SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ELISA OBANDO BERNARDEZ,

Plaintiff,

- against -

F.S. HEMPSTEAD REALTY, L.L.C., 927 REALTY, LLC and MILLENIUM TOYOTA,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 25904/09
Motion Seq. No.: 02
Motion Date: 07/08/11

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits and Memorandum of Law	2
Reply Affirmation and Exhibit	3
Sur-Reply Affirmation	4

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3025(b), for an order granting her leave to amend the pleadings and caption in the above captioned matter by adding defendants and amending the the location of the accident; and moves, pursuant to CPLR § 3124, for an order compelling an Examination Before Trial ("EBT") of defendant 927 Realty, LLC ("927 Realty"). Defendants 927 Realty and Millenium Toyota oppose the motion.

This action seeks damages arising from a slip and fall accident on snow and ice that occurred on February 9, 2009, at a vacant lot located near 220 North Franklin Street,

Hempstead, County of Nassau, State of New York. Plaintiff commenced this action by service of a Summons and Verified Complaint on defendant 927 Realty on or about December 31, 2009, on defendant F.S. Hempstead Realty, L.L.C. ("F.S. Hempstead") on or about December 31, 2009, and on defendant Millenium Toyota on or about March 5, 2010. Defendants 927 Realty and Millenium Toyota filed a Verified Answer on or about March 9, 2010 and an Amended Verified Answer on or about June 21, 2010. On July 2, 2010, a Supplemental Bill of Particulars was served identifying the place of occurrence as "a vacant lot adjacent to 220 North Franklin Street, Hempstead, New York 11550" and attaching a photograph of said vacant lot.

Plaintiff submits that, "[a]t the inception of this case, she stated that the location of the accident was a vacant lot located at the corner of Union Place and Franklin Street in Hempstead, New York. An investigation determined that the vacant lot did not have an address on it, that there was a sign on a building structure on that property stating 'Millenium Toyota', and that the vacant lot was next to another structure listed as 220 North Franklin Street. Prior to an action being commenced, plaintiff performed an abstract records search which indicated that the vacant lot with the then unknown address and the property at 220 North Franklin Street were both owned by defendant 927 Realty, LLC and part of the same deed...."

On June 7, 2011, plaintiff received a Response to her Demand to Produce dated June 3, 2011. Said Response identified the last tenant of the property located at 230 North Franklin Street, Hempstead, New York to be Millennium Super Store, LTD and included a copy of the last lease in effect for said property. Upon receiving such discovery, plaintiff now wishes to amend her pleadings to add the lessee of the subject premises as defendants and to clarify the location of the accident to be 230 North Franklin Street.

Plaintiff argues that defendants cannot claim any surprise or prejudice regarding amending the location of the accident to specify the vacant lot to be "the property at 230 North Franklin Street, Hempstead, New York" in place of "the property adjacent to 220 North Franklin Street." Photographs of the subject vacant lot were exchanged in plaintiff's Supplemental Verified Bill of Particulars dated July 2, 2010 and plaintiff identified the cross streets of the subject vacant lot at her EBT on November 5, 2010. Plaintiff adds that defendants cannot claim any prejudice or surprise because defendant 927 Realty owns both properties at 220 North Franklin Street and 230 North Franklin Street. Plaintiff notes that she is not changing the physical location of where the accident occurred, bur rather clarifying the actual address of the location where she slipped and fell.

Plaintiff further argues that defendants cannot claim any prejudice or surprise as to adding the lessee of the subject property as defendants since "[t]he last lease indicates that the owner of the subject premises at 230 North Franklin Street was defendant 927 Realty, LLC, and that a proposed additional defendant, Millennium Hyundai, who was a lessee of 220 North Franklin Street, was previously deposed in this action."

With respect to plaintiff's request to compel an EBT of a representative of defendant 927 Realty who has knowledge of the snow and ice removal procedures in effect at the subject location on the date of accident, plaintiff submits that "[i]t is clear that the two Examinations Before Trial produced by defendants did not have knowledge of the snow and ice removal procedures that were in effect at the subject location on the date of accident. As the subject lot was vacant on the date of accident, the only defendant who would have knowledge of the snow and ice removal procedures that were in effect (if any procedures were in effect) would be the

owner of the property, defendant 927 Realty, LLC....As no one with knowledge of the snow and ice procedures of the subject property has been produced to date, defendant cannot assert that a deposition of defendant 927 Realty, LLC would not be necessary, or that any additional testimony would be cumulative. Further, an Examination Before Trial (*sic*) a fact witness of defendant 927 Realty, LLC, is critical in plaintiff's proving the elements of his (*sic*) negligence action."

In opposition to the instant motion, defendants 927 Realty and Millenium Toyota state that "[i]t is defendants' position that two witnesses have already been produced who gave testimony regarding the premises plaintiff claimed the incident occurred on, including snow and ice removal procedures; that there is no witness from 'the owner' 927 Realty, LLC with knowledge of snow and ice removal procedures, and that it would be overly burdensome to compel a witness to come to New York from Florida merely to testify that there is no one with such knowledge. Testimony with regard to snow and ice removal procedure is, moreover, not material and necessary to the prosecution of plaintiff's case. Plaintiff herself can testify to conditions at the time of the incident." Defendants 927 Realty and Millenium Toyota add that defendant 927 Realty was an out-of-possession owner and the sole duty to perform snow and ice removal was the tenant's, in accordance with the lease and, because the property was unoccupied at the time of this incident, the owner has no duty to an unauthorized user such as plaintiff to keep it clear of snow and ice.

Defendants 927 Realty and Millenium Toyota argue that two witnesses were already produced and testified in this matter and, if plaintiff is unhappy with the witnesses produced, it is due in part to the fact that plaintiff failed to accurately identify the property where she claimed the incident took place, despite requests from defendants 927 Realty and Millenium Toyota to

do so, merely stating that it was "adjacent to 220 North Franklin Street" in Hempstead and finally providing a "fuzzy, totally illegible photograph of what was claimed to be the locus of the incident."

Defendants 927 Realty and Millenium Toyota submit that any additional witness produced on behalf of defendant 927 Realty would have to travel from Florida, where the company is based, merely to testify that, at the time of the alleged occurrence, defendant 927 Realty owned 230 Franklin Street and leased it under a net lease to Millenium Super Store, Ltd., d/b/a Millenium Toyota, and was an out-of-possession landlord with the tenant having sole responsibility for maintenance and snow and ice removal. Defendants 927 Realty and Millenium Toyota further submit that it has been demonstrated that defendant Millenium Toyota had absolutely no connection to 230 North Franklin Street on the date of the occurrence, or at any other time.

Defendants 927 Realty and Millenium Toyota argue that the vacant lot next to or adjacent to 220 North Franklin Street is 226 North Franklin Street, Hempstead, New York, and was owned on the date of the within occurrence by Abelyn Corporation and was "a vacant plot." The subject property was transferred to defendant 927 Realty on September 21, 2010 - one year and nine months after the alleged incident herein. *See* Defendants 927 Realty and Millenium Toyota's Affirmation in Opposition Exhibit C. The lot in the corner of North Franklin Street and Union where plaintiff now claims that the incident occurred is 230 North Franklin Street.

Defendants 927 Realty and Millenium Toyota contend that, "[i]n her pleadings and Bill of Particulars, plaintiff was unable to identify the premises in question by a street address, referring to it only as a vacant lot adjacent to 220 North Franklin Street, Hempstead, New York, despite the fact that tax records exist in the County of Nassau identifying the three lots between

220 North Franklin Street and the corner of Union Place. See Exhibit 'E', annexed hereto and made a part hereof, which shows 220 North Franklin Street, 226 North Franklin Street and 230 North Franklin Street, on tax maps, available to the public on line. The description given by plaintiff in both the Complaint and Verified Bill of Particulars led defendants to believe the incident occurred on the vacant piece of land located adjacent to 220 North Franklin Street (between 220 and 230 North Franklin Street) which is 226 North Franklin Street, which was neither owned, occupied nor leased to any of the defendants herein on the date of incident....Furthermore, if plaintiff's injury occurred on the property at 230 North Franklin Street, then the 'vacant lot' plaintiff claims her injury occurred was not- at the time of this occurrence- a vacant lot at all. It was unoccupied property with a building on it. After the deposition of two witnesses produced by defendants, it now appears that the location where plaintiff claims this incident occurred is somewhere on premises 230 North Franklin Street, Hempstead, New York. At the time of this occurrence, there was a building on that lot."

Defendants 927 Realty and Millenium Toyota also argue that, with respect to plaintiff's request to amend her pleadings to add a new defendant, "plaintiff should not be permitted to add a different defendant unless she discontinues against defendant Millenium Toyota who clearly has no connection with 230 North Franklin Street and does not belong in this action. To keep defendant Millenium Toyota in this action when it is clear that they have no connection to the premises where plaintiff now claims this incident occurred is unfair and an unnecessary burden on said defendant and its insurer." Defendants 927 Realty and Millenium Toyota add that "despite the bankruptcy of F.S. Hempstead Realty, L.L.C. - who have not appeared in this action- and plaintiff's knowledge of the same..., plaintiff also intends to keep that defendant in the action, making allegations that said defendant owned, operated and/or leased 230 North

Franklin Street on the date of this incident, which plaintiff knows, or should know, is not true."

Defendants 927 Realty and Millenium Toyota contend that, at the deposition of Steven Sutton on March 5, 2011, three months prior to bringing the instant Motion to Amend, plaintiff was made aware of the fact that the vacant lot adjacent to 220 North Franklin Street was not owned by any of the defendants and thus to allow plaintiff to amend her pleadings to bring in a new defendant at this point would be burdensome to both the existing defendants and to the new defendants. Defendants 927 Realty and Millenium Toyota note that since the incident herein is alleged to have occurred on February 3, 2009, the three year Statute of Limitations does not run until February 3, 2012, giving plaintiff ample time, should she so desire, to bring an entirely new action, discontinuing the instant action against the defendants most of whom, as indicated, are not proper defendants in the first place.

Generally, leave to amend a pleading should be freely granted. *See* CPLR § 3025(b). The party seeking such amendment must demonstrate a proper basis for same. *See Wieder v. Scala*, 168 A.D.2d 355, 563 N.Y.S.2d 76 (1st Dept. 1990). Such an application must be supported by an affidavit that the proposed amendment is meritorious. *See Zaid Theatre Corp. v. Suna Realty Co.*, 18 A.D.3d 352, 797 N.Y.S.2d 434 (1st Dept. 2005). A motion for leave to serve an amended pleading will only be denied where the amendment is wholly devoid of merit or is significantly prejudicial to the non-moving party. *See Norman v. Ferrara*, 107 A.D.2d 739, 484 N.Y.S.2d 600 (2d Dept.1985). The merits of the proposed amended pleading will not be reviewed "... unless the insufficiency or lack of merit is clear and free from doubt." *Id. at* 740, 741. Mere lateness is not a barrier to the amendment. In the absence of significant prejudice the court will not deny a delayed application for leave to amend a pleading. Lateness combined with significant prejudice to the non-moving parties is required in order to defeat the motion. *See*

Edenwald Contracting Co., Inc. v. City of New York, 60 N.Y.2d 957, 471 N.Y.S.2d 55 (1983).

The Court finds that defendants 927 Realty and Millenium Toyota have failed to demonstrate how permitting plaintiff to amend her Verified Complaint is significantly prejudicial. The information upon which plaintiff bases her request to amend the pleadings was obtained through the EBT of Frank Staluppi on May 6, 2011 and defendants 927 Realty and Millenium Toyota's Response to Plaintiff's Demand to Produce which was received by plaintiff on June 7, 2011. Plaintiff thereafter made the instant motion to amend. Defendants 927 Realty and Millenium Toyota merely state that "[t]o allow plaintiff to amend her pleadings to bring a new defendant at this point would be burdensome to both the existing defendants and to the new defendant, and would undoubtedly result in motion practice due to the fact that discovery by and against the new defendant would need to be completed at a point when the Note of Issue would already have been filed." The fact that permitting plaintiff to amend her pleadings would allegedly be "burdensome" to said defendants does not demonstrate how it would be prejudicial to them. Nowhere did defendants 927 Realty and Millenium Toyota indicate how the would be prejudiced by permitting amendment of the pleadings.

With respect to plaintiff's request to compel an EBT of a representative of defendant 927 Realty who has knowledge of the snow and ice removal procedures in effect at the subject location on the date of accident, after reviewing the transcript of Frank Staluppi's EBT, the Court finds that Frank Staluppi failed to possess the requisite knowledge of an individual with ownership interest in defendant 927 Realty and had no knowledge whatsoever with respect to many of the issues in the instant matter. This was evidenced by the numerous times Frank Staluppi responded to questions with answers of "I don't know"/ "I have no idea." Frank Staluppi did not even know what position his brother, John Staluppi (owner of the property

located at 230 North Franklin Street), held with respect to defendant 927 Realty, only that he was affiliated with same. It is evident that Frank Staluppi's EBT testimony provided little, if no, insight into the issues pertaining to the pending litigation.

The Court notes that many of defendants 927 Realty and Millenium Toyota's arguments made in opposition to plaintiff's motion were arguments that would be applicable to a motion for summary judgment, not a motion to amend and compel, and therefore not applicable to the issues presently before this Court.

Therefore, based upon the above, plaintiff's motion, pursuant to CPLR § 3025 (b), for an order granting her leave to amend the pleadings and caption in the above captioned matter by adding additional defendants Millennium Super Store 1, LTD., formerly Millennium Super Store, LTD., Millennium Hyundai 1, LTD and Millennium Hyundai LLC and to amend the pleadings for the location of the accident is hereby **GRANTED**.

Plaintiff is directed to serve the Amended Summons and Complaint, in the form annexed as Exhibit M to the instant motion, upon all of the parties herein by September 24, 2011. A copy of this Order shall be served with those papers.

It is further ordered that plaintiff's motion, pursuant to CPLR § 3124, for an order compelling an EBT of defendant 927 Realty is hereby **GRANTED**. Defendant 927 Realty shall produce for deposition John Staluppi or anyone who has an ownership interest in defendant 927 Realty that would have knowledge of the specific issues involved in this instant litigation, specifically the snow and ice removal procedures in effect for the subject property on the date of accident. Said EBT must take place within thirty (30) days of the issuance of this Decision and Order.

All parties shall appear for a Certification Conference in Nassau County Supreme Court, IAS Part 32, at 100 Supreme Court Drive, Mineola, New York, on September 27, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
September 13, 2011

ENTERED
SEP 15 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE