

**Blanca v Advantage Restoration, Inc.**

2019 NY Slip Op 30463(U)

January 16, 2019

Supreme Court, Bronx County

Docket Number: 310994/2011

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

MARCOS BLANCA,

INDEX NUMBER: 310994/2011

Plaintiff,

-against-

Present:  
HON. ALISON Y. TUITT  
*Justice*

ADVANTAGE RESTORATION, INC., EVEREST  
SCAFFOLDING, INC., PACOLET MILLIKEN  
ENTERPRISES, INC. and 104 WEST 40<sup>th</sup> STREET  
PROPERTY INVESTORS, I LLC,

Defendants.

PACOLET MILLIKEN ENTERPRISES, INC.,

Third-Party Plaintiff,

-against-

SKYLINE RESTORATION, INC.,

Third-Party Defendant.

SKYLINE RESTORATION, INC.

Second Third-Party Plaintiff,

-against-

ADVANTAGE RESTORATION, INC.,

Second Third-Party Defendant.

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**PACOLET MILLIKEN ENTERPRISES, INC.,**

Third Third-Party Plaintiff,

-against-

**CONSTRUCTION & REALTY SAFETY GROUP,  
INC.,**

Third Third-Party Defendant.

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The following papers numbered 1-6,

Read on this Motions to Amend Third-Party Complaint and Third Third-Party Complaint

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On Calendar of 10/1/17

Notices of Motion-Exhibits, Affirmations 1, 2

Affirmations in Opposition 3, 4

Reply Affirmations 5, 6

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Upon the foregoing papers, defendants Pacolet Milliken Enterprises Inc. and 104 West 40<sup>th</sup> Street Property Investors, I, LLC's ("Pacolet" and "104", respectively) motion for leave to amend the third-party complaint against Skyline Restoration, Inc. ("Skyline") and Pacolet and 104's motion for leave to amend the third third-party complaint against Construction & Realty Safety Group, Inc. ("Construction") are consolidated for purposes of this decision. For the reasons set forth herein, the motions are granted.

This case arises from an accident on June 21, 2011 in which plaintiff sustained injuries at a project located at or near 104 West 40<sup>th</sup> Street, New York, New York. Plaintiff alleges that while he was on a scaffold applying waterproofing with a brush, the scaffolding bicycle and plank on which he was standing suddenly moved causing him to fall approximately eight feet before being caught with his safety harness. Plaintiff brought the action alleging claims pursuant to the Labor Law. The premises was owned by defendant 104. Pacolet owned the property adjacent to 104, 1045 Sixth Avenue. The building at that location had been demolished sometime prior to plaintiff's accident. The previous owner of 104 had entered into a contract with

Pacolet in which Pacolet would install an exterior insulated finish system on the outside of the building at 104 to address an exposed in-fill wall that was not structurally sound. On November 13, 2010, Pacolet executed a contract with Skyline to perform the work. The contract called for Skyline to provide defense and indemnity to Pacolet and to list Pacolet as an additional insured on its policy. Skyline contracted with second third-party defendant Advantage Restoration, Inc. to complete the work.

Pacolet and 104 seek to amend the third-party complaint to allege claims for contractual and common law indemnification, contribution, breach of contract, and Pacolet also seeks to allege a claim for failure to procure insurance. Pacolet and 104 also seek to amend the third third-party complaint against Construction to allege claims for contribution, common law indemnity and breach of contract.

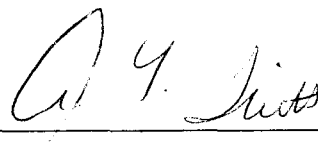
Pursuant to CPLR 3025(b), a party may amend her pleading at any time by leave of court or by stipulation of all parties; leave shall be freely given upon such terms as may be just; and, any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading. It is the policy of this State is to freely grant leave to amend pleadings in the absence of prejudice or surprise, and further providing that the amendment is not plainly and clearly lacking in good faith and merit. See, Fohey v. Ontario County, 44 N.Y.2d 934 (1978 ); Prote Contracting. Co., Inc. v. Board of Education of the City of New York, 672 N.Y.S.2d 109 (1<sup>st</sup> Dept. 1998); Stroock & Stroock & Lavan v. Beltramini, 550 N.Y.S.2d 337 (1<sup>st</sup> Dept. 1990); Thompson v. Cooper, 806 N.Y.S.2d 32 (1<sup>st</sup> Dept. 2005). In the absence of prejudice, a mere delay is insufficient to defeat the amendment. 17 Vista Fee Associates. v. Teachers Insurance & Annuity Association of America, 693 N.Y.S.2d 554 (1<sup>st</sup> Dept. 1999). On a motion for leave to amend a pleading, the movant need not establish the merit of its proposed new allegations but must simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit. Fairpoint Cos., LLC v. Vella, 22 N.Y.S.2d 49 (1<sup>st</sup> Dept. 2015); Perrotti v. Becker, Glynn, Melamed & Muffy LLP, 918 N.Y.S.2d 423 (1<sup>st</sup> Dept. 2011); MBIA Insurance Corp. v. Greystone & Co., Inc., 901 N.Y.S.2d 522 (1<sup>st</sup> Dept. 2010).

Here, the delay in seeking to amend is not inordinate and the claims in this action involve the same underlying transactions or occurrences underlying the litigation. See Duffy v. Horton Memorial Hospital, 66 N.Y.2d 473 (1985). While the case has been pending since 2011, there have been three third-party actions added throughout the pendency of the case. There is no prejudice by virtue of this proposed amendment to the pleadings. In addition, plaintiff has made a showing that the sought amendments are otherwise apparently meritorious cause of actions.

Accordingly, the motions are granted. Movants are directed to serve the Amended Third-Party Complaint and the Amended Third Third-Party Complaint within 30 days after service of this Order with Notice of Entry.

This constitutes the decision and Order of this Court.

Dated: 1/16/19



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**Hon. Alison Y. Tuitt**