STATE OF NEW YORK
SUPREME COURT **COUNTY OF ALBANY**

DANIEL T. LAPPIN,

Plaintiff,

-against-

DECISION & ORDER
Index No.: 900379-2016
RJI No.: 01-16-123116

BARBERA HOMES, INC., T.W. CONTRACTING, INC. and THOMAS WENDELL, JR.,

Defendants.

(Supreme Court, Albany County, All Purpose Term)

Appearances:

Napierski, Vandenburgh, Napierski & O'Connor, LLP
Attorneys for Plaintiff
By: David C. White, Esq.
296 Washington Avenue Ext., Suite 3
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Smith Dominelli & Guetti LLC
Attorneys for Defendants T.W. Contracting, Inc. and Thomas Wendell, Jr.
By: Jay A. Smith, Esq.
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David A. Weinstein, J.:

The motion before me arises out of a suit brought by plaintiff Daniel Lappin against defendants Barbera Homes, Inc. ("Barbera Homes" or "BH"), T.W. Contracting, Inc. ("TW") and Thomas Wendell, Jr., for injuries he allegedly suffered on March 28, 2013 when an unsecured board fell on his head. The complaint sets forth claims under Labor Law §§ 200, 240(1) and 241(6) and for common law negligence. According to the complaint, on the date of the accident, Lappin was employed by John D. Marcella & Sons Appliances, Inc., which was performing work

for defendants at 12 Mulberry Drive in Colonie, New York, as part of a development known as Parkside at the Crossings.

The complaint avers that the location of the fall was owned by defendant Barbera Homes, which also served as a contractor for the work being performed there (Compl. ¶¶ 4-5). BH served an answer denying ownership (BH Answer, ¶ 4), and its counsel represented to plaintiff's attorney that it was not a proper party to this action, as the work at issue was performed pursuant to a contract between defendant TW and a different corporation, Parkside at the Crossings, Inc. ("Parkside").

Thereafter, in December 2016, plaintiff moved to amend the summons to include Parkside as a defendant pursuant to CPLR 305(c) and 2001. In the alternative, Lappin sought leave to amend the complaint to add Parkside as a defendant pursuant to CPLR 3025. Barbera Homes, in turn, cross-moved to dismiss the complaint on the ground that it was neither an owner, nor a contractor in relation to the property at issue and, therefore, could not be held liable under Labor Law §§ 200, 240(1) or 241(6). By Decision and Order dated March 20, 2017 ("Mar 20 D&O"), I concluded that plaintiff failed to show a basis to add Parkside as a defendant under CPLR 305(c) and 2001 (Mar 20 D&O at 3-5). Nor did I find that Lappin adduced sufficient evidence to warrant granting leave to amend the complaint pursuant to CPLR 3025 (*id.* at 5-7). Finally, I denied BH's cross-motion after determining that plaintiff's allegations were sufficient to survive a CPLR 3211 motion (*id.* at 7-9).

By his present motion, plaintiff seeks an order pursuant to CPLR 2001 permitting him to amend the complaint to correct the location of the incident to 9 Mulberry Drive, Colonie.[1] In this regard, plaintiff's counsel states that the proposed amendment constitutes nothing more than the

[1] By letter dated April 18, 2018, Barbera Homes notified the Court that it does not oppose plaintiff's motion.

correction of a minor mistake that does not impact the substantial rights of any party in this action. Alternatively, Lappin seeks the same relief under CPLR 3025(b) and 203(f), arguing that the proposed amendment is meritorious, defendants' involvement in these claims remains unchanged and defendants will suffer no prejudice as a result of the amending of the complaint.

Plaintiff supports his application with the affidavit of counsel and various exhibits. These include, inter alia, a proposed amended summons and complaint; building permits for both addresses; the certificate of occupancy for 9 Mulberry; an overhead map of the two properties, which show that they are located across the street from one another; work orders from Lappin's employer pertaining to 9 Mulberry; and a workers' compensation report apparently prepared by John D. Marcella & Sons Appliances indicating that the incident occurred at 9 Mulberry Drive. In addition, Lappin submitted the deposition transcript of Frank Barbera, who testified that the property located at 12 Mulberry did not exist on the date of plaintiff's accident (White Aff, Ex E at 20). Plaintiff's counsel also attests that during the course of discovery, he learned that the building permit for 12 Mulberry was not issued until nearly a year after the accident occurred (White Aff, ¶¶ 10-12).

TW and Wendell (collectively "defendants") submitted papers in opposition to the motion. They argue that the proposed amendment is "substantial" and "highly prejudicial" because defendants should be able to rely on the plaintiff's written discovery and deposition testimony concerning the location of the accident (Smith Aff, ¶¶ 4 & 16). In the same regard, defendants claim that they have no information as to the layout of 9 Mulberry Drive and that the record lacks evidentiary proof substantiating Lappin's new allegations as to the location of the incident (*id.* ¶¶ 11-12, 17). They finally assert that plaintiff did not provide a satisfactory excuse for the delay, or any explanation as to why his prior testimony was in error (*id.* ¶¶ 13 & 18).

In a reply submission, Lappin points out that discovery has yet to conclude (White Reply Aff., ¶¶ 3 & 9). He also maintains that the amendment will not result in any prejudice to defendants because the facts underlying his claim – i.e. Thomas Wendell, Jr. dropped a board on his head at Parkside on March 28, 2013 – have not changed (White Reply Aff, ¶¶ 10 & 14).

Discussion

I turn, first, to Lappin's request for relief under CPLR 3025(b), which provides:

> A party may amend his or her pleading . . ., at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

Generally, leave to amend a pleading is "freely given absent prejudice or surprise resulting directly from the delay" (*Colucci v Canastra*, 130 AD3d 1268, 1270 [3d Dept 2015] [internal quotation and citation omitted]; *see also Cortes v Jing Jeng Hang*, 143 AD3d 854, 854-855 [2d Dept 2016] ["party opposing leave to amend must overcome a heavy presumption of validity in favor of permitting the amendment" (internal quotation marks and citations omitted)]).[2] Moreover, "[l]ateness alone is not a barrier to the amendment" (*Carducci v Bensimon*, 115 AD3d 694, 695 [2d Dept 2014]; *see also Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]).

[2] The Appellate Division, Third Department "previously adhered to a rule requiring the proponent of a motion for leave to amend a pleading to make a 'sufficient evidentiary showing to support the proposed claim'" (*NYAHSA Servs., Inc., Self-Ins. Trust v People Care Inc.*, 156 AD3d 99, 101-102 [3d Dept 2017], quoting *Cowsert v Macy's E., Inc.*, 74 AD3d 1444, 1445 [3d Dept 2010]). The Third Department recently, however, "depart[ed] from that line of authority and follow[ed] the lead of the other three Departments, . . . hold[ing] that '[n]o evidentiary showing of merit is required under CPLR 3025(b)'" (*id.* at 102, quoting *Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]).

In my view, plaintiff adduces sufficient evidence to meet this standard. Indeed, in *Vidal v Claremont 99 Wall, LLC* (124 AD3d 767 [2d Dept 2015]), the Appellate Division, Second Department recently determined that leave to amend was appropriate under strikingly similar circumstances to those before me.

In *Vidal*, *supra*, the plaintiff brought suit for injuries he sustained while working as a drywall finisher/painter during the construction of a T-Mobile store when a scaffold he was standing on collapsed, causing him to fall several feet to the floor (*id.* at 767). Both plaintiff's complaint and bill of particulars stated that the subject accident occurred at 99 Wall Street in Manhattan. During the course of discovery, however, it was disclosed that the incident did not occur at the 99 Wall Street premises, but rather at another building where a T-Mobile store was being constructed located at 125 Maiden Lane (*id.*). Under the circumstances, the Second Department found that the proposed amendment was neither palpably insufficient nor patently devoid of merit and that T-Mobile failed to establish prejudice (*id.* at 768). To this end, the Court noted: "With minimal effort upon receiving a complaint regarding the construction of a store in downtown Manhattan, T-Mobile could have ascertained the location of the subject accident" (*id.*). Nor was the Court persuaded by counsel's averment of prejudice in the absence of any evidence that T-Mobile was impeded in investigating plaintiff's claim, or that it undertook an investigation at the wrong site (*id.*).

Likewise, defendants cannot show that they will be prejudiced or surprised here. The proposed amendment does not assert a new cause of action or add a new theory of liability. Plaintiff, instead, only seeks to correct the address of the premises at which his alleged injury occurred and defendants had timely notice of the underlying claim. As in *Vidal*, defendants could have determined the true location of the incident with "minimal effort" following receipt of

Lappin's complaint and bill of particulars. Moreover, defendants' claim that further discovery is warranted relative to the layout of 9 Mulberry Drive does not constitute prejudice sufficient to justify the denial of a motion to amend the complaint (*see Smith v Haggerty*, 16 AD3d 967, 968 [3d Dept 2005] ["defendants' claim is insufficient to demonstrate that they were hindered in the preparation of their case or were prevented from taking some measure in support of their position" (internal quotation marks and citation omitted)]; *Rutz v Kellum*, 144 AD2d 1017, 1017 [4th Dept 1988]). Inasmuch as discovery is still in progress, defendants are in a position to obtain any material and relevant information about the residence situated at 9 Mulberry Drive in order to prepare an adequate defense (*see e.g. Frankart Furniture Staten Is. v Forest Mall Assoc.*, 159 AD2d 322, 323 [1st Dept 1990]).

Given the foregoing, I need not address the branch of plaintiff's motion seeking the same relief pursuant to CPLR 2001.

Accordingly, it is hereby

ORDERED that plaintiff's motion seeking leave to amend the complaint pursuant to CPLR 3025(b) is granted, as outlined above; and it is further

ORDERED that the parties appear for the previously scheduled conference before the Court on Friday, September 7, 2018 at 10:30 a.m. at 150 State Street, Albany, NY for the purpose of setting a schedule for any further discovery and addressing such other matters as may be appropriate.

This constitutes the Decision & Order of the Court. This Decision & Order is being transmitted to the plaintiff for filing and service. The signing of this Decision & Order shall not constitute entry or filing under CPLR Rule 2220, and counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

ENTER.

Dated: Albany, New York
August 21, 2018

David A. Weinstein
Acting Supreme Court Justice

8-29-18

Papers Considered:

1. Notice of Motion, dated April 12, 2018; Affidavit of David C. White, Esq., sworn to April 12, 2018, with annexed exhibits;

2. Letter from Chelsea E. Manocchi, Esq. addressed to Hon. David A. Weinstein, dated April 18, 2018;

3. Affirmation of Jay A. Smith, Esq. in Opposition, dated May 10, 2018, with annexed exhibits; and

4. Reply Affirmation of David C. White, Esq. in Support of Motion to Amend Complaint, dated May 17, 2018, with annexed exhibits; Reply Memorandum of Law in Further Support of Plaintiff's Motion to Amend the Complaint, dated May 17, 2018.