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| <b>Reinhardt v RCB4 Nominee LLC.</b>   |
| 2022 NY Slip Op 30956(U)   |
| March 16, 2022   |
| Supreme Court, New York County   |
| Docket Number: Index No. 160319/2017   |
| Judge: Alexander Tisch   |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER TISCH PART 18

Justice

-----X

JASON REINHARDT,

Plaintiff,

- v -

RCB4 NOMINEE LLC., TISHMAN CONSTRUCTION, RCB1
NOMINEE LLC, TISHMAN CONSTRUCTION
CORPORATION OF NEW YORK,

Defendant.

-----X

RCB4 NOMINEE LLC., TISHMAN CONSTRUCTION
CORPORATION OF NEW YORK

Plaintiff,

-against-

FRED GELLER ELECTRICAL, INC., EMPIRE TRANSIT MIX,
INC.

Defendant.

-----X

DECISION + ORDER ON
MOTION

Third-Party
Index No.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 92, 93, 94, 95, 96,
97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE

Upon the foregoing documents, plaintiff moves pursuant to CPLR 1003, 305 (a), 3025,
203 (f) for leave to amend the summons and complaint to assert direct claims against third-party
defendant Empire Transit Mix (Empire).

"Motions for leave to amend pleadings should be freely granted, absent prejudice or
surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently
devoid of merit" (Y.A. v Conair Corp., 154 AD3d 611, 612 [1st Dept 2017]). "[I]n considering
the proposed amendment, 'the court should examine, but need not decide, the merits of the

proposed new pleading unless it is patently insufficient on its face” (Pier 59 Studios, L.P. v Chelsea Piers, L.P., 40 AD3d 363, 366 [1st Dept 2007], quoting Hospital for Joint Diseases Orthopaedic Inst. v Katsikis Envtl. Contrs., 173 AD2d 210, 210 [1st Dept 1991]). “Once a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment” (Hospital for Joint Diseases Orthopaedic Inst., 173 AD2d at 210).

The Court agrees with plaintiff that he does not have to show that Empire is united in interest with the original defendants (see Deputron v A & J Tours, Inc., 93 AD3d 629, 630 [2d Dept 2012]).

“[W]here, as here, a proposed amended complaint contains an untimely claim against a defendant who is already a party to the litigation, the relevant considerations are simply (1) whether the original complaint gave the defendant notice of the transactions or occurrences at issue and (2) whether there would be undue prejudice to the defendant if the amendment and relation back are permitted” (O’Halloran v Metro. Transp. Auth., 154 AD3d 83, 87 [1st Dept 2017]).

Here, Empire had actual notice of the transactions and occurrences at issue when it was timely served with the third-party complaint and original complaint (see Duffy v Horton Mem. Hosp., 66 NY2d 473, 478 [1985] [“It is evident that when a third party has been served with the third-party complaint, and all prior pleadings in the action as required by CPLR 1007, the third-party defendant has actual notice of the plaintiff’s potential claim at that time”]).

Further, the Court finds that the proposed amendment is not patently insufficient on its face and there is no prejudice to Empire (see O’Halloran v Metro. Transp. Auth., 154 AD3d 83, 89 [1st Dept 2017] [“Prejudice does not occur simply because a defendant is exposed to greater liability or because a defendant has to expend additional time preparing its case”], quoting

Jacobson v McNeil Consumer & Specialty Pharms., 68 AD3d 652, 654 [1st Dept 2009] [internal quotation marks omitted]).

Accordingly, it is hereby ORDERED that the motion is granted; and it is further

ORDERED that the amended complaint, in the form annexed to the moving papers (NYSCEF Doc No. 103) shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that the caption is amended to reflect the third-party defendant being added to the main action as a direct defendant as follows:

JASON REINHARDT,

Plaintiff,

INDEX No.:

-against-

160319/2017

RCB1 NOMINEE, LLC; TISHMAN CONSTRUCTION CORPORATION OF NEW YORK; PINNACLE CONTRACTING, CONCRETE & MASONRY, CORP.; PINNACLE INDUSTRIES II, LLC; and EMPIRE TRANSIT MIX, INC.,

Defendants.

RCB1 NOMINEE, LLC and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Third-Party Plaintiffs,

THIRD-PARTY

-against-

INDEX No.:<sup>1</sup>

FRED GELLER ELECTRICAL, INC. and EMPIRE TRANSIT MIX, INC.,

Third-Party Defendants.

And it is further


ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon (1) the County Clerk (60 Centre Street, Room 141B) and (2) the Clerk of the General

<sup>1</sup> No third-party index number exists because the document appears to have been returned for correction of the caption on NYSCEF.

Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption and third-party defendant being added as a direct defendant in the main action; and it is further

ORDERED that service of this order upon (1) the Clerk of the Court and (2) 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* (see section J).<sup>2</sup>

This constitutes the decision and order of the Court.

|                       |  |                            |                                     |                       |
|-----------------------|--|----------------------------|-------------------------------------|-----------------------|
| 3/16/2022<br>DATE     | <br>ALEXANDER TISCH, J.S.C. |                            |                                     |                       |
| CHECK ONE:            | <input type="checkbox"/>   | CASE DISPOSED              | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
| APPLICATION:          | <input checked="" type="checkbox"/>  | GRANTED                    | <input type="checkbox"/>            | DENIED                |
| CHECK IF APPROPRIATE: | <input type="checkbox"/>   | SETTLE ORDER               | <input type="checkbox"/>            | OTHER                 |
|                       | <input type="checkbox"/>   | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/>            | REFERENCE             |
|                       |  |                            | <input type="checkbox"/>            | FIDUCIARY APPOINTMENT |

<sup>2</sup> The *Protocol* is accessible at the “E-Filing” page on the court’s website: [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh).