

**Guarneri v Metropolitan Transp. Auth.**

2024 NY Slip Op 31777(U)

May 22, 2024

Supreme Court, New York County

Docket Number: Index No. 153865/2022

Judge: Richard Tsai

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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. RICHARD TSAI PART 21**

*Justice*

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ANDREW GUARNERI and PATRI GUARNERI,

Plaintiffs,

- v -

THE METROPOLITAN TRANSPORTATION AUTHORITY,  
THE NEW YORK CITY TRANSIT AUTHORITY, TISHMAN  
CONSTRUCTION CORPORATION, MIDTOWN  
TRACKAGE VENTURES LLC, TISHMAN SPEYER  
DEVELOPMENT LLC, TISHMAN SPEYER PROPERTIES,  
L.P., TISHMAN SPEYER CONSTRUCTION  
CORPORATION OF NEW YORK and JP MORGAN CHASE  
BANK NA,

Defendants.

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**INDEX NO.** 153865/2022  
**MOTION DATE** 11/21/2023  
**MOTION SEQ. NO.** 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 59-83 were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this action, plaintiff Andrew Guarneri alleges he tripped and fell during the course of his employment as a result of: (i) negligence on behalf of all-named defendants and (ii) the failure of all-named defendants to furnish him with a reasonably safe place to work. Plaintiff Patri Guarneri asserts derivative claims. Plaintiffs now seek to amend their pleadings by adding third-party defendant Commodore Construction Corp. (Commodore) as a direct defendant. Commodore opposes the motion.

**DISCUSSION**

CPLR 3025 (b) provides that a party may amend its pleadings “at any time by leave of [the] court,” which “shall be freely given upon such terms as may be just”. It further provides that “[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.”

“[T]he movant need not establish the merits of the proposed amendment and, “[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Nyahsa Services, Inc., Self-Ins. Tr. v People Care Inc.*, 156 AD3d 99, 102 [3d Dept 2017] [internal quotation marks, brackets and citation omitted]).

“Prejudice is more than the mere exposure of the party to greater liability. Rather, there must be some indication that the party has been hindered in the preparation of the party's case or has been prevented from taking some measure in support of its position” (*Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014] [internal quotation marks, brackets and citation omitted]).

Here, plaintiffs failed to provide a copy of the proposed amended pleading in their moving papers. In opposition, Commodore argues this motion must be denied because of this failure (NYSCEF Doc. No. 73 [affirmation in opposition] ¶ 11; ¶ 13). According to Commodore, plaintiffs' failure to provide copy of proposed amended complaint has deprived it “of the opportunity to even present arguments that the proposed amendments are either palpably insufficient or devoid of merit” (affirmation in opposition ¶ 18).

In reply, plaintiff provided a copy of proposed amended complaint ((NYSCEF Doc. No. 80 [affirmation in reply] ¶ 5; *see also* Plaintiffs' Exhibit A (NYSCEF Doc. No. 81) [Proposed Second Amended Summons and Complaint]).

Plaintiffs' omission was a technical defect, which was cured when plaintiffs furnished the proposed amended complaint in their reply (*see Chen v 111 Mott LLC*, 200 AD3d 594 [1st Dept 2021] [movant's “failure to submit the proposed amended pleading (CPLR 3025[b]) was a technical defect that the court should have overlooked (*see* CPLR 2001), particularly since [movant] attached the proposed amendment to its reply”]).

On the merits, the proposed seconded amended summons and complaint does not result in any prejudice or surprise to Commodore. As plaintiffs point out, Commodore was already a third-party defendant, which was served with plaintiffs' bills of particulars (affirmation in reply ¶ 6). The same allegations that plaintiffs asserted against the other direct defendants are now asserted against Commodore. As Commodore did not move for dismissal of the plaintiff's complaint for legal insufficiency when it was a third-party defendant, the court is not persuaded that these same allegations are legally insufficient now that they are being directly asserted against Commodore. In any event, Commodore would still be able to challenge the legal sufficiency of the second amended complaint by a motion to dismiss after being served with the new pleading (*see e.g. Barbarito v Zahavi*, 107 AD3d 416, 417 [1st Dept 2013]).

## CONCLUSION

It is hereby **ORDERED** that plaintiffs' motion (Seq. No. 002) seeking leave to amend the Amended Summons and Complaint to add third-party defendant Commodore Construction Corp. as a direct defendant is **GRANTED**; and it is further

**ORDERED** that the proposed second amended summons and complaint annexed to the reply papers as Exhibit A (NYSCEF Doc. No. 81) is deemed served upon service of a copy of this order with notice of entry; and it is further

**ORDERED** that the caption is amended to read as follows:

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ANDREW GUARNERI and PATRI GUARNERI,

Plaintiffs,

*against*

THE METROPOLITAN TRANSPORTATION AUTHORITY,  
THE NEW YORK CITY TRANSIT AUTHORITY, TISHMAN  
CONSTRUCTION CORPORATION, TISHMAN SPEYER  
DEVELOPMENT LLC, TISHMAN SPEYER  
PROPERTIES, L.P., TISHMAN SPEYER  
CONSTRUCTION CORPORATION OF NEW YORK,  
MIDTOWN TRACKAGE VENTURES LLC, JP MORGAN  
CHASE BANK NA and COMMODORE CONSTRUCTION  
CORP.,

Defendants.

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and it is further

**ORDERED** that the third-party claims against Commodore Construction Corp. are deemed cross claims; and it is further

**ORDERED** that counsel for plaintiffs shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to amend their records to reflect such change in the caption herein; and it is further

**ORDERED** that service of this order upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in Section J of the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at <https://www.nycourts.gov/LegacyPDFS/courts/1jd/suptctmanh/Efil-protocol.pdf>); and it further

**ORDERED** that counsel are directed to appear for a status conference **in person** in Room **280**, 80 Centre Street, New York, New York, on **June 13, 2024**, at **3:00 PM**.



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5/22/2024

DATE

RICHARD TSAI, 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