

Izquierdo v Fortune Dist. Corp.
2018 NY Slip Op 30170(U)
January 31, 2018
Supreme Court, New York County
Docket Number: 152466/2017
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. _____ Robert D. KALISH
Justice

PART 29

MATILDE VERA IZQUIERDO,

INDEX NO. 152466/2017

Plaintiff,

MOTION DATE 11/22/17

- v -

MOTION SEQ. NO. 001

**FORTUNE DIST. CORP., FURNITURE DIST. CORP.
d/b/a EASY SHOPPING DEPARTMENT STORE, KMS
DISTRIBUTION, INC.,**

Defendants.

The following papers, numbered 8-12, were read on this motion for leave to supplement the complaint.

Notice of Motion—Affirmation in Support—Exhibit A-B—RJI

Nos. 8-12

Motion by Plaintiff Matilde Vera Izquierdo (“Izquierdo”) pursuant to CPLR 3025 (b) for an order granting her leave to file a supplemental summons and amended complaint naming Rite Aid as an additional defendant is granted, there being no opposition submitted.

BACKGROUND

In the instant action, Izquierdo alleges that she fell while lawfully walking on a sidewalk abutting 2050-Amsterdam Avenue, New York, New York 10032 (the “Sidewalk”) on June 20, 2016, due to the negligence of Defendants Fortune Dist. Corp., Furniture Dist. Corp. d/b/a Easy Shopping Department Store, and KMS Distribution, Inc. Izquierdo further alleges that Defendants owned, operated, maintained, managed, controlled, leased, used, repaired, and cleaned the Sidewalk. Izquierdo further alleges that she was “violently propelled to the ground” by “debris coming from inside [Defendants’] premises.” (Marrone affirmation, exhibit a, ¶ 44.)

In the instant motion, Izquierdo now moves for leave to supplement her complaint pursuant to CPLR 3025 (b) to add Rite Aid as an additional direct

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

defendant. Izquierdo attaches to her motion a proposed supplemental summons and amended complaint which adds Rite Aid as a defendant.

Izquierdo argues that she recently learned that Rite Aid occupies premises immediately adjacent to where she fell. Izquierdo further argues that Rite Aid might be responsible for her injury. Izquierdo further argues that leave to supplement the summons and complaint should be freely given, that Rite Aid would not be prejudiced by the supplement, and that the statute of limitations has not expired.

DISCUSSION

CPLR 3025 provides

“(b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.”

“As a general rule, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court.” (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks omitted]; *see also Y.A. v Conair Corp.*, 154 AD3d 611 [1st Dept 2017] [holding that leave should be granted “absent . . . surprise resulting therefrom”].) “To obtain leave, a plaintiff must submit evidentiary proof of the kind that would be admissible on a motion for summary judgment.” (*Velarde v City of New York*, 149 AD3d 457, 457 [1st Dept 2017].) “[P]laintiff need not establish the merit of its proposed new allegations, but simply 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].)

Here, Izquierdo submits an affirmation by counsel along with a proposed supplemental summons and amended complaint. While the Court finds that the

proposed amended complaint contains typos (e.g., ¶ 61 references ¶¶ 1–48, the first cause of action in the complaint, instead of ¶¶ 1–60, the first cause of action in the proposed amended complaint), in substance, it adds Rite Aid as a defendant without adding additional facts or causes of action. As such, the Court finds that Izquierdo has supported its proposed amendment with a sufficient showing for the purposes of the instant motion.

CONCLUSION

Accordingly, it is

ORDERED that that the motion by Plaintiff Matilde Vera Izquierdo pursuant to CPLR 3025 (b) for an order granting her leave to file a supplemental summons and amended complaint naming Rite Aid as an additional defendant is granted, there being no opposition submitted; and it is further

ORDERED that Plaintiff serve the supplemental summons and amended complaint (a clean copy of the proposed amended complaint with any typos corrected) upon defendants Fortune Dist. Corp., Furniture Dist. Corp. d/b/a Easy Shopping Department Store, KMS Distribution, Inc., and Rite Aid per the CPLR within 20 days of the entry of this order; and it is further

ORDERED that the action shall bear the following caption:

-----X
MATILDE VERA IZQUIERDO,

Plaintiff,

- against -

FORTUNE DIST. CORP., FURNITURE DIST. CORP. d/b/a
EASY SHOPPING DEPARTMENT STORE, KMS
DISTRIBUTION, INC., AND RITE AID,

Defendants.

-----X

And it is further

ORDERED that Plaintiff is directed to serve a copy of this order with notice of entry on the county clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158M), who shall mark their records to reflect the change in the caption herein; and it is further

ORDERED that all defendants named in the supplemental summons and amended complaint shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of service of the supplemental summons and amended complaint upon them; and it is further

ORDERED that counsel in the newly captioned matter are directed to appear for a preliminary conference in Part 29, located at 71 Thomas Street, Room 104, New York, New York 10013-3821, on Tuesday, March 27, 2018, at 9:30 a.m.

The foregoing constitutes the decision and order of the Court.

Dated: January 31, 2018
New York, New York


HON. ROBERT D. KALISH
J.S.C.
J.S.C.

1. Check one:.....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....

- | | |
|---|---|
| ☐ CASE DISPOSED | ☒ NON-FINAL DISPOSITION |
| ☒ GRANTED ☐ DENIED | ☐ GRANTED IN PART ☐ OTHER |
| ☐ SETTLE ORDER | ☐ SUBMIT ORDER |
| ☐ DO NOT POST | ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE |