

**Skanska USA Bldg., Inc. v Commerce & Indus. Ins.  
Co.**

2022 NY Slip Op 33499(U)

October 13, 2022

Supreme Court, New York County

Docket Number: Index No. 650664/2022

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART 14**

*Justice*

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SKANSKA USA BUILDING, INC.,

Plaintiff,

- v -

COMMERCE AND INDUSTRY INSURANCE COMPANY,

Defendant.

-----X

INDEX NO. 650664/2022

MOTION DATE 10/11/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Plaintiff's motion for leave to amend is granted.

**Background**

Plaintiff brings this case for declaratory relief against defendant rising out of purported insurance coverage obligations owed by defendant. It moves to amend its complaint to add an additional claim for declaratory relief against defendant with respect to purportedly additional coverage obligations under the same insurance policy cited in the original complaint.

Plaintiff contends that this case relates to the renovation of certain buildings comprising the United Nations Headquarters in Manhattan. Several allegations of exposure to asbestos arose as a result of the construction project from subcontractors. One case, by All Craft Fabricators, Inc. and Donaldson Interiors, Inc. led to the filing of an action in 2013. Another case filed by workers at the site was commenced in 2014. Plaintiff alleges that it timely tendered to defendant for both actions and that defendant has refused to participate in settlement negotiations in the All Craft case and, after defendant initially accepted defense in the 2014 case, it now refuses to

provide coverage in the 2014 action. Plaintiff moves to add a claim for declaratory relief with respect to the 2014 case (the original complaint only concerned the 2013 lawsuit).

In opposition, defendant contends that plaintiff is conflating two insurance coverage disputes (one about property damages caused by asbestos exposure and the other about bodily injury allegedly caused by lead exposure). It argues that plaintiff filed this case in February 2022 about a certain reservation of rights and now seek to add a claim related to a completely different reservation of rights. Defendant argues that the only commonality shared between the 2013 and 2014 cases are that plaintiff and defendant disagree about the application of the insurance policy to each set of facts. Defendant argues that it would confuse a fact finder if the two issues were covered in this litigation and constitutes unfair surprise as well as prejudice.

In reply, plaintiff emphasizes that its proposed amended pleading is neither palpably insufficient nor devoid of merit. It argues that defendant's arguments amount to a rehashing of the assertions lodged in the underlying actions, which do not constitute a basis to deny the instant motion. Plaintiff points out that the issues arise out of the same project and same insurance policy. It maintains that the proposed amended pleading is not an unfair surprise and that defendant will not be prejudiced.

### **Discussion**

"Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay or if the proposed amendment is palpably improper or insufficient as a matter of law. A party opposing leave to amend must overcome a heavy presumption of validity in favor of permitting amendment. Prejudice to warrant denial of leave to amend requires some indication that the defendant has been hindered in the preparation of their case or has been prevented from taking some measure in support of

their position” (*McGhee v Odell*, 96 AD3d 449, 450, 946 NYS2d 134 [1st Dept 2012] [internal quotations and citations omitted]).


The Court grants the motion. Defendant does not sufficiently dispute that the proposed amendment is palpably improper. Instead, it makes arguments about the merits of the two underlying cases. That does not constitute a basis to deny a motion for leave to amend which, as described above, must be freely given. Defendant’s claims about prejudice or unfair surprise are also without merit. This case was commenced in February 2022 and an RJI was not filed until September 7, 2022—such a delay is not nearly long enough to merit denial of the motion (*Bd. of Managers of Porter House Condominium v Delshah 60 Ninth LLC*, 206 AD3d 423 [1st Dept 2022] [permitting amendment of a pleading where more than two years had passed since it was originally served]).

To the extent that defendant asserts that a fact finder might get confused, defendant truly underestimates fact finders, who routinely deal with very complicated issues. And so even if this was complicated, that is not a reason to deny the instant motion. It remains to be seen how closely intertwined the issues are and fact finders often deal with distinct events as part of reaching a determination. And, as plaintiff points out, the issues here involve the same construction project and the same insurance policy. There is no reason to force plaintiff to bring a separate case under these circumstances.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for leave to amend is granted and plaintiff shall e-filed the proposed amended complaint as a separately e-filed document (it is now only an exhibit) on or before October 20, 2022 and defendant shall answer pursuant to the CPLR.

Conference: January 25, 2023 at 11:30 a.m. By January 18, 2023, the parties are directed to upload 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement or 3) letters explaining why no agreement could be reached. The Court will then assess whether an in-person conference is necessary. The failure to upload anything by January 18, 2023 will result in an adjournment of the conference.

<u>10/13/2022</u> DATE			 ARLENE P. BLUTH, 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"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE