

Tocto v 200 W. 108 Hous. Corp.

2026 NY Slip Op 30127(U)

January 9, 2026

Supreme Court, New York County

Docket Number: Index No. 158289/2022

Judge: Phaedra Perry-Bond

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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. PHAEDRA F. PERRY-BOND PART 35

Justice

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INDEX NO. 158289/2022

CHRISTIAN ORLANDO VELASQUEZ TOCTO,

Plaintiff,

MOTION DATE 11/27/2024, 12/24/2024

- v -

MOTION SEQ. NO. 001 002

200 WEST 108 HOUSING CORP.,

Defendant.

DECISION + ORDER ON MOTION

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200 WEST 108 HOUSING CORP.

Plaintiff,

Third-Party Index No. 595961/2023

-against-

LCS RESTORATION CORP

Defendant.

200 WEST 108 HOUSING CORP.

Plaintiff,

Second Third-Party Index No. 595527/2024

-against-

STATE NATIONAL INSURANCE COMPANY

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 109, 110, 114

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 111, 112, 113

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

Upon the foregoing documents, Defendant/Third-Party Plaintiff 200 West 108 Housing Corp. ("200 West") and Third-Party Defendant LCS Restoration Corp. (collectively "Movants")

motions seeking leave to amend to include fraud as an affirmative defense and counterclaim against Plaintiff (Mot. Seqs. 001 and 002), and seeking security for costs, are consolidated for disposition, and upon consolidation are granted in part and denied in part.

This action concerns Plaintiff's personal injuries incurred allegedly while working on a construction site. The Movants seek leave to assert an affirmative defense and counterclaim of fraud based on the purported affidavit of Luis Isidoro, who claims Plaintiff allegedly told him he was going to fake an injury to make money, and a few days later, witnessed Plaintiff laying on the floor acting as if he had slipped and fell (*see* NYSCEF Doc. 89). They also rely on an affidavit from Miguel Bravo, who claims Plaintiff pretended to sustain an injury, and that he went with Plaintiff to a hospital after the alleged accident and the x-ray taken of Plaintiff showed no broken bones (NYSCEF Doc. 95).¹ Movants also rely on an ongoing RICO action in Federal Court, and transcripts from a Workers' Compensation Board hearing. But Workers' Compensation Law Judge Eng found that the testimony of Mr. Isidoro and others was not sufficiently credible to deny Plaintiff workers' compensation benefits. After an appeal, the Workers' Compensation Board Panel affirmed Judge Eng's decision, stating that "the Board Panel ultimately finds that the carrier failed to satisfy its burden to demonstrate intentional fraud by credible or compelling evidence" (NYSCEF Doc. 110).

The motions seeking leave to amend are denied. A party opposing a motion to amend must demonstrate that it would be substantially prejudiced by the amendment, or the amendments are patently devoid of merit (*Greenburgh Eleven Union Free School Dist. v National Union Fire Ins. Co.*, 298 AD2d 180, 181 [1st Dept 2002]). Here, the proposed amendments are devoid of merit.

¹ Plaintiff claims these affidavits are inadmissible because the affiants are not fluent in English and there is no translator affidavit annexed (*see, e.g. 501 Fifth Ave. Co. LLC v Alvona LLC*, 110 AD3d 494 [1st Dept 2013]).

Movants are defending this matter vigorously and have denied Plaintiff's allegations. While the conflicting accounts of the accident, and the allegedly improper motive may go to Plaintiff's credibility and provide ample ammunition on cross-examination, they do not establish a viable fraud claim. This is especially the case where, as here, the Movants fail to show or allege any reliance on Plaintiff's allegedly fraudulent statements, which is an essential element to a fraud claim. Indeed, in analogous circumstances, the First Department has repeatedly denied leave to amend on the basis that defendants failed to allege justifiable reliance on the allegedly fraudulent statements (*see Anguisaca-Morales v St. Paul and St. Andrew United Methodist Church*, 238 AD3d 439, 440 [1st Dept 2025] citing *Breton v Dishi*, 234 AD3d 432 [1st Dept 2025]; *see also Linares v City of New York*, 233 AD3d 479, 480 [1st Dept 2024]).

The fraud upon the court counterclaim and affirmative defense are also insufficiently pled. While perhaps giving rise to issues of fact as to credibility, the conflicting accounts between Plaintiff and his former coworkers regarding the circumstances of his accident do not rise to the level of "a willful and pervasive scheme to defraud the court such that defendant's ability to defend against the claims was prejudiced" (*see Southerland v Tavern*, 241 AD3d 1184, 1184 [1st Dept 2025]).

The judiciary law § 487 claim is likewise insufficient, especially considering the Workers' Compensation Board, after hearing testimony and assessing the credibility of the witnesses, found Plaintiff's account sufficiently credible to provide him with workers' compensation benefits.² A judiciary law § 487 claim requires allegations of egregious conduct or a chronic and extreme pattern of behavior, and does not apply to allegations asserted that happen to be unfounded (*see*

² Moreover, allowing a judiciary law § 487 claim anytime a party's credibility was thrown into doubt would be unworkable and result in a series of trials within trials as to whether Plaintiff's attorney knew or should have known Plaintiff is lying.

Pruss v AmTrust North America inc., 204 AD3d 620 [1st Dept 2022]; *see also Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 615 [1st Dept 2015]). Therefore, the motions seeking leave to amend are denied.

200 West's motion seeking Plaintiff to post security for costs in the total sum of \$10,000 is granted in part and denied in part. CPLR § 8501(a) mandates that except where a plaintiff has been granted permission to proceed as a poor person or is the petitioner in a habeas corpus proceeding, the Court shall order security for costs if the plaintiff is not a resident of New York (*see also Yarwood v County of Suffolk*, 174 AD3d 954 [2d Dept 2019]; *Clement v Durban*, 147 AD3d 39 [2d Dept 2016]). CPLR § 8503 states that security for costs shall be made in an amount of five hundred dollars in counties within the City of New York, or such greater amount as shall be fixed by the Court. Plaintiff does not directly address this branch of 200 West's motion. There is no dispute that Plaintiff is not a resident of New York as he alleges in his bill of particulars that he lives in Mapleshade, New Jersey

While the Court agrees that 200 West is entitled to security for costs, 200 West has failed to justify the request for \$10,000 in security. This is a rather simple Labor Law action and 200 West has not provided any evidence of incurring such excessive costs. While the Court is cognizant that 200 West must pay to obtain Plaintiff's medical records and potentially conduct independent medical examinations, there is no evidence submitted that those costs have risen or will rise to \$10,000.00 Therefore, 200 West's motion is granted in part, and Plaintiff is ordered to post security for costs in the amount of \$3000.00.

Accordingly, it is hereby,

ORDERED that the motions seeking leave to amend are denied; and it is further

ORDERED that pursuant to CPLR 8501(a) and 8503, plaintiff shall, within thirty (30) days of service of this Decision and Order, post security for costs in the amount of \$3000.00, and the matter is stayed pursuant to CPLR 8502 until Plaintiff posts said security; and it is further

ORDERED that the stay pursuant to CPLR 8502 shall be automatically lifted upon Plaintiff posting security for costs; and it is further

ORDERED that the parties shall meet and confer and submit a proposed status conference order to the Court via e-mail on or before March 10, 2026. If the parties have a serious discovery dispute requiring a conference, the parties shall contact the Court via e-mail and explain the nature of the dispute, at which time a conference may be calendared; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

1/9/26
DATE


HON. PHAEDRA F. PERRY-BOND, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <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