[* 1]

SHORT FORM ORDER

INDEX NO. 10391-2009

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 2-14-12
ADJ. DATE 5-15-12
Mot. Seq. # 004 - MG

----------X

DRENA MILESKI, Individually and as Administratrix of the Goods, Chattels and Credits of: RONALD P. MILESKI, Deceased,

Plaintiff(s),

- against -

MSC INDUSTRIAL DIRECT CO., INC.,

Defendant(s).

----------X

MSC INDUSTRIAL DIRECT CO., INC.,

Third-Party Plaintiff(s),

- against -

BUFFALO MACHINERY CO., LTD. and DEER PARK HYDRAULICS & PACKING CO., INC.,

Third-Party Defendant(s).

----------X

Lieb at Law, P.C.
Attorneys for Plaintiff
376A Main Street
Center Moriches, New York 11934

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
Attorneys for Defendant/Third-Party Plaintiff
3 Gannett Drive
White Plains, New York 10604

Bee, Ready, Fishbein Hatter & Donovan
Attorneys for Third-Party Defendants
170 Old Country Road, Suite 200
Mineola, New York 11501

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated December 28, 2011; (2) Affirmation in Opposition by the defendant/third-party plaintiff, dated March 9, 2012, and supporting papers; (3) Reply Affirmation by the plaintiff, dated April 23, 2012, and supporting papers;and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the plaintiff's motion to add proposed additional parties Sid Tool Inc. and Enco Inc. pursuant to CPLR 3025 is granted; and it is further

ORDERED that the plaintiff's motion to add proposed additional parties Burns Real Estate, LLC, Nijon Tool Comp, Inc, Island Wide Supply Corp., and John Raymond Burns is granted; and it is further

ORDERED that the motion to add a cause of action to pierce the corporate veil of defendant MSC. Corp. is hereby granted; and it is further

ORDERED that the motion of the plaintiff to pierce the corporate veil of Burns Real Estate, LLC is hereby granted; and it is further

ORDERED that the motion by the plaintiff to add a claim for punitive damages in the *ad damnum* clause is hereby granted; and it is further

ORDERED that the plaintiff's motion to extend the time to serve the additional parties is hereby granted.

The plaintiff herein has moved for relief pursuant to CPLR 3025 to amend the complaint to add parties, add two causes of action to pierce the corporate veil, and amend the *ad damnum* clause to include punitive damages.

The complaint claims personal injuries and wrongful death in 18 causes of action alleging negligence, gross negligence and reckless conduct, strict products liability, breach of warranties of merchantability and fitness for a particular purpose. The case was commenced on March 23, 2009 by the filing of a summons with notice with the clerk of the court. On May 12, 2009 a verified complaint was filed with the Clerk of the Court. On June 8, 2009 the defendant MSC Industrial Direct Co. Inc. appeared by way of filing an answer verified by their attorneys. On December 20, 2010 an order was issued granting the defendant MSC's motion to add the third party defendant Deer Park Hydraulics and Packing Co. Inc.(hereinafter Deer Park) On July 20, 2001 one Larry Costigan appeared for an EBT on behalf of defendant MSC and on September 8, 2011, defendant Deer Park produced John Raymond Burns for EBT. The decedent, an employee of Deer Park, died on September 7, 2007 allegedly as a result of injuries sustained in work related accident involving the use of a micro lathe. The accident occurred on July 7, 2007 and thus the Statute of Limitations has expired as to any proposed new parties.

Plaintiffs argue they exercised due diligence prior to the commencement of the action in attempting to find out the corporate status of the defendant MSC. They propose to add Sid Tool Inc and Enco, Inc. They allege that Sid Tool is the parent corporation of both MSC and Enco and that both Sid Tool and Enco are so intertwined and commingled with MSC as to justify piercing the corp. veil and adding them as defendants. They argue that although they researched the defendant MSC through the New York State Dept. of State, they weren't truly aware of the extent of the commingled nature of these corporate entities until the EBT testimony. In support, plaintiffs submit testimony by Larry Costigan that Sid Tool owns defendant MSC and Enco, that Sid Tool, MSC and Enco share corporate headquarters, books, records, managers, directors, bank accounts and employees, that Sid Tool, MSC and Enco maintain cross-functionality in and

amongst each other, that Larry Costigan and other employees work for all three companies and that job duties and responsibilities, for him and his colleagues, extend to all three companies, and that MSC employees, including Mr. Costigan are paid by checks drawn on Sid Tool Inc.

The claim is that the deceased was operating a micro lathe without a safety item known as a "chuck guard" which was allegedly sold by MSC to the deceased's employer Deer Park. The deceased apparently got caught in the machine, causing the injuries which allegedly ultimately resulted in his death. It is further claimed, through the EBT testimony of Mr. Costigan, that all employees of all three entities were aware of the dangers of operating a lathe without a guard.

The plaintiff's also seek to add what they have described as "the Burns' defendants."Specifically, they seek to add Nijon Tool Comp. Inc., Island Machine Supply Corp. Burns Real Estate, LLC and John Raymond Burns. They argue that the testimony of John Raymond Burns at EBT supports these requests. On this point the testimony established that Nijon Tool Co, Inc., Island Machine Supply Corp Burns Real Estate LLC, as well as John Burns personally, operate out of the same location as the defendant Deer Park. Burns Real Estate LLC owns four buildings known as 12 Evergreen Place which were all "married" and located on one lot, purchased at the same time and that John Burns owns all the businesses operating on the lots owned by Burns Real Estate LLC with the exception of Deer Park which ownership he shares. There are no written or oral leases with the businesses which operate from the property. All of the companies can use any part of the building or any machinery without permission. Burns Real Estate LLC receives a salary of $4,000 a month from Deer Park. Burns Real Estate Inc. Pays the taxes on the buildings for the lot.

Burns also testified that he has experience operating a lathe similar to the lathe operated by the deceased at the time of this accident, that he had an apprenticeship where he learned the operation of machinery including lathes. The testimony established that at the time of the accident, there were no rules or regulations mandating the wearing of safety materials, or the use of a "chuck guard' on the lathe. The use or lack of use of these items was left to the discretion of the operator. There was no safety compliance or training coordinator at the facility at the time of the accident. There was no policy with respect to machine inspection or cleaning.

In opposition, the defendant argues that the plaintiff has failed to provide a reasonable excuse for the delay of almost 3 years in making the motion to add parties. Further, CPLR 203(b) only allows for the adding of parties after the expiration of the statue of limitations has expired if it can be said that the proposed new parties were "united in interest" with the named defendant and that the new proposed defendants are not united in interest with the named defendants. The claim that the corporate veil of MSC should be pierced thus making them united in interest with the named defendants cannot be sustained as there is no evidence that the proposed new parties, despite common ownership, exercised complete dominion and control over the sister companies (*See Pae v Yoon* 41 AD3d 681, 838 NYS 2d 172[2nd Dept., 2007]). The defendants submit that they would be prejudiced by adding parties over 3 years after the commencement of the action and such prejudice would be significantly more acute by allowing an amendment to the *ad damnum* clause for punitive damages. They argue that allowing a claim for punitive damages would subject the defendant's to different elements and standards of proof to defend against and subject the defendants to far greater liability than would otherwise have been the case (*Heller v Provensano,*

303 AD2d 20, 756 NYS2d 26).

In relevant part, CPLR 3025(b) provides that " a party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or stipulation of the parties. Leave shall be freely given upon such terms as may be just....". The policy of the courts is to liberally permit amendments of pleadings unless the rights of a party are substantially prejudiced thereby (*Mitchell v New York*, 44 AD2d 852, 355NYS2d 805[2nd Dept.1974]). Leave to amend a complaint is to be freely granted, provided that the proposed amendment does not prejudice or surprise the defendant, is not patently devoid of merit, and is not palpably insufficient (*see*, CPLR 3025(b); *Bonavita v McNicholas*, 72 AD3d 859, 898 NYS2d 866[2nd Dept. 2010]). A motion to amend a pleading is committed to the broad discretion of the court, and the resulting determination will not lightly be set aside (*Sidor v Zuhoski*, 257 AD2d 564, 683 NYS2d 590 [2nd Dept. 1999]). Leave should be freely granted absent a showing of prejudice and the court should not examine the merits or legal sufficiency of a proposed added cause of action unless it is clearly or patently insufficient on its face (*Fisher v Ken Carter Industries, Inc,*. 127 AD2d 817, 512 NYS2d 408 [2d Dept. 1987]).

A claim asserted against a defendant in an amended pleading will relate back to claims previously asserted against a co-defendant for Statute of Limitations purposes where the two defendants are "united in interest."(*Deluca v Baybridge at Bayside Condo I*, 5 AD3d 533, 772 NYS2d 876[2nd Dept. 2004]; *Buran v Coupal*, 87 NY2d 173, 638 NYS2d 405 [1995]). The relation-back doctrine requires the plaintiff to establish that: (1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well (*Davis v Larhette*, 39 AD3d 693, 834 NYS2d 280[2nd Dept. 2007]; *Deluca v Baybridge at Bayside Condo I, supra*). Mistake means merely that a mistake was made, not an excusable mistake.(*See, Deluca, supra; Losner v Cashline, LP,* 303 AD2d 647, 757 NYS2d 91 [2nd Dept. 2003]).

There is no question but that in order to pierce the corporate veil of a corporate entity requires a showing that the owners exercised complete dominion and control of the corporation and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury. (*Pae v Yoon*, *supra*). This question is analyzed under the rules of law concerning the amendment of pleadings. This is not a final determination of the merits of the matter or a determination of what ultimately may be submitted to a jury.

The Court finds that the plaintiff has made a sufficient showing that the MSC defendants and the Burns defendants are united in interest for purposes of amending the pleadings. The Court further finds that the evidentiary foundation to support the application wasn't obtained by the plaintiffs until the depositions of Larry Costigan and John Raymond Burns. As to the MSC defendants, it wasn't until the testimony of Mr. Costigan that the plaintiffs learned that Sid Tool owns both MSC and Enco and further that they share corp. headquarters, books, records, managers, directors, bank accounts, and employees. Mr. Costigan and others work for all three companies which include job duties that extend across the board for each. Notably, Mr.

Costigan, produced for EBT by defendant MSC, is paid by for work performed for any of the three companies, by checks drawn on Sid Tool Inc. Therefore, Sid Tool and Enco can be said to have already participated in the lawsuit by having it's employee deposed on behalf of MSC. (*See, Donovan v All-Weld Products Corp.*, 34 AD3d 257, 824 NYS2d 44).

There is no evidence submitted by the defendants that there are defenses that could be interposed as to one defendant and not the others.

The Court also finds that the plaintiffs have made a sufficient showing to add the Burns defendants as parties. The EBT of John Raymond Burns revealed the information upon which the plaintiff relies to support the motion. John Burns, according to the EBT, owns Nijon Tool Comp. Inc., Island Machine Supply Corp and Burns Real Estate, LLC. Burns real estate owns the real estate and the four buildings that house all the businesses operating at the one address known as 12 Evergreen Place. Mr. Burns owns all the businesses operating on the lots owned by Burns Real Estate LLC with the exception Deer Park Hydraulics and Packing Comp which he shares with another. Mr. Burns is president and shareholder of Deer Park. He operated lathes prior to the accident including the micro cut lathe which is the lathe alleged to have caused the injuries in this case. The companies are all operating in the same location, albeit, in different buildings. John Burns has also already participated in the lawsuit by being produced for EBT by third party defendant Deer Park. Accordingly there is a sufficient showing that the Burns defendants are united in interest.

The plaintiffs do not seek to add new causes of action with the exception of a claim to pierce the corp. veil of MSC in order to reach the assets of the other entities sought to be added should they prevail on the claim. They also seek to pierce the corporate veil of Burns Real Estate, LLC. These proposed new causes of action will not prejudice the defendants as the record evidence to date has shown a sufficient unity of interest of all the defendants to put them on notice of the claims (*See Donovan v All Weld Products Corp., supra*).

The Court concludes therefore, that the claims against the proposed new parties relate back to the previously interposed claims against the original defendant because the new claims arise out of the same conduct, transaction or occurrence. Moreover, the new proposed parties are shown to be sufficiently united in interest to allow the amended pleading and further that the new parties knew or should have known that, but for the mistake by the plaintiff as to the identity of the proper parties until the EBTs of Larry Costigan and John Raymond Burns, the action would have been brought against them. (*See Liverpool v Averne Houses Inc.*, 114 AD2d 840, 495 NYS2d 146[2nd Dept. 1985], *affd* 67 NY2d 878, 501 NYS2d 802 [1986]).

The plaintiffs also move to add a punitive damage request to the ad damnum clause. In the original complaint the plaintiffs brought causes of action alleging, *inter alia*, that the conduct of the defendant was grossly negligent as well as reckless and that such conduct caused the deceased's personal injuries and ultimate death. The complaint in this regard alleges that the defendant "recklessly failed to ...distribute to the plaintiff's employer a micro lathe that was safe and suitable for the performance of the plaintiff's work... that they recklessly failed to properly warn the plaintiff that the machine was not safe and suitable for the work to be performed on it... that they recklessly failed to distribute a lathe with the usual and ordinary safeguards which were in general use on machines of this character... that they recklessly failed to conduct appropriate inspection and testing of the lathe and in particular, its machine guarding... and that they were

reckless in their auxiliary functions of preparation, installation, packaging and servicing the micro cut lathe machine and its component parts, including its machine guarding."

However, the EBT of Larry Costigan on behalf of the defendant MSC revealed that he was in charge of the sales team, that he personally had extensive knowledge and training regarding operation of the lathe, that he trains employees of Sid Tool and their subsidiaries regarding lathe operation and safety, and has used guards when operating the lathe, that he was aware from as early as 1978 of the safety benefits of using "chuck guarding" on a lathe and that he was aware of OSHA regulations regarding chuck guards on lathes, that the chuck guard can prevent clothing, hair , or other loose articles from getting caught in the lathe, that he was aware of kill switches and other safety measures regarding lathe usage and that the defendant marketed guards in their catalogues at the same time this lathe was sold to the defendant Deer Park, albeit in a different section of the catalogue from where they marketed lathes. The lathes were sold without chuck guards notwithstanding the knowledge of the defendant of the enhanced safety to the operator of the lathe provided by such guards.

The knowledge derived from the EBT supplemented the evidence that the defendant's conduct was arguably more egregious than the grossly negligent and reckless conduct originally pled.

The defendant has claimed prejudice if the plaintiff is allowed to amend the *ad damnum* clause. Prejudice in this context means that the nonmoving party will be hindered in the preparation of its case or will be prevented from taking some measure in support of its position. The defendant has claimed that the plaintiffs cannot prove that MSC sold the lathe to Deer Park. Granting this amendment will not adversely effect the ability of the defendant to vigorously interpose this defense. *(See Demesnil vProctor and Schwartz,* 199 AD2d 869, 606 NYS2d 394[3rd Dept. 1993]). The defendant also states that the evidence cannot justify the finding of punitive damages as it can never be said that the conduct in question was so reckless or wantonly negligent as to constitute the equivalent of a conscious disregard of the rights of others (*Wilner v Allstate Ins. Comp.*, 71 AD3d 155, 893 NYS2d 208[2nd Dept. 2010]).

Given the fact that the defendant was on notice that they were being accused originally of reckless conduct the proposed amendment to the ad damnum clause cannot come as a surprise particularly under circumstances where the additional facts developed at EBT were exclusively within the knowledge of the defendant. Moreover, those additional facts cause the court to conclude that the proposed amendment is predicated on more than mere speculation (*See, Buckholz v Maple Garden Apts., LLC*, 38 AD3d 584, 754 NYS2d 888 [2nd Dept. 2003]).

Given the proof submitted, the proposed amendment is not plainly lacking in merit. Although the defendant has argued that the evidence does not support the assessment of punitive damages, this argument is more appropriately raised at trial or by way of motion for summary judgment because a motion to amend is not the proper place for a determination of the merits of this issue (*See, Lucido v Mancuso,* 49 AD3d 220, 851 NYS2d 238 [2nd Dept.2008]).

Finally, the Court is cognizant of the fact the New York public policy precludes insurance indemnification for punitive damages awards (*Home Ins. Co. V American Home Products Corp.*, 75 NY2d 196, 551 NYS2d 481[1990]). The case remains in this part's IAS calendar and has not yet been certified

for trial. Accordingly, the Court will afford the defendant a reasonable time to secure counsel to defend their interests for conduct allegedly constituting a basis for the imposition of punitive damages and allow discovery relevant to this issue.

Based upon the proof submitted the Court will permit the plaintiff 60 days from the filing of the notice of entry with affidavit of service of the order granting this relief to serve the "MSC defendants" and the "Burns defendants."

Settle order on notice.

Dated: January 22, 2013

PETER H. MAYER, J.S.C.

[ ] FINAL DISPOSITION

[X] NON FINAL DISPOSITION