

Torba v Green 485 TIC LLC

2022 NY Slip Op 33931(U)

November 3, 2022

Supreme Court, Kings County

Docket Number: Index No. 516622/2019

Judge: Carl J. Landicino

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

KINGS COUNTY CLERK
FILED
2022 NOV 18 AM 9:37

0

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 3rd day of November, 2022.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X
KRZYSZTOF TORBA,

Plaintiff,

- against -

Index No.: 516622/2019

DECISION & ORDER

GREEN 485 TIC LLC, GREEN 485 OWNER LLC,
485 EAT OWNER LLC, CONCEPT CONSTRUCTION
SERVICES INC., JT MAGEN & COMPANY INC. and
LIBERTY CONTRACTING CORP.

MOTION SEQUENCE
11

Defendants.

-----X
GREEN 485 TIC LLC, GREEN 485 OWNER LLC,
485 EAT OWNER LLC,

Third Party Plaintiffs,

- against -

W5 GROUP LLC D/B/A/ WALDORF DEMOLITION,

Third Party Defendants.

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed	253-270,
Opposing Affidavits (Affirmations).....	273-276,
Reply Affidavits (Affirmations)	277-279

After a review of the papers and oral argument on the motion the Court finds as follows:

The Plaintiff, Krzysztof Torba (hereinafter the "Plaintiff") hereby moves (motions sequence #11) for an order pursuant to CPLR §3025(b), granting the Plaintiff leave to serve and

file an Amended Summons and Complaint to add current Third-Party Defendant W5 Group, LLC d/b/a Waldorf Demolition (hereinafter “Waldorf”) as a direct defendant.

Waldorf opposes the motion. Waldorf argues that the motion is time barred under the applicable statute of limitations and otherwise devoid of merit. Waldorf argues that it would be prejudiced if named as a direct Defendant given the nature of the claims at issue.

As an initial matter, the Court finds that the Plaintiff’s application is not otherwise barred by the statute of limitations. The instant proceeding alleges that the Plaintiff suffered personal injuries as a result of an accident that occurred on January 18, 2019. The instant application was made on March 17, 2022 and the statute of limitation is tolled where a motion for leave to file an amended complaint is made prior to the expiration of the statute of limitation. *See Perez v. Paramount Commc'ns, Inc.*, 92 N.Y.2d 749, 756, 709 N.E.2d 83, 87 [1999]; see also *Schlapa v. Consol. Edison Co. of New York, Inc.*, 174 A.D.3d 934, 936, 106 N.Y.S.3d 115, 116 [2d Dept 2019]. What is more, the purported claims as against Waldorf are timely given the toll enacted pursuant to Executive Order 202.8.

Executive Order 202.8 and the subsequent executive orders extending it suspended the running of the statute of limitations from March 20, 2020 through November 3, 2020, a period of 228 days. In relation to these specific executive orders, the Supreme Court, Appellate Division, Second Department, has held that:

Governor Cuomo's March 20, 2020 executive order, Executive Order (A.Cuomo) No. 202.8 (9 NYCRR 8.202.8), expressly and plainly provided that the subject time limits were “hereby tolled,” and two of the subsequent executive orders referred to the temporary alternation of the subject time limits as a “toll”.

Brash v. Richards, 195 AD3d 582, 149 N.Y.S.3d 560, 563 [2d Dept 2021].

Consequently, when the toll expired on November 3, 2020, the Plaintiff had an additional 228 days to file his complaint. See *Amitrano v. Lorich*, No. 805341/2019, 2021 WL 3619760 [New York County Sup. Ct., 2021]; *Kocak v. Sabato*, No. EFCA2019002708, 2021 WL 2639458 [Broome County Sup. Ct., 2021]. The Court has determined that this suspension constituted a toll. “A toll suspends the running of the applicable period of limitations for a finite time period, ‘[t]he period of the toll is excluded from the calculation of the [relevant time period].’” *Brash v. Richards*, 195 A.D.3d 582, 149 N.Y.S.3d 560 [2d Dept 2021], quoting *Chavez v. Occidental Chem. Corp.*, 35 N.Y.3d 492, 505, 132 N.Y.S.3d 224 [2020]. “Unlike a toll, a suspension does not exclude its effective duration from the calculation of the relevant time period. Rather, it simply delays expiration of the time period until the end date of the suspension.” *Brash v. Richards*, 195 A.D.3d 582, 149 N.Y.S.3d 560 [2d Dept 2021]; quoting *Foy v. State of New York*, 71 Misc. 3d 605, 144 N.Y.S.3d 285 [2021]. Accordingly, the additional claims against Waldorf are timely.

Further, the Court finds that the application made by the Plaintiff to add Waldorf satisfies the liberal standard set forth by CPLR 3025. In general, “[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit.” *Degregorio v. Am. Mfrs. Mut. Ins. Co.*, 90 A.D.3d 694, 695-96, 934 N.Y.S.2d 457, 460 [2nd Dept, 2011], quoting *Sinistaj v. Maier*, 82 A.D.3d 868, 869, 918 N.Y.S.2d 196, 198 [2nd Dept, 2011]. “Additionally, ‘[t]he legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt.’” *Lucido v. Mancuso*, 49 A.D.3d 220, 227, 851 N.Y.S.2d 238, 243 [2nd Dept, 2008], quoting *Sample v. Levada*, 8 A.D.3d 465, 779 N.Y.S.2d 96 [2nd Dept, 2004].

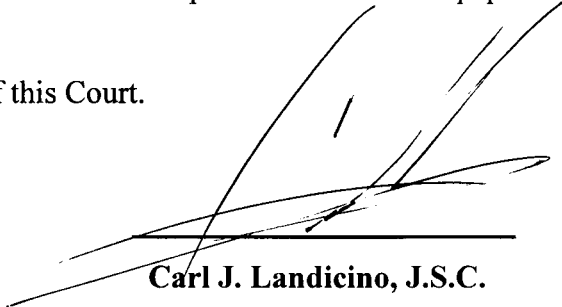
This amendment is well within a reasonable time. What is more, there is no prejudice to Waldorf, and “[p]rejudice to the adverse party is the main barrier which prevents granting a motion to amend an answer.” *St. Paul Fire & Marine Ins. Co. v. Town of Hempstead*, 291 A.D.2d 488, 489, 738 N.Y.S.2d 226 [2d Dept 2002], quoting *Bernstein v. Spatola*, 122 AD2d 97, 99, 504 N.Y.S.2d 686 [2d Dept 1986]. As a result, the Court grants the Plaintiff’s application for leave to amend its answer.

Based upon the foregoing, it is hereby ORDERED as follows:

The Plaintiff’s motion (motion sequence #11) to amend the Complaint to add Waldorf is granted. The Plaintiff shall have the period of sixty days after the date of entry of this Decision and Order to file and serve the Amended Complaint included as part of the movant’s papers.

This constitutes the Decision and Order of this Court.

ENTER:



Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
FILED
2022 NOV 18 AM 9:37