

<b>MLB Constr. Servs., LLC v Lake Ave. Plaza, LLC</b>
2017 NY Slip Op 32785(U)
September 8, 2017
Supreme Court, Saratoga County
Docket Number: 2015-781
Judge: Robert J. Chauvin
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STATE OF NEW YORK  
SUPREME COURT COUNTY OF SARATOGA

MLB CONSTRUCTION SERVICES, LLC,

Plaintiff,

-against-

LAKE AVENUE PLAZA, LLC; M&T BANK;  
NGM INSURANCE COMPANY; WILLIAM DORROUGH  
d/b/a DORROUGH CONSTRUCTION; PRO QUAL, LLC;  
THE LIGHTING PLACE, INC.; NS ASSOCIATES, LTD;  
BROOKSIDE FARMS, INC. a/k/a BROOKSIDE FARMS  
NURSERY, INC. d/b/a/ BROOKSIDE NURSERY;  
ALLERDICE BUILDING SUPPLY, INC.; PETER G.  
PALMIER d/b/a COMFORT HVAC; UNICO FINISHING  
SYSTEMS, INC.; PPG ARCHITECTURAL FINISHES, INC;  
MARJAM SUPPLY CO., INC.; A.E. ROSEN ELECTRICAL CO., INC.;  
EUROPEAN STUCCO AND STONE; ADVANCE GLASS, INC.;  
JR BUILDERS SUPPLY CORP; D.S. SPECIALTIES, LLC and  
LOUIS PETRACCIONE & SONS, INC.,

Defendants.

**ORIGINAL**

**DECISION and ORDER**

**Index No: 2015-781  
RJI No: 45-1-2015-0701**

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SARATOGA COUNTY  
CLERKS OFFICE  
BALLSTON SPA, NY

FILED

A.D.W., INC.,

Plaintiff,

-against-

MLB CONSTRUCTION SERVICES, LLC  
and LAKE AVENUE PLAZA, LLC,

Defendants

MLB CONSTRUCTION SERVICES LLC

Third-Party Plaintiff,

-against-

LAKE AVENUE PLAZA LLC AND M&T BANK

Third-Party Defendants.

MLB CONSTRUCTION SERVICES, LLC,

Plaintiff,

-against-

CREATIVE MATERIALS CORPORATION  
and TAB WALL SYSTEMS, LLC,

Defendants.

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TABS WALL SYSTEMS, LLC

Third -Party Plaintiff,

-against-

FRANKLIN INTERNATIONAL, INC.  
and FRANKLIN INTERNATIONAL CORPORATION,

Third-Party Defendants.

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FRANKLIN INTERNATIONAL, INC.,

Fourth Party Plaintiff,

-against-

TECH VALLEY CONTRACTING, LLC,

Fourth Party Defendant

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LAKE AVENUE PLAZA LLC,

Plaintiff

-against-

TABS WALL SYSTEMS, INC.,

Defendant.

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**Appearances:**

For Third Party Defendant/Fourth Party Plaintiff Franklin International, Inc.:

Lawrence J.T. McGivney, Esq.  
McGivney, Kluger & Cook, P.C.  
80 Broad Street, 23<sup>rd</sup> Floor  
New York, NY 10004

For Defendant, Lake Avenue Plaza LLC:

Christopher M. McDonald, Esq.  
Whiteman Osterman & Hanna LLP  
One Commerce Plaza  
Albany, NY 12260

**Before:** Hon. Robert J. Chauvin, J.S.C.

By notice of motion dated May 25, 2017 third-party defendant/fourth-party plaintiff, Franklin International Inc. (hereinafter referred to as Franklin), seeks an order of the court permitting said party to amend its pending amended answer by way of asserting additional cross-claims and counter-claims as against various parties in the underlying action. Such motion is

supported by the affirmation of Lawrence J.T. McGivney, Esq. dated May 25, 2017 along with annexed exhibits "A" through "I".

The only opposition to such motion was submitted by defendant, Lake Avenue Plaza, LLC (hereinafter referred to as Lake), by way of the affidavit of Christopher M. McDonald, Esq. dated July 7, 2017 along with annexed exhibits "A" through "F". In addition said defendant submitted a memorandum of law also dated July 7, 2017.

No other opposition was submitted by any party.

The motion was initially returnable June 27, 2017. However such return date was adjourned upon consent until July 14, 2017.

As noted in numerous prior decisions of this court the underlying matter herein is a multi-party commercial action concerning a building construction project involving premises located in the City of Saratoga Springs, New York. Lake was and is the owner of the premises and initially contracted with the general contractor on the project, plaintiff, MLB Construction Services, LLC.

Part of the construction process involved the installation of veneers or wall panels upon the exterior walls of the project. Such veneers or panels were installed by a use of materials and an installation system manufactured and packaged by third-party defendant/third-party plaintiff, Tabs Wall Systems LLC. Such materials were purchased through defendant, Creative Materials Corporation, and were installed by defendants, Pro Qual, LLC and European Stucco and Stone. The third-party defendant/fourth-party plaintiff, Franklin, manufactured the adhesive which was utilized for the installation system manufactured and packaged by Tabs Wall Systems LLC.

By the instant motion third-party defendant/fourth-party plaintiff, Franklin, seeks to amend its amended answer to include a cross claim for contribution and indemnification as against Lake; Pro Qual LLC; and Creative Materials Corporation. Further, Franklin requests permission to convert a prior cross-claim as against Tabs Wall Systems, LLC into a counterclaim. As noted above the only opposition interposed has been by defendant/third-party plaintiff, Lake, who opposes the motion to add cross-claims for contribution and indemnification as against it.

The claim for the relief requested as concerns Lake is based upon the allegation that an inferior metal panel system, upon which the veneer exterior was applied, was used in place of another pre-finished metal panel system which was called for in the contract and that the inferior

\* 4] product contributed to and/or caused the alleged failure of the adhesive product. In opposition it is alleged that the only change in the metal panel system employed during the project was for the materials used upon the roof area of the project and not the side veneers. As concerns the side veneers Lake asserts that the alleged inferior product was what was called for under the contract. As such, Lake contends that there is no factual basis and merit to the requested amendment.

To begin the court notes that CPLR § 3025 permits the amendment of a pleading upon court order at any time during the pendency of an action. Not only has it clearly been held, but such statute expressly sets forth, that such leave shall be freely given, and particularly where there is no surprise or prejudice (*McCaskey, Davies and Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]). Further, such leave has been held to be more likely permitted where the only change is in the theory of liability (*Rife v Union Coll.*, 30 AD2d 504, 505 [3d Dept. 1968]).

However it has also been held that permission to amend a pleading is within the sound discretion of the court and should be denied wherein there is no merit to the proposed amendment (*Girsten-Hillman Agency, Inc. v Heyman*, 68 AD3d 1284 [3d Dept. 2009]; *Trupia v Lake George Cent. School Dist.*, 62 AD3d 67 [3d Dept. 2009], *affirmed* 14 NY3d 392 [2010]). Yet in assessing the merit of a proposed amendment the proponent of a motion to amend is only required to make an evidentiary showing sufficient to support such claim or some evidence and a summary judgment standard is not to be utilized (*Bast Hatfield, Inc. v Schalmont Cent. School Dist.*, 37 AD3d 987 [3d Dept. 2007]).

In the present matter the proposed amendment, as concerns the only opposing party, Lake Avenue, LLC, is premised initially upon an allegation made upon information and consent contained in counsel's affirmation in support of his motion. However, the basis for such allegation is set forth in Lake's own response to a demand for a bill of particulars (Franklin Exhibit "I"). In paragraph "47" of such response, when asked the location of inferior metal finish installed, **without limitation**, Lake indicated that the initial contract called for the use of a Rheinzink pre-finish metal system, but that after multiple requests and upon certain circumstances Lake agreed to the use of a shop-applied Kynar 500 product.

Now Lake has presented certain documents which it alleges reflect that the approval and use of the inferior product was limited to applications made in the roof area of the project, as opposed to, the exterior walls. However, as was the case in *Bast* above, the analysis to be

applied, irrespective of opposing factual documentation, is not that of a motion for summary judgment, but rather whether the moving party has presented some foundation of evidence for the relief requested, which in this case they have.

Further the court notes the lack of opposition submitted by any other party.

As such, the motion to amend is in all respects **GRANTED**.

This memorandum shall constitute the decision and order of the court. The original decision and order and the underlying papers are being delivered directly to the Saratoga County Clerk for filing. The signing of this decision and order and the delivery of this decision and order to the Saratoga County Clerk shall not constitute notice of entry under CPLR § 2220, and the parties are not relieved from the applicable provisions of that rule regarding service of notice of entry.

DATED: September 8, 2017  
Ballston Spa, NY 12020

*Robert J. Chauvin*  
HON. ROBERT J. CHAUVIN  
SUPREME COURT JUSTICE

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SARATOGA COUNTY  
CLERK'S OFFICE  
BALLSTON SPA, NY

ENTERED

The following papers were read and considered:

1. Notice of Motion dated May 25, 2017;
2. Affirmation of Lawrence J.T. McGivney, Esq. dated May 25, 2017 with attached exhibits "A" through "I";
3. Affidavit of Christopher M. McDonald, Esq. dated July 7, 2017 with attached exhibits "A" through "F"; and
4. Memorandum of Law dated July 7, 2017.

ENTERED  
Craig A. Hayner  
*Craig A. Hayner*  
Saratoga County Clerk