

Hotaling v JMS Constr. Servs., Inc.
2018 NY Slip Op 33610(U)
June 23, 2018
Supreme Court, Saratoga County
Docket Number: 2016-1248
Judge: Richard E. Sise
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PRESENT: HON. RICHARD E. SISE
Acting Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

ROBERT HOTALING,

Plaintiff,

-against-

JMS CONSTRUCTION SERVICES, INC., J&R
CONSTRUCTION CORP. OF HUDSON, VVL
PROPERTY MANAGEMENT, INC., and LEE
CONTRACTORS, LLC,

Defendants.

JMS CONSTRUCTION SERVICES, INC.,

Third-Party Plaintiff,

-against-

ALBANY FIRE PROTECTION, INC., J&R
CONSTRUCTION CORP. OF HUDSON, VVL
PROPERTY MANAGEMENT, INC., and LEE
CONTRACTORS, LLC,

Third-Party Defendants.

(Supreme Court, Saratoga County, Motion Term)

CLERK OF THE COURT
STATE OF NEW YORK
SARATOGA COUNTY

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FILED

Sise, J.

In this action, brought to recover for personal injuries alleged to have been suffered in a work place accident, Albany Fire Protection, Inc. (third-party defendant) has moved, pursuant to CPLR 3025 (b), for leave to amend its answer to the second amended third-party complaint.

“Leave to amend a pleading rests within the trial court’s discretion and should be freely granted in the absence of prejudice or surprise resulting from the delay except in situations where the proposed amendment is wholly devoid of merit” (*Edwards & Zuck, P.C. v Cappelli Enters., Inc.*, 124 AD3d 181, 183 [3d Dept 2014] [citations and internal quotation marks omitted]). Here, the moving party seeks to add a sentence to its Twentieth Affirmative Defense to clarify that no written contract for contribution or indemnification exists between the parties. The third-party defendant also seeks to assert a Twenty-First Affirmative Defense and a Twenty-Second Affirmative Defense based on provisions in Workers’ Compensation Law § 11. The first proposed new affirmative defense (twenty-first) address a provision in the law which bars claims against an employer where the employer had workers’ compensation insurance and the injured worker received benefits. The other proposed new affirmative defense (twenty-second) is addressed to a provision in section 11 which prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a “grave injury”, or the “claim is based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered”.

In opposing the motion the third-party plaintiff argues that the proposed amendments are without merit and that it would be prejudiced if leave to amend was granted. In its answer to the

second amended complaint, with second amended third-party complaint and cross claims, the third-party plaintiff asserts, in a cause of action against the third-party defendant, that the latter contracted to indemnify and hold harmless the former for all claims for personal injury sustained by individuals employed by the third-party defendant. Each of the proposed amendments is addressed to that claim: the first maintains that no such agreement exists, the second asserts that such a claim is barred because the plaintiff, its employee, received workers' compensation benefits and the third argues that such a claim is barred because plaintiff did not suffer a "grave injury". All of the proposed amendments are addressed to issues arising from Workers' Compensation Law § 11 and are relevant to the issue of third-party defendant's liability for damages potentially owing to plaintiff. As such, the proposed amendments are not devoid of merit.

"In the context of a motion to amend, prejudice means the loss of a special right, a change in position, or significant trouble or expense that could have been avoided had the original pleading contained the proposed amendment (*Seaman Corp. v Binghamton Sav. Bank*, 243 AD2d 1027, 1028-1029 [3d Dept 1997] [citations and internal quotations omitted]). The third-party plaintiff's claim of prejudice is based on the assertion that disclosure is nearly complete and therefore, the opportunity to depose the third-party defendant on the issues raised by the amendments may be lost. Clearly, the third-party plaintiff is entitled to "full disclosure of all matter material and necessary to the prosecution of [its] action" (CPLR 3101 [a]) and that right is not abrogated simply because the matter is raised at a later stage of the litigation. The third-party plaintiff need only serve a notice or demand (*see* CPLR 3102). Moreover, the date for completing disclosure was recently extended to allow the parties more time to complete that process.

Consequently, the claimed prejudice is not an impediment to permitting the amendments.

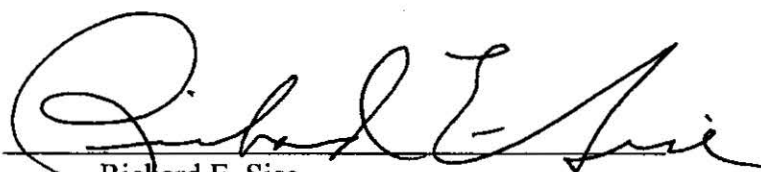
Accordingly, it is

ORDERED, that the motion by Albany Fire Protection, Inc. for leave to amend its answer to the second amended third-party complaint is granted and Albany Fire Protection, Inc. is directed to serve and file the amended answer within twenty days of the date of this decision and order.

This constitutes the decision and order of the Court. The original decision and order is returned to the attorney for Albany Fire Protection, Inc. A copy of the decision and order and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this decision and order, and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED.
ENTER.

Dated: Albany, New York
June 23, 2018



Richard E. Sise
Acting Supreme Court Justice

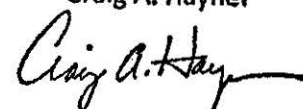
Papers Considered:

- 1. Notice of Motion dated April 30, 2018;
- 2. Affirmation of Brian M. Quinn dated April 30, 2018 with Exhibits A-H annexed
- 3. Affidavit of Brian P. Henchy dated May 14, 2018;
- 4. Affirmation of Brian M. Quinn dated May 21, 2018 with Exhibits A-D annexed

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SARATOGA COUNTY
CLERK'S OFFICE
BALLET JOHNSON

ENTERED

ENTERED
Craig A. Hayner



Saratoga County Clerk