Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

SUNG KYU-TO,
Plaintiff,

-against-

TRIANGLE EQUITIES, LLC and
ARTIMUS CONSTRUCTION, INC.,

Defendants.

Index No: 10944/00

Motion Date: 7/19/06

Motion Cal. Nos. 15,16, 17

ARTIMUS CONSTRUCTION, INC.,

Third-party Plaintiff,

-against-

BIG APPLE CONSTRUCTION and
RESTORATION, INC.,

Third-party Defendants.

The following papers numbered 1 to 36 read on the plaintiff's motion and the defendants' motion and cross-motion for summary judgment as to liability, or in the alternative, granting Triangle Equities, LLC cross-motion for summary judgment on its cause of action for contractual and common law indemnification; and the motion by plaintiff for leave to serve an amended complaint to assert a cause of action based upon the violation of Labor Law § 240(1).

	PAPERS NUMBERED
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Notice of Cross- Motion-Affidavits-Exhibits..	9 - 12
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Upon the foregoing papers it is ordered that the motions and cross motion for summary judgment are denied as untimely. (Miceli v. State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]; Brill v. City of New York, 2 NY3d 648 [2004].)

The plaintiff's motion for leave to file and thereafter serve an amended complaint. Plaintiff, may, within 30 days of entry of this Order file and thereafter serve an amended complaint to set forth what specific section(s) of the Labor Law he claims were violated and for which he claims defendants' are liable.

This is an action to recover for personal injuries plaintiff sustained at about 5:00 p.m. on August 25, 1999 when he was allegedly struck on the head by falling bricks and other demolition debris. The plaintiff was the employee of third-party defendant, Big Apple Construction & Renovation, Inc., which was hired by the defendant, Artimus Construction, Inc., the general contractor, to perform demolition of the interior walls of a five story building located at 2212 8th Ave, New York, N.Y. The accident occurred while plaintiff was on the ground floor of the building as he was gathering his tools. The note of issue was filed on September 13, 2003. On January 26, 2005 the action was stricken from the trial calendar to allow the parties to conduct further discovery regarding the surgeries of the plaintiff's back performed on April 22 and August 19, 2004, after the note of issue was filed.

On January 24, 2006 the plaintiff served his motion for summary judgment as to liability based on the violation of Labor Law §240(1). Plaintiff also separately moved on January 24, 2006 to restore this action to the trial calendar. Thereafter, the defendant, Artimus Construction, on March 13, 2006, and defendant, Triangle Equities, on April 13, 2006 by cross-motion, moved for summary judgment in their favor dismissing the complaint. Each party alleges that the motions for summary judgment are timely since the note of issue was vacated when the action was stricken from the trial calendar on January 26, 2005. The parties, however, are mistaken. The note of issue was not vacated. Inasmuch as all the parties assume their motions are timely, the court will treat the motion as also seeking leave to make a late summary judgment motion.

To prevail on an application for leave to make a late summary judgment motion, the movant has the burden to show "good

cause" for the delay in making the motion by submitting a satisfactory explanation for the untimeliness. No excuse at all, or a perfunctory excuse cannot be 'good cause.'"(Brill v. City of New York, 2 NY3d 648 [2004].) In the absence of such a "good cause" showing, the court has no discretion to entertain even a meritorious, non-prejudicial motion for summary judgment. (Brill v. City of New York, supra; Thompson v. New York City Bd. of Educ., 10 AD3d 650[2004].)

The parties in this case have failed to establish good cause for the inordinate delay in moving for summary judgment. While significant outstanding discovery may, in certain circumstances, constitute good cause for the delay in making a motion for summary judgment, (see Herrera v. Felice Realty Corp., 22 AD3d 723 [2005]; Cooper v. Hodge, 13 AD3d 1111 [2004]; Gonzalez v. 98 Mag Leasing Corp., 95 NY2d 124, 129) such circumstances do not exist here. The action was stricken from the trial calendar on January 26, 2005 to allow further discover as to plaintiff's damages only. The parties, however, now move for summary judgment based on the issue of liability. In addition, the sole evidence submitted in support of all three summary judgment motions is the plaintiff's deposition testimony which was taken on May 23, 2003. Yet, none of the parties submitted any explanation for the failure to move for summary judgment for 3 years after the plaintiff's deposition, or for the one year delay after they believed the note of issue was stricken.

The plaintiff's motion for leave to serve an amended complaint to assert violations of the Labor Law is granted.

Leave to amend a complaint to assert a new or different cause of action should be liberally granted in the absence of prejudice or surprise resulting from the delay, (see, CPLR 3025[b]; McCaskey, Davies & Assocs. v. New York City Health & Hosps. Corp., 59 NY2d 755, 757 [1983]; Fahey v. County of Ontario, 44 NY2d 934, 935 [1978]) unless the proposed amendment is insufficient as a matter of law or patently lacking in merit. (See, Hauptman v. New York City Health and Hosps. Corp., 162 AD2d 588 [1990]; Norman v. Ferrara, 107 AD2d 739, 740 [1985]; Grafer v. Marko Beer & Beverages, 36 AD2d 295 [1971].) Although judicial discretion in allowing leave to amend on the eve of trial should be exercised sparingly, (see Torres v. Educational Alliance, 300 AD2d 469 [2002]; Smith v. Sarkisian 63 AD2d 780 [1978], affd 47 NY2d 878 [1979]) neither lateness (see, Edenwald Contr. Co. v City of New York, 60 NY2d 957, 959 [1983]) nor the failure to offer an excuse for the delay (see, Hilltop Nyack Corp. v. TRMI Holdings Inc., 275 AD2d 440 [2000]; Smith v. Peterson Trust, 254 AD2d 479 [1998]) requires denial of leave to assert a meritorious claim where the opponents have failed to demonstrate actual prejudice resulting from the delay in pleading. (See, Edenwald Contr. Co. v. City of New York, supra; Fahey v. County of Ontario

, supra; Guiliano v. Carlisle, 296 AD2d 438 [2002]; Northbay Construction Co., Inc. v. Bauco Construction Corp., 275 AD 2d 310 [2000].)

In support of his motion, the plaintiff asserts that the failure to assert specific sections of the Labor Law was an oversight and typographic error. In addition, he maintains that the facts alleged in the complaint and bill of particulars together with the deposition testimony of the plaintiff and his affidavit, dated January 23, 2006 are sufficient to put the defendants on notice of the substance of the plaintiff's claims. In opposition, the defendants argue that Labor Law §240(1) does not apply, that the application is untimely and that the plaintiff's January, 2006 affidavit contradicts his earlier deposition testimony so as to support a Labor Law 240(1).

The defendants failed to establish prejudice or surprise if the application were granted. The factual allegations in the complaint, the bill of particulars and those to which plaintiff testified at his deposition, are adequate to put the defendants on notice that the plaintiff's claims as pleaded and implicate violations of the Labor Law despite the absence of specific reference to a particular Labor Law section. (Murtha v. Integral Construction Corp., 253 AD2d 637, 639 [1998]; cf. Caffaro v. Trayna, 35 NY2d 245 [1974]; Stuart v. Board of Directors of Police Benevolent Assn. of NY State Police, 86 AD2d 721 [1982], appeal dismissed 56 NY2d 807 [1982]; Owens v. Palm Tree Nursing Home, 50 AD2d 865 [1975].) In addition, defendants claim prejudice based on delay is without merit. The plaintiff's motion to restore this case to the trial calendar was denied based in part on the defendants' opposition and claims that discovery was not complete. It appears that despite the age of this case, defendants have not completed discovery and are not prepared to proceed with the trial of this action.

Moreover, the proposed amendment is not palpably insufficient or patently devoid of merit. (See, Portillo v. Roby Anne Dev.,LLC, ___ AD3d ___ [2006}, 2006 WL 2257182; Tylutki v. Tishman Technologies, 7 AD3d 696 [2004], lv dismissed 3 NY3d 702[2004]; Salinas v. Barney Skanska Const. Co., 2 AD3d 619 [2003]; Orner v. Port Authority of New York and New Jersey, 293 AD2d 517 [2002]; Outar v. City of New York, 286 AD2d 671 [2001].)

Dated: August 11, 2006

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J.S.C.