

Fainas-Wehrmann v Continental Owners Corp.

2020 NY Slip Op 30218(U)

January 31, 2020

Supreme Court, New York County

Docket Number: 159339/2018

Judge: W. Franc Perry

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

Justice

-----X

RENEE FAINAS-WEHRMANN,

Plaintiff,

INDEX NO. 159339/2018

MOTION DATE 01/17/2020

MOTION SEQ. NO. 001 002

- v -

CONTINENTAL OWNERS CORP., DOUGLAS ELLIMAN
PROPERTY MANAGEMENT, PATRICIA PETTWAY-
BROWN,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for LEAVE TO FILE

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for LEAVE TO FILE

In this personal injury action, plaintiff, in motion sequence number 001, seeks an order pursuant to CPLR §§1003 and 3025(b), to serve a Supplemental Summons and Amended Complaint, to add Etna Contracting Inc., as an additional defendant; and in motion sequence number 002, plaintiff seeks an order pursuant to CPLR §§1003 and 3025(b), to serve a Supplemental Summons and Amended Complaint, to add Shannon Side Concrete Corp., (“Shannon”) as an additional defendant. Non-party Etna Contracting Inc., (“Etna”) opposes motion sequence number 001; motion sequence number 002 is submitted without opposition. The motions are consolidated for disposition.

BACKGROUND

This action was commenced by service of a summons and verified complaint on October 8, 2018 upon defendants Continental Owners Corp., Douglas Elliman Property Management

Corp., and Patricia Pettway-Brown ("defendants"). (NYSCEF Doc. Nos. 1 - 4). Issue was joined by service of an answer and combined discovery demands were served by defendants on December 28, 2018. (NYSCEF Doc. No. 5). Plaintiff seeks to recover damages for personal injuries allegedly sustained on or about October 10, 2017, when plaintiff, then eighty-eight years old, while walking on the sidewalk in front of 70-20 108 Street, Forest Hills, NY ("Premises") was caused to trip and fall. (NYSCEF Doc. No. 1).

A preliminary conference was held on August 13, 2018. (NYSCEF Doc. No. 8). Subsequently, plaintiff learned of the identity of an additional potential defendant, Etna, alleged to be the company responsible for the construction at the Premises where plaintiff allegedly tripped and fell. (NYSCEF Doc. No. 14, ¶¶ 18-20). Plaintiff learned of the identity of additional defendant Shannon, Etna's subcontractor, when Etna opposed plaintiff's motion and provided documents demonstrating the scope of work to be performed by Etna and Shannon at the Premises where plaintiff allegedly fell. (NYSCEF Doc. No. 20). Plaintiff now moves for leave to serve a supplemental summons and amend the complaint to add Etna and Shannon as additional defendants.

STANDARD OF REVIEW/ANALYSIS

It is well-settled that "leave to amend a pleading should be granted where there is no significant prejudice or surprise to the opposing party and where the evidence submitted in support of the motion indicates that the amendment may have merit" (*Ingrami v Rovner*, 45 A.D.3d 806, 808, 847 N.Y.S.2d 132 [2nd Dept 2007]; CPLR 3025). "[I]n order to conserve judicial resources, an examination of the proposed [amendment] is warranted, and leave to amend will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law" (*Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585, 730

N.Y.S.2d 293 [1st Dept 2001]; *Detrinca v De Fillippo*, 165 AD2d 505, 509, 568 N.Y.S.2d 586 [1st Dept 1991]). The authority to grant leave to amend is committed to the sound discretion of the trial court (see *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 459 N.E.2d 164, 471 N.Y.S.2d 55 [1983]; see also *Murray v City of New York*, 43 NY2d 400, 404-405, 372 N.E.2d 560, 401 N.Y.S.2d 773 [1977]).

In opposition to plaintiff's motion, Etna argues that the proposed amended complaint lacks merit and should therefore be denied. Etna submits the affidavit of its president, Mario Sciacca, who avers that five months prior to plaintiff's accident, on May 9, 2017, Etna "submitted a proposal to Douglas Elliman Property Management for removal and replacement of sidewalk flags on all four sides of the building as well as demolish concrete around one tree well and install a new tree guard at 70-20 108 Street, Forest Hills, Queens, NY. Eileen Cannon signed the proposal, and it became a contract." (NYSCEF Doc. No. 20). Notwithstanding the affidavit of its president and the contract indicating the scope of work to be performed at the site of plaintiff's accident, Etna contends that the motion to add it as a defendant should be denied because Etna subcontracted the work to Shannon and claims that it did not "did not supervise, direct, or control Shannon's work", and it "did not provide any construction materials or tool, including but not limited to any construction tarps or bags." (NYSCEF Doc. No. 20).

Etna's opposition to the proposed amended complaint lacks merit. The standard for whether to grant a motion to amend a pleading to add a claim is whether the proposed claim is palpably insufficient or patently devoid of merit, not whether the movant will ultimately be successful on the proposed claim. (*Daniels v. Empire-Orr, Inc.*, 151 A.D.2d 370, 371, 542 N.Y.S.2d 614 [1st Dept 1989]). Similarly, Etna's claim that it would be prejudiced by this late amendment is without merit. "Mere lateness is not a barrier to the amendment. It must be

lateness coupled with significant prejudice to the other side." (*Detrinca v. De Fillippo*, 165 A.D.2d 505, 508, 568 N.Y.S.2d 586 [1st Dept 1991]). In the present case, defendant has failed to identify any prejudice that it would suffer as a result of the amendment. As noted, Shannon has not opposed the plaintiff's motion to amend.

Accordingly, for the foregoing reasons, it is hereby,

ORDERED that the plaintiff's motion sequence numbers 001 and 002, for leave to serve a supplemental summons and to amend the complaint to add Etna Contracting Inc., and Shannon Side Concrete Corp., as additional defendants is granted; and it is further

ORDERED that a supplemental summons and amended complaint, in the form annexed to the motion papers, shall be served, in accordance with the Civil Practice Law and Rules, upon the additional parties in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action shall bear the following caption:

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

-----X
RENEE FAINAS-WEHRMANN,

Plaintiff,

Index No.: 159339/18

-against-

CONTINENTAL OWNERS CORP., DOUGLAS ELLIMAN PROPERTY MANAGEMENT, PATRICIA PETTWAY-BROWN, ETNA CONTRACTING INC. and SHANNON SIDE CONCRETE CORP,
Defendants.

-----X

And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (ww.nycourts.gov/supctmanh)]; and it is further

ORDERED that the compliance conference currently scheduled for February 18, 2020 is adjourned to April 21, 2020 and counsel are directed to appear in Room 307, 80 Centre Street, on April 21, 2020, at 9:30 AM.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

1/31/2020
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: