

**Advantage Testing E. 88th, LLC v Fairpoint Bldrs.
LLC**

2025 NY Slip Op 30824(U)

March 12, 2025

Supreme Court, New York County

Docket Number: Index No. 157263/2022

Judge: Richard G. Latin

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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 G. LATIN PART 46M

Justice

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ADVANTAGE TESTING EAST 88TH, LLC, ADVANTAGE TESTING, INC.,

Plaintiff,

INDEX NO. 157263/2022

MOTION DATE 01/16/2025

MOTION SEQ. NO. 002

- v -

FAIRPOINT BUILDERS LLC, MARLBORO GROUP INTERNATIONAL LLC, A DEGREE OF FREEDOM STRUCTURAL ENGINEER PLLC, DOMINIC M CULLEN, HIRANI ENGINEERING & LAND SURVEYING, P.C., PLAN B ENGINEERING, LLC, CITYWIDE DEMOLITION & RUBBISH REMOVAL INC., CITYWIDE DEMOLITION & RUBBISH REMOVAL, CITY RECYCLING CORP.,

Defendant.

DECISION + ORDER ON MOTION

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FAIRPOINT BUILDERS LLC

Plaintiff,

Third-Party
Index No. 595852/2023

-against-

CITYWIDE INDUSTRIES CORP., M&A SCRAP METAL CORP. D/B/A CITYWIDE INDUSTRIES CORP.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

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

Upon the foregoing documents, plaintiff’s motion for leave to amend the pleadings pursuant to CPLR 3025 (b) is determined as follows:

Plaintiff seeks leave to serve a supplemental summons and amended complaint to clarify the specific claims against each respective party, to add a cause of action for gross negligence, and to remove defendant City Recycling Corp. d/b/a Citywide Demolition & Rubbish Removal from the caption. “Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is ‘prejudice or surprise resulting directly from the delay,’ or if the proposed amendment ‘is palpably improper or insufficient as a matter of law’” (*McGhee v Odell*, 96 AD3d

449, 450 [1st Dept 2012] [internal citations omitted]). Here, the proposed amendments are not palpably insufficient or devoid of merit, nor at this stage in the litigation is there any prejudice in allowing the plaintiff to amend the pleadings.

Defendant/third-party plaintiff Fairpoint Builders, LLC (“Fairpoint”) partially opposed the motion solely to the extent that the statute of limitations on the gross negligence claim has passed. However, “where, as here, a proposed amended complaint contains an untimely claim against a defendant who is already a party to the litigation, the relevant considerations are simply (1) whether the original complaint gave the defendant notice of the transactions or occurrences at issue and (2) whether there would be undue prejudice to the defendant if the amendment and relation back are permitted” (*O’Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83 [1st Dept 2017]; CPLR 203[f]). Here, the new cause of action flows from the same occurrence and Fairpoint failed to argue that it would be prejudiced.

Accordingly, it is

ORDERED that the plaintiff’s motion for leave to amend the complaint is granted in its entirety; and it is further

ORDERED that the amended complaint, in the form annexed to the motion papers, shall be deemed served upon the upload of this order onto NYSCEF upon all parties who have appeared in the action; and it is further

ORDERED that the action shall bear the following caption:

ADVANTAGE TESTING EAST 88TH,
LLC AND ADVANTAGE TESTING, INC.,

Plaintiffs,

-against-

FAIRPOINT BUILDERS LLC, MARLBORO
GROUP INTERNATIONAL LLC, A DEGREE OF
FREEDOM STRUCTURAL ENGINEER, PLLC,
DOMINIC M. CULLEN, HIRANI ENGINEERING
& LAND SURVEYING, P.C., PLAN B ENGINEERING,
LLC, CITYWIDE DEMOLITION & RUBBISH
REMOVAL INC., CITYWIDE DEMOLITION &
RUBBISH REMOVAL AND SAG ENGINEERING &
CONSULTING, P.C., CITIWIDE INDUSTRIES CORP.,
M&A SCRAP METAL D/B/A CITIWIDE INDUSTRIES
CORP., AND ROMA IRON WORKERS, INC.,

Defendants.

-----X

FAIRPOINT BUILDERS LLC,

Third-Party Plaintiff,

-against-

CITIWIDE INDUSTRIES CORP. AND
M&A SCRAP METAL CORP. D/B/A
CITIWIDE INDUSTRIES CORP.,
Third-Party Defendant.


And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse*

and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address (www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.

<u>3/12/2025</u>			
DATE			RICHARD G. LATIN, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> GRANTED IN PART
		<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE