At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of September, 2025.

P R E S E N T:

HON. INGRID JOSEPH,
Justice.

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RAULI RAMALHO FERREIRA,

Plaintiff,

Index No. 533064/2022

-against-

LEEDING BUILDERS GROUP LLC and QBDK HURON, INC.,

DECISION & ORDER
(Mot. Seq. No. 2)

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Affirmation/Exhibits.....	28 – 45
Affirmation in Opposition/Exhibits.....	52 – 55
Affirmation in Reply/Exhibits.....	56 – 61

Upon the foregoing papers, Defendants Leeding Builders Group LLC ("LBG") and QBDK Huron, LLC ("QBDK") (collectively, "Defendants") move for an order, pursuant to CPLR 3025 (b), granting them leave to amend their Verified Answer and assert the affirmative defense of fraud and a counterclaim of fraud against the Plaintiff Rauli Ramalho Ferreira ("Plaintiff") (Mot. Seq. No. 2). Plaintiff opposes the motion.

This Labor Law action arises out of an accident that occurred on July 27, 2022, while Plaintiff was working at a construction site at 29 Huron Street (also known as 1 Huron Street) in Brooklyn, New York. QBDK owned the site, and LBG was the general contractor. Plaintiff was employed by RC Structures, Inc. ("RCS"), LBG's subcontractor.

In their motion, Defendants aver that Plaintiff knowingly and intentionally misrepresented how his accident occurred, forcing Defendants to detrimentally rely on his claims and expend significant sums to defend this matter. In support, Defendants cite to (a) LBG and RCS's accident

reports, (b) Plaintiff's medical records from the day after the accident, and (c) the non-party witness testimony from: (i) Plaintiff's co-worker Franklin Gomez Melendez who witnessed the accident, (ii) RCS concrete safety manager Jorge Atunes, who acted as Plaintiff's translator while filing out the RCS report, (iii) RCS Safety manager Francisco Alvarez, who investigated the accident, and (iv) RSC compliance manager Hector Malaver, who attended Plaintiff's medical appointment. After the accident, LBG and RCS filled out accident reports indicating that Plaintiff was tasked with removing nails from a handrail; however, instead of using the provided prybar, he attempted to remove them with a hammer and hurt his *right wrist*. At his deposition, Mr. Melendez testified that he personally saw Plaintiff hurt his wrist by taking the wood out with the hammer (Melendez tr at 28, lines 18-20; at 29, lines 12-21).

The day after the accident Plaintiff, who speaks, writes and reads in Portuguese, went to the doctor accompanied by Mr. Malaver. Mr. Malaver speaks, writes and reads in Spanish and English. Mr. Malaver testified that Plaintiff told him that he twisted his wrist when he pulled a nail out with a hammer (Malaver tr at 30, lines 22-25; at 31, lines 2-4). Defendants further assert that Plaintiff never told his doctor, who used a translator, that he fell, slipped on debris, or injured any other body part. The record from Rothman Orthopaedics, which indicates that an interpreter was present, states that Plaintiff was "pulling some material and has some pain in his hand" (NYSCEF Doc No. 33).

Nonetheless, at his deposition, Plaintiff testified that he had tripped on pieces of concrete and wood and fell down the staircase, injuring his right shoulder, neck, back, and right wrist. He further testified that he was never provided with nor told to use a prybar. Plaintiff also denied that he filled out any accident reports or that any were completed before him, despite his signature on one report matching the one on his authorizations.

Plaintiff eventually underwent a cervical discectomy and fusion surgery at Surgicore of Jersey City ("Surgicore") in New Jersey. Defendants assert that this surgery, which was unrelated, unnecessary and onerously expensive, was facilitated by Plaintiff's former Workers' Compensation ("WC") attorneys, Fogelgaren, Forman & Bergman, LLP ("FFB"). Defendants aver that Surgicore and FFB are named as defendants in various Racketeering and Corrupt Organization Act ("RICO") actions.

According to Defendants, the proposed amendment would not prejudice or surprise Plaintiff since he already testified to his version of the accident and mechanism of injury before

the WC Board and at his deposition. In addition, Defendants contend that the record demonstrates that their fraud counterclaim is not palpably insufficient or patently devoid of merit and they have sufficiently pled the allegations of fraud.

In opposition, Plaintiff argues that Defendants have been aware of his allegations as to how the accident occurred and what injuries he sustained. In support, Plaintiff points to (1) his complaint wherein he alleged that he "was injured as a result of debris and other hazardous conditions at the site" (complaint ¶ 11), (2) his verified bill of particulars wherein he asserted that Defendants were negligent in causing and permitting him to fall as a result of debris and alleged injuries to his neck, back, right shoulder, and right wrist (NYSCEF Doc No. 30, ¶¶ 5, 9), and (3) his deposition testimony on July 18, 2023, in which he stated that his foot slipped on debris causing him to fall (Pl 7/18/23 tr at 59, lines 3-9).

In addition, Plaintiff submits the affidavit of his co-worker, Waslas De Oliveira Lima, who states that he saw and heard Plaintiff report the fall to his boss and say that he fell down a stairway because of debris (NYSCEF Doc No. 55, ¶ 4). Plaintiff acknowledges that Defendants have presented documents and deposition testimony reflecting a different version of how the accident occurred. However, Plaintiff claims that these are "routine credibility issues . . . , the resolution of which is a proper subject for cross-examination at trial, and the weighing of proof by the jury" (NYSCEF Doc No. 52, ¶ 15). Moreover, Plaintiff contends that Defendants' arguments rely upon hearsay, contradictions within their submissions to raise doubt as to the veracity of their witnesses, and much of their "proof" is the product of allegedly translated statements without any accompanying certification from a qualified and impartial translator.

Furthermore, Plaintiff avers that Defendants could have raised the fraud issue sooner and have proffered no excuse for not doing so. With respect to Defendants argument that Plaintiff would not be prejudiced by the amendment, Plaintiff assert the contrary. According to Plaintiff, "Defendants seek to advance vague allegations of fraud by Plaintiff and/or third-parties over which he had no control . . . and to collaterally attack Plaintiff's credibility based upon unproven allegations against others for alleged fraudulent acts" (NYSCEF Doc No. 52, ¶ 40). Plaintiff also argues that Defendants' proposed counterclaim is insufficient since it is pled upon information and belief and offers only general, conclusory and speculative allegations. Plaintiff further asserts that Defendants are not able to establish justifiable reliance. In addition, Plaintiff contends that there is

no viable affirmative defense for fraud since that would require a finding that Plaintiff's allegations are untrue.

In reply, Defendants raise several issues with Mr. Lima's affidavit. Defendants assert that Mr. Lima's affidavit was not disclosed and exchanged when Plaintiff was in possession of it at the time Defendants' demand for it was made. According to Defendants, Mr. Lima is in contempt of Court for failing to appear for testimony pursuant to a subpoena. Defendants also contend that Mr. Lima's affidavit is substantively defective because it offers contradictory and bare conclusions. Defendants argue that Mr. Lima's affidavit is procedurally defective because it fails to comply with CPLR 2016. Moreover, Defendants assert that their burden on a motion for leave to amend is showing that the amendment is not unfairly prejudicial or surprising to Plaintiff and that they provided evidence sufficient to make a reasonable inference of fraud. Defendants contend that whether or not there is hearsay is immaterial since they only have to demonstrate "that the amendment is not unfairly prejudicial or surprising to plaintiff and that defendants provide evidence sufficient to make a reasonable inference of alleged fraud." Regarding the timeliness argument, Defendants argue that they filed the instant motion as soon as discovery related to Mr. Lima, who was designated as a witness by Plaintiff in May 2024, was completed. Defendants maintain that their fraud allegations are detailed and particularized. With respect to the justifiable reliance element, Defendants contend that "justifiable reliance is found via rising loss runs that result in defendants being forced to pay rising premiums against their will" (NYSCEF Doc No. 56, ¶ 23).

Under CPLR 3025 (b), a defendant may amend his answer by leave of court and such leave "shall be freely given" unless the party opposing the motion establishes that the proposed amendment is palpably insufficient or patently devoid of merit, or that the delay in seeking the amendment would cause prejudice or surprise to the other parties (CPLR 3025 [b]; *Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]; *Wells Fargo Bank, N.A. v Spatafore*, 183 AD3d 853, 853 [2d Dept 2020]). It is not for this Court to determine, on a motion to amend an answer, the "legal sufficiency or merits" of the proposed amendment (*Sample v Levada*, 8 AD3d 465, 467-468 [2d Dept 2004]; *see Lucido*, 49 AD3d at 229 ["No evidentiary showing of merit is required under CPLR 3025 (b)."]). However, "[w]here the lack of merit of a proposed defense is clear and free from doubt, a motion for leave to amend an answer to raise that defense should be denied" (*Lucido*, 49 AD3d at 226 [2d Dept 2008]). Lateness in seeking an amendment or a party's failure to offer

an excuse for the delay will not bar the amendment absent prejudice (*Quiros v Polow*, 135 AD2d 697, 699 [2d Dept 1987]; *Smith v D.L. Peterson Trust*, 254 AD2d 479, 480 [2d Dept 1998]). Ultimately, "the determination to permit or deny amendment is committed to the sound discretion of the trial court" (*US Bank N.A. v Murillo*, 171 AD3d 984, 986 [2d Dept 2019]).

After review of the documents submitted, the Court finds that Defendants' proposed affirmative defense and counterclaim asserting fraud are insufficient since they fail to plead with sufficient particularity the essential element of justifiable reliance. The proposed counterclaim merely states, in a conclusory fashion, that Defendants "justifiably relied on [Plaintiff's] false statements and material misrepresentations and did expend significant sums to defend [Plaintiff's] lawsuit, along with other financial costs and damages" (NYSCEF Doc No. 45, ¶ 25). However, Defendants' "remedy would be to seek sanctions under CPLR 8303-a; however, that provision does not support an independent cause of action" (*Breton v Dishi*, 234 AD3d 432, 433 [1st Dept 2025]). Accordingly, as the proposed amendments are devoid of merit,[1] Defendants' motion seeking leave to amend their answer is denied.

Accordingly, it is hereby

ORDERED, that Defendants' motion to amend their answer (Mot. Seq. No. 2) is denied.

All other issues not addressed are either without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice

[1] While the Court recognizes that there appears to be two different versions of what occurred, "[s]uch inconsistencies may be fodder for cross-examination" (*Sabourin v Chodos*, 194 AD3d 660, 661 [1st Dept 2021]).