

American Bldg. Supply Corp. v Petrocelli Group, Inc.
2013 NY Slip Op 32474(U)
October 9, 2013
Supreme Court, New York County
Docket Number: 601562/2008
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 601562/2008
AMERICAN BUILDING SUPPLY
vs
PETROCELLI GROUP
Sequence Number : 004

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

PARTIAL SUMMARY JUDGMENT

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s) <u>1, 2</u>
Answering Affidavits — Exhibits _____	No(s) <u>3, 4</u>
Replying Affidavits _____	No(s) <u>5, 6</u>

Upon the foregoing papers, it is ordered that this motion is

FILED


OCT 16 2013

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/9/13


HON. EILEEN A. RAKOWER, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
AMERICAN BUILDING SUPPLY CORP.,

Plaintiff,

- against -

PETROCELLI GROUP, INC. and POLLAK
ASSOCIATES,

Defendants

Index No.
601562/08

**DECISION
and ORDER**

Mot. Seq.
004

FILED

HON. EILEEN A. RAKOWER

OCT 16 2013

NEW YORK
COUNTY CLERK'S OFFICE

On or about October 18, 2005, Gregory Lucero ("Lucero"), an employee of plaintiff, was allegedly injured. On or about February 12, 2006, Lucero instituted an action against American Building Supply, DRK, LLC, and Howard L. Kahn in Bronx County under the Index No. 7487/06 ("the Underlying Lucero Action"). Lucero instituted a second action against New York City Industrial and Development Agency ("NYCIDA"). The two actions were consolidated. Both actions were forwarded to the insurer, Burlington Insurance Company to defend, indemnify and pay any claims alleged by Lucero under the insurance policy that Petrocelli Group, Inc. had allegedly procured on behalf American Building Supply. Burlington Insurance Company disclaimed coverage under the insurance policy that had been procured by defendant Petrocelli Group, Inc. on behalf of American Building Supply based upon the cross-liability exclusion contained in the policy.

On May 21, 2008, plaintiff American Building Supply Corp. ("American Building") commenced this action against defendant Petrocelli Group, Inc. ("Petrocelli"), American Building's broker, and Pollak Associates ("Pollak")¹ for negligence and breach of contract in connection with their procuring of general

¹ The action against Pollak was discontinued.

liability insurance on behalf of American Building and their additional insureds.

On or about August 17, 2009, a Note of Issue was filed in this action. By a motion dated November 3, 2009, Petrocelli served and filed a motion for summary judgment. By Order dated March 19, 2010, Petrocelli's motion for summary judgment was denied. On appeal, the Appellate Division, First Department reversed the Court's Order and dismissed the Complaint on the grounds that there was a presumption that a policy holder read and understood the insurance policy. After leave to appeal to the Court of Appeals was granted, the Court of Appeals reversed the Appellate Division, First Department, and reinstated the Complaint by Order dated November 19, 2012. Petrocelli then filed a motion to reargue, which was denied by the Court on Appeals on February 14, 2013. In accordance with the Court of Appeals' decision, the matter was then remanded back to this Court for further proceedings consistent with its decision.

During the pendency of Plaintiff's appeal to the Court of Appeals in connection with the First Department's reversal, a decision was issued on August 28, 2012 by Judge Betty Owen Stinson in the Underlying Lucero Action, which granted American Building's motion for summary judgment and dismissed American Building from the action.

Petrocelli now moves for an Order granting Petrocelli leave to file a late motion for partial summary judgment on the issue of damages upon good cause and for an Order granting Petrocelli summary judgment. Petrocelli seeks an Order limiting American Building's recovery in the instant matter to the reasonable attorneys' fees and costs expended by American Building in defending itself in connection with the Underlying Lucero Action.

American Building opposes Petrocelli's motion and cross moves for an Order "amending the caption to add DRK, LLC, and New York Industrial Development Agency" as plaintiffs. In the proposed Amended Complaint, Plaintiff seeks to add DRK and NYCIDA as named plaintiffs and to assert a negligence cause of action against Petrocelli on behalf of DRK and NYCIDA, entities which American Building claims were to be additional insureds on American Building's insurance policy. American Building alleges that had Petrocelli obtained proper insurance from Burlington Insurance Company, Burlington Insurance Company would have had the burden of defending American Building as well as DRK and NYCIDA.

CPLR §3212 prohibits the filing of summary judgment more than 120 days after the note of issue is filed except with leave of court “on good cause shown.” Successive motions for summary judgment are not permitted in the absence of showing newly discovered evidence or other sufficient cause. *Marine Midland Bank v. Fisher*, 85 A.D. 2d 905, 906 [4th Dept. 1981]. Here, Petrocelli previously filed a motion for summary judgment and could have made the arguments that it seeks to make now - i.e. Petrocelli could have moved for partial summary judgment seeking to cap its damages as to the damages sustained by Plaintiff in the Underlying Action, but failed to do so.

Pursuant to CPLR §3025(b), “A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences at any time at any time by leave of court.... Leave shall be freely given upon such terms as may be just....” “CPLR §3025 allows liberal amendment of pleadings absent demonstrable prejudice.” (*Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000]). Notwithstanding the absence of prejudice, leave to amend a pleading must be denied where the proposed amendment is plainly lacking in merit. (*see Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 A.D.2d 636 [1st Dept. 1993]). Here, American Building is now seeking to add DRK and NYCIDA as additional plaintiffs almost five years after commencing this litigation. Petrocelli would be prejudiced if American Building was permitted to amend its Complaint at such a late juncture even if it was within the applicable statute of limitations, after American Building has already filed its note of issue certifying that all discovery has been completed.


Wherefore it is hereby

ORDERED that defendant Petrocelli Group, Inc.’s motion for leave to file a late motion for partial summary judgment is denied; and it is further

ORDERED that plaintiff American Building Supply Corp.’s cross motion to amend is denied.

This constitutes the decision and order of the Court. All other relief requested is denied.

DATED: OCTOBER 9, 2013



EILEEN A. RAKOWER, J.S.C.

FILED

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NEW YORK
COUNTY CLERKS OFFICE