

<b>Burton v 50 W. Dev., LLC</b>
2020 NY Slip Op 34105(U)
December 14, 2020
Supreme Court, New York County
Docket Number: 151422/2019
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

*Justice*

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CURTIS BURTON,

Plaintiff,

- v -

50 WEST DEVELOPMENT, LLC, HUNTER ROBERTS  
CONSTRUCTION GROUP, L.L.C., SKANSKA USA, INC.  
and PRIMA PAVING CORP.,

Defendants.

-----X

SKANSKA USA, INC.,

Third-Party Plaintiff,

-against-

PRIMA PAVING CORP.,

Third-Party Defendant.

-----X

50 WEST DEVELOPMENT, LLC and HUNTER ROBERTS  
CONSTRUCTION GROUP, L.L.C.,

Second Third-Party Plaintiff,

-against-

PRIMA PAVING CORP.,

Second Third Party Defendant.

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**DECISION AND ORDER**

Third-Party  
Index No. 595750/2019

Second Third-Party  
Index No. 595802/2019

The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for DISMISS.

In this personal injury action, defendant/third-party defendant/second third-party defendant Prima Paving Corp. ("Prima") moves to dismiss the amended summons and complaint filed by

plaintiff Curtis Burton ("Burton") on the ground that he failed to comply with the requirements set forth in CPLR 3025 (Docs. 40-45). Burton opposes the motion (Docs. 52-58). After a review of the parties' contentions, as well as the relevant statutes and case law, the motion is decided as follows.

#### **FACTUAL AND PROCEDURAL BACKGROUND:**

On April 8, 2017, Burton was allegedly injured when he tripped and fell due to a defective condition at the premises located at 50 West Street in Manhattan (Doc. 1). In February 2019, Burton commenced this action by filing a summons and complaint against defendants 50 West Development, LLC ("Development"), Hunter Roberts Construction Group, L.L.C. ("Hunter") and Skanska USA, Inc. ("Skanska"), the alleged owners of the premises (Doc. 1 ¶¶ 17, 27, 37). On May 2, 2019, Development and Hunter filed a joint verified answer and issue was joined by Skanska on May 10, 2019 (Docs. 10, 12). In August 2019, Skanska commenced a third-party action against Prima, asserting claims for, *inter alia*, breach of contract and contractual indemnification relating to work allegedly performed at the premises (Doc. 14). Thereafter, on September 24, 2019, Burton amended his summons and complaint to assert a direct claim of negligence against Prima as a direct defendant (Doc. 28). Development, Hunter and Skanska answered the amended complaint (Docs. 32, 49). On October 31, 2019, Prima filed an answer in the main action, denying the allegations in the complaint and asserting affirmative defenses and cross claims against its co-defendants (Doc. 39). Four days later, Prima filed the instant motion (Doc. 40). On September 29, 2020, Prima filed its answer in the third-party action (Doc. 63).

Prima argues that the amended summons and complaint must be dismissed because Burton failed to amend the pleadings within 20 days after Development, Hunter and Skanska interposed

their answers on May 2 and 10, 2020, respectively, in accordance with CPLR 3025(a) (Doc. 41 ¶ 10). Alternatively, Prima argues that Burton did not stipulate, pursuant to CPLR 3025(b), to amend the pleadings, or seek leave from this Court to add Prima as a direct defendant (Doc. 41 ¶ 11).

In opposition to the motion, Burton maintains that "[s]ince the [t]hird-[p]arty [s]ummons and [c]omplaint was filed on or about September 9, 2019, [his] [a]mended [s]ummons and [v]erified [c]omplaint is timely" (Doc. 52 ¶ 7). Specifically, Burton contends that his amended pleadings comply with CPLR 3025(a) because Prima had not yet responded to the third-party summons and complaint when he amended the pleadings (Doc. 57 ¶ 8).

#### **LEGAL CONCLUSIONS:**

"Leave to amend a complaint should be freely given absent prejudice or surprise so long as the proposed claims are not palpably insufficient or devoid of merit" (*Brummer v Wey*, 187 AD3d 566, \_\_\_, 2020 NY Slip Op 05846, \*1 [1st Dept 2020] [citation omitted]; *see* CPLR 3025[b]; *O'Halloran v Metro. Transp. Auth.*, 154 AD3d 83, 86 [1st Dept 2017]; *Rodriguez v Paramount Dev. Assoc., LLC*, 67 AD3d 767, 767 [2d Dept 2009]). However, CPLR 3025(a) provides that "[a] party may amend his [or her] pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." Further, "[a] party may amend his or her pleading . . . at any time by leave of court or by stipulation of all parties" (CPLR 3025[b]).

Generally, the "failure to obtain leave pursuant to CPLR 3025(b) . . . requires dismissal of the action against a party so joined" (*Tesher v Sol Goldman Invs., LLC*, 2011 NY Slip Op 31457[U], 2011 NY Misc LEXIS 2644, \*31-32 [Sup Ct, NY County 2011], quoting *Gross v BFH Co.*, 151 AD2d 452, 452 [2d Dept 1989]). However, "[t]he failure to obtain prior leave of court

is a waivable defect, and is not fatal in all instances" (*Tesher v Sol Goldman Invs., LLC*, 2011 NY Misc LEXIS 2644 at \*31-32, quoting *He-Duan Zheng v American Friends of the Mar Thoma Syrian Church of Malabar, Inc.*, 67 AD3d 639, 640 [2nd Dept 2009]; see also *Santopolo v Turner Construction Company*, 181 AD2d 429, 429 [1st Dept 1992]). "The purported defect in joinder thus requires a prompt motion to dismiss or preservation by way of defense in the answer, lest, it be deemed waived" (*Tesher v Sol Goldman Invs., LLC*, 2011 NY Misc LEXIS 2644 at \*31, quoting *McDaniel v Clarkstown Cent. Dist. No. 1*, 83 AD2d 624, 625 [2d Dept 1981]).

This Court rejects Burton's argument that the filing of the third-party summons and complaint somehow extended his time to add Prima as a defendant in the main action. The plain language of CPLR 3025(a), allowing a party to amend his or her pleadings as of right "before the period for responding to it expires," is inapplicable here. Prima was not a named defendant in the original summons and complaint and, contrary to Burton's implication, Prima's answer in the third-party action does not constitute a pleading *responding* to Burton's original pleadings (*compare Empire Blue Cross & Blue Shield v Various Underwriters At Lloyds, London, England*, 5 Misc 3d 1024[A], 2004 NY Slip Op 51528[U], 2004 NY Misc LEXIS 2478, \*5-6 [Sup Ct, NY County 2004]). Therefore, the fact that a subsequent third-party summons and complaint was filed and that Prima had not yet joined issue in that action when the subject amendment was made is irrelevant to the time requirements imposed on Burton by CPLR 3025(a).

Burton was thus required to amend his summons and complaint as of right within 20 days after May 2 or 10, 2019, which correspond to the dates that responsive pleadings were filed in the main action, or seek leave from this Court to add Prima as a direct defendant (*see generally Rodriguez v Paramount Dev. Assoc., LLC*, 67 AD3d at 767; *Choinski v 115 W. 69, LLC*, 2016 NY Slip Op 30836[U], 2016 NY Misc LEXIS 1695, \*7-8 [Sup Ct, NY County 2016]). Accordingly,

it was improper for Burton to serve the amended summons and complaint without leave of court or a stipulation of the parties in accordance with CPLR 3025(b) (*see Hulse v Wirth*, 175 AD3d 1276, 1279 [2d Dept 2019]; *Nikolic v Fedn. Empl. & Guidance Serv.*, 18 AD3d 522, 524 [2d Dept 2005]; *Khedouri v Equinox*, 73 AD3d 532, 533 [1st Dept 2010]). However, Prima's motion seeking dismissal of the amended summons and complaint is denied because, although not raised by Burton, Prima waived this jurisdictional defense by failing to assert this defense in its answer or in a pre-answer motion to dismiss (*see generally McGowan v Hoffmeister*, 15 AD3d 297, 297 [1st Dept 2005]; *NY Cent. Ins. Co. v Berdar Equities, Co.*, 33 Misc 3d 1214[A], 2011 NY Slip Op 51923[U], 2011 NY Misc LEXIS 4995, \*7-8 [Sup Ct, NY County 2011]).

Importantly, Prima has already filed an answer to the amended summons and complaint and does not argue that it will be prejudiced by the amended pleadings or that they are patently insufficient or clearly devoid of merit (*see generally Khalil v Guardino*, 288 AD2d 349, 350 [2d Dept 2001]; *Rodschat v Herzog Supply Co. Inc.*, 208 AD2d 1167, 1167-1168 [3d Dept 1994]; *Torres v 120 Broadway Holdings, LLC*, 2020 NY Slip Op 32726[U], 2020 NY Misc LEXIS 4704, \*2 [Sup Ct, NY County 2020]). Thus, this Court's determination reinforces the longstanding principle that leave to amend the pleadings shall be freely given and furthers the interests of judicial economy by avoiding additional motion practice regarding the subject amendment.

Therefore, in accordance with the foregoing, it is hereby:

**ORDERED** that Prima Paving Corp.'s motion seeking dismissal of the amended summons and complaint is denied; and it is further

**ORDERED** that, within 20 days after this decision and order is uploaded to NYSCEF, plaintiff Curtis Burton shall serve a copy of this decision and order, with notice of entry, on all parties; and it is further

**ORDERED** that, due to budget cuts, the undersigned will be leaving the bench as of December 31, 2020 and the parties are therefore directed to contact the chambers of the Justice to whom this case will be reassigned as of January 1, 2021 to schedule a compliance conference; and it is further

**ORDERED** that this constitutes the decision and order of the court.

12/14/2020  
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE