractors, licensees or invitees or other contractor or Subcontractor....whether based upon, or claimed to be based upon statutory (including, without limiting the generality of the foregoing workers' compensation), contractual, tort or other liability of any Indemnitee, contractor, Subcontractor or other persons....

defendants/third-party plaintiffs being held liable to plaintiffs for other than their own negligence.[2]

After the court issued its decision and order, the matter was set down for a trial on February 2, 2010. In the interim, the parties attempted to settle the remaining claims through mediation. The mediation was unsuccessful for reasons that are disputed by the parties. Then, by letter dated January 26, 2010, counsel for defendants/third-party plaintiffs wrote to counsel for Benson, advising that the matter had been settled between NYTB and plaintiffs, and that plaintiffs intended to discontinue the claims against AMEC with prejudice. Counsel wrote that "[i]n light of the fact that AMEC is no longer a party to the proceedings, it is our position that the only issues remaining to be tried are the reasonableness of the settlement and the fees incurred by [NYTB] in connection with defending the action, including those incurred in prosecuting the third-party action. While we understand from prior discussions that it is Benson's intention to attribute a portion of the fault for the happening of the accident to AMEC, we believe that the discontinuance of all claims against AMEC moots the issue."

The settlement agreement dated January 19, 2010, between plaintiffs and defendants/third-party plaintiffs, discontinues the claims against AMEC with prejudice, and settles the claims by plaintiffs against NYTB for $175,000, and indicates that "it is expressly understood that and agreed that no portion of this settlement is being paid for or in connection with the claims against AMEC...which have been discontinued with prejudice." Plaintiffs also signed a release in favor of NYTB and Travelers Insurance Company ("Travelers"), and not AMEC. Travelers is the insurer for both NYTB and AMEC.

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[2]Since the NYTB's potential liability was purely vicarious based on Labor Law § 241(6), the conditional nature of the indemnification was relevant to AMEC only.

Plaintiffs also entered into separate Stipulations of Discontinuance with prejudice against NYTB and AMEC. The stipulations are signed by counsel for plaintiffs and counsel for the defendants/third-party plaintiffs.

Benson now moves to vacate the Stipulation of Discontinuance entered between AMEC and plaintiffs, arguing that the failure to obtain its consent renders the stipulation a nullity. Benson also seeks to amend its answer to assert a counterclaim for contribution against AMEC and an affirmative defense to the claim for contractual indemnification of breach of the implied duty of good faith and fair dealing based on its alleged failure to consider Benson's interests in settling the action by using "a sham apportionment to prevent the proper apportionment to AMEC."

Defendants/third-party plaintiffs oppose the motion, arguing that since Benson is not a party to the claim that was discontinued against AMEC it is without standing to challenge it.[3] They also argue that as AMEC is no longer a party, Benson cannot serve a counterclaim against it, and that its request to amend to add a counterclaim is too late in any event. In addition, they argue that there is no basis for Benson's proposed defense based on an alleged breach of the implied duty of good faith and fair dealing since it was Benson's bad faith failure to settle at the time of mediation that lead to the settlement with NYTB without Benson's participation, and that the settlement is fair and reasonable. Defendants/third-party plaintiffs also cross move for an

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[3]Defendants/third-party plaintiffs also argue that a motion is an improper method of seeking to vacate a stipulation of discontinuance and that a plenary action is needed. This argument is without merit as this rule is only arguably applicable when a party to a stipulation seeks to vacate it and not when, as here, the request to vacate the stipulation is made by a nonparty to the stipulation on the grounds that its interests are adversely affected by the stipulation. See Siegel Practice Commentaries, McKinney's Book 7B, CPLR 3212-3400, CPLR 3217:10, at 743 (2005).

order finding that plaintiffs settlement with NYTB was reasonable and precluding Benson from offering any evidence at trial to challenge the reasonableness of the settlement.

Benson opposes the cross motion, asserting that defendants/third-party plaintiffs failed to meet their burden of showing that the settlement was reasonable as a matter of law, made in good faith, and that NYTB would have been found liable if it had proceeded to trial.

Discussion

The threshold issue is whether the Stipulation of Discontinuance with AMEC should be vacated based on the failure to obtain Benson's agreement to its terms. CPLR 3217 (a) sets forth three methods for discontinuing a claim without a court order. Of relevance here is CPLR 3217(a)(2) which provides that "[a]ny party asserting a claim may discontinue it without an order...by filing with the clerk of the court before the case has been submitted to the court or jury a stipulation in writing signed by the attorney of record for all parties, provided that ...no person not a party has an interest in the subject matter of the action."

The statute has interpreted the term "all parties" to mean all parties to the claim being discontinued. Gonzalez v. U.P.S., 272 AD2d 129 (2d Dept 2000)(noting that "the third-party action by defendant against plaintiff's employer was properly discontinued pursuant to [a] stipulation of the parties thereto [and] ....Plaintiff's consent was not required....);Hoag v. Chase Pitkin Home and Gardens Centre, 252 AD2d 953, 953 (4th Dept 1998)(holding that the term "all parties" in CPLR 3217(a)(2) refers to all parties in the third party action and as plaintiff did not have a claim against the third party defendant its consent to the stipulation was not needed to discontinue the third party action); see also, Siegel Practice Commentaries, McKinney's Book 7B, CPLR 3212-3400, CPLR 3217:9 at 742 (2005).

As Benson is not a party to the main action, the issue here is whether Benson is "a person not a party [with] an interest in the subject matter of the action,"such that the Stipulation of Discontinuance is not effective without its consent under CPLR 3217(a)(2). See Gonzalez v. U.P.S., 272 AD2d at 130 (finding that plaintiff's consent to the stipulation of discontinuance of the third party action "was not required since plaintiff was neither a party nor interested in its subject matter"); Siegel Practice Commentaries, McKinney's Book 7B, CPLR 3212-3400, CPLR 3217:9, at 742 (noting that the stipulation of discontinuance is "precluded as a discontinuation device when a nonparty has an interest in the subject matter and would be adversely affected by the discontinuance).

Here, Benson qualifies as a non-party with an interest in the subject matter of the main action, since it has a contractual obligation to indemnify the defendants in the main action to the extent they are found liable to plaintiffs for other than their own negligence. Moreover, this interest is adversely impacted by the manner in which the settlement was structured so as to discontinue the claims against AMEC, the party found by the court to be potentially negligent and to settle the claims against NYTB, the party whose liability was determined to be wholly vicarious. Tthe result of this structuring of the settlement agreement was to retain NYTB's claim for contractual indemnification against Benson to recover from Benson the amounts it paid in settlement, while depriving Benson of its right to assert that AMEC's negligence was partially or wholly responsible for Toledo's injuries and to apportion any liability to AMEC.

Moreover, while the settlement would not foreclose Benson from bringing an action for contribution against AMEC, aside from being contrary to policies of judicial economy, such a scenario would prejudice Benson by requiring it to bring a new action to address claims that have

already been litigated in this action. See e.g. County of Westchester v. Welton Becket Assocs., 102 AD2d 34, 50 (2d Dept 1984)(discontinuation of claims may be denied when indemnity claims between defendants should be resolved in the same litigation). Under these circumstances, the Stipulation of Discontinuance should be vacated.

The next issues concern Benson's motion for leave to amend to add a counterclaim for contribution against AMEC and an affirmative defense alleging the breach of the implied covenant of good faith and fair dealing.

It is well-settled that "leave to amend should be freely granted in the absence of prejudice or surprise, upon a showing that the proposed amendment has merit." Centrifugal Associates, Inc. v Highland Metal Industries, Inc., 193 AD2d 385 (1st Dept. 1993); Murray v City of New York, 43 NY2d 400, 404-405, reargument dismissed, 45 NY2d 966 (1977). Moreover, mere lateness does not establish grounds to reject the amendment. State National Ins. Co. v. Berakha, 22 AD3d 331 (1st Dept 2005). Instead, the delayed request must be accompanied by prejudice as well. Edenwald Contracting Co. Inc. v. City of New York, 60 N.Y.2d 957, 959 (1983). In this context, the courts define prejudice as a "some special right lost in the interim, some change of position, or some significant trouble or expense which could have been avoided had the original pleading contained what the amended one wants to add." Barbour v. Hospital for Special Surgery, 169 A.D.2d 385, 386 (1st Dept. 1991)(citations omitted); See also Siegel, New York Practice, § 237, at 379 (3d ed. 1999).

Under this standard, Benson's request for leave to amend its answer to add the counterclaim for contribution against AMEC should be granted. As the court has vacated the Stipulation of Discontinuance of the claims against AMEC, AMEC is still a defendant and third-

party plaintiff and Benson may assert a counterclaim against it. In addition, based on evidence that AMEC's negligence may have caused or contributed to plaintiffs' injuries, Benson has a viable claim for contribution against AMEC. See generally, Garrett v. Holiday Inns, Inc., 58 NY2d 53 (1983). Moreover, while Benson's motion to amend was made on the eve of trial, AMEC cannot show that it has been prejudiced by the delay since the counterclaim is based on the same facts the provide the basis for AMEC's potential liability to plaintiffs. State National Ins. Co. v. Berakha, 22 AD3d at 332 (trial court properly granted leave to amend on eve of trial where plaintiff failed to show any prejudice resulting from delay); Brewster v. Baltimore & Ohio Railroad Co., 185 AD2d 653, 654 (4th Dept 1992)(trial court erred in denying leave to amend plaintiff's complaint on eve of trial to add further basis of recovery when proposed amendment did not set forth any new facts).

In contrast, the request to add an affirmative defense of the breach of the implied duty of good faith and fair dealing must be denied as there is no basis for such a defense. "Implicit in every contract is a promise of good faith and fair dealing, which is breached when a party 'acts in a manner that, although not expressly forbidden by a contractual provision, would deprive the other party of a right to receive benefits under their agreement.'" O'Neil v. Warburg, Pincus & Co., 39 AD3d 281, 282 (1st Dept 2007), quoting, Jaffe v. Paramount Communications, 222 AD2d 17, 22-23 (1st Dept 1996). At the same time, however, "such covenant does not impose any obligation upon a party to the contract beyond what the explicit terms of the contract provide." Silvester v. Time Warner, Inc., 1 Misc3d 250 (Sup Ct NY Co. 2003), aff'd, 14 AD3d 430 (1st Dept 2005).

Here, while Benson argues that AMEC breached an implied duty of good faith and fair

dealing in not considering its interests when settling the action, such an obligation cannot be inferred from the contract between AMEC and Benson to perform iron work or the indemnification clause in that agreement. Accordingly, the motion to amend is denied to the extent it seeks to add a defense based on the breach of the implied duty of good faith and fair dealing.

As the court has vacated the Stipulation of Discontinuance of the claims against AMEC and as the settlement with NYTB is related to the discontinuation of the claims against AMEC, the cross motion regarding the reasonableness of the settlement is denied as moot.

In view of the above, it is

ORDERED that the motion to vacate the stipulation of discontinuance of the claims against AMEC is granted and the claims against AMEC are reinstated; and it is further

ORDERED that the motion to amend is granted to the extent of granting Benson leave to amend its answer to the extent of adding a counterclaim against AMEC for contribution; and it is further

ORDERED that within 15 days of the date of this decision and order, Benson shall serve an amended answer to the third-party complaint consistent with this decision and order; and it is further

ORDERED that the parties shall appear for a pretrial conference in Part 11, room 351, 60 Centre Street, on January 20, 2011 at 2:30 pm.

DATED: ~~December 2010~~ January 3, 2011

J.S.C.