

**TPG Contr. Corp. v Expressway Shopping Ltd.
Partnership**

2011 NY Slip Op 33777(U)

May 3, 2011

Supreme Court, Queens County

Docket Number: 24633/10

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

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TPG CONTRACTING CORP.,

Plaintiff,

Index No. 24633/10
Motion Seq. 1

-against-

**EXPRESSWAY SHOPPING LIMITED
PARTNERSHIP d/b/a SHOPPING COMPANY
LIMITED PARTNERSHIP, MENEMSHA
DEVELOPMENTGROUP, INC. d/b/a
MENEMSHA CONSTRUCTION SOLUTIONS,
CAM CONSTRUCTION SERVICES, LLC d/b/a
CAM CREATIVE ARCHITECTURAL MILLWORK,
JP MORGAN CHASE & CO., KENNETH LEVY
and JOHN DOES NO. 1-10,**

Defendants.

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The following papers numbered 1 to 12 read on this motion by defendants **CAM CONSTRUCTION SERVICES, LLC d/b/a CAM CREATIVE ARCHITECTURAL MILLWORK and KENNETH LEVY** for order pursuant to CPLR 306-b and 3211(a)(8) dismissing the complaint, or in the alternative, for an order pursuant to Lien Law §77 dismissing the second cause of action and pursuant to CPLR 3211(a)(7) dismissing the third cause of action and cross-motion by plaintiff for an order pursuant to CPLR 306-b extending plaintiff's time to serve the moving defendants with the Summons and Verified Complaint or Amended Summons and Amended Verified Complaint and pursuant to CPLR 3025(a) and /or CPLR 1003 permitting plaintiff to amend its Summons and Complaint and for an order extending the time for the plaintiff to make a motion pursuant to CPLR 902 to seek class certification and for an order permitting plaintiff's late filing of the affidavits of service relating to the moving defendants *nunc pro tunc*. These motions were fully submitted in Justice Elliot's Part on March 22, 2011, and, on April 27, 2011, Justice Elliot requested the reassignment of this case. The reassignment was granted and became effective on May 2, 2011.

PAPERS
NUMBERED

Notice of Motion-Affirmation-Exhibits.....	1 - 4
Notice of Cross-Motion-Affirmation of Service- Affirmation in Opposition to Moving Defendant's	

Motion To Dismiss and In Support to Plaintiff's Cross Motion.....	5 - 8
Reply Affidavit on Motion To Dismiss and In Opposition to Cross Motion	9 -11
Reply Affirmation In Further Support to Plaintiff's Cross Motion	12

Upon the forgoing papers it is ordered that this motion by defendants CAM CONSTRUCTION SERVICES, LLC d/b/a CAM CREATIVE ARCHITECTURAL MILLWORK and KENNETH LEVY for order pursuant to CPLR 306-b and 3211(a)(8) dismissing the complaint on the ground that plaintiff has failed to properly serve the moving defendants, or in the alternative, for an order pursuant to Lien Law §77 dismissing the second cause of action on the grounds that the plaintiff has not complied with the requirement that such actions be brought in a representative capacity and plaintiff has not applied for class certification and pursuant to CPLR 3211(a)(7) dismissing the third cause of action on the ground that plaintiff has failed to state a cause of action against the individual defendant and cross-motion by plaintiff for an order pursuant to CPLR 306-b extending plaintiff's time to serve the moving defendants with the Summons and Verified Complaint or Amended Summons and Amended Verified Complaint and pursuant to CPLR 3025(a) and /or CPLR 1003 permitting plaintiff to amend its Summons and Complaint herein converting this lawsuit to a class action and/or by adding the other interested parties of the beneficiaries of the CAM Trust as party plaintiffs in this action and further ordering that the Amended Summons and amended Verified Complaint be deemed served upon the moving defendants and that moving defendants have ten days from the date of the Court's Order to answer the Amended Verified Complaint and for an order extending the time for the plaintiff to make a motion pursuant to CPLR 902 to seek class certification and for an order permitting plaintiff's late filing of the affidavits of service relating to the moving defendants nunc pro tunc is decided as follows:

Regarding the branch of defendants' motion seeking to dismiss the complaint pursuant to CPLR 3211 (a) (8), defendants claim that they were not served properly in accordance with the provisions of CPLR306-b, and, consequently, this Court lacks personal jurisdiction over them and the complaint must be dismissed. Plaintiff opposes the defendants' claims, and has moved for an order granting an extension of time to re-serve the defendants. Plaintiff argues that their service was proper, but, if it is deemed improper, its efforts show good faith and diligence and defendants would not be prejudiced if the time to serve is extended. Plaintiff also claims such extension would be in the interest of justice. Defendants oppose any extension of time.

Under CPLR 306-b, "if service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that

defendant, or upon good cause shown or in the interest of justice, extend the time for service". As stated in Leader v Maroney, 97 NY2d 95 (2001), "the interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant."

Here, plaintiff did make efforts to serve defendants; unfortunately for it, such efforts were not sufficient to satisfy the pertinent statutory provisions. Since plaintiff's action would not be time-barred by the statute of limitations, there has been a prompt request for the extension of time, there is no prejudice to defendants, an extension of time to serve the defendants is appropriate. Accordingly, defendant's motion to dismiss pursuant to CPLR 3211 is denied and plaintiff's cross-motion is granted.

The branch of the cross-motion, pursuant to CPLR 3025(a) and /or CPLR 1003 permitting plaintiff to amend its Summons and Complaint herein converting this lawsuit to a class action and/or by adding the other interested parties of the beneficiaries of the CAM Trust as party plaintiffs in this action is granted. It is well-settled that leave to amend pleadings is freely given "absent prejudice" or surprise resulting directly from the delay." McCaskey Davies & Associates Inc. v. New York City Health and Hospitals Corp., 59 N.Y.2d 755 (1983). However, an amendment which is plainly lacking in merit will not be permitted. Sunrise Plaza Assocs., LP v International Summit Equities Corp., 288 AD2d 300 (2d Dept 2001.) This Court notes that cases involving CPLR § 3025(b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed. No evidentiary showing of merit is required under CPLR § 3025(b). The court need only determine whether the proposed amendment is "palpably insufficient" to state a cause of action or defense or is patently devoid of merit. Where the proposed amended pleading is palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise, the motion for leave to amend should be denied. If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing. Lucido v. Mancuso, 2008 NY Slip Op 952 (2d Dept 2008.)

In the instant case, the Court finds that there has been no showing of prejudice or surprise. Moreover, this Court does not find the proposed amendments to be patently devoid of merit. As pleaded, this court cannot find Plaintiff's proposed allegations to be patently devoid

of merit.

Accordingly, the branch of the motion seeking to amend the complaint is granted. Plaintiff shall serve the amended complaint in the proposed manner upon Defendants within 20 days of receiving a copy of this order. A copy of this order is being sent to the parties by means of facsimile transmission on May 3, 2011. Based on the above, the other branches of the motion and cross-motion are denied, and may be renewed if deemed at appropriate, pursuant to the CPLR.

Dated: May 3, 2011

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ORIN R. KITZES, J.S.C.