

Wynne v East Coast Imperial Gardens LLC
2018 NY Slip Op 34283(U)
December 19, 2018
Supreme Court, Orange County
Docket Number: Index No. EF004855-2016
Judge: Maria S. Vazquez-Doles
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At a term of the IAS Part of the Supreme Court of the State of New York,
held in and for the County of Orange, at 285 Main Street,
Goshen, New York 10924 on the 19th day of December, 2018.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

CATHERINE WYNNE,

PLAINTIFF,

-AGAINST-

EAST COAST IMPERIAL GARDENS LLC;
IMPERIAL GARDENS APARTMENT;
PATRIOT CONCRETE, INC.;
MITCHELL MORGAN PROPERTIES
MANAGEMENT CO., LLC;
MORGAN PROPERTIES MANAGEMENT
COMPANY, LLC and
FORTITUDE CONCRETE CO.,

DEFENDANTS.

VAZQUEZ-DOLES, J.S.C.

To commence the statutory time for
appeals of right (CPLR 5513[a]), you are
advised to serve a copy of this order,
with notice of entry, on all parties.

DECISION & ORDER
INDEX #EF004855/2016

Motion Date: 10/12/18
Motion Seq.# 3, 4 & 5

The following papers numbered 1 to 11 were read on the motion by Defendant, East Coast Imperial Gardens LLC s/h/a East Coast Imperial Gardens, LLC and Imperial Gardens Apartment and Morgan Properties Management Company, LLC f/k/a Mitchell Morgan Properties Management Co., LLC s/h/a Mitchell Morgan Properties Management Co., LLC and Morgan Properties Management Company, LLC (hereinafter the "realty defendants") to amend their answer and for summary judgment granting their cross-claims against defendant, Patriot Concrete, Inc. and summary judgment dismissing any cross-claims against them by defendant, Patriot Concrete, Inc. (hereinafter "Patriot") and the respective motions by plaintiff and defendant, Patriot, for default judgment against defendant, Fortitude Concrete Co. (hereinafter "Fortitude"):

PAPERSNUMBEREDSeq.#3

Notice of Motion/Affirmation (Kelly)/ Exhibits A - Q	1 - 3
Affirmation in Opposition (Campbell)	4
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Seq.#4

Notice of Motion/ Affirmation (Jacoby)/ Exhibits 1-11	13 - 15
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Seq.#5

Notice of Cross-Motion/ Affirmation (Campbell)/Exhibit A	16 - 18
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Since submission of motions #4 and #5, defendant Fortitude has interposed an Answer rendering said motions for default judgment moot.

This matter arises out of a trip and fall on September 11, 2015 due to an alleged defective condition at an apartment complex located at 134 Greencrest Drive, Middletown, New York. The realty defendants had a contract with co-defendant, Patriot, dated June, 2015 to replace concrete sidewalks at the premises. The summons and complaint was filed on July 20, 2016 and the realty defendants served an answer with cross-claims for contribution and contractual indemnification on May 12, 2017. The realty defendants now would like to serve an Amended Answer to assert a cross-claim against Patriot for contractual defense.

Applications for leave to amend pleadings under CPLR 3025(b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit” (*Maldonado v. Newport Gardens, Inc.*, 91 A.D.3d 731, 731–732 [2d Dept 2012]; see *Longo v. Long Is. R.R.*, 116 A.D.3d 676 [2d Dept 2014]; *United Fairness, Inc. v. Town of Woodbury*, 113 A.D.3d 754 [2d Dept 2014]; *Faiella v.*

Tysens Park Apts., LLC, 110 A.D.3d 1028, 1029 [2d Dept 2013]).

As a general rule, leave to amend a pleading rests within the trial court's discretion and should be freely granted absent prejudice or surprise. In assessing the merit of a proposed amendment, however, the proponent is required only to make an evidentiary showing sufficient to support the proposed claim (see *McFarland v Michel*, 2 AD3d 1297, 1300 [2003]). A summary judgment standard is not to be applied (see *Acker v Garson*, 306 AD2d 609, 610 [2003]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:11). "No evidentiary showing of merit is required under CPLR 3025(b)" (*Lucido v. Mancuso*, 49 A.D.3d 220, 229, 851 N.Y.S.2d 238). "The court need only determine whether the proposed amendment is 'palpably sufficient' to state a cause of action or defense; or is patently devoid of merit" (id.). The legal sufficiency or merits of a claim need not be examined unless such insufficiency or lack of merit is clear and free from doubt" (*Favia v Harley-Davidson Motor Co., Inc.*, 119 A.D.3d 836 [2d Dept 2014]; *Edwards v 1234 Pacific Management, LLC* 139 Ad3d 658 [2d Dept 2016]).

Here, Patriot does not allege that the proposed amended pleading would result in any prejudice or surprise. Patriot was well aware of the contract they entered into with the realty defendants and this motion is made prior to the completion of discovery. The proposed amended pleading is not palpably insufficient or patently devoid of merit. "If the opposing party wishes to test the merits of the proposed added cause of action ..., that party may later move for summary judgment upon a proper showing" (*Lucido v. Mancuso*, 49 A.D.3d [2d Dept 2008]).

Indemnification:

The realty defendants also move for partial summary judgment granting their cross-claims alleged against co-defendant, Patriot, for contractual indemnification. "[A] party seeking

contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]; see **General Obligations Law** § 5-322.1; *Hirsch v Blake Hous., LLC*, 65 AD3d 570, 571 [2d Dept 2009]). Here, there has not been a deposition of the plaintiff and the blanket allegations of negligence contained in her Bill of Particulars do not explain with any specificity, what caused plaintiff’s fall. Plaintiff does include an allegation of inadequate lighting contending that her injuries stem not from the manner in which the masonry work by Patriot was being performed, but, rather, from a dangerous condition on the premises (see *Hirsch v Blake Hous., LLC*, 65 AD3d at 571; *Lane v Fratello Constr. Co.*, 52 AD3d 575, 576 [2d Dept 2008]; *Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708-709 [2007]). Therefore, in order for the realty defendants to satisfy their prima facie burden of demonstrating that it was not negligent, they are required to demonstrate that they lacked control over the work site or notice of the allegedly dangerous condition (see *Hirsch v Blake Hous., LLC*, 65 AD3d at 571; *Keating v Nanuet Bd. of Educ.*, 40 AD3d at 708-709). Here, there is nothing in the record that determines the cause of plaintiff’s fall. There is no deposition of the plaintiff or an affidavit from the plaintiff explaining how she fell, exactly where she fell or why she fell. The realty defendants’ explanation of the cause of plaintiff’s fall is pure speculation. Accordingly, the realty defendants have failed to meet their burden, thus precluding a finding, as a matter of law, that it was not negligent (see *Hirsch v Blake Hous., LLC*, 65 AD3d at 571; *Lane v Fratello Constr. Co.*, 52 AD3d at 576; *Keating v Nanuet Bd. of Educ.*, 40 AD3d at 708-709).

Since the realty defendants failed to establish their prima facie entitlement to judgment as a matter of law, we need not review the sufficiency of the opposition papers (see *Winegrad v.*

New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]).

In light of the above, it is hereby

ORDERED that the branch of realty defendants' motion to amend their Answer is granted; and it is further

ORDERED that the Amended Complaint is considered served upon all parties who shall have thirty (30) days from the date of this order to file their Reply; and it is further

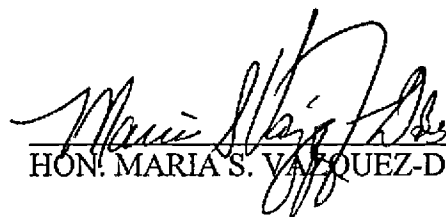
ORDERED that the branch of realty defendants' motion for summary judgment is denied with leave to renew upon completion of discovery; and it is further

ORDERED that the motions for default judgment are denied as moot; and it is further

ORDERED that the parties shall appear for a status conference, as previously scheduled, on **March 7, 2019 at 9:15 a.m.**

ENTER

Dated: December 19, 2018
Goshen, New York



HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

TO: Counsel of Record via NYSCEF