

Pollard v City of New York

2021 NY Slip Op 30135(U)

January 4, 2021

Supreme Court, Kings County

Docket Number: 524136/2019

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of January, 2021.

PRESENT:

HON. CARL J. LANDICINO,

Justice.

-----X
JANET T. POLLARD, as Administratrix of the Estate of STEVEN POLLARD, deceased, and JANET T. POLLARD, Individually,

Plaintiffs,

- against -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY FIRE DEPARTMENT, MILL BASIN BRIDGE CONSTRUCTORS, LLC, HALMAR INTERNATIONAL CONSTRUCTION, LLC, MICHEL'S CORPORATION, HNTB NEW YORK ENGINEERING AND ARCHITECTURE P.C. GREENMAN-PEDERSON, INC., AECOME and GPI/CTE,

Defendants,

-----X

Index #: 524136/2019

DECISION AND ORDER

Motion Sequence #4 and 5

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered (e-file)</u>
Notice of Motion and	
Affidavits (Affirmations) Annexed	<u>61-66, 71-82</u>
Opposing Affidavits (Affirmations)	<u>90-98, 104-107</u>
Reply Affidavits (Affirmations)	<u>111-112 114</u>

After a review of the papers and oral argument, the Court finds as follows:

This is a personal injury action for pain and suffering and wrongful death, resulting from an accident wherein Plaintiff, Steven Pollard, deceased, allegedly fell in a gap on the span of the Mill Basin Bridge in New York City. Defendant, the City of New York (hereinafter referred to as "NYC"), now moves (motion sequence #4) for an order, pursuant to CPLR 3025(b), to amend

its Answer to the Plaintiff's Complaint. NYC contends that the amendments to its Answer relate solely to (i) the contractual breach of duty to procure insurance; (ii) the applicability of the firefighters rule; and (iii) the applicability of GML 205-a. NYC claims there would be no surprise or prejudice in allowing the proposed amendment.

The Plaintiffs, Janet T. Pollard, as Administratrix of Steven Pollard (deceased) and Janet T. Pollard, Individually (hereinafter referred to as the "Plaintiffs"), oppose the motion (motion sequence #4) and argue that NYC's motion must be denied as premature since the Plaintiffs have sought summary judgment on the issue of liability, and granting this amendment will render the Plaintiffs' prior motion moot. The Plaintiffs also assert that NYC seeks to amend an allegation that is already deemed admitted as a matter of law. The Plaintiff contends that, NYC did not respond to the Plaintiffs' Notice to Admit dated February 27, 2020. The remaining parties have taken no position on motion sequence #4.

NYC, in reply, argues that the controlling precedent dictates that leave to amend be freely granted absent surprise or prejudice resulting from delay.

The Plaintiffs also move (motion sequence #5) for an order granting the Plaintiff judgment on the issue of liability against NYC for filing a sham answer. The Plaintiffs essentially restate their argument opposing NYC's motion (motion sequence #4) in support of their motion.

NYC opposed the Plaintiff's motion (motion sequence #5) and argue that the Plaintiffs' motion is procedurally deficient because it fails to set out the facts upon which it relies, and does not cite the provision of the CPLR by which it seeks to obtain relief. NYC further argues that the Complaint is confusing at points and makes complex allegations throughout, within singular paragraphs. NYC argues that its Answer, was interposed to reflect the contents of the records available to NYC at the time the Answer was interposed. Also, NYC alleges that the information

that the Plaintiffs seek to rely upon as evidence in support of their allegations are not probative in determining the ownership, control, or management of the Mill Basin Bridge. NYC considers the instant dispute as distinct from the matters referenced in the cases the Plaintiffs cite. NYC argues that in those cases the municipal agencies had recorded information about the ownership of the assets in dispute. NYC further argues that dismissal of its pleadings is inappropriate in light of New York's strong public policy of resolution of disputes on the merits. Finally, NYC contends that it timely denied the Plaintiffs' Notice to Admit.

The Plaintiffs, in reply, argue that there should be no confusion about the substance of the Complaint since there is only one Mill Basin Bridge in relation to this case. Also, the Plaintiffs allege that NYC's allegation that the original Answer was premised on the drafter's information at the time it interposed it, has no evidentiary value, because it is not based on personal knowledge of the pertinent facts. The Plaintiffs also argue that the Complaint provided sufficient detail in order to have NYC admit or deny its ownership and control of the bridge. The Plaintiffs allege that failure to explicitly admit or deny allegations should be subject to dismissal or sanction.

Motion Sequence #4

We adhere to the rule applied in *Norman v. Ferrara*, 107 AD2d at 740, 484 N.Y.S.2d 600 as an accurate reflection of the Legislature's express policy that motions for leave to amend pleadings should be freely granted (see *G.K. Alan Assoc., Inc. v. Lazzari*, 44 AD3d 95, 99, 840 N.Y.S.2d 378 [(i)n the absence of prejudice or surprise to the opposing party, leave to amend should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit"], *Tartaros Constr., Inc. v. New York City Hous. Auth.*, 34 AD3d 451, 452-453, 823 N.Y.S.2d 534). Additionally, "[t]he legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt" (*Sample v. Levada*, 8 AD3d 465, 467-468, 779 N.Y.S.2d 96; see *Sleepy's Inc. v. Orzechowski*, 7 AD3d 511, 775 N.Y.S.2d 581, *Zacma Cleaners Corp. v. Gimbel*, 149 AD2d 585, 586, 540 N.Y.S.2d 268). These cases make clear that a plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance.

Lucido v. Mancuso, 49 AD3d 220, 227, 851 N.Y.S.2d 238, 243 [2d Dept 2008]. See also *GMAC Mtge., LLC v. Coombs*, 2020 NY Slip Op 07039 [2d Dept 2020].

Here, there has been no argument of surprise. Also, the allegation that the proposed amendment will prejudice the Plaintiffs is not substantiated by the record. NYC denied the Plaintiffs Notice to Admit. There is no evidence that NYC's proposed amendment clearly and without doubt lacks merit. Therefore, NYC's motion (motion sequence #4) is granted. NYC shall have 30 days from entry of this Decision and Order, to serve and file its amended Answer.

Motion Sequence #5

The Plaintiffs cite no statute or rule and do not rely on any specific case law in support of its application. However,

... there is no requirement that a movant identify a specific statute or rule in the notice of motion, only that the notice, 'specify... the relief requested and the grounds therefor' (CPLR 2214(a). Even though the [Plaintiff's] notice of motion and supporting affidavit did not formally and specifically request relief ... where, as here, there is no misunderstanding or prejudice, 'a court may grant relief that is warranted by the facts plainly appearing on the papers on both sides.'

Blauman-Spindler v. Blauman, 68 AD3d 1105, 1106, 892 N.Y.S.2d 143, 144 [2d Dept 2009].

The Plaintiffs application seems to be one for summary judgment (CPLR 3212) based on the Plaintiffs' contention that NYC interposed a sham Answer. The Plaintiffs also seek, in the alternative, that a number of paragraphs within the Complaint be deemed admitted. This proceeding is in the nascent stage of the discovery phase of this case. NYC has indicated that it needs to obtain further discovery in order to ascertain information relating to the ownership, management, and control of the bridge. NYC has raised with sufficient specificity, and without mere hope on speculation, that facts exist but cannot be stated, since they do not possess the information. *Aurora Loan Services, LLC v. LaMattina & Associates, Inc.*, 59 AD3d 578, 872

N.Y.S.2d 724 [2d Dept 2009]. Therefore, the Plaintiffs' motion (motion sequence #5) is denied without prejudice to renew on good cause shown after the completion of discovery.

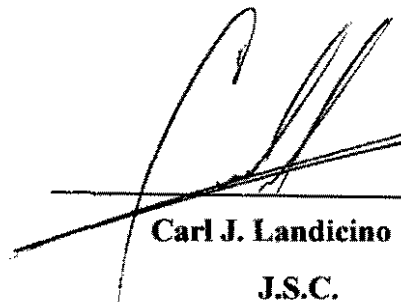
It is hereby ordered:

NYC's motion (motion sequence #4) is granted. NYC shall have 30 days from entry of this Decision and Order, to serve and file its amended Answer.

The Plaintiffs' motion (motion sequence #5) is denied without prejudice to renew on good cause shown after the completion of discovery.

This constitutes the Decision and Order of the Court.

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FILED
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J.S.C.