UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

LEVI YODER, JONAS ZOOK, SAM ZOOK, JOHN L. HERSHBERGER, MENNO S. HERSHBERGER, URIE HERSHBERGER, MENNO L. GLICK, ANDY A. MILLER, DANNIE L. SCHWARTZENTRUBER, MOSIE SCHWARTZENTRUBER, PETER D. SCHWARTZENTRUBER, BISHOP HARVEY MILLER, and BISHOP MOSE MILLER,

Plaintiffs,

Civil Case No. 09-cv-0007 (TJM/GHL)

- against -

TOWN OF MORRISTOWN, LANETTA KAY DAVIS, in her official capacity; FRANK L. PUTMAN, in his official capacity; HOWARD WARREN, in his official capacity; DAVID STOUT, III, in his official capacity; MARK BLANCHARD, in his official capacity; CHRISTOPHER COFFIN, in his official capacity; and GARY TURNER, in his official capacity,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO AMEND THEIR ANSWER TO CLARIFY AND SUPPLEMENT AN AFFIRMATIVE DEFENSE PURSUANT TO FRCP 15(a)

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PRELIMINARY STATEMENT

Defendants, the Town of Morristown (hereinafter "Town"), Lanetta Kay Davis, Frank L. Putman, Howard Warren, David Stout III, Mark Blanchard, Christopher Coffin, and Gary Turner, (hereinafter collectively "Defendants"), by and through their attorneys, Lemire Johnson, LLC, submit this Memorandum of Law in support of their motion to amend their Answer pursuant to FRCP 15(a) to clarify and supplement an Affirmative Defense.

In 2006 the Town of Morristown, through its Town Council, enacted Local Law #4 which incorporates portions of the New York State Building and Fire Code for the regulation of, among other things, construction, relocation, and reconstruction, of new and existing residential dwellings (Exhibit "A" ¶3). Pursuant to Town Law §130, the Town of Morristown is authorized to regulate the "construction, alteration, removal and inspection of buildings and structures of every nature and description erected or proposed to be erected in said town, including the materials to be used therefor..." (*N.Y. Town L.* §130; Exhibit "A" ¶31).

Defendant Lanetta Kay Davis, as the Town's Code Enforcement Officer (Exhibit "A" ¶32), is charged with enforcing the Building Codes promulgated by the State of New York and the Town of Morristown (*N.Y. Town L.* §138) to ensure the proper construction of those structures for the safety of the residents of the Town.

Defendants Putman, Warren, Stout, Blanchard, Coffin, and Turner, comprised the Town Board in 2006 and voted to enact Local Law #4.

Since the enactment of Local Law #4 in 2006, Plaintiffs (with the exception of now deceased Bishop Harvey Miller and Bishop Mose Miller) have constructed or moved residential structures within the Town of Morristown without securing the appropriate permits (Exhibit "A" ¶¶5, 18-28), and without complying with the State Building Code requirements (e.g., installing smoke detectors in residential structures). Plaintiff Bishop Mose Miller has not applied for, nor been denied, building permits for any reason by the Town of Morristown (Exhibit "A" ¶¶29-30). Plaintiffs have not made a motion or taken other steps to amend the Complaint to reflect that Bishop Harvey Miller died following the commencement of the action.

Upon receipt of the Complaint, Defendants timely served and filed their Answer with numerous Affirmative Defenses (Exhibit "B"; Docket No. 13). For instance, the tenth Affirmative Defense states as follows: "*Some or all of Plaintiffs' claims must be dismissed under the doctrine of legislative immunity*" (Exhibit "B"). While this Affirmative Defense implies that the individual Defendants are immune to suit, Defendants nonetheless sought to clarify and supplement this Affirmative Defense by serving an Amended Answer as follows: "*Defendants are absolutely immune from suit and/or liability under the doctrine(s) of judicial immunity, legislative immunity and/or prosecutorial immunity*" (Exhibit "D"). Defendants requested that Plaintiffs' counsel stipulate to allow this clarification, however, Plaintiffs' counsel refused to consent (Exhibit "C").

It should be noted that from the time that issue was joined, there has been significant settlement negotiations between the parties since July 20, 2009. In light of these negotiations, discovery in this matter has only recently commenced after being stayed for approximately twenty-six months. A trial date has not yet been assigned.

Defendants, by this motion, respectfully request this Court allow Defendants to: (1) clarify and supplement an Affirmative Defense to their Answer pursuant to FRCP 15(a); and (2) for such further relief as this Court deems just and proper.

RELEVANT PROCEDURAL HISTORY

On or about January 6, 2009, Plaintiffs filed their Complaint with the Northern District of New York. *See*, Exhibit "A"; Docket No. 1. Issue was joined by service of Defendants' Answer with Affirmative Defenses on or about March 17, 2009. *See*, Exhibit "B"; Docket No. 13.

On July 20, 2009, the parties participated in a status conference with Magistrate Judge George H. Lowe. The text minute entry of that proceeding documents as follows: "Prior to undertaking depositions, the parties wish to pursue settlement discussions through Early Neutral Evaluation, which they hope to conduct by the end of August. If the case does not settle, the Court will hold a telephone conference call early in September, and dates for depositions will be agreed upon." On October 15, 2009, the parties made "a request for an additional sixty days to 'explore and possibly finalize settlement' in this matter." This requests was granted by the Court.

On December 29, 2009, a status conference was held with Magistrate Judge George H. Lowe at which time counsel for Defendants informed the Court that they intended to file a motion to implead New York State as a direct defendant and/or for dismissal of portions of Plaintiffs' Complaint. This motion was filed on February 5, 2010, within the Court's deadline to seek amendments to the pleadings. *See*, Docket No. 42 and Docket No. 37. The motion was fully submitted on March 5, 2010. *See*, Docket No. 55.

While said motion was pending before the Court, on May 24, 2010, the parties attended a discovery hearing with Magistrate Judge George H. Lowe. In the text minute entry, it is documented

that "[t]he Court and counsel had an in-chambers discussion about substantive issues, the parties' position with respect to settlement....It was agreed that further efforts at settlement would be undertaken."

On August 18, 2010, Plaintiffs filed a letter brief with the Court stating "that Plaintiffs agree with Defendants that the 9-2-10 status conference should be held in person to discuss settlement." *See*, Docket No. 67. The parties attended an in-person conference with Magistrate Judge George H. Lowe on September 2, 2010 and the text minute entry of that conference noted as follows: "[t]he Court and counsel conferred concerning numerous outstanding issues. Several were resolved and with respect to many the issue was narrowed. Counsel will confer further with their clients, and another in-person conference with the Court will be held in the near future."

The parties continued settlement negotiations throughout the remainder of 2010 and into the Spring of 2011. On May 23, 2011, a status conference was held with Magistrate Judge George H. Lowe. The text minute entry for that conference documented that "[t]he parties are in agreement that further settlement efforts should be vigorously pursued...."

Settlement discussions continued between the parties until late-Summer 2011. On September 9, 2011, the parties attended a status conference before Magistrate Judge George H. Lowe. The text minute entry for the proceedings noted as follows: "...a settlement has not been reached. Counsel are directed to confer and try to resolve any loose ends with respect to paper discovery and to discuss the possibility of scheduling depositions while the Motion to Dismiss is still pending."

On November 7, 2011, by written Decision and Order, the Court denied, in its entirety, Defendants' Motion to join the State and County under either Rule 19 or Rule 20. *See*, Docket No. 85. More importantly, the Court's November 7, 2011 Decision and Order made clear that Plaintiffs'

challenge is one of selective enforcement by the Town's Code Enforcement Officer (*see*, Docket No. 85), not a challenge to the State Building Code or the Town's Local Laws (*see*, Docket No. 85).

In the wake of this Court's November 7, 2011 Decision and Order narrowly casting Plaintiffs' Complaint and resuming discovery, Defendants reviewed their Answer and proposed a single amendment. Specifically, on January 18, 2012, Defendants requested that Plaintiffs stipulate to allow them to amend their Answer in light of the recent Court decision. Notably, Defendants' request was made weeks after Plaintiffs' counsel indicated that Plaintiffs "may be" seeking to amend the Complaint in light of Bishop Harvey Miller's death and to substitute a new Bishop as Plaintiff.[1] However, Plaintiffs' counsel refused, stating that "we do not intend to amend the Complaint to add a "substitute" and "we do not consent to Defendants amending their answer...," necessitating this motion. *See*, Exhibit "C."

Nevertheless, Defendants have prepared a proposed Amended Answer for the Court's review, a copy of which is annexed hereto as Exhibit "D." In short, the proposed Amended Answer clarifies a prior Affirmative Defense by supplementing one (1) additional Affirmative Defense containing the following language: "*Defendants are absolutely immune from suit and/or liability under the doctrine(s) of judicial immunity, legislative immunity and/or prosecutorial immunity.*"

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1 It should be noted that, Pursuant to Federal Rule of Civil Procedure 25, Plaintiffs must amend their Complaint to remove the now deceased Bishop Harvey Miller from the action. Federal Rule of Civil Procedure 25 states as follows: "If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party...." Under Rule 25(a), a motion for substitution of a party must be made within 90 days from the date that "death is suggested upon the record by service of a statement of the fact of death as provided in Rule 5...for the service of a motion." However, a motion may be brought under Rule 6(b) to enlarge the time in which to file the motion for substitution beyond the 93 day time period. *See*, 1 Fed R. Civ. P. 6(b); *Unicorn Tales v. Banerjee*, 138 F.3d 467 (2d Cir. 1998); *see, also, Pastorello v. City of New York*, 2000 U.S. Dist. LEXIS 15137 (S.D.N.Y. Oct. 17, 2000) (granting 6(b) enlargement motion to extend the time to move for substitution). Therefore, in the interests of "judicial economy," a temporary stay of discovery may be warranted pending identification of a substitute party for deceased Plaintiff Bishop Harvey Miller as to avoid the possibility of "duplicative discovery" that might be taken once a substitute party enters the case. *See, Travelers Cas. & Sur. Co. v. Vanderbilt Group,* 2002 U.S. Dist. LEXIS 7939 (S.D.N.Y. 2002); *see, also, Karimona Invs. v. Weinreb*, 2003 U.S. Dist. LEXIS 3559 (S.D.N.Y. Feb. 11, 2003).

POINT I

DEFENDANTS SHOULD BE ALLOWED TO AMEND THEIR ANSWER TO CLARIFY AND SUPPLEMENT AN AFFIRMATIVE DEFENSE

As noted above, Defendants request that the Court grant leave to amend the Answer. Generally, leave to amend a pleading shall be freely given when justice so requires. *See*, Fed. R. Civ. P. 15 (a) (2). It is in the sound discretion of this Court "to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007); *see, also, Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227 (1962).

Here, Defendants seeks to amend their Answer pursuant to Rule 15(a) of the Federal Rules of Civil Procedure ("FRCP") to clarify and supplement an Affirmative Defense. *See*, Exhibit "D." Pursuant to this Court's scheduling order, the deadline to amend pleadings was February 5, 2010. Defendants moved the Court to add New York State and or the County of St. Lawrence in a timely fashion by filing their motion on February 5, 2001 (*see*, Docket No. 42). Said motion was pending for approximately eighteen (18) months while the parties vigorously attempted to settle this action. Once it became apparent that a complete settlement could not be reached prior to conducting party depositions, the Court rendered its decision. Upon denial of Defendants' motion to amend the pleadings to add additional defendants, Defendants herein sought to stipulate to clarify and supplement one Affirmative Defense.

Moreover, during the course of the litigation, Plaintiff, Bishop Harvey Miller, died. Following Plaintiff Bishop Harvey Miller's death, Plaintiffs' counsel conveyed to Defendants that they were considering an amendment to their Complaint to reflect the fact that Bishop Harvey Miller

had died and to add the new Bishop as a Plaintiff. After not hearing anything further from Plaintiffs' counsel, we contacted them on January 18, 2012 to request their consent to amend the Answer to clarify and supplement the aforementioned Affirmative Defense. At this juncture, Plaintiffs have not amended their Complaint and have informed Defendants that they do not now intend to do so (*see*, Exhibit "C"). Finally, given the fact that the parties have been exchanging paper discovery and participating in extensive settlement negotiations for the better part of the past eighteen (18) months, party depositions have only recently commenced. Therefore, Plaintiffs would clearly not be prejudiced by the proposed amendment, nor would said amendment further delay this action.

A. Amendment To Pleadings Should Be Freely Given.

In determining a motion filed after a court-ordered deadline for amending the pleadings, a court must balance the requirements of Rules 15(a) and 16(b) of the Federal Rules of Civil Procedure. *See, Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 339 (2d Cir. 2000). Rule 15(a) provides that once the time for amending a pleading as of right has expired, a party may request leave to amend, which "the court should freely give ...when justice so requires." *See*, Fed. R. Civ. P. 15(a). Generally, under Rule 15, if the underlying facts or circumstances relied upon by the party seeking leave to amend may be a proper subject of relief, the party should be afforded the opportunity to test the claim on its merits. *See, United States ex rel. Maritime Admin. v. Cont'l Ill. Nat'l Bank and Trust Co. of Chi.*, 889 F.2d 1248, 1254 (2d Cir. 1989). "In the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave

sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227 (1962).

Rule 16(b) directs the court to enter a scheduling order that limits the time to amend the pleadings. Fed. R. Civ. P. 16(b)(3). Moreover, the rule also provides that "[a] schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4); *see, also, Parker v. Columbia Pictures Indus.*, 204 F.3d at 340.

In *Parker*, the Second Circuit addressed the showing required of a party moving to amend its pleadings after the time set by the court for filing such motions. In that case, the Court joined several other circuits in holding that "the Rule 16(b) 'good cause' standard, rather than the more liberal standard of Rule 15(a), governs a motion to amend filed after the deadline a district court has set for amending the pleadings." *Id.* (cites to collecting cases omitted).

In this case, the scheduling deadlines could not have been met in light of the parties' diligent settlement negotiations which lasted approximately eighteen (18) months. Moreover, the Court was made aware of the progress of these settlement negotiations through a number of status conferences held with the Court at which time all parties agreed to stay discovery and continue with settlement negotiations. Therefore, Defendants have not, by their own accord, wantonly delayed serving the amendment to their Answer. Once settlement negotiations broke down and the Court issued its ruling as to Defendants' motion in late-2011, Defendants sought Plaintiffs' consent to amend their Answer. This request was denied by Plaintiffs' counsel on January 18, 2012 (*see*, Exhibit "C"), and this motion has been promptly initiated thereafter (*see*, Exhibit "C").

B. Defendants Have "Good Cause" For The Delay To Amend The Answer.

As noted above, Defendants did not promptly seek to amend their Answer to clarify and supplement an Affirmative Defense for three reasons: 1) the parties were actively attempting to settle this matter for approximately eighteen (18) months; 2) after the death of a Plaintiff and Plaintiffs' counsel's announcement that they were going to amend their Complaint; and 3) the decision regarding Defendants' Motion to Dismiss, or as an alternate relief, to join the State and County was not rendered until November 7, 2011. All of these reasons establish "good cause" for Defendants' delay to amend their Answer to clarify and supplement one Affirmative Defense.

In deciding whether to grant a motion to amend, the Court must weigh the good cause shown for the delay against the prejudice to the non-movant that will result from the amendment. *Evans v. Syracuse City Sch. Dist.*, 704 F.2d 44, 46-47 (2d Cir. 1983). Considerations of prejudice include whether the new claim would: (1) require significant additional discovery; (2) significantly delay the resolution of the dispute; or (3) prevent the non-moving party from bringing a timely action in another jurisdiction. *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993).

Here, Defendants have demonstrated "good cause" for their delay and should be allowed to amend their Answer.

C. Assuming, *Arguendo*, That The Court Does Not Find "Good Cause," Defendants Have Shown "Excusable Neglect."

Given the aforementioned procedural history, more specifically that all parties participated in significant settlement discussions in an attempt to resolve this case for approximately eighteen (18) months, Defendants have shown that they have "good cause" to clarify and supplement an Affirmative Defense under Rule 16(b). However, assuming, *arguendo*, that the Court finds absence

of "good cause," the "excusable neglect" standard under Rule 6(b) should applies here. Under that Rule, "the court may, for good cause, extend the time...on motion made after the time has expired if the party failed to act because of excusable neglect." *See*, Fed. R. Civ. P. 6(b).

Interpreting Rule 6(b), the Second Circuit has held:

> *To determine whether a party's neglect is excusable, a district court should take into account: [1] [t]he danger of prejudice to the [opposing party], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was in the reasonable control of the movant, and [4] whether the movant acted in good faith. As these factors suggest, excusable neglect is an elastic concept, that is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission.*

Tancredi v. Met. Life. Ins. Co., 378 F.3d 220, 228 (2d Cir. 2004) (internal quotations and citations omitted).

In the instant case, as party depositions have only recently commenced and there is no assigned trial date, there is no danger of prejudice as to plaintiffs. Moreover, the delay at issue in this case was as a result of ongoing settlement negotiations. There is no evidence before this Court that Defendants acted in bad faith by waiting to amend their Answer.

D. Delay Alone Is An Insufficient Reason To Deny Defendants From Amending Their Answer To Clarify and Supplement An Affirmative Defense.

As documented above, there is no evidence that Plaintiffs will be prejudiced by allowing Defendants to amend their Answer, nor is there evidence that Defendants have acted in bad faith. It is well-settled that a motion to amend may be granted even without a showing of good cause where the opposing party would not be prejudice and authority in this Circuit exists to support that contention. *See, e.g., Nycomed U.S. Inc. v. Glenmark Generics Ltd.*, 2010 U.S. Dist. LEXIS 29267, 2010 WL 1257803 (E.D.N.Y. 2010) (holding that "delay alone, in the absence of bad faith or prejudice, is usually not sufficient reason for denying a motion to amend"); *New Yuen Fat Garments*

Factory Ltd. v. August Silk, Inc., 2009 U.S. Dist. LEXIS 45857, 2009 WL 1515696, (S.D.N.Y. 2009) (the Southern District permitted amendment, which was based upon facts known at the time of the original complaint, in the absence of showing of prejudice).

For instance, Court have liberally allowed amendments of pleadings up and until the "eve of trial." See, *Morris v. Fordham Univ.*, 2004 U.S. Dist. LEXIS 7310 (S.D.N.Y. Apr. 27, 2004)(granting leave to plaintiff to amend the complaint to avoid dismissal of claim); *Guzman v. Bevona*, 90 F.3d 641 (2d Cir. N.Y. 1996)(granting leave to amend the complaint on the "eve of trial"); *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1087 (2d Cir. N.Y. 1977)(granting leave to amend the complaint on the "eve of trial"); *Kelcey v. Tankers Co.*, 217 F.2d 541 (2d Cir. N.Y. 1954) (granting leave to amend the complaint on the "eve of trial"); *Chiquita Int'l, Ltd. v. M/V Cloudy Bay*, 2009 U.S. Dist. LEXIS 91790 (S.D.N.Y. Sept. 30, 2009) (granting leave to amend the complaint on the "eve of trial"); *Hannah v. Metro-North C. R. Co.*, 753 F. Supp. 1169 (S.D.N.Y. 1990)(holding that "parties are routinely permitted to assert new claims long after they acquired the facts necessary to support such claims . . . and have even been permitted to amend a complaint on the eve of trial"); *Nomura Sec. Int'l, Inc. v. E*Trade Sec., Inc.*, 280 F. Supp. 2d 184 (S.D.N.Y. 2003)(holding delay alone is insufficient basis to deny amendment at the close of discovery; *Adler v. Alcide Corp.*, 1998 U.S. Dist. LEXIS 15219 (S.D.N.Y. Sept. 29, 1998) (granting leave to amend the complaint on the "eve of trial"); *Schare v. Six Flags Theme Parks*, 1998 U.S. Dist. LEXIS 592 (S.D.N.Y. Jan. 21, 1998)(permitting amendment following he close of discovery); *Doe v. Karadzic*, 176 F.R.D. 458 (S.D.N.Y. 1997)(holding that the Second Circuit has instructed the district courts to permit leave to amend, even on the eve of trial, where the new claims arise from the same set of operative facts asserted in the original complaint).

Here, as discovery has only recently commenced and a trial date has yet to be assigned, Defendants must be allowed to amend their Answer to clarify and supplement one Affirmative Defense.

E. Affirmative Defenses May Be Added Up Until the Time of Trial.

The Second Circuit has allowed new affirmative defenses to be added as late in the pre-trial proceedings, such as through alternative relief requested during summary judgment motions. In *Saks v. Franklin Covey Co.*, the Second Circuit observed, "[n]otwithstanding a defendant's failure to timely plead the preemption defense, a district court may still entertain affirmative defenses at the summary judgment stage in the absence of undue prejudice to the plaintiff, bad faith or dilatory motive on the part of the defendant, futility, or undue delay of the proceedings." 316 F.3d 337, 350 (2d Cir. 2003) (citing *Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 283 [2d Cir.], cert. denied, 531 U.S. 1035, 121 S. Ct. 623, 148 L. Ed. 2d 533 [2000]).

As noted above, since depositions have only recently commenced, the instant matter is far removed from the pre-trial proceedings. Therefore, Defendants are entitled to an amendment of the Answer to clarify and supplement an Affirmative Defense.

CONCLUSION

WHEREFORE, Defendants respectfully request this Court issue an Order allowing Defendants to: (1) clarify and supplement an Affirmative Defense to their Answer pursuant to FRCP 15(a); and (2) for such further relief as this Court deems just and proper.

DATED: Malta, New York
February 17, 2012

Respectfully submitted,

LEMIRE JOHNSON, LLC

s /April J. Laws

By _____

April J. Laws
Bar Roll No. 517148