

**Lower E. Side Mgt. Corp. v MB-REEC Houston Prop.
Owner, LLC**

2021 NY Slip Op 30287(U)

January 22, 2021

Supreme Court, New York County

Docket Number: 655690/2017

Judge: Shawn T. Kelly

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

-----X
LOWER EAST SIDE MANAGEMENT CORP.,

Plaintiff,

- v -

MB-REEC HOUSTON PROPERTY OWNER, LLC,

Defendant.

INDEX NO. 655690/2017

MOTION DATE 11/10/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

-----X
MB-REEC HOUSTON PROPERTY OWNER, LLC

Plaintiff,

-against-

KINGDOM ASSOCIATES, INC., FNA ASSOCIATES, INC.

Defendant.

Third-Party
Index No. 595071/2018

-----X
KINGDOM ASSOCIATES, INC.

Plaintiff,

-against-

TITAN INDUSTRIAL SERVICES CORPORATION

Defendant.

Second Third-Party
Index No. 595429/2019

-----X
KINGDOM ASSOCIATES, INC.

Plaintiff,

-against-

PRIDE BUILDERS LLC

Defendant.

Third Third-Party
Index No. 596078/2019

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for

AMEND CAPTION/PLEADINGS

Upon the foregoing documents, it is

Defendant/Third-Party Plaintiff, MB-REEC Houston Property Owner, LLC., (hereinafter “MB-REEC”) moves an Order (a) pursuant to CPLR §3025(b) allowing MB-REEC to file a Second Amended Third-Party Complaint against Third-Party Defendants Kingdom Associates, Inc. (hereinafter “Kingdom”) and FNA Associates, Inc. (hereinafter “FNA”) that would add background facts, clarify one count, and add another for breach of contract for failure to procure excess coverage or sufficient excess coverage. In opposition, Kingdom and FNA contend that the amendments are unnecessary and improper.

In the alternative, if the court grants MC-REEC’s motion, Defendant/Third-Party Plaintiff, Kingdom cross moves pursuant to CPLR §1007 to dismiss the fourth cause of action asserted by MB-REEC against Kingdom averring negligence and damages on the basis that they are unrelated to allegations contained in the first-party action filed by Plaintiff Lower East Side Management Corp.

Background

The present case stems from a construction. MB-REEC undertook a project at 194 Orchard Street to build a mixed-use mid-rise building (herein “the Project”). Under the terms of the written agreement, MB-REEC was responsible for the proper demolition of the existing structure at 194 Orchard Street and subsequent construction of the new building at the Project, including protection of the adjoining structure owned by LOWER EAST SIDE at 192 Orchard Street during all phases of The Project. MB-REEC engaged various contractors and subcontractors to provide construction services.

As the Project was underway, the building at 192 Orchard Street experienced movement which allegedly caused damage to the structure and which caused disruption to the Project. FNA was retained to design the underpinning to secure the foundation of the building at 192 Orchard Street, and Kingdom was retained as the underpinning contractor.

Plaintiff filed his original Summons and Complaint on or about September 6, 2017 and MB-REEC filed its Answer on or about October 25, 2017. MB-REEC filed a Third-Party Summons and Complaint against Kingdom on or about January 29, 2018. On February 16, 2018, MB-REEC amended its Third-Party Complaint to add FNA as a third-party defendant. Kingdom filed its Answer to the Amended Third-Party Complaint on May 21, 2018, and FNA filed its Answer on June 13, 2018.

On September 11, 2019, MB-REEC served on both FNA and Kingdom a Notice for Discovery and Inspection for copies of all insurance policies in effect at the time of the incidents in question. The discovery demand sought to discover the amount of the Third-Party Defendants' excess coverage, if any, since both were contractually required to have it. MB-REEC found that Kingdom's excess coverage was substantially below that required by the contract between Kingdom and MB-REEC's agent, PRIDE. FNA has yet to provide a response to the discovery, but MB-REEC alleges that it has been informed that there is a coverage issue that is preventing a definitive response. Based on this information, MB-REEC seeks to amend to its breach of contract claim for failure to procure the required amount of excess coverage as to both Third-Party Defendants.

Analysis

MB-REEC concedes that the existing Amended Third-Party Complaint could be interpreted to include a claim for failure to procure insurance. However, MB-REEC seeks to

assert the claim with more specificity. Both the FNA contract with MB-REEC and the Kingdom contract with PRIDE (MB-REEC's agent) mandate certain amounts of excess coverage. MB-REEC alleges that instead of the \$10 million of excess coverage required, Kingdom only purchased \$4 million. MB-REEC also alleges that FNA was contractually obligated to purchase \$5 million of excess coverage and name MB-REEC an additional insured under the policy, but failed to do so.

MB-REEC argues that amendment would not prejudice any party or create any delays. A claim for failure to procure was already generally pled in the Amended Third-Party Complaint. Specifically, MB-REEC seeks to add specific facts related to the excess coverage – noting where the requirement for same appeared in the respective contracts – and also add specific language with respect to claimed damages in Count IV of the Amended Third-Party Complaint. Additionally, MB-REEC contends that neither Kingdom nor FNA has been deposed, so any arguments regarding delay are unwarranted.

In opposition, Kingdom alleges that the amendments are not permissible under CPLR §1007 since it fails to state any cause of action arising from or conditioned upon the liability asserted against MB-REEC in the main action by LOWER EAST SIDE. Kingdom contends that the damages allegedly sustained resulting from the movement of the building located at 192 Orchard Street are separate and distinct from the allegations and damages brought by LOWER EAST SIDE in its original Summons and Complaint. Kingdom additionally argues that MB-REEC's proposed Second Amended Third-Party Complaint also seeks to add further facts and damages to MB-REEC's fourth cause of action for negligence against KINGDOM which is completely distinct from the claims' alleged by LOWER EAST SIDE.

Third-Party Defendant FNA contends that the motion should be denied as the amendment is unnecessary and patently devoid of merit. In support of this contention, FNA merely states that the allegations in the proposed Second Amended Third-Party Complaint are already contained within the Amended Third-Party Complaint.

In reply, MB-REEC asserts that facts gleaned from recent discovery enable MB-REEC to plead its Third-Party Complaint with more specificity. MB-REEC states that adding details in a new pleading is neither repetitive nor redundant, as it clarifies and specifies the bases for MBREEC's already stated failure to procure cause of action.

Leave to amend a pleading should be freely granted so long as the amendment will not cause surprise or prejudice to the opposing party (*see* CPLR §3025(b); *see also Solomon Holding Corp. v Golia*, 55 AD3d 507, 507 [1st Dept 2008] [granting motion to amend absent showing of surprise or prejudice]). A showing of “prejudice requires '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.’” *Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007] [*quoting Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 (1981)]. Kingdom and FNA have failed to show any prejudice they would experience as a result of MB-REEC’s Amended Third-Party Complaint and accordingly, the motion to amend cannot be denied on these grounds.

“‘Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side’” (*Edenwald Constr. Co. v City of NY*, 60 NY2d 957, 959 [1983] [citation omitted]). Having failed to show surprise or any prejudice accruing from MB-REEC’s proposed amendment, Kingdom’s timeliness argument fails.

Moreover, MB-REEC's proposed amendments are not “palpably insufficient” or “devoid of merit” (see *Perotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011] [quoting *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] [“[O]n 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.’”]). Analyzing MB-REEC’s amendments under the proper standard, contrary to FNA’s argument, the amendments are neither insufficient nor devoid of merit. Accordingly, MB-REEC’s motion to amend is granted.

Kingdom’s Cross Motion to Strike

Kingdom cross moves to strike MB-REEC’s fourth cause of action against KINGDOM from MB-REEC’s Second Amended Third-Party Complaint as insufficiently derivative of the underlying First-Party action.

Pursuant to CPLR §1007 “a Defendant may proceed against a person not a party who is or may be liable to that Defendant for all or part of the Plaintiff’s claim against that Defendant.” Historically, third party actions were narrowly construed as limited to the claim of plaintiff in the action and the obligation of the third party defendant to indemnify another held liable for the plaintiff’s loss (see generally, as cited by Kingdom, *George Cohen Agency, Inc., v Donald S. Perlman Agency, Inc.*, 51 NY2d 358, 365 [1980]).


However, this view has been relaxed substantially such that it is now recognized that, to the extent that the plaintiff was damaged as a result of the third-party defendant’s actions, the inclusion of all parties in one action is appropriate as it prevents the judicially inefficient result of multiple actions before multiple courts (see *Bd. of Managers of 125 N. 10th Condo. v 125North10, LLC*, 51 Misc 3d 585, 600 [2016]). “[A]lthough third-party practice has its origins

in strict indemnity, it has grown beyond its early limitations and should now be seen primarily as a tool for economical resolution of interrelated lawsuits” (George Cohen Agency, Inc., 51 NY2d 358 at 364–365; see also Qosina Corp. v C & N Packaging, Inc., 96 AD3d 1032, 1035 [2d Dept.2012]). MB-REEC’s proposed amendments directly relate to the project and claims in the initial First-Party action. Accordingly, Kingdom’s contentions fail under CPLR §1007.

ORDERED that the Defendant/Third-Party Plaintiff, MB-REEC Houston Property Owner, LLC.’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 Third-Party Defendants Kingdom Associates, Inc. and FNA Associates, Inc. shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service.

1/22/2021
DATE


SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE