Kryk v City of New York
2021 NY Slip Op 31940(U)
February 5, 2021
Supreme Court, Richmond County
Docket Number: 152751/2017
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2
---X
ROMAN KRYK,

Plaintiff,

-against-

THE CITY OF NEW YORK, and NEW YORK CITY DEPARTMENT OF PARKS & RECREATION,

Defendants.
---X
THE CITY OF NEW YORK, and NEW YORK CITY DEPARTMENT OF PARKS & RECREATION,

Third-Party Plaintiffs,

-against-

REGIONAL MANAGEMENT & CONSULTING, INC.,

Third-Party Defendant.
---X

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No: 152751/2017
Motion No. 001 & 002

Recitation in accordance with CPLR 2219(a) of the following papers numbered "1" through "4 were marked fully submitted on December 17, 2020.

	Papers Numbered
Defendant's Notice of Motion to Amend Third-Party Complaint and Answer with Supporting Papers (001) (dated July 31, 2020)	1, 2
Plaintiff's Notice of Cross-Motion and Opposition to Defendant's Motion to Amend with Supporting Papers (002) (dated October 1, 2020)	3
Defendant's Affirmation in Reply and in Opposition to Plaintiff's Cross-Motion (dated October 7, 2020)	4

Upon the foregoing, Defendant City of New York's motion to amend the pleadings is granted. Plaintiff's cross-motion to sever is denied for the reasons set forth below.

Defendant City of New York (City) moves for an Order pursuant to CPLR § 3025(b) to amend the caption to add two new third-party defendants together with additional causes of action. Defendant City also moves to amend the answer to insert additional affirmative defenses to the third-party complaint.

Plaintiff opposes the motion and also cross-moves pursuant to CPLR §§ 603 and 1010 to sever the proposed third-party action against the additional third-party defendants in the event defendant's motion is granted.

Plaintiff alleges that on October 25, 2017, he fell from an A-frame ladder while removing asbestos from a bathroom located in the park at Grandview Avenue and Continental Place in Staten Island, New York. On December 21, 2017, he filed a complaint against the City alleging they were negligent under Labor Law §§§ 200, 240(1) and 241(6). On February 21, 2018, the Corporation Counsel served an answer on behalf of the City. Then, on May 29, 2018, Bennet, Bricklin & Saltzburg, LLC, were substituted as counsel for the Corporation Counsel.

The City conducted plaintiff's deposition over two days, on November 30, 2018 and December 6, 2018. On August 11, 2019, the City gave notice of another change of counsel on August 11, 2019 from Bennet Bricklin and Saltzburg to Perez, Morris Hyde, LLC and simultaneously commenced a third-party action against plaintiff's employer, Regional Management alleging causes of action for indemnification among other things.

On September 24, 2019, Michael Browne, the City's project manager testified on behalf of the City. He testified that the comfort station where plaintiff's accident occurred was undergoing a total renovation in addition to the asbestos removal being conducted by Regional,

by the general contractor UTB – United Technologies. Inc. Upon further investigation by the City, it was also discovered that AECOM USA, Inc., was the resident engineer contracted by the City to supervise the greater renovation project at the comfort station.

City now moves to add UTB and AECOM as third-party defendants to the complaint. The City contends that so far, third-party plaintiff Regional has yet to be deposed and paper discovery from Regional remains outstanding, Additionally, Regional has reserved its right to depose the City, which has not yet occurred. Because a significant amount of discovery remains outstanding, City argues that leave to amend the third-party complaint does not cause unfair prejudice or surprise to any party in this case.

CPLR § 3025(b) provides that courts may grant leave to parties to amend or supplement their pleadings. "In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Lucido v. Mancuso,* 49 AD3d 220, 222 [2d Dept 2008]; *see Katz v. Castlepoint Ins. Co.,* 121 A.D3d 948, 950 [2d Dept 2014]; *Postiglione v. Castro,* 119 AD3d 920, 922 [2d Dept 2014]; *Maldonado v. Newport Gardens, Inc.,* 91 AD3d 731, 731–732 [2d Dept 2012]; *Kahan v. Spira,* 88 AD3d 964, 965 [2d Dept 2011]; *Jablonski v. Jakaitis,* 85 AD3d 969, 971 [2d Dept 2011]. Under this standard, a party seeking leave to amend a pleading need not make an evidentiary showing of merit (*see Katz v. Castlepoint Ins. Co.,* 121 A.D.3d at 950; *Lucido v. Mancuso,* 49 A.D.3d at 229), and leave to amend will be granted unless insufficiency or lack of merit is clear and free from doubt (*see Favia v. Harley–Davidson Motor Co., Inc.,* 119 AD3d 836, 836 2d Dept 2014]).

Here, City's proposed amended verified third-party complaint asserts new causes of action for contribution, common law indemnification, breach of contract and failure to procure

insurance against two new third-party defendants, UTB – United Technologies, the general contractor and AECOM USA, Inc., the resident engineer on the project. The defendants assert that the proposed amended pleading will not result in any prejudice or surprise because all the parties who had appeared in the action were provided with discovery indicating the proposed new third-party defendants had supervisory or had assumed supervisory duties at the job site. Because of this, defendant City argues the addition of the new third-party defendants is meritorious given plaintiff's allegations of violations of Labor Law § 240(1) and Labor Law 241(6). Additionally, defendant City argues that this motion is being made prior to the filing of the note of issue, as discovery has not been completed. Further, the need to add the new third-party defendants is based upon information defendant discovered during further investigation of the claim and by information supplied by the plaintiff's testimony as well as the City's own witness, Michael Browne. Although plaintiff testified that he did not know the subcontractor by name, he testified that during the removal of the asbestos in the comfort station, another contractor removed the tiles from the floor, causing the surface to become rough and uneven.

The court holds that the claim is not palpably insufficient or patently devoid of merit. In addition, "[i]f the opposing party wishes to test the merits of the proposed added cause of action ..., that party may later move for summary judgment upon a proper showing" (*Lucido v. Mancuso,* 49 A.D.3d at 229). Accordingly, that branch of defendant City's motion to add UTB and AECOM, Inc. as third-party defendants is granted.

Now with the addition of the two new third-party defendants, plaintiff cross-moves to sever the third-party action from the main action, arguing it will cause unnecessary delay.

Although it is within a trial court's discretion to grant a severance, this discretion should be exercised sparingly" (*Shanley v. Callanan Indus.,* 54 NY2d 52, 57 [1981]; *see New York Cent.*

Mut. Ins. Co. v. McGee, 87 AD3d 622, 624 [2d Dept 2011]; *Curreri v. Heritage Prop. Inv. Trust, Inc.,* 48 AD3d 505, 507 [2d Dept 2008]. Severance is generally "inappropriate where the claims against the defendants involve common factual and legal issues, and the interests of judicial economy and consistency of verdicts will be served by having a single trial" (*New York Cent. Mut. Ins. Co. v. McGee,* 87 AD3d at 624; *see Zili v. City of New York,* 105 AD3d 949, 950–951 [2d Dept 2013].

Here, the only prejudice cited by the plaintiff was that resulting from delay, namely that it took defendant City almost three years to move to amend the action. A review of the record, however, reveals that it was only in January 2020 plaintiff was made aware of the name of UTB and was provided with the construction contract along with AECOM's daily reports that included the day of the accident. Defendant City assumed that plaintiff would amend the first party action to include the potential third-party defendants, but that did not happen. In March of 2020, the emergence of the COVID-19 virus stayed all civil actions by Executive Order of Governor Cuomo. Further, discovery in the action is only partially complete. Among other things, no one from Regional has been deposed other than the plaintiff; the City has not produced a witness on the third-party claim; paper discovery has not been completed; and the Note of Issue has not been filed. Lastly, the issues in the main action and third-party action are essentially the same -UTB's and AECOM's duties and responsibilities as contractors and the City's responsibilities as supervisor of the project. The only additional issue in the third-party action is the City's indemnification claims. Under these circumstances, any potential prejudice resulting from the delay is outweighed by the interests of judicial economy and consistency of verdicts that would be served by having a single trial (*see Zili v. City of New York,* 105 A.D.3d at 951). For these reasons, the plaintiff's cross-motion to sever is denied.

The court has reviewed the remaining arguments and finds them to be unavailing.

Accordingly, it is hereby,

ORDERED, that the branch of defendants/third-party plaintiffs, THE CITY OF NEW YORK, and NEW YORK CITY DEPARTMENT OF PARKS & RECREATION's, motion to amend the caption to add third-party defendants UTB and AECOM is granted and it is further,

ORDERED, that the branch of defendants/third-party plaintiffs, THE CITY OF NEW YORK, and NEW YORK CITY DEPARTMENT OF PARKS & RECREATION, motion to amend and supplement the third-party complaint is granted and it is further,

ORDERED, that the branch of defendants/third-party plaintiffs, THE CITY OF NEW YORK, and NEW YORK CITY DEPARTMENT OF PARKS & RECREATION, motion to amend the answer to assert additional affirmative defenses is granted and it is further,

ORDERED, that defendants/third-party plaintiffs, THE CITY OF NEW YORK, and NEW YORK CITY DEPARTMENT OF PARKS & RECREATION's, shall electronically serve a copy of this Order with Notice of Entry upon all parties who have appeared in this action within 30 days of entry in NYSCEF; and it is further

ORDERED, that defendants/third-party plaintiffs, THE CITY OF NEW YORK, and NEW YORK CITY DEPARTMENT OF PARKS & RECREATION, shall separately electronically file the amended and supplemental pleadings in NYSCEF within 30 day of entry of this Order and service shall be deemed complete; and it is further

ORDERED, that the parties who have appeared in this action shall serve answers, cross-claims and/or counter claims in response to the amended and supplemental pleadings in accordance with the CPLR from the date of completion of service; and it is further

ORDERED, that upon the electronic filing of the amended and supplemental pleadings, the Clerk of the Court shall amend their records accordingly; and it is further

ORDERED, that defendants/third-party plaintiffs, THE CITY OF NEW YORK, and NEW YORK CITY DEPARTMENT OF PARKS & RECREATION, shall serve the newly added defendants with a copy of this Order with Notice of Entry and the pleadings in accordance with the CPLR; and it is further

ORDERED, that plaintiff's cross-motion to sever pursuant to CPLR 603 and 1010 is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: February 5, 2021

ENTER:

HON. THOMAS P. ALIOTTA, J.S.C.