

**Araujo v Monadnock Constr., Inc.**

2025 NY Slip Op 31967(U)

May 29, 2025

Supreme Court, Kings County

Docket Number: Index No. 527715/2019

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 527715/2019  
Motion Date: 5-15-25  
Mot. Seq. No.: 12, 14

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HELIO ARAUJO,

Plaintiff,

-against-

MONADNOCK CONSTRUCTION, INC., DUNN CO  
SAFETY, LLC and EAST HARLEM MEC PARCEL B  
WEST, LLC,

Defendants.

DECISION/ORDER

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MONADNOCK CONSTRUCTION, INC., and EAST  
HARLEM MEC PARCEL B WEST, LLC,

Third-Party Plaintiffs,

-against-

ANDREW MEROLA, MD, FAAOS,

Third-Party Defendant.

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The following papers, which are e-filed with NYCEF as Document Numbers 263-271, 273-275, 279, 287-300, 304, 307-314 were read on this motion and cross-motion:

In this action to recover damages for personal injuries arising out of an alleged worksite accident, in Motion Sequence No. 12, the third-party defendant, ANDREW MEROLA, MD, FAAOS ("Dr. Merola"), moves for an Order dismissing the third-party complaint on several grounds, including on the ground that it fails to state a cause of action sounding in fraud. In Motion Sequence No. 14, defendants/third-party plaintiffs, MONADNOCK CONSTRUCTION, INC. ("Monadnock") and EAST HARLEM MEC PARCEL B WEST, LLC (collectively "third-party plaintiffs") cross-move for an Order, pursuant to § 3025(b), granting them leave to amend their Third-Party Complaint. The motion and cross-motion are consolidated for disposition.

The Court will first address Motion Sequence No. 14. In the proposed amended third-party complaint, third-party plaintiffs allege several causes of action against Dr. Merola, all of which are premised on essentially the same allegations of fraud. Third-party plaintiffs allege that Dr. Merola submitted two bills to Helmsman Management Services ("Helmsman"), the company that administered Monadnock's workers' compensation program, for surgical procedures that he

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claims to have performed on the plaintiff on September 2, 2020, and May 19, 2021. In the main action, the plaintiff is claiming that he had to undergo the surgical procedures referred to in the bills due to injuries he suffered because of the accident. The first bill concerns surgical procedures that Dr. Merola claims to have performed on September 2, 2020. Third-party plaintiffs claim that Dr. Merola, or someone on his behalf, submitted the bill to Helmsman for the procedures he allegedly performed on this date, which included charges for partial vertebral corpectomies at the C5 and C6 levels, procedures that the third-party plaintiffs claim were never actually performed.

With respect to the surgical procedures that Dr. Merola claims to have performed on May 19, 2021, third-party plaintiffs claim that Dr. Merola or someone on his behalf submitted a bill to Helmsman for performing a partial vertebral corpectomy of L3 with resection of 30% of the L3 vertebral body, a partial vertebral corpectomy of L4 with resection of 30% of the L4 vertebral body, and laminectomies, medial facetectomies, neural foraminotomies, and decompression of the neurological elements of the nerve roots of both the L5 and S1 levels. Third-party plaintiffs also claim that these procedures were also never actually performed.

Third-party plaintiffs further claim that Dr. Merola prepared operative reports following the two surgeries, in which he represented he performed the procedures that third-party plaintiffs are claiming were never performed.

The proposed amended third-party complaint also alleges that the bills and operative reports were submitted to Helmsman, with the intent that Helmsman and third-party plaintiffs rely on them, that Helmsman and third-party plaintiffs did in fact rely on them, that their reliance was justified, that Helmsman paid the bills in reliance on the bills and operative reports, and that in reliance on the bills and operative reports, third-party plaintiffs reimbursed Helmsman for such payments pursuant to their arrangement with Helmsman.

A determination whether to grant leave to serve an amended pleading is within the Supreme Court's broad discretion (*see Bank of Smithtown v. 219 Sagg Main, LLC*, 107 A.D.3d 654, 968 N.Y.S.2d 95; *Greco v. Christoffersen*, 70 A.D.3d 769, 770, 896 N.Y.S.2d 363; *Brooks v. Robinson*, 56 A.D.3d 406; 867 N.Y.S.2d 133). Although leave to amend pleadings should be "freely given" (CPLR 3025[b]; *see Boakye-Yiadom v. Roosevelt Union Free School Dist.*, 57 A.D.3d 929, 931, 871 N.Y.S.2d 314), a court should deny such a motion when the proposed

amendment is palpably insufficient or patently without merit (*see Pedote v. Kelly*, 124 A.D.3d 855; *Young v. Brown*, 113 A.D.3d 761, 978 N.Y.S.2d 867; *Spodek v. Neiss*, 104 A.D.3d 758, 961 N.Y.S.2d 251; *Bloom v. Lugli*, 102 A.D.3d 715, 958 N.Y.S.2d 184; *Congel v. Malfitano*, 84 A.D.3d 1145, 1146, 924 N.Y.S.2d 129). Here, contrary to plaintiffs' and third-party defendant's contention, the proposed amended third-party complaint is not palpably insufficient, nor is it patently without merit.

In order to state a cause of action in fraud, a complaint must alleged "a misrepresentation or a material omission of fact which was false and known to be false by [the] [third-party] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178, 919 N.Y.S.2d 465, 944 N.E.2d 1104, quoting *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 668 N.E.2d 1370; *see Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559, 883 N.Y.S.2d 147, 910 N.E.2d 976). "A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)" (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559, 883 N.Y.S.2d 147, 910 N.E.2d 976). Here, the proposed amended third-party complaint pleads all these elements.

The proposed amended third-party complaint alleges in his bills and operative reports, that Dr. Merola made material misrepresentations of fact by stating that he performed surgical procedures that were never performed. It further alleges and that he made these misrepresentations with knowledge of their falsity. Although it is not alleged that Mr. Merola made these misrepresentations directly to the third-party plaintiffs, a complaint states a viable cause of action for fraud if it is alleged that the misrepresentation was made to a third-party, in this case Helmsman, "so long as the statement was made with the intent that it be communicated to the [third-party] plaintiff and that the [third-party] plaintiff rely on it" (*Pasternack v. Lab'y Corp. of Am. Holdings*, 27 N.Y.3d 817, 828, 59 N.E.3d 485, 492 (2016), *see also*, *is Golobe v. Mielnicki*, \_\_ N.E.3d \_\_, 2025 WL 864512, 2025 N.Y. Slip Op. 01670 [2025]; *Eaton, Cole & Burnham Co. v. Avery*, 83 N.Y. 31, 36 (1880)). Here, the proposed third-party complaint, liberally construed, sufficiently all of these facts.

The proposed amended third-party complaint also alleges that the third-party plaintiffs justifiably relied upon the alleged malpresentations contained in the bills and operative reports, and that in reimbursing Helmsman for the amounts Helmsman paid Dr. Merola, they incurred a direct financial loss.

Plaintiff's contention that Justice Fischer's Order dated February 3, 2025, is the law of the case on the issue of whether third-party plaintiffs' motion to amend should be granted is without merit for the simple reason that Justice Fisher never addressed the viability of the third-party action in her Order.

While plaintiff's counsel has requested a severance of the third-party action in an affirmation submitted in opposition to the motion to amend, neither the plaintiff nor any other party, requested this relief in a Notice of Motion, a Notice of Cross-Motion, or an Order to Show Cause. These are the only vehicles by which this Court may consider whether a severance is in order (*Knopp v Slater*, 258 AD2d 624 [2d Dept 1999]; *Pierre v City of New York*, 22 AD3d 733 [2d Dept 2005]). The court will therefore not entertain the request for a severance.

The Court rejects plaintiff's contention that since the third-party action is impermissible under CPLR 1007 since the third-party complaint does not allege that Dr. Merola owed a duty directly to the plaintiff. Contrary to plaintiff's contention, a third-party action that states any cause of action arising from or conditioned upon the liability asserted against a third-party plaintiff in the main action is permitted by CPLR 1007 (see *Qosina Corp. v C & N Packaging, Inc.*, 96 A.D.3d 1032, 1035, 948 N.Y.S.2d 308; *Galasso, Langione & Botter, LLP v. Liotti*, 81 A.D.3d 880, 883, 917 N.Y.S.2d 664; *25-86 41st St., LLC v. Chong*, 235 A.D.3d 813, 816, 228 N.Y.S.3d 593, 597). Here the third-party action arises from and is conditioned upon the liability asserted against the third-party plaintiffs in the main action for the payment of plaintiff's medical expenses.

The Court also rejects the argument that the proposed third-party complaint does not sufficiently plead justifiable reliance. The issue of justifiable reliance generally implicates questions of fact which are not to be resolved at this early stage in the proceedings (see e.g. *DDJ Mgmt*, 15 NY3d at 156 ("If plaintiffs can prove the allegations in the complaint, whether they were justified in relying on the warranties they received is a question to be resolved by the trier of fact."); *Knight Sees, LP v. Fiduciary Trust Co*, 5 A.D.2d 172, 173 ("on a motion to dismiss for

failure to state a cause of action, a plaintiff ... need only plead that he relied on misrepresentations made by the defendant ... since the reasonableness of his reliance [generally] implicates factual issues whose resolution would be inappropriate at this early stage.”); *MBIA Ins Corp v. Countrywide*, 2013 WL 1845588, at \*5 (N.Y. Sup Ct Apr 29, 2013) (“[W]hether MBIA's due diligence review was sufficient and whether MBIA's review made adequate use of the means available to it, at bottom, are disputed issues of fact.”).

Finally, there is no merit to the argument that the proposed third-party complaint lacks the requisite specificity required by CPLR 3016(b). The court has considered the remaining arguments advanced in opposition to the third-party plaintiffs’ motion to amend the third-party complaint and find them unavailing.

Accordingly, it is hereby

**ORDRED** that Motion Sequence No. 14 is **GRANTED**; the amended third-party complaint will be deemed served upon the filing of this Order on NYCEF, and the third-party defendant will have the time allotted by the CPLR to interpose an answer; and it is further

**ORDERED** that Motion Sequence No. 12 is **DENIED** as moot.

This constitutes the decision and order of the Court.

Dated: May 29, 2025.

**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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