

Maneggio v Flushing Bldg. Supply LLC
2025 NY Slip Op 35645(U)
January 3, 2025
Supreme Court, Bronx County
Docket Number: Index No. 806014/2021E
Judge: Myrna Socorro
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Supreme Court of the State of New York
County of Bronx: Part IA-9

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William Maneggio,

Plaintiff,

Index No. 806014-2021E

Motion seq #1, 2 and #3

-against-

Flushing Building Supply' LLC and 2470 &
2480 Rowe St. Realty, LLC,
Defendants.

DECISION & ORDER

Hon. Myrna Socorro, J.S.C.

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2470 & 2480 Rowe St. Realty LLC,
Third-Party Plaintiff,

-against-

Triborough Scaffolding and Hoisting, Inc.,
Third-Party Defendant.

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Recitation as required by CPLR §2219 of the papers filed by defendant/third-party plaintiff, 2470 & 2480 Rowe St. Realty LLC, for summary judgment dismissing plaintiff's complaint (motion seq #1); by plaintiff for partial summary judgment against defendant/third-party plaintiff (motion seq #2); and by plaintiff in motion sequence no. 3 to amend his Summons and Complaint:

Papers	NYSCEF Doc. No.
Motion seq #1	
Defendant/Third-Party Plaintiff's Notice of Motion, Affirmation in Support, Exhibits	#32-42
Plaintiff's Affirmation in Opposition	#64
Defendant, Flushing Building Supply, and Third-Party Defendant, Triborough Scaffolding's Affirmation in Opposition and Exhibits	#66-71
Motion seq #2	
Plaintiff's notice of Motion, Affirmation in Support, Exhibits and Statement of Material Facts	#44-62
Defendant/Third-Party Plaintiff's Affirmation in Opposition	#73
Plaintiff's Reply Affirmation	#74
Motion seq #3	
Plaintiff's Notice of Motion for Leave to Amend Pleadings, Affirmation in Support, and Exhibits	#75-97
Defendant/Third-Party Plaintiff's Affirmation in Opposition	#99
Plaintiff's Reply Affirmation	#106

Plaintiff commenced the above captioned action against the Defendants upon filing the Summons and Complaint on April 30, 2021(NYSCEF Doc. #1) which appears to be based on common law negligence as it does not cite to any labor law violations, more specifically, the complaint does not cite Labor Law §200, §240(1), nor §241(6). The action arises out of an accident that allegedly occurred on September 9, 2020 at the premises of 2470 Rowe Street, Bronx, New York

Defendant 2470 & 2480 Rowe St. Realty LLC appeared and filed their Answer on August 2, 2021 (NYSCEF Doc. #7). Defendant Flushing Building Supply LLC appeared and filed their Answer on August 30, 2021 (NYSCEF Doc. #11).

It is on July 11, 2022, that Plaintiff cites to Labor Law §200, §240(1) and §241(6) in the Verified Supplemental Bill of Particulars¹ but Plaintiff fails to file a motion to amend their Summons and Complaint in 2022.

On February 14, 2023, defendant 2470 & 2480 Rowe St. Realty LLC, filed their Third-Party Summons and Complaint against Third-Party Defendant, Tri Borough Scaffolding and Hoisting Inc. (NYSCEF Doc. #23).

Third-Party Defendant, Tri Borough Scaffolding and Hoisting Inc., appeared and filed their Answer on May 31, 2023 (NYSCEF Doc. #29).

On August 30, 2023, plaintiff's Note of Issue was filed with the Court (NYSCEF Doc. #30), which signaled to the Court and all parties, that all discovery was complete in this matter, however it appears that the IMEs had not been completed by the filing date.

Defendant/Third-Party Plaintiff filed their motion for summary judgment on October 18, 2023 (motion seq #1) seeking dismissal of plaintiff's complaint. Defendant/Third Party Plaintiff states that it is an out-of-possession landlord who did not have control over the premises, and therefore, should not be liable for any dangerous or hazardous conditions on the property

Then, on December 28, 2023, plaintiff filed its own motion for summary judgment under motion sequence no. 2 (NYSCEF Doc. No. 44) seeking partial summary judgment against defendant, 2470 & 2480 Rowe St. Realty LLC under §240(1) and §241(6). Plaintiff claims that Defendant/Third-Party Plaintiff is liable under §240(1) as it owns the warehouse, is a proper labor law defendant, and plaintiff was performing protected work, and that industrial codes were not complied with which violated §241(6).

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The Supplemental Bill of Particulars dated July 11, 2022 is attached as NYSCEF Doc. #50 in motion seq #2.

Plaintiff on February 21, 2024 filed their motion (seq #3) seeking leave to amend the Summons and Complaint pursuant to CPLR 3025(b) to formally assert causes of action against Rowe Street for violations of Labor Law §200, §240(1) and §241(6).

On March 28, 2024, the parties entered into a Stipulation, which was “So Ordered” by the Court (NYSCEF Doc. #103) which provided that motion seq #3 would be argued with summary judgment motions. However, it appears that the motion to amend was marked submitted on April 29, 2024, and the motions for oral arguments were held, and marked submitted on October 21, 2024.

In order to effectively deal with the motions for summary judgment, the Court must address motion seq #3. The Court notes that Plaintiff filed their Summons and Complaint which, pursuant to the proposed Supplemental Summons and Amended Complaint (filed as NYSCEF Doc. #77), a Second cause of action is now proposed to include the violations of Labor Law §200, §240(1) and §241(6). Plaintiff claims that this should not be a surprise to defendant/third-party plaintiff as 2470 Rowe was aware that plaintiff was “formally” alleging violations of the labor law statutes in the Supplemental Bill of Particulars in July 2022.

However, it has been held that an amended bill of particulars cannot allege a theory or claim not originally asserted in the complaint (see *Martinez v Fields* 74 AD 3d 653, 902 NYS 2d 361 (1st Dept. 2010). In *Courtney v 18th & 8th LLC*, 2014 NY Slip OP 30983(U), it was held that:

“It is well-settled that a bill of particulars may not be used to supply a new cause of action or theory of liability that is not already included in a pleading . . . If there are any doubts as to whether the matter sought to be added in an amended bill of particulars constitutes a new cause of action, or even a new theory of recovery, a party should make a motion to amend the pleading under CPLR 3025(b)”

As Plaintiff has filed motion seq #3, the added Second Cause of Action to cover Labor Law §200, §240(1) and §241(6) are separate theories which not may not be consistent with the original Summons and Complaint.

Plaintiff further argues that leave should be granted to amend the complaint because it would not create prejudice or surprise for Rowe Street, and further that the proffered amended complaint is not palpably devoid of merit. Plaintiff highlights that since the inception of this case, he has been alleging that he fell from a defective ladder while working on Rowe Street’s property, which is central to Labor Law §240(1) actions. Plaintiff continues that despite failing to include formal labor law causes of action in their original complaint, Rowe St. was served with a supplemental bill of particulars in July of 2022, which included plaintiff’s Labor Law claims. The case proceeded to go through discovery until summary judgment motions were filed in December 2023. Therefore, plaintiff argues, that Rowe Street would not be prejudiced by the proposed amendment to the complaint, because they been aware of plaintiff’s Labor Law claims for nearly 3 years. Plaintiff also

states that neither his §200, §240(1) or §241(6) claims are palpably devoid of merit, and therefore leave should be granted by this Court for him to amend his complaint.

In opposition, Rowe Street argues plaintiff should not be granted leave to amend his complaint as summary judgment motions are currently pending before the Court, and should the Court dismiss plaintiff's complaint, there would be no complaint left for plaintiff to amend. Rowe street continues that should leave be granted, they would be subjected to prejudice because they have filed a dispositive summary judgment motion prior to plaintiff adding new allegations (i.e. the formal Labor Law claims).

CPLR §3025(b) states:

“[a] party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances...”

Courts have consistently held that permission to amend pleadings should be freely given, so long as the moving party can show the proffered amendment is not palpably insufficient or clearly devoid of merit, and the nonmoving party will not suffer prejudice or surprise resulting from the delay in seeking leave (*see generally, Greene v. Esplanade Venture P'ship*, 36 N.Y.3d 513, 168 N.E.3d 827 [2021], *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 500 [1st Dept. 2010], *Miah v. Pipe Dreams Realty V Corp.*, 214 A.D.3d 575, 576-577 [1st Dept. 2023]). “The determination whether to grant leave to amend a pleading is within the court's discretion, and the exercise of that discretion will not lightly be disturbed” (*Cortes v Jing Jeng Hang*, 143 AD3d 854 [2d Dept 2016] *quoting AFBT-II, LLC v Country Vil. on Mooney Pond, Inc.*, 21 AD3d 972, 972 [2005]). “Thus, “[a] party opposing leave to amend ‘must overcome a heavy presumption of validity in favor of [permitting amendment]’ (*Id. quoting McGhee v Odell*, 96 AD3d 449, 450 [2012], *quoting Otis EL Co. v 1166 Ave. of Ams. Condominium*, 166 AD2d 307, 307 [1990]).

Upon a review of the motion papers and the arguments proffered in motion seq #3, and taking into consideration the arguments made by the parties in their respective motions for summary judgment, and as it is within this Court's discretion, plaintiff's motion seeking leave to file a Supplemental Summons and Amended Complaint to include the Second Cause of Action that presents the claim under Labor Law §200; §240(1) and §241(6) , is **GRANTED**.

Motion seq #1 and #2

Defendant has moved (seq #1) for summary judgment based on the original filing of the Summons and Complaint, which appears to be a cause of action based on common law negligence. Defendants may want to seek summary judgment requesting dismissal of Labor Law §200/common law negligence; §240(1) and §241(6) that are presented in the Supplemental Summons and Complaint.

Plaintiff has moved (seq #2) for partial summary judgment against Defendant/Third-Party Plaintiff based on allegations of violation of Labor Law §240(1) and §241(6). Although they may have been pled in the Supplemental Bill of Particulars, as stated above, a Bill of Particulars may not be used add a separate theory not included in the pleading (i.e., in the Summons and Complaint).

The Court finds, in its discretion, that to entertain the summary judgment motions as filed, is not judicial fairness to the parties, in light of a new Supplemental Summons and Amended Complaint being permitted. Taking into considerations that although the Court is permitting a Supplemental Summons and Amended Complaint, plaintiff should have, prior to filing their Note of Issue, filed a motion to amend their Summons and Complaint to include the allegations of Labor Law violations by specific reference.

Accordingly, based on the above, motion seq #2 and motion seq #3 are being **DENIED WITH LEAVE TO RENEW MOTIONS FOR SUMMARY JUDGMENT**. The parties are to appear in Part 9 on January 31, 2025 at 9:30 A.M. for a "Conference" as to scheduling.

Accordingly, the plaintiff's motion (seq #3) to amend his Summons and Complaint is **GRANTED** and it is further

ORDERED that Plaintiffs is to serve a Notice of Entry of this Decision and Order within twenty (20) days from the date hereof; and it is further

ORDERED, that plaintiff is to file, via NYSCEF, the Supplemental Summons and Amended Complaint, as presented in NYSCEF Doc. #77, within ten (10) days of the service and filing of the Notice of Entry; and it is further

ORDERED, that defendants and Third-Party Defendants, shall file their Amended Answers to the Supplemental Summons and Amended Complaint within thirty (30) days of the filing of the Supplemental Summons and Amended Complaint on NYSCEF; and

ORDERED that motion seq #1 and #2 are **DENIED WITH LEAVE TO RENEW**; and it is further

ORDERED, that the parties are to appear on January 31, 2025 in Part 9 at 9:30 A.M.

This constitutes the Decision and Order of the Court.

Dated: January 3, 2025



Hon. Myrna Socorro, J.S.C.