

**Sanchez v Aldi Inc.**

2021 NY Slip Op 32763(U)

December 23, 2021

Supreme Court, New York County

Docket Number: 159750/2020

Judge: David Benjamin Cohen

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DAVID B. COHEN

PART 58

*Justice*

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INDEX NO. 159750/2020

GLENDALEE SANCHEZ,

Plaintiff,

MOTION SEQ. NO. 001

- v -

ALDI INC., EAST RIVER PLAZA, EAST RIVER PLAZA LLP,  
and PF SUPREME INVESTOR LLC,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for

AMEND CAPTION/PLEADINGS

In this personal injury action, plaintiff Glendalee Sanchez moves, pursuant to CPLR 3025, to amend her complaint to change the date of her alleged accident. Defendant Aldi, Inc. opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND**

In the complaint, filed November 12, 2020, plaintiff alleged that she was injured in an escalator accident due to the negligence of the defendants on December 23, 2018. Doc. 1. In her bill of particulars, served January 29, 2021, plaintiff reiterated that the accident occurred on that date. Doc. 15.

On August 31, 2021, plaintiff filed the instant motion seeking to amend the complaint to assert that the accident actually occurred on December 22, 2017. Docs. 21-25. In an affirmation in support of the motion, plaintiff's counsel represents that "[a]fter further investigation and

review of [p]laintiff's medical records, it was discovered that the subject accident occurred on December 22, 2017." Doc. 21 at pars. 4, 9.

In opposition, counsel for defendant Aldi Inc. argues, relying, inter alia, on *Davis v New York City Transit Authority*, 234 AD2d 153 (1<sup>st</sup> Dept 1996), that the motion must be denied because of plaintiff's lengthy delay in seeking to amend the complaint. Doc. 29 at pars. 8-9. Aldi's attorney further asserts, relying on *Otero v Walton Ave. Assoc. LLC*, 166 AD3d 539 (1<sup>st</sup> Dept 2018), that there would be a "tremendous prejudicial effect" (Doc. 29 at par. 5) against Aldi if the motion were granted. Additionally, counsel for Aldi maintains, relying on *Guzman v Mike's Pipe Yard*, 35 AD3d 266 (1<sup>st</sup> Dept 2006), that the motion must be denied since the plaintiff fails to submit any evidence substantiating the merit of the proposed amendment.

### LEGAL CONCLUSIONS

A motion for leave to amend a pleading may be made "at any time," and "[l]eave shall be freely given upon such terms as may be just" (CPLR 3025[b]). The determination to permit or deny the amendment is committed to the sound and broad discretion of the trial court (*see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959), and its determination will not lightly be set aside (*see Nanomedicon, LLC v Research Found. of State Univ. of N.Y.*, 129 AD3d 684, 685; *Ingrami v Rovner*, 45 AD3d 806, 808). Delay alone is insufficient to bar an amendment to the pleading; "[i]t must be lateness coupled with significant prejudice to the other side" (*Edenwald Contr. Co. v City of New York*, 60 NY2d at 959 [internal quotation marks omitted]; *see Coleman v Worster*, 140 AD3d 1002). "In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Mannino v Wells Fargo Home Mtge., Inc.*, 155 AD3d 860, 862; *see CPLR 3025[b]; CDx Labs., Inc. v Zila, Inc.*, 162 AD3d 972, 973, 80 N.Y.S.3d 382). "Prejudice is more than the mere exposure of the [party] to greater liability" (*Kimso Apts., LLC v Gandhi*, 24 NY3d at 411, quoting *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]). "Rather, there must be some indication that the [party] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position" (*Kimso Apts., LLC v Gandhi*, 24 NY3d at 411, quoting *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d at 23). The burden of establishing prejudice is on the party opposing the amendment (*see Kimso Apts., LLC v Gandhi*, 24 NY3d at 411).

(*Park v Home Depot U.S.A., Inc.*, 183 AD3d 645, 646-647 [2d Dept 2020]).

This Court finds, in its discretion, that plaintiff is entitled to amend the complaint to change the date of the alleged accident since this will not cause surprise or prejudice to defendants (*See* CPLR 3025[b]); *Dockery v UPACA Site 7 Assoc., LP*, 148 AD3d 580, 580 [1st Dept 2017] [citations omitted], *47 W. 14th St. Corp. v NY Wigs & Plus, Inc.*, 106 AD3d 527, 527 [1st Dept 2013]). There is no indication from a review of the complaint, the proposed amended complaint, and the motion papers that accident date is central to defendants' theory of the case (*see Dockery*, 148 AD3d at 580). Although plaintiff did not set forth a specific excuse for her delay in moving to amend the complaint, plaintiff's counsel represents, as noted above, that she learned that the accident actually occurred in December of 2017 as a result of "further investigation and review of [p]laintiff's medical records" (Doc. 21 at par. 4), thereby implying that counsel's initial investigation had not revealed the correct date.

Relying, *inter alia*, on *Davis v New York City Transit Authority*, 234 AD2d 153 (1<sup>st</sup> Dept 1996), Aldi asserts that plaintiff's delay in moving to amend the complaint is excessive and therefore prejudicial. However, *Davis* is clearly distinguishable since the delay in that matter exceeded five years. Here, plaintiff commenced this action on November 12, 2020 and moved to amend the complaint on August 31, 2021, less than one year later.

Although Aldi argues that it would be prejudiced if plaintiff were permitted to amend the complaint, it does not elaborate on how the granting of this motion would affect its ability to defend the case (*See Loomis*, 54 NY2d at 23; *Kimso Apts.*, 24 NY3d at 411). In furtherance of this argument, Aldi relies on *Otero v Walton Ave. Assoc. LLC*, 166 AD3d 539 (1<sup>st</sup> Dept 2018), which is also distinguishable from this action. In that case, plaintiff alleged in her complaint that she was injured on a particular (incorrect) date, and defendant saved video surveillance tape from that date in order to investigate the incident. When plaintiff moved to amend the complaint to

allege the correct date, the IAS Court denied the motion, and the Appellate Division affirmed, on the ground that defendant was prejudiced because it was unable to preserve the videotape from the date of the accident. Since Aldi has not made a similar showing herein, its argument regarding prejudice is unpersuasive (*See generally Arroyo v New York City Hous. Auth.*, 12 AD3d 254, 785 N.Y.S.2d 60 [1st Dept 2004]). This conclusion is bolstered by the fact that discovery is still in its nascent stage, i.e., a preliminary conference has not yet been held, and thus Aldi will have an ample opportunity to explore the facts giving rise to the alleged accident (*See Charles v William Penn Life Ins. Co. of N.Y.*, 162 AD3d 490 [1<sup>st</sup> Dept 2018]).

Aldi further asserts, relying on *Guzman v Mike's Pipe Yard*, 35 AD3d 266 (1<sup>st</sup> Dept 2006), that the motion must be denied since plaintiff failed to submit proof that the amendment to the complaint is meritorious. However, “plaintiff need not establish the merit of its proposed new allegations but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit ...’ *MBIA Ins. Corp. v Greystone & Co. Inc.*, 74 AD3d 499 [1st Dept 2010] (internal citations omitted)” (*Lum v Edison*, 2021 NY Slip Op 32318[U], \*2 [Sup Ct, NY County 2021]). Where, as here, plaintiff seeks to amend the complaint solely to change the date of the alleged incident, there is no showing of merit to be made; the allegations in the proposed amended complaint are otherwise identical to those in the initial complaint. Docs. 1, 23. In any event, *Guzman* is inapposite herein since it did not concern the correction of a mere error, but instead a motion to add a new affirmative defense.

Accordingly, it is hereby:

ORDERED that the motion by plaintiff Glendalee Sanchez to amend the complaint is granted; and it is further

ORDERED that the amended complaint, in the form annexed to the motion papers (NYSCEF Doc. No. 23), shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

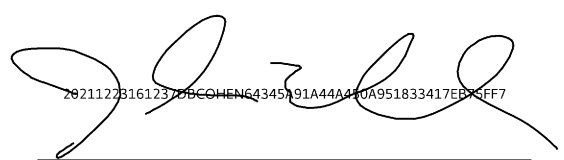
ORDERED that a supplemental summons and amended complaint, in the form annexed to the motion papers (NYSCEF Doc. No. 23), shall be served, in accordance with the Civil Practice Law and Rules, upon the additional parties in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address ([www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh))); and it is further

ORDERED that the parties are to appear for a preliminary conference in this matter via Microsoft Teams on February 22, 2022 at 2:30 p.m.

12/23/2021  
DATE

  
DAVID B. COHEN, J.S.C.

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