

Loutit v Redfern

2008 NY Slip Op 33687(U)

December 24, 2008

Supreme Court, New York County

Docket Number: 106825/06

Judge: Paul Wooten

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 22

DOUGLAS M. LOUITIT and TIMOTHY TAFT,

Plaintiffs,

Index No.:106825/06

- against -

DECISION/ORDER

WILLIAM D. REDFERN, JAMES R. LOUITIT,
and CYBERT TIRE CORPORATION d/b/a
CYBERT TIRE & CAR CARE,

Defendants.

FILED

JAN 16 2009

COUNTY CLERK'S OFFICE
NEW YORK

WOOTEN, PAUL, J.:

In this action, plaintiffs sue to recover for injuries allegedly sustained in a motor vehicle accident on August 13, 2003, while they were passengers in an automobile owned by defendant James Loutit and operated by defendant William Redfern (Redfern). Defendant Redfern moves to amend his answer to assert a cross claim for contribution and/or indemnification against co-defendant James Loutit, and to add a counterclaim for contribution and/or indemnification against plaintiff Douglas Loutit.

There is no opposition to the branch of the motion which seeks to add a cross claim against James Loutit, and that branch of the motion accordingly will be granted. The branch of the motion which seeks to add a counterclaim against plaintiff Douglas Loutit, is opposed by plaintiff Loutit.

The decision whether to permit amendment of pleadings is committed to the discretion of the court. Edenwald Contr. Co. v City of New York, 60 NY2d 957 (1983). In general, leave to amend an answer should be freely granted absent prejudice or surprise resulting from the delay. CPLR 3025 (b); McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp., 59 NY2d 755 (1983). This Department, however, "has consistently held that, in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted" (Non-Linear Trading Co. v Braddis Assocs., 243 AD2d 107, 116 [1st Dept 1998]), and leave to amend will be denied if the amendment is shown to be clearly lacking in merit. Crimmins Contr. Co. v City of New York, 74 NY2d 166, 170 (1989); Herrick v Second Cuthouse, Ltd., 64 NY2d 692, 693 (1984). "Therefore, a motion for leave to amend a pleading 'must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment'." Non-Linear Trading Co., 243 AD2d at 116, quoting Nab-Tern Constructors v City of New York, 123 AD2d 571, 572 (1st Dept 1986). See Schulte Roth & Zabel, LLP v Kasso, 28 AD3d 404 (1st Dept 2006).

Here, defendant Redfern submits only an attorney's affirmation in support of his proposed amended answer adding the counterclaim for contribution and/or indemnification against plaintiff Douglas Loutit, and Redfern submits no evidence to show

that the counterclaim has merit. To the extent that Redfern seeks to demonstrate the merit of the proposed amendment based on deposition testimony discussed by Redfern for the first time on the reply, the court declines to consider defendant's arguments, as plaintiff did not have an opportunity to respond to them. See id. at 405; Ritt v Lenox Hill Hosp., 182 AD2d 560 (1st Dept 1993). Moreover, contrary to Redfern's contention, the addition of the new cause of action would likely necessitate additional discovery and result in a delay of the trial of this case. Defendant Redfern also fails to provide a reasonable explanation for the delay in moving to amend until discovery has been substantially completed. See Oil Heat Inst. of L.I. Ins. Trust v RMTS Assocs., 4 AD3d 290 (1st Dept 2004); Rose v Velletri, 202 AD2d 566 (2d Dept 1994). Under these circumstances, the court declines to exercise its discretion to grant leave to amend the answer to add a counterclaim.

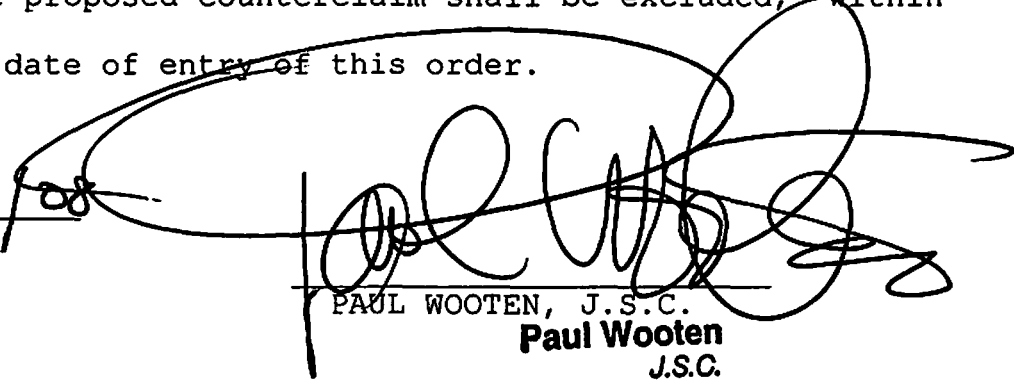
Accordingly, it is

ORDERED that defendant Redfern's motion is granted, without opposition, to the extent of permitting defendant Redfern to amend his answer to assert a cross claim for indemnification and/or contribution against co-defendant James Loutit, and is otherwise denied; and it is further

ORDERED that defendant Redfern shall serve and file an amended answer in the proposed form annexed to the moving papers,

except that the proposed counterclaim shall be excluded, within 15 days of the date of entry of this order.

Dated: 12/24/08

A large, stylized handwritten signature in black ink, appearing to read 'Paul Wooten', is written over the typed name and extends upwards into the text area.

PAUL WOOTEN, J.S.C.
Paul Wooten
J.S.C.

FILED
JAN 16 2009
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