

<b>Steer v City of New York</b>
2022 NY Slip Op 31057(U)
April 1, 2022
Supreme Court, New York County
Docket Number: Index No. 151948/2020
Judge: Leslie Stroth
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LESLIE STROTH**

**PART 52**

*Justice*

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SEAN STEER,

Plaintiff,

- v -

CITY OF NEW YORK, CONSOLIDATED EDISON  
COMPANY OF NEW YORK INC., DONOFRIO GENERAL  
CONTRACTORS CORP., SUB-TECH SERVICES, LLC,

Defendant.

-----X

CONSOLIDATED EDISON COMPANY OF NEW YORK INC.

Plaintiff,

-against-

DONOFRIO GENERAL CONTRACTORS CORP

Defendant.

-----X

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595199/2021

The following e-filed documents, listed by NYSCEF document number (Motion 002) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 116, 117, 120, 125, 126, 127, 128, 129, 133, 134

were read on this motion to/for

AMEND PLEADINGS

This action arises from an alleged bicycle accident on August 15, 2019. Plaintiff alleges that while riding his bicycle southbound at the corner of West End Avenue and 63rd Street in Manhattan, he sustained injuries when the wheel of his bike entered a depression in the roadway and caused him to fall.

Plaintiff now moves to amend his first amended complaint to add causes of action for negligent contracting against Defendants Consolidated Edison Company of New York Inc. (Con Ed) (fifth cause of action) and for negligent subcontracting against Donofrio General Contractors Corp. (Donofrio) (sixth cause of action). Plaintiff also moves to add facts uncovered during

discovery as to these additional causes of action, namely, the existence of prior actions against Donofrio involving roadway accidents and of violations from the City of New York against Donofrio as to hazardous roadway conditions. Oral argument was held on this motion on March 10, 2022, whereupon the motion was deemed submitted.

Plaintiff filed its summons and complaint on February 21, 2020. The parties subsequently stipulated to allow plaintiff to file a first amended complaint, and plaintiff filed same on April 20, 2021. Plaintiff then brought a motion to compel defendants to turn over records regarding incidents that resulted in lawsuits involving defendants' alleged negligent subcontracting. Con Ed and Donofrio cross-moved, *inter alia*, for a protective order against and to quash plaintiff's subpoenas. Justice Lyle E. Frank denied plaintiff's motion and granted that portion of defendants' cross-motion as follows:

As to the substance of the demands, the Court finds that plaintiff has failed to articulate a factual or legal basis for the discovery sought and agrees with the objections made by defendant in its response. Plaintiff has not cited any deposition testimony or any other documents that serve as a foundation to obtain the additional discovery. Plaintiff's arguments are based solely on speculative arguments that the initiation of a lawsuit is somehow notice of negligence or wrongdoing. The Court is not inclined to make that leap. Moreover, the record before this court is silent as to any substantiated violations for the same type of conduct that plaintiff alleges caused the instant accident. While the Court is not in the position to guide plaintiff as to how to litigate this matter, there are other discovery vehicles that may serve more fruitful and less burdensome than an inquiry into ongoing litigation. *Most importantly though, the amended complaint does not allege that Donofrio or any other defendant was negligent in the way it selected and/or hired its subcontractor(s), thus the relevance of the information sought is unclear as it does not relate to any causes of action in the amended complaint.* (NYSCEF doc. 98) (emphasis added).

Plaintiff now moves to amend his first amended complaint to add causes of action for negligent contracting and subcontracting,<sup>1</sup> arguing that defendants would be prejudiced if the court grants this motion and permits the proposed amendment. Plaintiff contends that the proposed amendments do not change plaintiff's original allegations relating to liability but merely clarify his negligence claims by providing additional facts. Defendants Con Ed and

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<sup>1</sup> The Court originally granted plaintiff's motion as unopposed (*see* NYSCEF doc. 116), but subsequently vacated its own order and allowed further briefing (*see* NYSCEF doc. 120).

Donofrio oppose the motion, arguing that that plaintiff is improperly attempting to circumvent Justice Frank's previous Order. Additionally, defendants maintain that where an amendment of a pleading would serve no purpose but to needlessly complicate discovery and trial, as here, the motion to amend should be denied, citing to *Thomas Crimmins Contr. Co., Inc. v City of New York*, 74 NY2d 166 (1989).

Pursuant to CPLR 3025 (b), "[a] party may amend his or her pleading, . . . , at any time by leave of court . . . [and] [l]eave shall be freely given upon such terms as may be just including the granting of costs and continuances." The Court of Appeals recognizes that "[a]s a general rule, 'leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court.'" *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 (2015) (internal citation omitted).

After considering the papers submitted and the arguments of both sides, the Court grants Plaintiff's motion to amend. Although the defendants claim prejudice in that additional discovery may ensue from allowing the amendment, this possibility alone is insufficient to demonstrate actual prejudice and deny plaintiff's motion to amend the pleadings. Moreover, opposing defendants do not establish that the proposed amendment "plainly lacks merit," so as to deny plaintiff's motion for "needless complication" of discovery and trial. *See Thomas Crimmins Contr. Co., Inc. v City of New York*, 74 NY2d 166, 170 (1989). Moreover, defendants' assertion that Justice Frank's decision granting a protective order and quashing non-party subpoenas somehow precludes plaintiff from moving to amend to add the proposed language fails. Given the liberal standard in allowing amending pleadings, the Court, in its discretion, does not find

that the proposed amendment is so deficient or results in such prejudice so as to deny plaintiff's motion.

To be clear, Justice Frank's Decision and Order remains in full force and effect with respect to the discovery sought by plaintiff. The additional information in the proposed second amended complaint does not, in and of itself, give plaintiff a license to now seek discovery based solely on speculative arguments that are not supported by deposition testimony or any other documents that serve as a foundation to obtain the additional discovery.

The Court has considered the parties remaining contentions and finds them to be unavailing.

Accordingly, it is

ORDERED that the plaintiff's motion for leave to amend the first amended complaint herein is granted, and the second 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 defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service.

The foregoing constitutes the Decision and Order of the Court.

4/1/2022

DATE

  
LESLIE STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE