SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

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THE CITY OF NEW YORK,

Plaintiff,

- v -

524-530 FAILE STREET, LLC, NEX-GEN READY MIX CORP.

Defendants.

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INDEX NO. 452083/2019

MOTION DATE 01/26/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The Complaint in this action was filed on November 7, 2019, by plaintiff The City of New York (the "City") against defendants 524-530 Faile Street, LLC ("Faile LLC") and Nex-Gen Ready Mix Corp. ("Nex-Gen") (collectively, "defendants").

Now pending before the court is a motion wherein the City seeks an order, pursuant to CPLR Rule 3025(b), granting the City leave to amend its Complaint in this action against defendants and deeming the amended Complaint served and filed. Upon the foregoing documents, this motion is GRANTED.

Arguments Made by the Parties

In the Complaint, the City alleged that defendants damaged a 15-foot public sewer main running below Faile Street, between Randall Avenue and Oakpoint Avenue in the Bronx (the "Sewer Main"). More specifically, the City alleged that NexGen operates a ready-mix cement manufacture and supply business at 530 Faile Street, a property owned by Faile LLC. The City further alleged that the Sewer Main was damaged on or before November 12, 2016, when NexGen unlawfully caused or allowed cement to flow and/or be discharged into the Sewer Main, and that the damage caused by defendants led to sewage backups and necessitated the inspection, flushing, and high-pressure cleaning of the blocked Sewer Main, as well as the eventual replacement of the Sewer Main and one of the affected manholes. The Complaint alleges that the process took approximately two months and hundreds of thousands of dollars to complete, and the City seeks indemnity and restitution to recover the costs that it incurred for the repair of the blocked Sewer Main.

According to the City on January 20, 2020, after defendants had filed their Answer, the City received information indicating that defendants were again causing and/or allowing cement to be discharged into the sewers. The City and its contractors subsequently inspected the Sewer Main and found a new clog allegedly caused by defendants. The City states that the Emergency Response Unit of the City's Department of Environmental Protection ("DEP") issued a Commissioner's Order under 15 RCNY §19-03(a) and Admin Code § 24-524(a), noting the unlawful discharge and directing defendants to cease their unlawful activities. Reconstruction of the obstructed Sewer Main began on March 5, 2020, wherein the City's contractor replaced and reinstalled 339 linear feet of obstructed sewer pipe and one manhole that was irreparably damaged by cement. The cost to the City for this repair, including any emergency flushing, pumping and/or

bypassing of the blocked Sewer Main, was approximately $340,714.24. Now, the City seeks to modify their Complaint to the extent of adding allegations of the second sewer clog.

The City argues, first, that in May 2021, the City notified defendants' counsel of the City's intent to file an amended Complaint to reflect the second sewer clog. The City submitted a copy of an email (NYSCEF Document #19) sent from the City's counsel to defendants' counsel on May 11, 2021, which states, *inter alia*, "as discussed, if we are unable to reach agreement I will likely move to amend the Complaint to include the 2020 spill, the DEP internal costs and additional claims for civil penalties."

The City argues, second, that to date, there has been no disclosure, preliminary conference, or request for judicial intervention in this action, and that neither party has served discovery demands. Therefore, the City argues, there is no prejudice to defendants if the City were to amend its Complaint. Finally, the City also argues that addressing both sewer clogs in a single action will allow for more efficient resolution of the City's claims, and will obviate the need for the City to file an entirely separate lawsuit.

In opposition, defendants argue that this action was commenced nearly three years ago; that the "lengthy delays" caused by the City's "failure to diligently prosecute this action" have caused the defendants substantial prejudice; and that this motion to amend the Complaint is causing prejudice.

Specifically, defendants argue:

> 5. […] Upon learning of the alleged "clog", the Plaintiff did not notify the Defendants that it intended to conduct any investigation of this alleged "clog", the cause thereof and the extent of the damages caused thereby. Further, the Plaintiff never provided the Defendants an opportunity to participate in an investigation or to bring their own experts to conduct an independent investigation.
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> 6. Yet, as alleged in the proposed amended complaint, the Plaintiff unilaterally commenced "reconstruction" of the sewer main at issue on March 5, 2020, thereby depriving the Defendants the opportunity to independently investigate the cause and extent of the alleged

> "clog". Indeed, by unilaterally "reconstructing" the sewer main at issue, the Plaintiff removed essential evidence and deprived the Defendants of the opportunity to inspect same.
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> 7. According to the proposed amended complaint, and as alleged in Plaintiff's motion papers, Plaintiff claims to have made video recordings and to have replaced sewer pipes beneath the street, but Plaintiff has not provided Defendants with any evidence of the work performed. Clearly, whatever material that caused the alleged "clog" complained of should have been made available to the Defendants for testing and inspection in order to determine if such material did in fact emanate from the Defendants' property. This is particularly important due to the fact that other industrial companies operate in the subject area, which could have caused such a "clog".
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> 8. Without such a contemporaneous independent investigation, Defendants are now unable to conduct such a review more than two years after the fact, and the Plaintiff is belatedly seeking to add this new cause of action after causing Defendants to suffer this prejudice […]
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> […]
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> 12. The fact remains that, as a result of the Plaintiff's two year failure to diligently prosecute this action, the Defendants cannot now conduct their own discovery of the alleged "clog" and have been precluded from being able to verify on their own the cause of the alleged "clog", the extent of the clog and damage allegedly caused thereby, and the scope of work required to correct it. It is impossible to do so at this point as a direct result of the Plaintiff's unilateral actions.

Analysis and Conclusions of Law

Pursuant to Civil Practice Law and Rules (CPLR) §3025 [b], "[a] party may amend his or her pleading . . . at any time by leave of court . . ., " such "[l]eave shall be freely given upon such terms as may be just including the granting of costs and continuances." Further, "it is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay," unless "the proposed pleading fails to state a cause of action … or is palpably insufficient as a matter of law." Davis & Davis v. Morson, 286 AD2d 584 (1st Dept 2001).

Here, it is undisputed that the statute of limitations for the alleged second sewer clog in January 2020 has not yet expired and that the City can file an entirely new lawsuit concerning the second clog. In the exercise of this court's discretion and in the interest of judicial economy, this court grants leave to amend. In cases such as this, where the alleged causes of action are related,

the First Department has also made clear that related actions should be tried together when possible, and the presumption is one against severance, unless there is some clear utility to doing so. *See* Sichel v. Cmty. Synagogue, 256 A.D.2d 276 (Sup. Ct. App. Div. 1st Dept. 1998) ("Where two actions arise from a common nucleus of facts, a trial court should only sever the actions to prevent prejudice or substantial delay to one of the parties . . .]. To avoid the waste of judicial resources and the risk of inconsistent verdicts, it is preferable for related actions to be tried together such as in a tort case where the issue is the respective liability of the defendant and the third-party defendant for the plaintiff's injury [. . .]. That is exactly the situation here. Significantly, plaintiffs do not oppose consolidation and have not asserted any prejudice resulting from the third-party action."); *and* Range v. Trustees of Columbia Univ. in City of New York, 150 A.D.3d 515 (Sup. Ct. App. Div. 1st Dept. 2017) ("The note of issue was filed April 23, 2015. The second third-party complaint was filed September 22, 2015, after it 'became evident' to defendants' counsel, on September 9, 2015, when they received expert disclosure from plaintiffs' counsel, that they had a cause of action against City Safety. Even if there was a delay, it did not rise to the level of the knowing and deliberate delay by the defendants in *Skolnick v. Max Connor, LLC, 89 A.D.3d 443, 932 N.Y.S.2d 453 (1st Dept. 2011)*, on which City Safety relies. Moreover, the issues of law and fact involved in the main and second third-party actions are intertwined, since the inspection of the job site by second third-party defendants was integral to plaintiffs' liability claims. It is also likely that almost all the same witnesses will be required.") Here, there is no dispute that the first alleged sewer clog and second alleged sewer clog stem from a common fact pattern, and judicial economy would be served if the cases were tried together.

With regard to defendants' claims of prejudice, it is undisputed that there has been no disclosure or preliminary conference. In fact, the record shows that defendants have not made any discovery demands whatsoever. In contrast, the City served discovery demands on February 2, 2022 (NYSCEF Document #14).

Finally, defendants seem to argue that the City cannot prove its case because dispositive evidence was destroyed during the reconstruction of the sewer line. However, this is unrelated to the issue at hand, namely, whether there is reason to decline the deny the City's request to amend their Complaint. Given that there is no prejudice or surprise to defendants, the court hereby GRANTS this motion.

Accordingly, it is hereby:

ORDERED that this motion is GRANTED; and it is further

ORDERED that the City is granted leave to amend its Complaint in this action against defendants, and said Amended Complaint is deemed served and filed; and it is further

ORDERED that plaintiff City shall communicate with SFC-CITY-DCM@nycourts.gov to schedule a Preliminary Conference forthwith.

4/11/2022
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE