Yick Tak Cheung v City of New York
2017 NY Slip Op 30717(U)
April 11, 2017
Supreme Court, New York County
Docket Number: 157328/2012
Judge: Gerald Lebovits

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

YICK TAK CHEUNG, HAO DONG ZHANG, and YEUNG SUN POULTRY MARKET, INC.

Plaintiffs,

-against-

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NORTHEAST REMSCO CONSTRUCTION, INC., NICHOLSON CONSTRUCTION COMPANY, CORPORATIONS XYZ NOS. 1 – 5 and JOHN DOES NOS. 1 – 10

Defendants.

Index No.: 157328/2012
DECISION/ORDER
Motion Seq. No. 009

NORTHEAST REMSCO CONSTRUCTION, INC.

Third-Party Plaintiff,

-against-

BRIERLY ASSOCIATES, LLC,

Third-Party Defendants.

NORTHEAST REMSCO CONSTRUCTION, INC.

Second Third-Party Plaintiff,

-against-

HAZEN AND SAWYER, P.C.

Second Third-Party Defendant.

HAZEN AND SAWYER, P.C.

Third Third-Party Plaintiff,

-against-

D&B ENGINEERS AND ARCHITECTS, P.C.

Third Third-Party Defendant.

D&B ENGINEERS AND ARCHITECTS, P.C.

Fourth Third-Party Plaintiff,

-against-

GANNET FLEMING ENGINEERS AND ARCHITECTS, P.C.

Fourth Third-Party Defendant.

D&B ENGINEERS AND ARCHITECTS, P.C.

Fifth Third-Party Plaintiff,

-against-

D&B ENGINEERS AND ARCHITECTS, P.C. and GANNET FLEMING ENGINEERS AND ARCHITECTS, P.C.

Fifth Third-Party Defendant

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiffs' motion for leave to amend the complaint.

Papers	**Numbered**
Plaintiffs' Notice of Motion	1
Defendant D&B Engineers and Architects, P.C.'s Affirmation in Opposition	2
Defendant Hazen and Sawyer's Opposition to Plaintiffs' Motion	3
Defendant Brierley Associates, LLC's Affirmation in Opposition	4
Plaintiffs' Affirmation in Reply	5

Mary T. Dempsey P.C., New York (Mary T. Dempsey of counsel), for plaintiffs.
L'Abbate, Balkan, Colavita & Contini, LLP, New York (Jessica E. Gelsomino of counsel), for third-party defendant D&B Engineers and Architects, P.C.
Law office of Lori D. Fishman, New York (Daniel C. Folchetti of counsel), for third-party defendant Brierley Associates, LLC.
Milber Makris Plousadis & Seiden, LLP, New York (Leonardo D'Alessandro), for third-party defendant Hazen and Sawyer, P.C.

Gerald Lebovits, J.

Plaintiffs commenced this action on October 17, 2012, asserting four causes of action — inverse condemnation against the City of New York and the New York City Department of Environmental Protection (DEP); strict liability against Northeast Remsco, Inc. (Remsco) and

Nicholson Construction Company (Nicholson); injury to property against Remsco and Nicholson; negligence against Remsco and Nicholson — and two causes of action brought individually by plaintiff Hao Dong Zhang — breach of contract and injury to property against Remsco —for the damage and diminished value of plaintiffs' premises, a one-story building at 185 Columbia Street and a three-story building at 183 Columbia Street, both located in Kings County.

According to the complaint, beginning in February 2010 DEP began work on a project known as the "Gowanus Facilities Upgrade" in Brooklyn, New York, to improve the Gowanus Canal wastewater pumping station and flushing tunnel system (the Gowanus Project), located adjacent to plaintiffs' premises. (Plaintiffs' Affirmation in Support at ¶ 5.)

Plaintiffs allege that from June 2010 through December 2011, or later, plaintiffs' premises were damaged as a result of defendants' "excavation and subsurface construction." (*Id.* ¶ 7.) Plaintiffs allege that the damage led to the partial collapse of 185 Columbia Street and structural damage to 183 Columbia Street on or about December 23, 2011. (*Id.* ¶ 7.) After plaintiffs commenced this action, they assigned their claim for damages to "183-185 Columbia St. Inc.," a corporation formed by plaintiff Yick Tak Cheung and his daughter, Miu Cheung, aka Monica Cheung. (Plaintiffs' Notice of Motion, Exhibits C, D.)

Plaintiffs allege that defendants participated in the microtunelling portion of the DEP's Gowanus Project in the following roles: D&B Engineers and Architects, P.C (D&B) and Gannett Fleming Engineers and Architects, P.C. (Gannet) were the engineers; Hazen and Sawyer P.C. (Hazen) was the construction manager; Remsco was the contractor; Nicholson was a subcontractor; and Brierley Associates, LLC (Brierley) was the designer. Plaintiffs allege that actions and inactions by the defendants led to the damage to plaintiffs' property. (Plaintiffs' Notice of Motion, Exhibit U at 8, 20-21, 27-33.)

Plaintiffs filed this motion for various relief: (1) under CPLR 1018, to amend the complaint to substitute plaintiffs Yick Tack Cheung and Hao Dong Zhang for "183-185 Columbia St. Inc." for plaintiffs as their assignee; (2) under CPLR 3025 (b), to amend the caption and complaint to reflect "183-185 Columbia" as plaintiffs' assignee; (3) under CPLR 3025 (b), to amend the caption to discontinue the case against defendants "Corporations XYZ Nos. 1-5" and "John Does No. 1-10"; (4) under CPLR 2001 and 3025 (b), to amend the caption and complaint to substitute "Yeung Sun Live Poultry Market, Inc." in place of "Yeung Sun Poultry Market, Inc."; (5) under CPLR 3212, to discontinue the third cause of action against Remsco and Nicholson; (6) under CPLR 3025 (b), to amend the complaint to modify and add allegations against Remsco for negligence; (7) under CPLR 3025 (b), to amend the complaint to state a separate cause of action against Nicholson for negligence; (8) under CPLR 3025 (b), to amend the complaint to assert direct claims against third-party defendants for negligence; and (9) under CPLR 3025 (b), to amend the complaint to reduce the amount demanded against defendant City of New York, Remsco, and Nicholson on the causes of action for strict liability and negligence.

D&B oppose plaintiffs' motion to amend the complaint to add causes of action against D&B. (D&B Affirmation in Opposition.)

Adopting the arguments raised by D&B, Hazen opposes plaintiffs' motion to amend to add causes of actions against Hazen and to substitute plaintiffs. (Hazen Opposition to Plaintiffs' Motion.)

Adopting the arguments raised by D&B, Brierley opposes plaintiffs' motion to amend to add causes of action against Brierley and to substitute plaintiffs. (Brierley Affirmation in Opposition.)

I. Plaintiffs' Unopposed Motion

Several aspects of plaintiffs' motion are unopposed: (1) CPLR 3025 (b) motion to discontinue the case against defendants "Corporations XYZ Nos. 1-5" and "John Does No. 1-10"; (2) CPLR 3212 motion to discontinue the third cause of action against Remsco and Nicholson; (3) CPLR 3025 (b) motion to add allegations against Remsco for negligence; (4) CPLR 3025 (b) motion to state a separate cause of action against Nicholson for negligence; (5) CPLR 3025 (b) motion to amend the complaint to reduce the amount demanded against defendant City of New York, Remsco, and Nicholson on the causes of action for strict liability and negligence. These aspects of plaintiffs' motion are granted without opposition.

II. Plaintiffs' CPLR 2001 Motion

Plaintiffs' CPLR 2001 motion to amend the caption and complaint to change the name of "Yeung Sun Poultry Market Inc." to "Yeung Sun Live Poultry Market, Inc." is granted. Under CPLR 2001, "at any stage of an action . . . the court may permit a mistake, omission, defect or irregularity . . . to be corrected." Correcting a complaint is "subject to a broader degree of judicial discretion without necessary regard to prejudice." (Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, 2014 Electronic Update, CPLR 2001, citing *Grskovic v Holmes* 111 AD3d 234, 242-243 [2d Dept 2013].) Plaintiffs are correcting a filing error to reflect the name of the Yeung Sun Live Poultry Market, Inc., which, at the time of the damage, was the leaseholder of both 183 and 185 Columbia Street. (Plaintiffs' Affirmation in Support, ¶ 6; Plaintiffs' Notice of Motion, Exhibit T.) The court allows plaintiffs to amend their complaint under CPLR 2001. The court need not determine whether defendants are prejudiced. Plaintiffs' motion is granted.

III. Plaintiffs' CPLR 1018 Motion

Plaintiffs' motion to substitute "183-185 Columbia St. Inc." for plaintiffs Yick Tack Cheung and Hao Dong Zhang is granted. Under CPLR 1018, "upon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." An assignee may enforce a claim when an assignment "purports to assign or transfer a chose in action." (*Titus v Wallick*, 306 US 282, 288-289 [1939].) When an action has begun, the court is free to "permit it to continue." (*Copeland v Salomon*, 56 NY2d 222, 230 [1982] [finding that when an action is properly commenced, it can be continued notwithstanding a transfer of interest]; *accord Central Fed. Sav., F.S.B. v 405 W. 45th St. Inc.*, 242 AD2d 512, 512 [1st Dept 1997] [finding that the

assignee of a mortgage had a statutory right, under CPLR 1018, to continue a prior action in the original plaintiff's place].)

Plaintiffs commenced this action on October 17, 2012; plaintiffs assigned their claims for damages to 183-185 Columbia St. Inc. (Plaintiffs' Notice of Motion, Exhibits C, D, & E.) Plaintiffs' assignment transferred to "183-185 Columbia St. Inc." the following:

> "All of Assignors rights, titles, interests claims and demands in and to certain causes of action which are the subject of litigation now pending in the Supreme Court of the State of New York, County of New York, styled as *Cheung Et al v City of New York et al,* docketed under Index No. 157328/2012 (the 'litigation') and any and all other rights, title, interest, claims and demands which Assignor may posses, have or assert against any and all persons, corporations, partnerships or sole proprietorships, their heirs, executors, successors, and assigns arising out of the state of facts on which the litigation is based relating to the real property . . . at the commencement of the litigation and purchased by Assignee on April 9, 2015 during the pendency of the litigation." (Plaintiffs' Notice of Motion, Exhibits C & D.)

The assignment refers to plaintiffs' properties 185 Columbia Street and 183 Columbia Street, both in Kings County. Once plaintiffs transferred their interest to "183-185 Columbia St. Inc.," the proposed substituted plaintiffs gained statutory right to continue this case. Other than arguing that "183-185 Columbia St. Inc." is not an original party — an unpersuasive argument — defendants do not otherwise challenge the assignment. Because plaintiffs assigned their interest to "183-185 Columbia St. Inc." and defendants are comprised of original parties to this action, plaintiffs' motion to amend "183-185 Columbia St. Inc." is granted.

IV. Plaintiffs' CPLR 3025 (b) Motion

Plaintiffs' motion for leave to amend the complaint to assert direct claims of negligence under CPLR 3025 (b) is granted. CPLR 3025 (b) provides that parties may amend their pleadings and courts shall freely grant leave. A party seeking leave to amend "is not required to establish the merit of the proposed amendment." (*Lucido v Mancuso,* 49 AD3d 220, 227 [2d Dept 2008].) The First Department has established that motions for leave to amend should be freely granted "unless the proposed amendment is palpably insufficient or patently devoid of merit." (*MBIA Ins. v Greystone & Co., Inc.,* 74 AD3d 499, 500 [1st Dept 2010].) The court may deny a motion to amend if the proposed amendment will prejudice or surprise the opposing party. (*Aurora Loan Servs. LLC v Thomas*, 70 AD3d 986, 987 [2d Dept 2010] [finding no prejudice or surprise from a delay to amend an answer when the movant relied on documents obtained during disclosure].)

A. Proposed Amendment Neither Palpably Insufficient Nor Patently Meritless

Plaintiffs' proposed amendment to assert direct negligence claims against Brierley is neither palpably insufficient nor patently meritless.

Plaintiffs' proposed amendment to assert direct negligence claims against D&B is neither palpably insufficient nor patently meritless.

Plaintiffs' proposed amendment to assert direct negligence claims against Hazen is neither palpably insufficient nor patently meritless.

Given the courts determination above that substituting plaintiffs for "183-185 Columbia St. Inc." is proper under CPLR 1018, the court need not examine whether the substitution is appropriate under CPLR 3025 (b).

A proposed amendment is neither palpably insufficient nor patently devoid of merit when movant sufficiently alleges the opposing parties negligence has caused movant harm. (*Lucido*, 49 AD3d at 227.) Speculative evidence in support of a motion to amend a complaint is sufficient to allege an opposing party's negligence. (*Id.* at 221 [finding that competent medical proof is not required in support of a motion seeking leave to amend to add a cause of action alleging wrongful death].) The First Department has established that an amended claim is neither palpably insufficient nor patently meritless when a party submits an attorney affirmation. (*Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [1st Dept 2007]; *accord MBIA Ins.*, *74* AD3d at 500 [finding that an attorney affirmation in support of a proposed amendment sufficiently establishes the merit of an amendment].)

Plaintiffs' proposed amended complaint is neither palpably insufficient nor patently devoid of merit as it sufficiently alleges that defendants' negligence caused plaintiffs damage to the premises. (Plaintiffs' Notice of Motion, Exhibit V ¶¶ 58-62, 65, 70-73; exhibit U, ES-2, ES-3, 8, 20-21, 27-33.) In support of their motion, plaintiffs attach the Gowanus Microtunnel Incident Review Draft Final Report (Report) conducted by Hatch Mott Macdonald Inc. (Hatch Mott), which plaintiffs hired to evaluate the primary causes that led to the partial collapse of 185 Columbia Street. The Report provides that "had the provisions and requirements presented in the specifications been carried out as intended . . . the work could have been completed without damaging the wall." (Plaintiffs' Notice of Motion, Exhibit U, ES-2.)

The Report further provides that D&B, the engineer, failed to enforce "specification requirements" on the contractors Remsco, whose work allegedly caused the damage. (Plaintiffs' Notice of Motion, Exhibit U, at ES-3.) Also, defendant Brierley's design allegedly did not address potential adverse impact to the property. (Plaintiffs' Notice of Motion, Exhibit U, at 28.) The Report provides that the construction manager, Hazen, failed to mitigate risks that led to the damage. Hazen allegedly did not recognize key aspects about the microtunelling, lacked expertise in the field, and failed to properly communicate with engineer defendants D&B and Gannet. (Plaintiffs' Notice of Motion, Exhibit U, at 30, 32.)

In opposition, defendants argue that they cannot determine whether the conclusions in the Report are final or authenticated by Hatch Mott. But whether the Report is final or authenticated is irrelevant. The court will consider the Report on a motion to amend a pleading. The plaintiffs need not establish its negligence claim at this phase with "competent proof." (*Lucido*, 49 AD3d at 221.) The Report sufficiently alleges defendants' negligence and plaintiffs' counsel submits an

affirmation to demonstrate that the amended complaint is sufficient. (Plaintiffs' Affirmation in Support.)

Defendants' reliance on *East Asiatic Co. v Corash* (34 AD2d 432 [1st Dept 1970]), a case that predates CPLR 3025 (b), is unpersuasive. (*See* D&B Affirmation in Opposition at ¶ 5.) The plain language and legislative history of CPLR 3025 (b) demonstrate that it was enacted to replace the former and more stringent standard for leave to amend. (*Lucido*, 49 AD3d at 224, citing First Preliminary Report of the Advisory Committee on Practice and Procedure, 1957 N.Y. Legis. Doc. No. 6 [b], at 77.) The outdated standard in *East Asiatic* does not take into account whether an amendment is meritorious but rather "the validity of the causes of action as amended." (34 AD2d at 434.) Examining the amendment need not go further once a movant demonstrates that its proposed amendment is neither palpably insufficient nor patently devoid of merit. (*Lucido*, 49 AD2d at 230.) As plaintiffs have satisfied this test, "in the absence of a requirement of an evidentiary showing of merit," the court need not examine the validity of the CPLR 3025 (b) amendment. (*See id.* at 230.) The plaintiffs' proposed amendment to assert direct claims against defendants Brierley, D&B, and Hazen is neither palpably insufficient nor patently meritless.

B. Prejudice and Surprise

Plaintiffs' proposed amendment to assert direct claims against defendant Brierley for negligence neither prejudices nor surprises Brierley.

Plaintiffs' proposed amendment to assert direct claims against defendant D&B for negligence neither prejudices nor surprises D&B.

Plaintiffs' proposed amendment to assert direct claims against defendant Hazen for negligence neither prejudices nor surprises Hazen.

Prejudice does not exist when an amendment "merely adds a new theory of recovery or defense arising out a transaction or occurrence already in litigation." (*Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 477 [1985], citing *Cerrato v Crown Co.*, 58 AD2d 721 [3d Dept 1977] & *Henegar v Freudenheim*, 40 AD2d 825, 826 [2d Dept 1972]; *accord Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981] [finding that an amendment that exposes a defendant to greater liability does not constitute prejudice].)

A plaintiff must show that a potential direct-claim defendant had notice of any potential direct claims when the party was served with a third-party complaint. (*Grant v Solomon R. Guggenheim Museum*, 2013 NY Slip Op 32063 [U], *5, 2013 WL 4811335, at *5 [Sup Ct, NY County 2013] [finding that a proposed direct claim does not create prejudice when a potential direct first-party defendant was a third-party defendant in a suit arising from the same transaction or occurrence as the new claim], citing *Duffy*, 66 NY2d at 475.) A third-party defendant has actual notice of a plaintiff's potential claim when a third-party complaint is filed. (*Grant*, 2013 NY Slip Op 32063 [U], *5, 2013 WL 4811335, at *5.)

That defendants may have to expend more time on the case does not amount to prejudice. (*See Rutz v Kellum*, 144 AD2d 1017, 1018 [4th Dept 1988].) The need for additional disclosure does not constitute prejudice. (*Id.* [finding that no prejudice exists when a defendant needs additional disclosure or time to prepare a defense against a new claim]; *accord Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654 [1st Dept 2009].)

The Court of Appeals has found that "mere lateness is not a barrier to an amendment. It must be lateness coupled with significant prejudice." (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983].) Delay is inexcusable if a court determines it to be an extended delay. (*IDT Corp. v Morgan Stanely Dean Witter & Co.*, 26 Misc 3d 1231 [A], *5, 2010 NY Slip Op 50335 [U], *5, 2010 WL 768873, at *5 [Sup Ct, NY County 2010] [finding that an extended delay exists when an amendment is filed "significantly after" a plaintiff files a note of issue and certificate of readiness for trial]; *accord Jablonski v County of Erie*, 286 AD2d 927, 928 [4th Dept 2001] [finding that a court must exercise its discretion with caution when a case has been certified as ready for trial.)

Defendants are neither prejudiced nor surprised by plaintiffs' lack of notice. Defendants should have expected plaintiffs' direct claims for negligence. The third-party complaints put defendants on notice of potential direct claims. The facts for which the new theories of recovery plaintiffs rely on are identical to those from the original complaint and third-party complaints against defendants. (Plaintiffs' Affirmation in Support ¶¶ 5-7, Exhibit E ¶¶ 14-37, Exhibit I ¶¶ 7-8, Exhibit K ¶¶ 8-14, Exhibit M ¶¶ 5-10, Exhibit O ¶ 3, Exhibit S, at 10 ¶ 7, Exhibit V ¶¶ 20-32.) Preliminarily, no statute of limitations issues exist. The third-party complaints were served on defendants within three years of December 2011 — when plaintiffs' buildings were damaged. (Plaintiffs' Notice of Motion, Exhibit I, K, L, M, O, S.) Defendants argue unpersuasively that they are in a worse position now than they would have been because they must alter their defense strategy. Defendants are simply subject to further liability; that does not constitute prejudice. Also, no extended delay has occurred in this case because plaintiffs have not filed their note of issue, and the case is not on the trial calendar. (Defendant D&B Engineers and Architects, P.C. 's Affirmation in Opposition ¶ 15.)

Defendants argue unpersuasively that a lack of direct claims in plaintiffs' bill of particulars caused surprise. The purpose of a bill of particulars is to "amplify the pleadings." (*Paterra v Arc Develop. LLC.*, 136 AD3d 474, 475 [1st Dept 2016].) A bill of particulars "may not be used to supply allegations essential to a cause of action that was not pleaded in the complaint." (*Alami v 215 E. 68th St., L.P.*, 88 AD3d 924, 926 [2d Dept 2011].) A bill of particulars is not the proper vehicle for the plaintiffs to supply allegations essential to a cause of action. Thus, the absence of the proposed direct claims for negligence against the defendants in plaintiffs' bill of particulars is irrelevant in the court's analysis of surprise.

Plaintiffs have demonstrated that the proposed amended complaint is neither palpably insufficient nor patently meritless and does not prejudice or surprise defendants. Plaintiffs' motion for leave to amend is granted.

Accordingly, it is hereby

ORDERED that plaintiffs' motion is granted in its entirety and plaintiffs shall settle order.

Dated: April 11, 2017

J.S.C.

HON. GERALD LEBOVITS
J.S.C.