| **Naughton v City of New York** |
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| 2011 NY Slip Op 32144(U) |
| August 4, 2011 |
| Supreme Court, New York County |
| Docket Number: 104026/05 |
| Judge: Martin Shulman |
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SCANNED ON 8/5/2011

[* 1]

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

PRESENT: Shulman, Justice — PART 1

PATRICK NAUGHTON et al

- v -

CITY OF NY

INDEX NO. 104026/05

MOTION DATE

MOTION SEQ. NO. 11

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for Amend

| | PAPERS NUMBERED |
|---|---|
| ~~Notice of Motion~~/ Order to Show Cause — Affidavits — Exhibits 1-4 | 1 |
| Answering Affidavits — Exhibits | 2,3 |
| Replying Affidavits (see motion seq. 012) | 4 |

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

FILED

AUG 05 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: August 4, 2011

MARTIN SHULMAN, J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----------------------------------------------------------X

PATRICK NAUGHTON, JR.,
Plaintiff,

Index No. 104026/05

*-against-*

**Decision & Order**

THE CITY OF NEW YORK and
PETROCELLI CONSTRUCTION, INC.,
Defendants,

-----------------------------------------------------------X

PETROCELLI CONSTRUCTION, INC.,
Third-Party Plaintiff,

Third Party Index No. 280137/08

*-against-*

W&W GLASS SYSTEMS, INC. and METAL SALES,
Third-Party Defendants.

-----------------------------------------------------------X

FILED

AUG 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

**Shulman, J.:**

In motion sequence 011, plaintiff moves to amend his complaint to assert a direct claim against third-party defendant W&W Glass Systems, Inc. ("W&W"). W&W and co-third-party defendant Metal Sales oppose the motion.

In motion sequence 012, plaintiff seeks renewal of this court's decisions and orders dated November 30, 2010 and April 11, 2011[1] based on the June 2, 2011 decision in *Burke v. Hilton Resorts Corp.*, 85 AD3d 419 (1st Dept.). Plaintiff maintains the decision in *Burke* represents a change in the law that would change this court's prior

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1 This court's November 30, 2010 decision and order *inter alia* denied plaintiff's motion for summary judgment on his Labor Law §240(1) (the "Scaffold Law") cause of action and granted defendant Petrocelli Construction, Inc.'s ("Petrocelli") cross-motion for summary judgment dismissing the complaint. The April 11, 2011 decision and order granted plaintiff's motion for reargument and upon granting same, adhered to the determination in the November 30, 2010 decision and order.

determinations. Petrocelli, W&W and Metal Sales oppose plaintiff's renewal motion. Motion sequences 011 and 012 are consolidated for disposition.

This case's factual and procedural background is summarized in the November 30, 2010 and April 11, 2011 decisions and orders and will not be repeated herein. Since those decisions and orders were issued, the sole remaining claim in this case for indemnity between W&W and Metal Sales was settled.

**Motion to Renew**

The court addresses plaintiff's motion for renewal first. CPLR 2221(e) requires in pertinent part, *inter alia*, that a motion for leave to renew "shall demonstrate that there has been a change in the law that would change the prior determination." Here, plaintiff fails to show that the First Department's recent decision in *Burke* presents a change in the law which would change this Court's prior determinations.

In *Burke*, the First Department found that the plaintiff established entitlement to summary judgment on his Scaffold Law claim against a company which "had contractual supervisory authority over the work performed by its subcontractor, . . . (plaintiff's employer), and was therefore a statutory agent of [the construction manager], even if it did not exercise that supervisory authority with respect to plaintiff's particular task . . ." [Citation omitted and bracketed matter added]. This is nothing new and accordingly, renewal must be denied.

It is well settled that where a party is neither an owner or a general contractor, liability under Labor Law § 240(1) will only be found if such party was a statutory agent of the owner or general contractor. See *Russin v. Louis N. Picciano & Son,* 54 NY2d

311, 318 (1981). "Only upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under [Labor Law] section[ ] 240 . . ." *Id.*

*Burke* merely applies the foregoing principles to the factual scenario presented in that case. However, it does not represent a change in the law automatically negating this court's application of those principles to the facts of this case including, but not limited to, the specific findings that Petrocelli presented evidentiary proof, which plaintiff failed to controvert, that: non-party E & F Walsh ("Walsh") was the general contractor with overall authority for the renovation of the Family Court building's facade and lobby; Petrocelli was subordinate to Walsh; and Petrocelli did not direct or supervise the hoisting operation Metal Sales performed, nor did it have authority to supervise or control such work. To the extent that plaintiff contends this court erred in reaching the foregoing conclusions, his sole remedy is an appeal of this court's prior determinations.

For all of the above reasons, no basis for renewal exists and the motion must be denied.

**Motion to Amend**

Third-party defendants W&W and Metal Sales oppose plaintiff's motion to amend the complaint to add W&W as a direct defendant on the basis that the three year statute of limitations has long since run, the action has been finally disposed and the proposed amendment would therefore prejudice them. In support of its motion for leave to amend the complaint pursuant to CPLR §§ 1003 and 3025(b) to add W&W as a direct defendant, plaintiff preemptively attempts to dispel any potential statute of limitations

defenses by relying on the "relation back" doctrine discussed in *Duffy v. Horton Mem. Hosp.*, 66 NY2d 473, 476 (1985). Plaintiff argues that W&W has been a party to this litigation since January 2006 and can claim no surprise or prejudice. However, in applying *Duffy*:

> The court must analyze the pleadings and surrounding circumstances on a case-by-case basis . . . The court must analyze whether permitting the direct claim would cause undue prejudice and be at odds with the policies underlying the statute of limitations.

*Fitzpatrick v. City of New York*, 714 NYS2d 185, 188 (Sup. Ct., NY Co., 2000).

In addressing the policies behind the three year statute of limitations, the court is concerned with this claim being long overdue and with the fact that plaintiff presents no compelling reason for the five year delay in asserting his direct claim against W&W. *Duffy* at 477; *Brock v. Bua*, 83 AD2d 61, 69-71 (2d Dept. 1981). Additionally, the motion to amend was made after the court had already dismissed the complaint. Having denied plaintiff's bid to revive the complaint by granting renewal, the court finds that allowing plaintiff to amend his complaint at this late date would undermine the policies behind the statute of limitations and would prejudice W&W. Accordingly, it is hereby

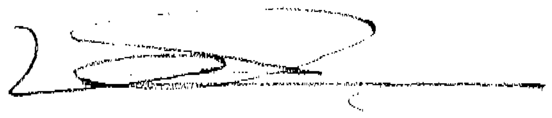
ORDERED that plaintiff's motion for renewal (motion seq. 012) is denied in its entirety; and it is further

ORDERED that the plaintiff's motion to amend the complaint (motion seq. 011) to add current third-party defendant, W&W, as a direct defendant is denied.

[* 6]

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
August 4, 2011



Hon. Martin Shulman, J.S.C.

FILED

AUG 05 2011

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