

**Tigre v Domino Refinery LLC**

2024 NY Slip Op 33705(U)

October 1, 2024

Supreme Court, Kings County

Docket Number: Index No. 500851/2023

Judge: Devin P. Cohen

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Supreme Court of the State of New York  
County of Kings

Index Number 500851/2023  
Seqs. 003, 004, 005, 006

Part LL1M

**DECISION/ORDER**

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

\_\_\_\_\_  
SILVIO A. TIGRE,

Plaintiff,

against

DOMINO REFINERY LLC,

Defendant.

\_\_\_\_\_  
DOMINO REFINERY LLC,

Third-Party Plaintiff,

against

CORE SCAFFOLD SYSTEMS, INC AND GMNY  
CONSTRUCTION SERVICE INC.,

Third-Party Defendants.

<b>Papers Numbered</b>	
Notice of Motion and Affidavits Annexed . . . . .	_____
Order to Show Cause and Affidavits Annexed . . . . .	_____
Answering Affidavits . . . . .	_____
Replying Affidavits . . . . .	_____
Exhibits . . . . .	<u>Var.</u>
Other . . . . .	_____

Upon the foregoing papers, third-party defendant Core Scaffold Systems, Inc. (Core)'s motion to amend its answer (Seq. 003), plaintiff's cross-motion to amend his complaint (Seq. 004), defendant/third-party plaintiff Domino Refinery LLC (Domino)'s motion to amend its answer (Seq. 005), and third-party defendant GMNY Construction Service Inc. (GMNY)'s motion to amend its answer (Seq. 006) are decided as follows:

**Introduction**

Plaintiff commenced this action to recover for damages he claims to have sustained on November 7, 2022. Plaintiff's bill of particulars alleges that plaintiff fell approximately eight

feet when the plank of scaffold he was standing on broke (bill of particulars at ¶ 3). The note of issue has not yet been filed and is due on or before November 1, 2024.

### Analysis

#### **Amendment**

Leave to amend pleadings pursuant to CPLR 3025 (b) is generally liberally granted. However, that general rule is limited by certain circumstances, and permission to amend is “committed to the broad discretion of the trial court” (*Vorobichik v Greenpoint Goldman SM, LLC*, 164 AD3d 866, 866 [2d Dept 2018]). Leave “should not be granted” where the movant’s delay subjects the plaintiff to “prejudice or surprise” (*CitiMortgage, Inc. v Nunez*, 198 AD3d 865, 865 [2d Dept 2021]; *see e.g. McGowan v RPC Realty Corp.*, 46 AD3d 771, 771–72 [2d Dept 2007]). Finally, the amendment must not be palpably deficient on its face (*see Vorobichik*, 164 AD3d at 866–867).

As an initial matter, plaintiff’s cross-motion to amend his pleadings to assert direct claims against Core is unopposed as to amendment; that motion is therefore granted. Additionally, Core and GMNY moved to assert counter-claims and affirmative defenses for fraud; however, these parties do not have direct claims against them by the plaintiff at the time of these motions. The proposed counter-claims are procedurally improper (*see* CPLR 3019), and the proposed affirmative defenses are not germane to the third-party claims against these parties. Therefore, these motions are denied.

With respect to Domino’s motion to amend, fraud must be plead “in detail,” or “with particularity,” whether as a cause of action or as a defense (CPLR 3016 [b]; (*Matter of Clarke v Wallace Oil Co., Inc.*, 284 AD2d 492, 492–93 [2d Dept 2001])). “The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with

knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation . . . and damages” (*Eva Chen Fine Jewelry, Inc. v Recovery Racing IX, LLC*, 222 AD3d 840, 842 [2d Dept 2023]).

Domino presents plaintiff’s C-3 from his Workers’ Compensation claim, and his medical records from Trinitas Regional Medical Center, Newark Pain & Rehabilitation Center, and Dr. Stewart Eidelson. Domino contends that plaintiff has provided conflicting accounts of how his accident occurred in each of these records, including telling Dr. Eidelson at his independent medical examination that “tables fell on him” (Eidelson report at 1). Domino also points to a collection of seven affidavits provided by defendant Core as exhibits to Core’s motion to amend. Those affidavits are from Jorge Coyago, plaintiff’s GMNY foreman, and six of plaintiff’s co-workers. The affidavits are essentially identical and claim that no one witnessed plaintiff’s fall, that plaintiff did not report his fall, and that no accident occurred on the date plaintiff alleges.

Defendant Domino’s submissions may be germane to a motion for summary judgment, but they do not outline the elements of fraud with particularity. Despite defendants’ claims that the plaintiff has made material misstatements about his accident, defendants do not claim to have justifiably relied on any such misstatements. Indeed, the fact that defendants are actively litigating this matter indicates that they are not relying on any statements plaintiff has made about his alleged accident. Therefore, defendants’ proposed amendments state neither a viable cause of action nor an affirmative defense of fraud.<sup>1</sup>

Additionally, though their veracity would not cure the defects in the instant motion, the co-worker affidavits on which defendant seeks to rely are of questionable provenance. The

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<sup>1</sup> Although it was noted above that Core’s and GMNY’s motions were denied because they were procedurally improper, since they relied on substantially the same reasoning as Domino’s motion, the same outcome would have obtained had their motions been analyzed here.

addresses of each of the co-workers is redacted. Perhaps more concerning is the narrative about how these affidavits were obtained. Counsel for Core represents that, after receiving notice of plaintiff's claim on or around December 14, 2022, Core's safety director Patrick Monahan conducted interviews of GMNY's foreman, Mr. Coyago, and eight other GMNY laborers (Core aff. in supp. at ¶ 25). At oral argument, counsel indicated that this was a group interview, and not individual interviews. After the interview, Mr. Monahan created an incident report and collected witness statements from the GMNY employees, which are all substantially identical (*id.*). On August 3, 2023, Mr. Coyago and six of the GMNY laborers executed substantially identical affidavits which support defendants' claims. Given the circumstances under which these affidavits were collected and without any discovery, the authenticity of these statements to the workers is unreliable.

### **Undertaking**

Defendant and third-party defendants also request the court direct plaintiff to post an undertaking pursuant to CPLR 8501 and 8503. Plaintiff does not oppose this portion of the motions. It is undisputed that plaintiff is a resident of New Jersey. Therefore, since this portion of defendants' motion is unopposed, and since the action is in Kings County Supreme Court, security for costs is hereby directed in the amount of \$500 (CPLR 8503). Although defendants requested a \$10,000 undertaking, that amount is excessive—the court will adhere to the statutory amount (*see Yarwood v Cty. Of Suffolk*, 174 AD3d 954, 855 [2d Dept 2019]). Plaintiff shall post a bond in the amount of \$500.00 on or before October 30, 2024.

### **Conclusion**

Core's motion (Seq. 003) is granted to the extent of requiring an undertaking; the motion is otherwise denied.

Plaintiff's cross-motion to amend (Seq. 004) is granted as to amendment; the discovery-related relief is denied without prejudice to an appropriate motion to the discovery part.

Domino's motion (Seq. 005) is granted to the extent of requiring an undertaking; the motion is otherwise denied.

GMNY's motion (Seq. 006) is granted to the extent of requiring an undertaking; the motion is otherwise denied.

This constitutes the decision and order of the court.

October 1, 2024  
**DATE**



**DEVIN P. COHEN**  
Justice of the Supreme Court