

**Urquiza v Park and 76th St. Inc.**

2019 NY Slip Op 30142(U)

January 16, 2019

Supreme Court, New York County

Docket Number: 158295/2013

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

ANTONIO URQUIZA A/K/A ANTONIO PELAGIO URQUIZA CARDENAS,  
BY MARTHA PARADA ARDAYA AND STIVENA A.  
SANQUIO, AS COADMINISTRATORS OF THE ESTATE  
OF ANTONIO URQUIZA A/K/A ANTONIO PELAGIO  
URQUIZA CARDENAS, DECEASED

INDEX NO. 158295/2013  
MOTION DATE 12/18/2018  
MOTION SEQ. NO. 030  
MOTION CAL. NO. \_\_\_\_\_

Plaintiffs,

-against-

PARK AND 76TH ST. INC., MARY L.  
CARPENTER & EDMUND L. CARPENTER, NORDIC CUSTOM BUILDERS, INC.,  
MITCHELL STUDIO, LLC., CONSULTING ENGINEERING SERVICES, INCORPORATED,  
MELTZER/COSTA & ASSOCIATES, ARCHITECTURE & ENGINEERING, LLP., GUMLEY-HAFT, LLC.,  
AND HERIBERTO SERRANO D/B/A CAP COMPANY (EXACT NAMES BEING UNKNOWN),

Defendants

The following papers, numbered 1 to 5 were read on this motion by defendants Edmund and Mary Carpenter for leave to amend the pleadings.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits _____	3-4
Replying Affidavits _____	5

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Edmund and Mary Carpenter’s (hereinafter, “the Carpenters”) motion for leave to amend their Answer pursuant to CPLR §3025(b), is denied. Defendants’ motion to renew under CPLR §2221(e) and summary judgment under CPLR §3212 are also denied.

Plaintiff-decedent Antonio Urquiza fell from a third-floor window of a room where he was performing staining work inside the apartment of the Defendants Mary L. Carpenter and Edmund L. Carpenter. Plaintiff-decedent died shortly after falling out of the window onto the sidewalk below. Plaintiffs now bring this wrongful death action to recover for Antonio Urquiza’s death. Said action is based on alleged violation of the New York State Labor Law § § 200, 240(1) and 241(6) arising out of Antonio Urquiza’s accident which occurred on May 24, 2012 at 840 Park Avenue, New York, New York.

The Carpenters filed a motion for summary judgment on January 12, 2018 which was denied. They now move for leave to amend their original Answer so as to raise the affirmative defense of the single-family homeowner’s exemption found in the New York State Labor Law Sections 240(1) and 241(6). If leave to amend is granted, they seek leave to renew their motion for summary judgment under CPLR §2221(e) and CPLR §3212.

The Carpenters argue that they should be given permission to amend their answer under CPLR Section 3025(b) so as to include the single-family homeowner's affirmative defense (provided by New York State Labor Law §§ 240(1) and 241(6)) because (1) their proposed amendment will not surprise or prejudice the opposing party and (2) the proposed amendment is not palpably insufficient as a matter of law or otherwise totally devoid of merit.

The Carpenters also argue that if their request for leave to amend their Answer to include the homeowner's defense is granted, a legal theory supported by a new fact would be presented. The new fact would be that the defense is now raised in their answer, thereby also providing the excuse that the defense was not raised before because it was not in their original Answer. As such, they would be entitled to renew. On renewal, the Carpenters, essentially, argue that the facts of the case already show that the homeowner's defense would apply to them. Therefore, once the homeowner's exception affirmative defense has been successfully raised, the Carpenters are entitled to summary judgment.

Leave to amend pleadings pursuant to CPLR §3025(b) should be freely given "absent prejudice or surprise resulting directly from the delay" (*Anoun v City of New York*, 85 AD3d 694, 926 NYS2d 98 [1st Dept. 2011]; citing *Fahey v County of Ontario*, 44 NY2d 934, 408 NYS2d 314, 380 NE2d 146 [1978]), "or if the proposed amendment is palpably improper or insufficient as a matter of law" (*McGhee v Odell*, 96 AD3d 449, 946 NYS2d 134 [1st Dept. 2012]). A party opposing leave to amend "must overcome a heavy presumption of validity in favor of [permitting amendment]" (Id). "Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment" (*Valdes v Marbrose Realty, Inc.*, 289 AD2d 28, 734 NYS2d 24 [1st Dept. 2001]). Defendants will not suffer any prejudice when an amended complaint adds a claim premised upon the very same subject matter alleged by the original complaint (*Brown v Blennerhasset Corp.*, 113 AD3d 454, 979 NYS2d 27 [1st Dept. 2014]).

A motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR §2221(e)(2)) and that the application "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR §2221(e)(3)). A motion for leave to renew is addressed to the sound discretion of the court (*Hamlet At Willow Creek Development Co., LLC v Northeast Land Development Corp.*, 64 AD3d 85, 878 NYS2d 97 [2nd Dept. 2009]), and "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Renna v Gullo*, 19 AD3d 472, 797 NYS2d 115 [2nd Dept. 2005] citing *Rubinstein v Goldman*, 225 AD2d 328, 638 NYS2d 469 [1st Dept. 1996]). "Renewal is granted sparingly ... ; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Henry v Peguero*, 72 AD3d 600, 900 NYS2d 49 [1st Dept. 2010] citing

**Matter of Weinberg**, 132 AD2d 190, 522 NYS2d 511 [1987], lv dismissed 71 NY2d 994, 524 NE2d 879, 529 NYS2d 277 [1988]). A motion for leave to renew must be based on additional material facts existing at the time the prior motion was made, but the material facts were not known to the party seeking leave to renew (*Nassau County v Metropolitan Transp. Authority*, 99 AD3d 617, 953 NYS2d 183 [1st Dept. 2012] citing *Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [1st Dept. 1979]).

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1st Dept. 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

Summary judgment is a drastic remedy that should only be granted if there are no triable issues of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13, 965 NE3d 240 [2012]).

Before addressing other aspects of the Carpenters motion, it must be noted that the request to amend their original answer fails and, therefore, a more involved analysis of their motion for leave to renew and summary judgment is unnecessary.

The Carpenters in this case have failed to amend their Answer to include the homeowner's defense timely such that leave of court would not be required (i.e., within 20 days after service of their Answer) (CPLR §3025(a)). A defendant who omits an affirmative defense from an answer has not waived the defense if he files an amended answer which includes that defense before the time for amending the answer without leave of court has expired (see McKinney's CPLR §3025(a), §3211(e); see *Iacovangelo v Shepherd*, 5 NY3d 184, 800 NYS2d 116 [2005]).

The date of the Carpenters original answer, which they now seek to amend is December 9, 2013. Therefore, Defendants seek to amend far too late in the proceedings. It is more than within this court's discretion to deny this request for amendment based on timeliness (see *Sampson v Contillo*, 55 AD3d 591, 865 NYS2d 137 [2d Dept 2008]). Allowing the parties to amend their original answers many years after litigation has already been underway would prejudice the parties and the system.

Significant progress has already been made in this case since the Carpenters' original Answer was filed. Depositions have been taken, documents have been exchanged amongst the parties, discovery is complete, a note of issue was filed on January 18, 2018, and the parties are awaiting trial assignment. That is not days or months but many years after the Carpenters' original Answer was filed.


The Carpenters, do not offer a reasonable excuse for the many years delay in seeking to amend their original Answer. Rather, they simply focus on their claims that there would not be unfair surprise if they were allowed to amend their Answer (see Defendants' Affirmation in Support and Reply Affirmation). Allowing amendment at this stage of this litigation would be prejudicial and unfair to Plaintiffs.

Accordingly, it is ORDERED that Edmund and Mary Carpenter's motion for leave to amend their Answer under CPLR §3025(b) is denied. Their motions to renew under CPLR §2221(e) and for summary judgment under CPLR §3212 are also denied.

ENTER:

**MANUEL J. MENDEZ  
J.S.C.**

Dated: January 16, 2019

  
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**MANUEL J. MENDEZ  
J.S.C.**

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
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