

**Larkin v City of New York**

2013 NY Slip Op 31534(U)

July 9, 2013

Sup Ct, New York County

Docket Number: 113998/09

Judge: Joan A. Madden

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

**PRESENT:** Hon Joan A. Madden  
*Justice*

**PART** 11

Index Number : 113998/2009  
LARKIN, PETER  
VS.  
DEPT. OF ENVIRONMENTAL  
SEQUENCE NUMBER : 002  
AMEND SUPPLEMENT PLEADINGS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ **No(s).** \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ **No(s).** \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ **No(s).** \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the answered Memorandum Decision and Order.*

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

## FILED

JUL 16 2013  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: July 9, 2013

*[Signature]*, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY, PART 11

-----X  
PETER LARKIN and LAURA LARKIN,

Index No.: 113998/09

Plaintiffs,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
and WDF, INC.,

Defendants.

-----X  
WDF, INC.,

Index No.: 590012/10

Third-Party Plaintiff,

-against-

S & M MECHANICAL CORP.,  
Third-Party Defendant.

-----X  
THE CITY OF NEW YORK, THE NEW YORK CITY  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
and WDF, INC.,

Index No.:590987/11

Second Third-Party Plaintiffs,

-against-

METCALF & EDDY OF NEW YORK, INC.,  
Second Third-Party Defendants.

-----X  
S&M MECHANICAL CORP.,

Index No.: 590323/12

Third Third-Party Plaintiff,

-against-

PRO SAFETY SERVICES LLC,  
Third Third-Party Defendants.

-----X  
JOAN A. MADDEN, J.:

In this action arising out of a workplace accident, plaintiffs move pursuant to CPLR

**FILED**

JUL 16 2013

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NEW YORK

3025(b) to amend their complaint to add third-party defendants Metcalf & Eddy of New York (“M&E”) and Pro Safety Services LLC (“Pro Safety”) as direct defendants. M&E opposes the motion or, in the alternative, moves to sever all claims against it. Pro Safety also opposes the motion and cross moves to dismiss or, in the alternative, to sever the third third-party action. Plaintiffs oppose the cross motions. Third-party defendant/third-party plaintiff S&L Mechanical Corp. (S&L) opposes Pro Safety’s cross motion and opposes M&E’s cross motion only to the extent of clarifying that M&E seeks to sever only plaintiffs’ claims in the event that the motion to amend is granted.

### Background

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Peter Larkin (“Larkin”) on January 7, 2009, while he was working for S&M at Ward’s Island WPCP-Return Sludge Pump Station (“the Station”). Defendant the City of New York (“the City”) is the owner of the Station, which was leased to WDF, Inc. At the time of the accident Larkin was installing a pipe used to provide air to waste water at the Station. Larkin was injured when he was knocked off the ladder by a pressurize air explosion as he attempted to remove a cap from the pipe. In this action, plaintiffs assert claims against the City, the New York City Department of Environmental Protection (“DEP”) and WDF under Labor Law §§ 240(1), 241(6) and 200 and for negligence. WDF commenced a third-party action against Larkin’s employer, S&M, on January 5, 2010.

The City, DEP and WDF, commenced a second-third party action against M&E on December 1, 2011, in which it was alleged that M&E was the construction, engineering environmental, health and safety consultant retained by the City and DEP at the Station and that,

M&E breached its duty by, inter alia, negligently, carelessly and recklessly failing to manage, control and maintain the Station.

Third-party defendant S&M commenced a third third-party action against Pro Safety on April 19, 2012, for common law indemnity and for contribution in which it alleged that as the supplier of safety equipment to S&M's employees, including Larkin, Pro Safety is liable for Larkin's injuries.

Plaintiffs now move to amend their complaint to assert direct causes of action against M&E and Pro Safety. With regard to M&E, the proposed amended complaint, which asserts claims against the defendants under Labor Law §§ 240(1), 241(6) and 200, alleges that M&E performed certain renovations at the Station and controlled and inspected the work and held safety meetings, and that it failed to provide safety equipment to Larkin. Plaintiffs argue that should be permitted to assert direct claims against M&E as such claims relate back to those asserted in the second-third party action commenced against M&E in December 2011, and that as the second-third party action gave M&E notice of the claims that might be asserted against M&E in the main action, M&E will not be prejudice by the amendment.

M&E opposes the motion and, in the alternative, cross moves to sever any direct claims permitted to be asserted against it. M&E argues that it will be prejudiced by the amendment as the note of issue deadline is approaching and it has not had time to conduct discovery with respect to the direct claims which plaintiffs seek to assert against it. M&E also asserts that there is no basis for the claims since its contracts specifically state that M&E is not responsible for supervising the means and methods of the contractor's work.

In reply, plaintiffs cite various provisions of the contract, including one requiring M&E to inspect all facets of the work.

As for Pro Safety, plaintiffs argue that it had the authority to supervise and control the work at the Station at the time of the accident, and that it provided the valve at issue in the accident. Plaintiffs also argue that at the time that S&M was brought into the action, Pro Safety should have foreseen that it would be named in the main action based on the same theory of liability as the other defendants. Moreover, plaintiffs argue that as it is seeking to add Pro Safety as a direct defendant only two months after it was added by S&M Mechanical as a third-party defendant, Pro Safety has not been prejudiced.

In opposition, Pro Safety argues that the statute of limitations period expired before the assertion of the third-party claims and that plaintiffs cannot assert claims against it based on the relation back theory as it is not united in interest with any of the direct defendants, including WDF. Pro Safety also argues that it will be prejudiced by the delay in joining it as a direct defendant and seeks to sever any direct claims permitted to be asserted against it as well as the third-third party claims.

#### Discussion

“Leave to amend a pleading should be ‘freely given’ (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise.” Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-356 (1<sup>st</sup> Dept 2005)(internal citations and quotations omitted). That being said, however, “in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted.” Eighth Ave. Garage Corp. v. H.K.L Realty Corp., 60 AD3d 404, 405 (1<sup>st</sup> Dept), lv dismissed, 12 NY3d 880 (2009). At the same time, leave to amend will be granted as long as the proponent submits sufficient support to show that proposed amendment is not “palpably insufficient or clearly devoid of merit.” MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1<sup>st</sup> Dept 2010)(citation omitted). In addition, “[o]nce a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide a subsequent basis for a motion for summary judgment” Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 AD3d 363, 365 (1<sup>st</sup> Dept 2007).

The first issue to be address with respect to the merit of the proposed amended complaint is whether the proposed direct claims have been timely asserted. The statute of limitations for the claims at issue is three years. See CPLR 214(2)(5). As for Pro Safety, the third party claims were not asserted against until April 2012, which is more than three years after the January 2009 accident and thus after the expiration of the statute of limitations. Thus, in order to be timely, the direct claims asserted against Pro Safety must relate back to those previously asserted against the direct defendants. See Hemmings v. St Marks Housing Ass'n L.P., 169 Misc2d 155 (Sup Ct Kings Co. 1996), appeal dismissed, 242 AD2d 284 (2d Dept 1997).

“[T]he relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a co-defendant for Statute of Limitations purposes where the two defendants are ‘united in interest.’” Buran v. Coupal, 87 N.Y.2d 173, 177 (1995), quoting CPLR 203(c). For the relation back doctrine to apply, three conditions must be satisfied: “(1) Both claims [arise] out of the same conduct, transaction, or occurrence, (2) the new party is ‘united in interest’ with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff, as to the identity of the proper parties, the action would have been brought against him as well.” Buran v. Coupal, 87 N.Y.2d at 178, quoting Brock v. Bua, 83 A.D.2d 61, 69 (2<sup>nd</sup> Dept 1981) (citations omitted).

Here, even assuming arguendo that the first and third requirements have been met, the motion to amend with respect to Pro Safety must be denied as it cannot be said that Pro Safety and the original defendants are united in interest. For purposes of relation back, the parties' interests must be “ ‘such that they stand or fall together and that judgment against one will similarly affect the other’ ” Connell v Hayden, 83 AD2d 30, 40-41 [2d Dept 1981], quoting Prudential Ins. Co. of Amer. v Stone, 270 NY 154, 159 (1936). In other words, the original defendants and proposed defendants must “necessarily have the same defenses to the plaintiffs

claim.” Id. at 43. Accordingly, if the only relationship between the original defendants and the proposed defendants is that of joint tortfeasors, the parties are not united in interest. Capital Dimensions, Inc. v Samuel Oberman Co., 104 AD2d 432, 433 (2d Dept 1984). Here, Pro Safety does not has not relationship with the original defendants such that they are united in interest. To the contrary, Pro Safety, as an independent contractor hired by S&M, has distinct and potentially adverse defenses than those of the original defendants. See e.g., Sowa v. S.J.N.H. Realty Corp., 21 AD3d 893 (2d Dept 2005)(relationship back doctrine did apply where third-party defendants and main defendants had adverse defenses).

In contrast, the direct claims against M&E are timely as the second-third party action was commenced against M&E in December 2011, which is within three years of the January 2009 accident. Duffy v Horton Memorial Hosp., 66 NY2d 473 (1985). Moreover, contrary to M&E’s position, the proposed direct claims are of sufficient prima facie merit to be added based on M&E’s role at the worksite and M&E has not shown that it will be prejudiced by the assertion of direct claims against it, particularly as the court will provide an adequate opportunity for M&E to obtain discovery.

The cross motions to sever by M&E and Pro Safety are denied. CPLR 603 permits a court to sever a claim or action for trial “[i]n furtherance of convenience or to avoid prejudice.” At the same time while it is “within a trial court’s discretion to grant a severance, this discretion should be exercised sparingly.” Shanley v. Callanan Indus., Inc., 54 NY2d 52, 57 (1981). As the Court of Appeals explained:

Where complex issues are intertwined, albeit in technically different actions, it would be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time. Fragmentation increases litigation and places an unnecessary burden on court facilities by requiring two separate trials instead of one.

Id.

Thus, “[w]here two actions arise from the same nucleus of facts, a trial court should only

sever the actions to prevent prejudice or substantial delay to one of the parties.” Sichel v Community Synagogue, 256 AD2d 276, 276 (1<sup>st</sup> Dept 1998).

Here, the claims against M&E in the direct action and the third-party claims against Pro Safety in the third third-party action arise out of the same facts as the claims asserted against the original defendants. Furthermore, neither M&E nor Pro Safety has shown that it will be prejudiced in the absence of an order granting severance, as discovery is still proceeding

In view the above, it is

ORDERED that plaintiffs’ motion to amend their complaint to add third-party defendants Metcalf & Eddy of New York and Pro Safety Services LLC as direct defendants is granted only to the extent of permitting plaintiffs’ to assert direct claims against Metcalf & Eddy of New York; and it is further

ORDERED that within 20 days of the date of this decision and order plaintiffs shall serve and file an amended complaint consistent the proposed pleading annexed to the moving papers except that it will add claims against Metcalf & Eddy of New York only and not Pro Safety Services LLC and that Metcalf & Eddy of New York; and it is further

ORDERED that the cross motions to sever by Metcalf & Eddy of New York and Pro Safety Services LLC are each denied; and it is further

ORDERED that the status conference scheduled for July 11, 2013 is hereby adjourned to August 22, 2013 at 9:30 am.

DATED: ~~June~~ July 9, 2013 2013

  
\_\_\_\_\_  
J.S.C.

**FILED**

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