

**Long Is. Pipe Supply Inc. v RCI Plumbing Corp.**

2022 NY Slip Op 32037(U)

July 1, 2022

Supreme Court, New York County

Docket Number: Index No. 151717/2020

Judge: Lisa S. Headley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
 NEW YORK COUNTY**

**PRESENT:** HON. LISA HEADLEY **PART** **28M**

*Justice*

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LONG ISLAND PIPE SUPPLY INC.,	<b>INDEX NO.</b>	<u>151717/2020</u>
Plaintiff,	<b>MOTION DATE</b>	<u>04/05/2022, 04/05/2022</u>
- v -	<b>MOTION SEQ. NO.</b>	<u>001 002</u>

RCI PLUMBING CORP., PARK ROW 23 OWNERS  
 LLC, SURETEC INSURANCE COMPANY, JOHN DOES

Defendant.

**DECISION + ORDER ON  
 MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 41  
 were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 39, 40, 42  
 were read on this motion to/for MODIFY.

Upon the foregoing documents, it is hereby ORDERED that the within motion sequences 001 and 002 will be decided together, and in accordance with the decision herein.

Plaintiff Long Island Pipe Supply Inc. seeks an order to amend its Amended Complaint in motion sequence 001, and to amend its mechanic’s lien in motion sequence 002, pursuant to *CPLR §2001 and 3025*. In opposition, defendant RCI Plumbing Corporation filed a cross-motion seeking an order to deny plaintiff’s motion to amend its Complaint and lien and to grant summary judgment to defendant pursuant to *CPLR §3212*. Plaintiff filed a reply.

On June 28, 2021, plaintiff in motion sequence 001 filed a motion to amend its Complaint to change the name of plaintiff from “Long Island Pipe Supply Inc.” to “Core and Main LP, d/b/a Long Island Pipe supply Inc.”; change the name of defendant from “RCI Plumbing Corp.” to “RCI PLBG Inc.”; add a Sixth Cause of Action to assert claims for trust fund accounting and diversion of trust funds pursuant to the New York Lien Law; remove Park Row 23 Owners LLC as a defendant; and make non-substantive revisions. On July 2, 2021, plaintiff in motion sequence 002 filed a motion to amend its mechanic’s lien by changing the description of the party to whom it furnished goods and materials from “RCI Plumbing Corp.” to “RCI PLBG Inc.,” the correct name of the party.

Plaintiff states that this action is *one of three* related actions pending in this Court concerning goods and materials plaintiff provided to defendant. Plaintiff argues its motion to amend its Complaint, in a related action presided over by Justice Shawn Kelly, *Core & Main LP d/b/a Long Island Pipe Supply, Inc. v. RCI PLBG, INC., et al.*, Index No. 151716/2020 (hereinafter, “*Core & Main LP*”), is nearly identical to plaintiff’s motion in this action, except for the removal of Park Row 23 Owners LLC requested by plaintiff in this action. Similarly, in

the *Core & Main LP* action, defendant filed a cross-motion to deny plaintiff's motion to amend its Complaint and lien, and for the Court to grant summary judgment for defendant. On January 11, 2022, Justice Kelly granted plaintiff's motions and denied defendant's cross-motion in the *Core & Main LP* action, ordering that defendant waived the defense of lack of personal jurisdiction by not filing a motion to dismiss within sixty days of serving its answer; plaintiff's proposed amendments to its Amended Complaint were not "devoid of merit"; and defendant had not provided any argument against plaintiff's motion to amend its mechanic's lien. Plaintiff asks this Court to take judicial notice of the Court's decision in the *Core & Main LP* case, and grant plaintiff's motions and deny defendant's cross-motion in this action. Additionally, plaintiff states the Court should reject defendant's claim that plaintiff lacks personal jurisdiction because defendant failed to file a motion to dismiss within sixty days of serving its answer.

On July 15, 2021, defendant filed a cross-motion requesting this Court to deny plaintiff's motion to amend its complaint and lien; and grant summary judgment to defendant. Defendant argues that plaintiff's request to amend its Complaint should be denied because plaintiff is attempting to add a newly named defendant, RCI PLBG Inc. Defendant argues that RCI Plumbing Corp. is an entirely distinct entity from RCI PLBG Inc., and RCI PLBG Inc. was never properly served. Defendant asserts that "an amendment of a summons must be denied where a plaintiff seeks to substitute a defendant who has not properly been served" (*Smith v Garo Enterprises, Inc.*, 60 A.D. 3d 751, 752 [2d Dept 2009]). Defendant contends that because plaintiff has failed to properly serve defendant, plaintiff's motion to amend its Complaint and mechanic's lien must be denied. Additionally, defendant states the action should be dismissed since it was admitted by plaintiff that no materials were furnished to RCI Plumbing Corp, but were furnished to RCI PLBG Inc. Lastly, defendant stated in his answer filed on August 26, 2020, that plaintiff lacks personal jurisdiction in this case, thus defendant argues the Court should grant summary judgment to defendant.

Plaintiff replies by asserting that "*CPLR 3211(e)*'s requirement that a party file a motion for judgment within 60 days of filing a responsive pleading asserting a defense of lack of service and/or personal jurisdiction applies to motions for summary judgment pursuant to *CPLR 3212*, such as [defendant's] Cross-Motion." Thus, plaintiff states the Court should deny defendant's cross-motion to dismiss plaintiff's Complaint.

It is well settled that "motions for leave to amend a pleading should be granted unless the proposed amendment is 'palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise'" (*Corwise v Lefrak Org.*, 93 A.D. 3d 754, 755 [2d Dep't 2012]). "Prejudice, of course, is not found in the mere exposure of the defendant to greater liability. Instead, there must be 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" (*Loomis v Civetta Corinno Const. Corp.*, 54 N.Y. 2d 18, 23 [1981]). According to *CPLR §3211 (e)*, "an objection . . . is waived if, having raised such an objection in the responsive pleading, the objecting party does not move for judgment on that ground within sixty days after serving the responsive pleading, unless the court extends the time upon the ground of undue hardship."

As an initial matter, this Court finds plaintiff's motion to amend its Complaint (motion sequence 001) should be granted, as the proposed amendment was neither palpably insufficient or devoid of merit. Plaintiff's proposed amendments were mainly technical, and defendant would face no prejudice or surprise by the delay in seeking the amendment. Additionally, Defendant has not been prevented from taking any measure to support his position, or hindered from

preparing his case. Likewise, defendant would not be surprised by the change of defendant's name in the proposed amendment, as defendant's answer to plaintiff's Complaint names itself as "RCI PLBG Inc. s/h/a Defendant, RCI Plumbing Corp." Additionally, in the *Core & Main LP* action, Justice Shawn Kelly allowed plaintiff to amend the name of defendant from "RCI Plumbing Corp." to "RCI PLBG." Thus, defendant was put on notice of the proposed amendment in the *Core & Main LP* action, and suffered no surprise when plaintiff proposed the identical amendment in this action. As reflected in the *Core & Main LP* action and the case at bar, defendant's name was incorrect in the complaint; however, this Court cannot concur with defendant that its incorrect name in the complaint warrants the conclusion of improper service or the idea that there was a "substitution of a defendant who has not been properly served."

Likewise, plaintiff's motion to amend its mechanic's lien (motion sequence 002) should be granted, as the proposed amendment was neither palpably insufficient nor devoid of merit. Plaintiff asks this Court to change the name of defendant from RCI Plumbing Corp. to RCI PLBG Inc. in the mechanic's lien in order to correctly name the proper defendant. Plaintiff understands RCI PLBG Inc. to be the correct name of the party, because as filed in NYSCEF (Document #12), defendant's answer names itself as "RCI PLBG Inc. s/h/a Defendant, RCI Plumbing Corp." This Court finds defendant will not be prejudiced by the proposed amendment to the mechanic's lien, as they were put on notice that plaintiff had misidentified them in the complaint, and defendant acknowledged that fact themselves in their answer to plaintiff's complaint. Additionally, defendant has set forth no evidence to persuade this Court that plaintiff's motion to amend its mechanic's lien should be denied as per mechanic's lien law. This Court grants plaintiff's motion to amend its mechanic's lien, as changing the name of defendant is meritorious, not fatal to the lien, and would not prejudice or surprise defendant.

Additionally, defendant's assertion that it should be granted summary judgment because plaintiff lacks personal jurisdiction is erroneous. According to *CPLR 3211 (e)*, defendant has waived its right to assert the defense of lack of personal jurisdiction, because defendant failed to file a Motion to Dismiss within sixty days of serving its answer. Defendant served its answer on August 26, 2020, but did not file a cross-motion until July 15, 2021, thereby surpassing the sixty-day window and waiving its right to assert the defense of lack of personal jurisdiction. Defendant's cross-motion to dismiss plaintiff's Complaint and grant summary judgment to defendant must be denied.

Accordingly, it is

**ORDERED** that plaintiff's motion to amend its Complaint in motion sequence 001 is granted in its entirety as sought in plaintiff's motion, on the basis that this Court finds plaintiff's proposed amendment is neither palpably insufficient or devoid of merit; and it is further

**ORDERED** that plaintiff's motion to amend its mechanic's lien in motion sequence 002 is granted on the basis that this Court finds plaintiff's proposed amendment is neither palpably insufficient or devoid of merit; and it is further

**ORDERED** that defendant's cross-motion to deny plaintiff's motion to amend its Complaint and lien is denied, and defendant's cross-motion to dismiss plaintiff's Complaint for lack of personal jurisdiction and to grant summary judgment to defendant is denied; and it is further

**ORDERED** that any requested relief sought not expressly addressed herein has nonetheless been considered and is denied; and it is further

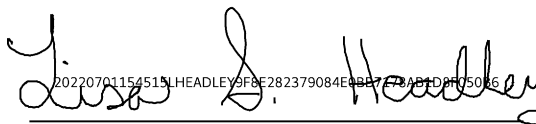
**ORDERED** that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendants with notice of entry; and it is further

**ORDERED** that defendant shall serve an answer to the amended complaint or otherwise respond within 20 days from the date of service.

This constitutes the Decision/Order of the Court.

7/1/2022

DATE



LISA HEADLEY, 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