

**Elefante v J.F. Shea Constr., Inc.**

2014 NY Slip Op 30550(U)

March 5, 2014

Supreme Court, New York County

Docket Number: 104367/21

Judge: Donna M. Mills

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

PRESENT: DONNA M. MILLS

PART 58

Justice

WILLIAM ELEFRANTE

INDEX NO. 104367/11

Plaintiff

MOTION DATE

METROPOLITAN TRANSIT AUTHORITY CAPITAL CONSTRUCTION CO.

MOTION SEQ. No. 004

Defendant

MOTION CAL. NO.

The following papers, numbered 1 to [redacted] were read on this motion for [redacted]

PAPERS NUMBERED

Notice of Motion/Order to Show Cause/Affidavits - Exhibits

Answering Affidavits - Exhibits

FILED

Replying Affidavits

MAR 10 2014

CROSS-MOTION: YES  NO

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated:

3/5/14

[Signature]

DONNA M. MILLS, J.S.C.

Check one:

FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

-----X  
WILLIAM ELEFANTE,

Plaintiff,

-against-

Index No. 104367/11

J.F. SHEA CONSTRUCTION, INC., and  
SCHIAVONE CONSTRUCTION CO., LLC, and  
SKANSKA USA CIVIL NORTHEAST, INC., and  
METROPOLITAN TRANSIT AUTHORITY CAPITAL  
CONSTRUCTION CO.,

Defendants.  
-----X

**Donna Mills, J.:**

In this action, plaintiff seeks monetary damages for injuries he allegedly sustained while he was working at a construction site. By stipulation, plaintiff has discontinued his action as against S3-II Tunnel Constructors s/h/a J.F. Shea Construction, Inc., Schiavone Construction Co., LLC, and Skanska USA Civil Northeast, Inc. As such, the only remaining defendant is Metropolitan Transit Authority Capital Construction Co. (MTACC).

In this motion sequence number 004, plaintiff moves to amend his complaint to add additional party defendants, and to strike MTACC's answer.

On April 16, 2010, plaintiff was working on the construction of the Number 7 Line Extension in Manhattan. While he was working in a shaft, a bag of steel plates fell from above,

striking him on the head and injuring him.

Plaintiff's complaint asserts causes of action sounding in common-law negligence, violations of Labor Law §§ 200, 240 (1) and 241 (6), and respondeat superior. Plaintiff does not pursue his claim for respondeat superior on this motion; thus, the claim is deemed abandoned (see e.g. *Rather v CBS Corp.*, 68 AD3d 49, 60 [1st Dept 2009]; *Freeford Ltd. v Pendleton*, 53 AD3d 32, 41 [1st Dept 2008]).

The note of issue has not yet been filed.

Plaintiff seeks to amend the complaint to add party defendants; he does not seek to amend to add any new causes of action. The additional party defendants plaintiff seeks to add are "a Consultant Construction Management Joint Venture consisting of Hill International, Inc., Lemley International, Inc., Henningson, Durham & Richardson, P.C., and LiRo Engineers, Inc." (Proposed Amended Complaint, ¶ 1). According to plaintiff, "Hill International, Inc., Lemley International, Inc., Henningson, Durham & Richardson, P.C., and LiRo Engineers, Inc., formed a Consultant Construction Management Joint Venture (hereinafter CCM) to act . . . with and on behalf of MTACC" (*id.*, ¶ 7).

**Amendment of Pleadings**

"Leave to amend pleadings under CPLR 3025 (b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed

amendment is palpably improper or insufficient as a matter of law. A party opposing leave to amend must overcome a heavy presumption of validity in favor of permitting amendment. Prejudice to warrant denial of leave to amend requires some indication that the defendant has been hindered in the preparation of their case or has been prevented from taking some measure in support of their position [internal quotation marks and citations omitted]"

(*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]). In order to conserve judicial resources, "examination of the underlying merit of the proposed amendment is mandated. Therefore, a motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment [internal quotation marks and citations omitted]" (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). In seeking amendment, a plaintiff need not establish the merits of the proposed allegations, but he must "show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; see also *Miller v Cohen*, 93 AD3d 424, 425 [1st Dept 2012], citing *MBIA Ins.*).

Plaintiff's counsel has failed to produce an affidavit of anyone with personal knowledge of the facts.

"The affidavit of respondent's attorney is inadequate to support a motion for leave to file an amended answer. While leave to amend is to be freely given, upon such terms as may

[\* 5]

be just (CPLR 3025, subd. [b]), the affidavit accompanying the notice of motion should be the affidavit of the party himself"

(*Leonard Hosp. v Messier*, 32 AD2d 596, 596 [3d Dept 1969]). A motion to amend "should be accompanied by an affidavit from one with knowledge of the underlying facts, not by an attorney lacking such knowledge" (*Polak v Schwenk*, 115 AD2d 142, 143 [3d Dept 1985], citing *Leonard Hospital*; see also *McDermott v Village of Menands*, 74 AD2d 661, 661 [3d Dept 1980] ["the affidavit of plaintiff's attorney is . . . inadequate to support the cross motion for leave to serve an amended complaint under the provisions of CPLR 3025 (subd. [b])"], citing *Leonard Hospital*).

"Moreover, a plaintiff must meet his or her burden of demonstrating that the proposed amendments to the complaint were not palpably insufficient or patently devoid of merit" (*Zelevnik v MSI Constr., Inc.*, 50 AD3d 1024, 1025 [2d Dept 2008]).

Plaintiff's papers on this motion to amend are "insufficient as a matter of law" (*McGhee v Odell*, 96 AD3d at 450), and the part of the motion which seeks leave to amend the complaint must be denied.

#### **Strike the Answer**

Plaintiff's counsel alleges that MTACC's counsel "deceitfully concealed" the CM-1311 contract until three days before the statute of limitations had run. Plaintiff's counsel also accuses MTACC's counsel of deceit, intentionally failing to

produce the CM-1311 contract, disregarding judicial process, and other things,<sup>1</sup> yet only that one failure to respond to the discovery request for the CM-1311 contract in plaintiff's first discovery demand has been alleged in this motion as a basis for striking MTACC's answer. Plaintiff has failed to substantiate his accusations that MTACC's counsel acted in a willful, contumacious way, or in bad faith (see e.g. *Scorzari v Pezza*, 111 AD3d 916, 917 [2d Dept 2013] [plaintiff "failed to make a clear showing that the defendants' failure to comply with the discovery demand was willful or contumacious, as required to support the drastic remedy of striking an answer"]; *Thomas v McGuire Serv. Corp.*, 251 AD2d 148, 148 [1st Dept 1998] ["Striking the answer here was an improvident exercise of discretion where plaintiffs failed to meet their burden of showing (defendant's) conduct to be willful or contumacious"]).

Therefore, the part of plaintiff's motion which seeks

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<sup>1</sup>Counsel for plaintiff is cautioned that any further ad hominem attacks on opposing counsel will not be tolerated.

striking MTACC's answer is denied.

Accordingly, it is

ORDERED that plaintiff's motion is denied.

Dated: 3/5/14

ENTER:

*DM*

J.S.C.

**DONNA M. WILLS, J.S.C.**

\* A status conference is scheduled for May 2, 2014 at 10:00am