

**Crimp v 21 W. 58th St., LLC**

2011 NY Slip Op 30378(U)

February 15, 2011

Supreme Court, New York County

Docket Number: 109766/09

Judge: Eileen A. Rakower

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

PRESENT: **HON. EILEEN A. RAKOWER**

PART 15

Index Number : 1098667/2009

CRIMP, SUSAN

INDEX NO. 1098667/09

vs

21 WEST 58TH STREET

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

Sequence Number : 001

MOTION SEQ. NO. 001

AMEND PLEADINGS

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2, 3, 4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

**FILED**

FEB 17 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/16/11

[Signature]  
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 15

-----X  
SUSAN CRIMP,

Plaintiff,

Index No.109766/09

- against -

DECISION/ORDER  
Mot. Seq.: 001

**FILED**

21 WEST 58<sup>TH</sup> STREET, LLC and 21 WEST  
58<sup>TH</sup> STREET CORPORATION,

FEB 17 2011

Defendants.

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
21 WEST 58<sup>TH</sup> STREET CORPORATION,

Third-Party Plaintiff,

Third-party Index No:  
591072/09

-against-

SERVICELINK, INC. and ALLIED BARTON SECURITY  
SERVICES, LLC,

Third-party Defendants.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for personal injuries allegedly sustained when she slipped and fell on ice covered steps outside her residence located at 212 West 58<sup>th</sup> Street in the County and State of New York on January 11, 2009. Plaintiff claims that the accident exacerbated her pre-existing Multiple Sclerosis.

Following her accident, defendant 21 West 58<sup>th</sup> Street Corporation ("21 West") allegedly fired the employee who was responsible for maintaining the steps. On July 13, 2009, plaintiff commenced the instant action against 21 West for negligence.

Thereafter, plaintiff alleges that she began to experience “harsh and negative” treatment from the building staff and management, including turning a deaf ear to her complaints about bed bugs and about a hostile neighbor, cursing at her and threatening to “chop” up her mail, and being threatened by the building manager, who allegedly informed her that he “had secretly taped her conversations.” On November 18, 2009, 21 West brought a third-party action against Servicelink, Inc. and Allied Barton Security Services, LLC (“third-party defendants”) for common law and contractual indemnification.

Plaintiff now moves to have her amended complaint served *nunc pro tunc*. Plaintiff seeks to add third-party defendants as direct defendants; to add claims for retaliation, intentional infliction of emotional distress, discrimination, and rent abatement, as against 21 West, and to delete defendant 21 West 58<sup>th</sup> Street, LLC from the caption. 21 West partially opposes and third-party defendants oppose only that portion of the motion seeking to add them to the direct action.

Plaintiff asserts that her motion should be granted because the additional claims arose from the subject incident, and the addition of the third-party defendants is necessary because they may be liable for plaintiff’s injuries.

21 West, in opposition, argues that the additional claims are separate and distinct from the facts plead in the original complaint. Thus, 21 West asserts that they will be prejudiced by the amendment.

CPLR Section 3025(b) states:

Amendments and supplemental pleadings by leave: A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of the 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.

Initially, that portion of the motion seeking to delete 21 West 58<sup>th</sup> Street, LLC from the caption is granted without opposition. Further, at this early stage of the proceedings, no party will be surprised or prejudiced by the addition of third-party defendants to the direct action. (*Fahey v. Ontario County*, 44 NY2d 944[1978]).

As to the new causes of action plaintiff seeks to add, "leave to amend a pleading is freely granted absent prejudice or surprise resulting directly from any delay in asserting the proffered claim." (*Peach Parking Corp. v. 346 West 40<sup>th</sup> Street, LLC*, 42 AD3d 82[1st Dept. 2007]). Prejudice arises when a party "incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measures in support of its position . . ." (*Valdes v. Marbrose Realty, Inc.*, 289 AD2d 28[1st Dept. 2001]).

However, "where no cause of action is stated, leave to amend will be denied." (*Konrad v. 136 East 64<sup>th</sup> Street Corp.*, 246 AD2d 324[1st Dept. 1998]). Plaintiff alleges "retaliation" in the proposed amended complaint. Assuming plaintiff is alleging a violation of Real Property Law §223-b, "Retaliation by landlord against tenant," the facts alleged here fail to state a claim. RPL §223-b only applies when a landlord serves a notice to quit, substantially alters the terms of the tenancy, or charges a fee or penalty, as the result of, among other things, a tenant filing a complaint or attempting to secure his or her rights under the lease agreement.

Regarding the remainder of the amended complaint, defendants fail to show prejudice. 21 West will not be hindered in the preparation of its case, as minimal discovery has been conducted thus far, and it has ample opportunity to investigate the new claims.

Wherefore it is hereby

ORDERED that plaintiff's motion for leave to amend the complaint herein is granted in part, as follows: plaintiff may delete defendant 21 West 58<sup>th</sup> Street, LLC from the caption, and is permitted to add Servicelink, Inc. and Allied Barton Security Services, LLC as direct defendants; and it is further

ORDERED that the amended complaint in the form annexed to the moving papers shall be deemed timely served upon service of a copy of this order with notice of entry; and it is further

ORDERED that reference in the amended complaint to allegations of "retaliation" shall be stricken; and it is further

ORDERED that defendant shall answer the amended complaint or otherwise

respond thereto within 20 days from the date of said service.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: February 15, 2011



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EILEEN A. RAKOWER, J.S.C.

**FILED**

FEB 17 2011

NEW YORK  
COUNTY CLERK'S OFFICE