

McElroy v Mercer Health & Benefits LLC

2020 NY Slip Op 31083(U)

April 29, 2020

Supreme Court, New York County

Docket Number: 153735/2018

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

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KEVIN MCELROY,

Plaintiff,

- v -

MERCER HEALTH & BENEFITS LLC, SCOTT
CATHERWOOD

Defendant.

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INDEX NO. 153735/2018
MOTION DATE 11/21/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 were read on this motion to/for AMEND CAPTION/PLEADINGS

In this employment discrimination action, plaintiff seeks to amend the complaint and caption to add an additional plaintiff Joanne Descovich ("Descovich") who has alleged similar employment discrimination causes of action against the Defendants. Defendants oppose the motion.

Leave to amend pleadings should be freely given provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (see Sheila Props., Inc. v A Real Good Plumber, Inc., 59 AD3d 424, 874 NYS2d 145 [2d Dept 2009]; Boakye-Yiadow v Roosevelt Union Free School Dist., 57 AD3d 929, 871 NYS2d 314 [2d Dept 2008]).

A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed (see Ingrami v Rovner, 45 AD3d 806, 808, 847 NYS2d 132 [2d Dept 2007]). Here, leave to amend is proper, as plaintiff's

proposed amendments are not "patently devoid of merit" and will not prejudice or surprise defendants, who have not demonstrated any grounds to oppose the proposed amendment. (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499, 901 NYS2d 522 [1st Dept 2010]; see CPLR 3025 [b]).

To establish prejudice "there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Loomis v Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23, 429 N.E.2d 90, 444 N.Y.S.2d 571 [1981]; *Valdes v Marbrose Realty, Inc.*, 289 A.D.2d 28, 29, 734 N.Y.S.2d 24 [2001]).

Defendants have not established that the proposed amended complaint which seeks to add plaintiff Descovich will prejudice or hinder defendants in supporting or defending a position in this pending action where discovery is in the early stages. (compare *Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d 290, 772 NYS2d 313 [1st Dept 2004] [2½ year delay]; *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 756 NYS2d 26 [1st Dept 2003] [motion made more than six years after commencement of action, four years after filing of note of issue, more than four years after first trial, and more than 1½ years after decision on prior appeal]) Moreover, defendants' amorphous claims that adding the additional plaintiff will cause juror confusion are premature and are not supported by proof. Based upon a review of the pleadings and the proposed amended complaint, the motion is granted. Accordingly, it is hereby,

ORDERED that the plaintiff's motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 30 days from the date of said service; 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
KEVIN MCELROY and JOANNE DESCOVICH,

Plaintiffs,

Index No. 153735/2018

-against-

MERCER HEALTH & BENEFITS LLC and
SCOTT CATHERWOOD,

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 (www.nycourts.gov/supctmanh)).

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.

<u>4/29/2020</u> DATE	 <hr/> W. FRANC PERRY, J.S.C.			
CHECK ONE: APPLICATION: CHECK IF APPROPRIATE:	<input type="checkbox"/> CASE DISPOSED <input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> OTHER <input type="checkbox"/> REFERENCE