SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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CORNELL MARTIN, individually, and SABRINA WRENICK, as parent and natural guardian of A.D., an infant under the age of 18 years,

Plaintiffs,

- against -

GELCO CORPORATION and ALBERTO O'BRIEN,

Defendants.

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DECISION AND ORDER

Index No. 26191/2017E

John R. Higgitt, J.

Upon plaintiffs' March 15, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; defendants' March 26, 2019 affirmation in opposition and the exhibit submitted therewith; plaintiffs' April 1, 2019 affirmation in reply and the exhibit submitted therewith; and due deliberation; plaintiffs' motion for leave to amend the complaint to add Precision Pipeline Solutions, LLC (Precision) and Primeline Utility Services LLC (Primeline) as party defendants is granted in part.

The February 25, 2019 amended complaint alleges that pedestrian plaintiffs Martin and A.D. sustained personal injuries when they were struck by the vehicle owned by defendant Gelco Corporation (Gelco) and operated by defendant O'Brien. The complaint also alleges causes of action against defendant Gelco sounding in negligent entrustment and respondeat superior.

Plaintiffs seek to add Precision and Primeline as party defendants and assert causes of action for negligent entrustment and respondeat superior against them because Precision is defendant O'Brien's employer and Precision is a subsidiary of Primeline. Additionally, Primeline has a leasehold interest in the vehicle defendant O'Brien was operating at the time of the accident.

"Leave [to amend a pleading] shall be freely given upon such terms as may be just including the granting of costs and continuances" (CPLR 3025[b]). Leave should not be granted

where prejudice or surprise results from the delay in seeking amendment (*see Byrne v Fordham Univ.*, 118 AD2d 525 [1st Dept 1986]), but mere lateness does not bar amendment (*see Edenwald Contr. Co. v New York*, 60 NY2d 957 [1983]). "Prejudice may be found where a party has incurred some change in position or hindrance in the preparation of its case which could have been avoided had the original pleading contained the proposed amendment" (*Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 293 [1998] [citations omitted]). The prejudice alleged, however, must be "significant" (*see Spitzer v Schussel*, 48 AD3d 233 [1st Dept 2008]).

The court may examine the merit of a proposed amendment to weed out those amendments that are palpably insufficient or clearly devoid of merit (*see MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]).

In support of the motion, plaintiffs submit a May 2016 Assignment and Assumption Agreement between Precision, Primeline and Gelco wherein Precision assigned to Primeline its interest in (1) a master lease between Gelco, as lessor, and Precision, as customer; (2) a service agreement between Gelco and Precision; and (3) a master lease between Gelco Fleet Trust, assignee of Gelco, as lessor, and Precision, as customer. The agreement contains addenda listing the vehicles ostensibly associated with the two leases.[1]

In opposition, defendants initially assert that neither Precision nor Primeline is a necessary party.

With respect to the proposed claims against Precision, defendants assert that defendant O'Brien was acting within the scope of his employment with Precision at the time of the accident and that defendant O'Brien's defense is being provided pursuant to his employer's insurance policy. They submit defendant O'Brien's December 12, 2018 affidavit in which he avers that he

[1] Because the vehicles are identified by vehicle identification number ("VIN"), and the VIN number of the vehicle involved in the accident is unknown, plaintiffs have not established that the Agreement governs the subject vehicle.

was operating the vehicle in the course of his employment with Precision. Defendants thus assert that because the proposed second amended complaint asserts respondeat superior claims against Precision (and Primeline), there can be no claim for negligent hiring and retention (*see Williams v 268 W. 47th Rest. Inc.*, 160 AD3d 436, 437 [1st Dept 2018]), or negligent entrustment (*see De La Cruz v Dalmida*, 151 AD3d 563 [1st Dept 2017]) against Precision (or Primeline).

As to Primeline, defendants assert that because Precision, not Primeline, employed defendant O'Brien, plaintiffs may not assert a respondeat superior claim against Primeline. Defendants further assert that the vehicle defendant O'Brien was operating was part of a master lease between Gelco, as owner and lessor, and Precision, as lessee, and that Primeline had assumed the lease on behalf of Precision. Given that the lease purportedly covering the subject vehicle was assigned to Primeline in May 2016, and the vehicle was ostensibly still in use as of the date of the accident in April 2017, defendants have failed to establish that Primeline could not be considered an owner of the vehicle under Vehicle and Traffic Law § 128 because of its "exclusive use thereof, under a lease or otherwise, for a period greater than thirty days" (*see Caraballo v Rivas-Barzola*, 92 AD3d 532 [1st Dept 2012]; *Grant v Alexandria Toyota*, 224 AD2d 187 [1st Dept 1996]).

The question is thus whether defendant O'Brien's affidavit, standing alone, is sufficient to establish his employment by Precision, such that the proposed claims are "palpably insufficient or clearly devoid of merit," given that, on a motion to amend the complaint, "[t]he fact that the documentary record is inconclusive with respect to the truth or falsity of many of [the proposed] allegations does not mandate [denial of the motion], as plaintiffs are not required to prove their allegations at this stage" (*Cohen v Saks Inc.*, 169 AD3d 515, 515 [1st Dept 2019]). Defendants have failed to establish that defendant O'Brien's subjective assertion, even though sworn, is sufficient to conclusively establish an employment relationship requiring denial of plaintiffs'

motion to amend the complaint to assert respondeat superior claims against Precision or Primeline. Defendants have failed to establish that the proposed amendments, with respect to the respondeat superior claims, are "obviously not reliable or are [clearly] insufficient" (*Miller v Staples the Off. Superstore E., Inc.*, 52 AD3d 309, 313 [1st Dept 2008] [citation omitted]). As stated above, however, the additional proposed claims against Precision and Primeline sounding in negligent entrustment and negligent hiring and retention are without merit (*see Williams*, *supra*; *De La Cruz*, *supra*).

In light of the foregoing, with respect to defendants' assertion that Precision and Primeline are not necessary parties, defendants have not established that complete relief may be afforded as between the existing parties if Precision and Primeline are not joined (*see* CPLR 1001[a]; *Matter of Morgan v de Blasio*, 29 NY3d 559 [2017]).

Accordingly, it is

ORDERED, that the aspect of plaintiffs' motion for leave to amend the summons and complaint to add Precision Pipeline Solutions, LLC and Primeline Utility Services LLC as party defendants is granted; and it is further

ORDERED, that the caption of this action shall be amended to reflect the foregoing and all papers to be served and filed herein shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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CORNELL MARTIN, individually, and SABRINA WRENICK, as parent and natural guardian of A.D., an infant under the age of 18 years,

Index No. 26191/2017E

Plaintiffs,

- against -

GELCO CORPORATION, ALBERTO O'BRIEN, PRECISION PIPELINE SOLUTIONS, LLC and PRIMELINE UTILITY SERVICES LLC,

Defendants.

----------X

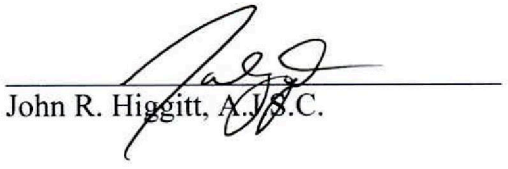
and it is further

ORDERED, that the aspect of plaintiffs' motion for leave to serve a second supplemental summons and second amended complaint is granted to the extent that, within 30 days after entry of this decision and order, plaintiff shall file and serve a second supplemental summons and second amended complaint substantially in the form as annexed to the moving papers as Exhibit L, except that plaintiff is not permitted to allege the proposed causes of action enumerated five and seven therein.

The parties are reminded of the September 6, 2019 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: June 3, 2019



John R. Higgitt, A.J.S.C.