

**Pavarini McGovern, LLC v HFZ KIK 30th St.
Owner, LLC**

2023 NY Slip Op 32047(U)

June 20, 2023

Supreme Court, New York County

Docket Number: Index No. 160556/2020

Judge: Lisa S. Headley

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.

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

PRESENT: HON. LISA S. HEADLEY PART 28M

Justice

-----X

PAVARINI MCGOVERN, LLC,

Plaintiff,

- v -

HFZ KIK 30TH STREET OWNER, LLC, HFZ KIK 30TH STREET, LLC, OTERA CAPITAL INVESTMENTS IX, INC., EMPIRE STATE LAYOUT INC., BSI SERVICES AND SOLUTIONS (NYC) INC., ZIEL FELDMAN, NIR MEIR, JOHN SHANNON, ANTHONY MORRONE, JOHN DOE, RICHARD ROE, XYZ CORP. 1 THROUGH XYZ CORP. 10, BETONS PREFABRIQUES DU LAC INC., 9229-0188 QUEBEC INC., ACHESON DOYLE PARTNERS, ARCHITECTS, P.C., B.I.G. ARCHITECTURE D.P.C., CODE CONSULTANTS PROFESSIONAL ENGINEERS, P.C., DESIMONE CONSULTING ENGINEERING, D.P.C., FABBRICA LLC, GILLMAN CONSULTING INC., KRYPTON ENGINEERING, PLLC, LANGAN ENGINEERING, ENVIRONMENTAL, SURVEYING, LANDSCAPE ARCHITECTURE AND GEOLOGY, D.P.C., LINDEGRIFFITH CONSTRUCTION CO., MG ENGINEERING D.P.C., MGE UNIFIED TECHNOLOGIES CORP., TILLOTSON DESIGN ASSOCIATES, INC., ENVIRONMENTAL WASTE MINIMIZATION, INC., ROSCHMANN STEEL & GLASS CONSTRUCTIONS INC., HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS, P.C., DELTA TESTING, INC., SALTUS LLC, TOP HAT EXTERM1NATING CORP., PSI AGENCY INC., VBGO COLLEGIATE TOWER LLC,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 394, 395, 396, 397, 398, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437

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

Defendant HFZ KIK 30th Street Owner, LLC (“Defendant/KIK Owner”) filed this motion pursuant to *CPLR § 3025(b)* for an Order granting KIK Owner leave to amend its Amended Answer to Plaintiff’s Amended Complaint and Answers to various crossclaims filed by Defendants. Plaintiff Pavarini and Defendants Delta Testing, Inc., Linde-Griffith Construction Co., MGE Unified Technologies, MG Engineering D.P.C., and Langan Engineering filed

DECISION + ORDER ON MOTION

opposition. Defendants Saltus LLC and BSI filed cross claims. The movant-defendant KIK Owner filed a reply.

The present action concerns the construction and development of an office tower located at 11 West 29th Street, 9 West 29th Street and 3 West 29th Street, New York, New York (the “Project”). Defendant KIK Owner engaged Plaintiff Pavarini to act as construction manager for the Project. The Plaintiff and Defendants provided certain work, labor, services, and materials (collectively, the “Work”) for the Project, and each alleges that defendant KIK Owner, without justification, failed to pay for the Work. As such, Plaintiff and Defendants filed mechanic’s liens against the Project (collectively, the “Liens”).

Defendant HFZ KIK 30th Street Owner, LLC Affirmation in Support

Defendant KIK Owner submits this Memorandum of Law in support of its Motion for Leave to Amend its Amended Answer to Plaintiff’s Amended Complaint and Answers to various crossclaims filed by the following defendants: (i) Betons Prefabriques Du Lac Inc.; (ii) BSI Services and Solutions (NYC) Inc.; (iii) Delta Testing, Inc. d/b/a Delta Testing Labs; (iv) Fabbrica LLC; (v) Langan Engineering, Environmental, Surveying, Landscape Architecture and Geology, D.P.C.; (vi) Linde-Griffith Construction Co.; (vii) MG Engineering D.P.C. and MGE Unified Technologies Corp.; (viii) Saltus LLC; and (ix) Tillotson Design Associates, Inc. (collectively, “Defendants”). Defendant KIK Owner argues, *inter alia*, pursuant to *CPLR §3025(b)*, that the instant motion to amend should be granted since it was made timely, and because neither Plaintiff nor Defendants can establish that any party would be prejudiced by such amendment at this stage of the action.

Defendant KIK Owner asserts the parties are still engaged in discovery and the proposed Amended Answers by Defendant KIK Owner raises triable issues concerning the validity of the liens and whether such liens reflect the trust costs owed to plaintiff and defendants. Thus, defendant KIK Owner requests permission to amend its Answers to add affirmative claims against Plaintiff and Defendants for willful exaggeration of liens pursuant to *New York Lien §§ 39 and 39-a*.

Defendant Delta Testing, Inc.’s Affirmation in Opposition

In opposition to the motion, Defendant Delta Testing, Inc. (“Defendant Delta”) argues the proposed Amended Answer is supported by the affirmation of Mr. Grippo, an attorney with no factual knowledge of the events. Defendant Delta further asserts the motion is not supported by an individual with first-hand knowledge of the Project or any other factual evidence. Defendant Delta further asserts if movant defendant KIK Owner’s instant application was granted, defendant Delta would suffer significant prejudice the facts and allegations set forth in the proposed Amended Answer’s Crossclaim are demonstrably false and without merit. Defendant Delta also argues that defendant Delta has no record of ever submitting lien waivers on the project, and the movant-defendant’s allegations cannot be supported by evidence.

Furthermore, defendant Delta submits the affidavit of Brandon Price (“Mr. Price”), the president of Delta Testing, Inc. (“Defendant Delta”) who states that on or about January 2020, the movant defendant KIK Owner executed an agreement with defendant Delta to commence certain

testing and inspections on the Project. Mr. Price attests that Delta conducted on the Project no less than the following: 22 concrete inspections; 138 grout inspections and tests; 7 mechanical demolition and structural stability inspections; and a stud welding inspection. Mr. Price also states that defendant Delta diligently and timely submitted invoices for amounts due and owing totaling \$119,784.40, to defendant Delta. Therefore, Delta submits that the movant's motion to amend should be denied.

Plaintiff Pavarini's Affirmation in Opposition

Further, the plaintiff, in opposition to the motion, submits the affidavit of Scott Slater ("Mr. Slater"), the Project Executive for Pavarini McGovern, LLC. Mr. Slater attests that defendant VBGO and the movant-defendant KIK Owner entered into a mezzanine loan agreement whereby defendant VBGO agreed to loan up to \$95 million to the movant for the construction of the Project. Mr. Slater attests that one of the required supporting documents to be submitted with each payment requisition was a partial release and waiver of lien form by which plaintiff Pavarini, in exchange for contemporaneous payment, would waive its right to assert a mechanic's lien for amounts actually paid. Mr. Slater states the billing statements for Phase 1 Contract totals \$27,121,099.53 (*see, Exhibit E, NYSCEF Doc. No. 405*); the billing statements for the Phase 2/3 Contracts totals \$14,700,367.94 (*see, Exhibit F, NYSCEF Doc. No. 406*); and the billing statements for Phase 4 Contract totals \$8,743,866.15 (*see, Exhibit G, NYSCEF Doc. No. 407*).

Plaintiff Pavarini asserts movant defendant KIK Owner's proposed amended answer includes allegations that Pavarini submitted lien waivers and releases thereby waiving Pavarini's right to file the Phase 1 Lien with an amount of \$7,028,335.56 due and owing to Pavarini; Phase 2 and 3 Lien with an amount of \$7,143,757.87 due and owing to Pavarini; and Phase 4 Lien with an amount of \$6,268,160.91 still due and owing to Pavarini. Plaintiff Pavarini further argues the reference to the lien waivers must be barred from any amended pleading since this action is limited to the issue of the enforceability of the required release and waiver of lien documents, where the recited payment was not made. Therefore, Pavarini argues that the movant's motion to amend should be denied.

Cross-Claim Defendant Saltus LLC's Affirmation in Opposition

Cross-claim defendant Saltus LLC ("Defendant Saltus") filed opposition to the motion for leave to amend defendant KIK Owner's Answer to defendant Saltus' Crossclaims, and to add a First Crossclaim against Saltus for a Declaration of Lien Invalidity and Willful Exaggeration of Lien. Defendant Saltus, adopts and reasserts the legal arguments asserted by counsel for Defendant Delta Testing, Inc. ("defendant Delta") (*see, NYSCEF Doc. No. 398*). In support, Saltus submits the affidavit of Victor P. Buono, Managing Partner of Saltus LLC, which states movant-defendant KIK Owner's motion is entirely false since defendant Saltus provided true and accurate copies of their monthly invoices totaling \$57,600.00, which represent the exact amount of defendant Saltus' Notice of Mechanic's Lien served on movant-defendant KIK Owner. Defendant Saltus submits that it is engaged in residential and commercial projects of all sizes to provide wireless vibration monitoring, optical structural surveying, and other services ensuring that owners, developers, and contractors comply with all applicable codes, laws, and NYC Department of Buildings' regulation.

Defendant Saltus contends it began providing 24-hour vibration monitoring services on the subject construction project in or around June 2018, pursuant to a subcontract with BSI Services & Solutions (“Defendant BSI”).

Additionally, defendant Saltus asserts that its initial work included the installation of two portable field seismographs on or around June 2018, an additional two seismographs on or around October 2018, and another two seismographs on or around August 2019, for a total of six leased units. Furthermore, defendant Saltus asserts it signed a subcontract with PSI Agency Inc. (“PSI”), which provided six seismographs for a monthly rental fee of \$4,800.00. Defendant Saltus contends, based upon their submitted exhibits, there is no willful exaggeration or a single change order inflating defendant Saltus’ Mechanic’s Lien. Therefore, defendant Saltus argues that movant defendant KIK Owner’s motion to amend should be denied.

Cross-Claim Defendant BSI’s Affirmation in Opposition

Defendant BSI Services and Solution (NYC) Inc., (“Defendant BSI”) filed opposition to the motion by KIK Owner seeking leave to amend its Answer to the amended Crossclaims of defendant BS, and to add a Crossclaims against Defendant BSI seeking a Declaration of Lien Invalidity and Willful Exaggeration of Lien. Defendant BSI submits the affidavit of Charles J. Cortalano (“Mr. Cortalano”), the Regional Practice Lead for the East Coast of defendant BSI. Mr. Cortalano attests that BSI supplied vibration monitoring equipment, and provided vibration monitoring services, structural monitoring services, and asbestos consulting services in connection with construction at the Project. Additionally, Mr. Cortalano attests that the movant defendant KIK Owner acknowledged receipt of invoices in the amount of \$152,105.00, representing all amounts due to defendant BSI for services performed as of January 2020. (*See, Exhibit A, NYSCEF Doc. No. 416*).

Furthermore, defendant BSI asserts movant-defendant KIK Owner’s motion papers provide no evidence to support its proposed crossclaim against defendant BSI since the motion is based upon the affirmation of Jonathan A. Gruppo, Esq., who has no personal knowledge of the allegations set forth in the proposed amended crossclaim against defendant BSI, and movant defendant KIK Owner’s amended crossclaim against defendant BSI is not verified. Moreover, defendant BSI claims that the \$181,475.00 due and owing to BSI represents the \$152,105.00 acknowledged in the Letter of Termination, and for additional Services provided after January 2020 through the termination date of March 1, 2020. Lastly, defendant BSI argues movant defendant KIK Owner has not offered any evidence that any such lien waivers or releases were submitted by BSI, therefore, movant’s motion should be denied.

Defendant Linde-Griffith Construction Co. Affirmation in Opposition (NYSCEF #418)

In opposition to Defendant KIK Owner’s motion for leave to amend its Answer to Plaintiff’s Amended Complaint and Answers to various Defendants’ Crossclaims, including those of defendant Linde-Griffith (“Defendant Linde”), Defendant Linde contends that its opposition incorporates the facts and arguments set forth in the Memorandum of Law in Opposition of PMG dated August 10, 2022, and the affidavit in opposition of Scott Slater, dated August 5, 2022. (*See NYSCEF Doc. No. 400-409*). Defendant Linde asserts that it rendered services to PMG and

defendants KIK Owner and KIK 30th in connection with the project pursuant to four contracts between Linde and PMG, whereby the amount of \$12,895,556.76 remains due and owing. In addition, Linde claims it contracted directly with HFZ for work performed in connection with the project. Defendant Linde contends that it performed work.

Furthermore, defendant Linde argues the partial lien waivers state that Defendant Linde agreed to waive its right to assert a mechanic's lien in consideration of the total payments to date, but defendant Linde states they never received the full sum owed to them as required by the language of the partial waiver. Therefore, defendant Linde contends the lien waivers are ineffective and movant-defendant's motion should be denied.

Defendant MGE Unified Technologies Corp. and MG Engineering D.P.C. Affirmation in Opposition

In opposition to defendant HFZ KIK 30th Street Owner, LLC's motion to amend its answer to include crossclaims for willful exaggeration of liens against numerous defendants, including MG Engineering D.P.C. ("defendant MG") and MGE Unified Technologies Corp. ("defendant MGE") and Metropolitan Building Services, LLC ("defendant MBS"). These defendants assert defendants MG and MGE were retained by the developer, pursuant to a November 2017 Proposal and June 2018 Rider, to provide IT infrastructure design services, access control and video surveillance design services and audio/visual consulting services for the Project. (*See, Exhibit B, NYSCEF Doc. No. #429*).

Defendant MG's Invoices for Unpaid Services at the Project

Defendant MG asserts in 2019 and 2020, it submitted detailed and timely invoices to the developer in the amount of \$300,961.44, owed for engineering services it provided for the Project. Additionally, on January 15, 2021, defendant MG filed a Mechanic's Lien in the amount of \$300,961.44, which matches the total amount that defendant MG is owed as identified in the unpaid invoices for its engineering services at the Project. (*See, Exhibit C, NYSCEF Doc No. #430*).

Defendant MGE's Invoices for Unpaid Services at the Project

Defendant MGE asserts in 2019 and 2020, it submitted detailed and timely invoices to developer in the amount, of \$81,380.00, owed for engineering services it provided for the Project. Additionally, on January 15, 2021, defendant MGE filed a Mechanic's Lien in the amount of \$81,380.00, which matches the total amount that defendant MGE is owed as identified in the unpaid invoices for its engineering services at the Project. (*See, Exhibit F, NYSCEF Doc. No. #433*).

Therefore, these defendants argue that the court should deny defendant KIK Owner's motion to amend its Answer to include crossclaims for willful exaggeration against defendants MG and MGE.

Defendant Langan Engineering's Affirmation in Opposition

In opposition, Defendant Langan asserts the motion is meritless and must be denied because defendant Langan was hired directly by movant defendant KIK Owner to perform services at the Project and movant defendant KIK Owner lacks knowledge since it is unable to verify the accuracy of its accounting ledgers. (*See, Exhibit B, NYSCEF Doc. No. #436*). Furthermore,

defendant Langan asserts movant-defendant KIK Owner cannot claim that it does not have access to project documents and then proceed to file a motion to amend premised upon meritless allegations. Therefore, defendant Langan requests that the court deny movant-defendant KIK Owner's motion.

Defendant HFZ KIK 30th Street Owner, LLC's Reply

In reply, movant-defendant KIK Owner argues, *inter alia*, that its motion should be granted since the opposing parties cannot establish that they would be prejudiced by such amendment, nor do any opposing parties establish that the movant's willful exaggeration claim is insufficient or that it is clearly or unequivocally lacks merit as a matter of law. Defendant KIK Owner further argues the lien waivers cast doubt upon the veracity of the liens filed therefore, the opposition of plaintiff Pavarini and defendants, Linde and BSI, must fail. The movant further contends that arguments of defendants Delta and Saltus must fail because although they argue that KIK Owner failed to submit an affidavit in support of the motion, an affidavit is not necessary to support a motion to amend. Therefore, the opposition by defendants Delta and Saltus must fail, and the instant motion should be granted.

ANALYSIS

Pursuant to *CPLR §3025(b)*, “[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties.” Leave to amend pleadings is generally freely granted, absent prejudice and surprise resulting from the delay. *See, Edenwald Contr. Co. v. City of New York*, 60 N.Y.2d 957, 959 (1983); *Antwerpse Diamantbank N.V. v. Nissel*, 27 A.D.3d 207, 208 (1st Dep’t 2006). To find prejudice there must be some indication that a party has been hindered in the preparation of his case or prevented from taking some measure in support of his position. *See, Abdelnabi v. NYC Transit Authority*, 273 A.D.2d 114, 115 (1st Dep’t 2000).

In this motion, the movant defendant KIK Owner seeks an Order pursuant to *CPLR §3025(b)* granting KIK Owner leave to amend its (a) Amended Answer to Plaintiff's Amended Complaint and (b) Answers to various Crossclaims filed by Defendants (i) Betons Prefabrique Du Lac Inc.; (ii) BSI Services and Solutions (NYC) Inc.; (iii) Delta Testing, Inc. d/b/a Delta Testing Labs; (iv) Fabbrica LLC; (v) Langan Engineering, Environmental, Surveying, Landscape Architecture and Geology, D.P.C.; (vi) Linde-Griffith Construction Co.; (vii) MG Engineering D.P.C. and MGE Unified Technologies Corp.; (viii) Saltus LLC; and (ix) Tillotson Design Associates, Inc., and file the proposed Amended Answers submitted herewith. Here, the opposing defendants alleged the existence of contracts with defendant KIK Owner to perform work at the Project site. Defendant KIK Owner's motion to answer crossclaims and to amend the complaint also admitted the existence of those contracts. Here, this Court finds that there is no prejudice to the opposing parties, and that the defendant KIK Owner's motion to amend its Amended Answer to Plaintiff's Amended Complaint and Answers to various Crossclaims filed by Defendants is granted.

Accordingly, it is

ORDERED that defendant HFZ KIK 30th Street Owner, LLC is granted leave to file and serve the proposed Verified Amended Answer and Answers to various crossclaims filed by defendants; and it is further

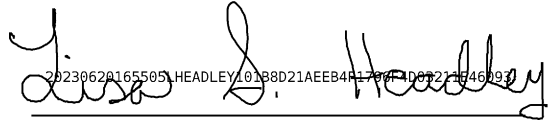
ORDERED that within 30 days of entry, movant-defendants shall serve a copy of this decision/order upon the plaintiffs with notice of entry; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered.

This constitutes the Decision/Order of the Court.

6/20/2023

DATE


20230620165505 HEADLEY, LISA S. HEADLEY, J.S.C. 20230620165505

LISA S. 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