

**Putrelo Bldg. Enters., Inc. v Fahs Constr. Group, Inc.**

2023 NY Slip Op 33213(U)

September 19, 2023

Supreme Court, Broome County

Docket Number: Index No. EFCA2018001882

Judge: Eugene D. Faughnan

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This opinion is uncorrected and not selected for official publication.

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 28<sup>th</sup> day of June 2023, by Microsoft Teams.

PRESENT: HON. EUGENE D. FAUGHNAN  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF BROOME

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PUTRELO BUILDING ENTERPRISES, INC.,

Plaintiff,

vs.

DECISION AND ORDER

Index No. EFCA2018001882

FAHS CONSTRUCTION GROUP, INC., and  
LIBERTY MUTUAL INSURANCE COMPANY,

Defendant.

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APPEARANCES:

Counsel for Plaintiff:

JASON B. BAILEY, ESQ.  
Sheats & Bailey, PLLC  
PO Box 586  
Liverpool, NY 13088

Counsel for Defendants:

ALAN J. POPE, ESQ.  
Coughlin & Gerhart, LLP  
99 Corporate Dr.  
Binghamton, NY 13904

**EUGENE D. FAUGHNAN, J.S.C.**

Defendants, Fahs Construction Company, Inc. (“Fahs”) and Liberty Mutual Insurance Company, have filed a motion seeking to file and serve an Amended Answer to the Amended Complaint of Plaintiff, Putrelo Building Enterprises, Inc. (“Putrelo”).<sup>1</sup> Fahs seeks to add a counterclaim against Putrelo, asserting that Putrelo’s delay on the construction project at issue herein caused damage to Fahs. Putrelo filed opposition to the motion and the parties appeared for oral argument, conducted virtually. After due deliberation, this constitutes the Decision and Order of this Court.

**BACKGROUND FACTS**

This case has been before the Court previously, resulting in a Decision and Order filed on September 6, 2022, on the issue of Fahs providing a response to Plaintiff’s Lien Law § 76 Demand. The underlying facts were set forth in that Decision and Order and will only be highlighted as necessary for consideration of this motion.

Fahs entered into a contract with Office of General Services (“OGS”) for a construction project at the Mohawk Correctional Facility, and Fahs then entered into a subcontract with Putrelo for masonry work. Putrelo claims it is owed money from Fahs for the work it performed. Putrelo brought this action for damages and for a full and complete accounting of all funds received by Fahs on this project, pursuant to Lien Law § 77(1). Fahs filed an Answer with affirmative defenses and then filed an Answer (again with affirmative defenses) to the Amended Complaint. Fahs now seeks to include a counterclaim against Putrelo.

**LEGAL DISCUSSION AND ANALYSIS**

“Pursuant to CPLR 3025 (b), a party may amend its pleadings ‘at any time by leave of [the] court,’ which ‘shall be freely given upon such terms as may be just.’” *NYAHS A Servs., Inc. Self-Ins. Trust v. People Care Inc.*, 156 AD3d 99, 102 (3<sup>rd</sup> Dept. 2017), quoting *Kimso Apts., LLC v. Gandhi*, 24 NY3d 403, 411 (2014); *Walden v. Varricchio*, 195 AD3d 1111 (3<sup>rd</sup> Dept. 2021). It is not necessary, nor appropriate, for the Court to consider the merits of the proposed

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<sup>1</sup> All the papers filed in connection with the motion and cross motion are included in the NYSCEF electronic case file, and have been considered by the Court.

claim. Instead, “[w]hen leave is sought to amend a pleading, the movant need not establish the merits of the proposed amendment and, in the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit.” *Lakeview Outlets Inc. v. Town of Malta*, 166 AD3d 1445, 1446 (3<sup>rd</sup> Dept. 2018) (internal quotation marks and citations omitted); *Passeri v. Brody*, 199 AD3d 1260, 1261 (3<sup>rd</sup> Dept. 2021); *Gulfstream Anesthesia Consultants, P.A. v. Cortland Regional Med. Ctr., Inc.*, 165 AD3d 1430 (3<sup>rd</sup> Dept. 2018); *NYAHSA Servs., Inc., Self-Ins. Trust v. People Care Inc.*, 156 AD3d at 102. “It is within the sound discretion of the trial court to decide whether to permit the filing of an amended pleading, and the trial court’s decision “absent a clear abuse of that discretion, will not be lightly cast aside.” *Cowsert v. Macy’s E., Inc.*, 74 AD3d 1444, 1444 (3<sup>rd</sup> Dept. 2010), quoting *Gersten-Hillman Agency v. Heyman*, 68 AD3d 1284, 1289 (3<sup>rd</sup> Dept. 2009); *Green Tree Servicing, LLC v. Feller*, 159 AD3d 1246 (3<sup>rd</sup> Dept. 2018).

The Third Department has recognized that there is a “liberal standard for leave to amend” and that if the party who is opposing the motion “wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment or to dismiss upon a proper showing.” *NYAHSA Servs., Inc., Self-Ins. Trust v. People Care Inc.*, 156 AD3d at 102 (brackets omitted), citing *Lucido v. Mancuso*, 49 AD3d 220, 229 (2<sup>nd</sup> Dept. 2008); *Passeri v. Brody*, 199 AD3d 1260; Cf. *Olam Corp. v. Thayer*, 2021 NY Misc. LEXIS 476 (Sup. Ct. 2021) (concluding that leave to amend a complaint should be denied if the amended complaint could not survive a subsequent motion to dismiss). The Court’s analysis must focus on: 1) whether the amendment will result in surprise or prejudice, and 2) whether the amendment is palpably insufficient or devoid of merit. Prejudice is more than the mere exposure of a party to greater liability. Rather, there must be some indication that the party has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position.” *Lilley v. Greene Cent. Sch. Dist.*, 187 AD3d 1384, 1389 (3<sup>rd</sup> Dept. 2020) (internal quotation marks, brackets and citations omitted). With respect to the second prong, a claim would be palpably insufficient or devoid of merit if, for example, the party lacks standing (*see e.g. Frometa v. Mar-Can Transp. Co, Inc.*, 72 Misc3d 316 [Sup. Ct., Bronx County 2021]), or if the amendment seeks to add a cause of action which would be barred by the statute of limitations. *See, Belair Care Ctr., Inc. v. Cool Insuring Agency, Inc.*, 161 AD3d 1263 (3<sup>rd</sup> Dept.

2018); *see also*, *Roco G.C. Corp. v. Bridge View Tower, LLC*, 166 AD3d 1031 (2<sup>nd</sup> Dept. 2018). The *Olam* case shows the difficulty in assessing whether the standard for permitting the filing of an amended pleading is more or less lenient than a motion to dismiss, and even though the merits are not to be considered, as a practical matter the only way to determine if a proposed amendment is “palpably insufficient or patently devoid of merit” is to at least minimally review the merits.

Putrelo argues that there is undue prejudice and surprise that would result if the motion to amend is granted, and that Fahs has unduly delayed in asserting any claim against Putrelo. Specifically, Putrelo asserts prejudice by claiming that discovery was nearly complete and that it will have to be re-conducted if the motion is granted. Next, Putrelo argues that there has been undue delay and that between 2011 and 2018, Fahs communicated to OGS and advanced the position that OGS was responsible for any delays, but with the proposed counterclaim against Putrelo, now casts the fault on Putrelo. Fahs’ Answer to the Amended Complaint was filed in July 2018, but did not include a counterclaim. Putrelo had previously submitted its own delay claim to Fahs and Fahs included Putrelo’s delay claim in the Fahs-OGS claim. Putrelo claims that at no point prior to the current request to amend the Answer did Fahs claim that Putrelo delayed the project. Putrelo contends that Fahs should not now be permitted to amend its Answer, five years after the initial Answer was filed, particularly because Fahs should have known of the facts long ago. Putrelo points out that there are no new facts being alleged in the proposed counterclaim and that all discovery has been completed.

Fahs contends that it was obligated to present Putrelo’s claim to OGS, and that it offered Putrelo the opportunity to argue its own claim with OGS, but that Putrelo never did so. Fahs also argues that it repeatedly advised Putrelo that it believed Putrelo caused delays on the project and interfered with the progress and completion of the project. Further, Fahs argues that Putrelo was responsible for any discovery delays in this litigation and will not suffer any prejudice from the amendment.

“The burden of demonstrating prejudice or surprise, or that a proposed amendment is palpably insufficient or patently devoid of merit, falls upon the party opposing the motion.” *Wells Fargo Bank, N.A. v. Spatafore*, 183 AD3d 853, 853 (2<sup>nd</sup> Dept. 2020) (citations omitted). Assuming *arguendo* that Putrelo is correct that discovery is nearly complete (Plaintiff’s Memorandum of Law dated June 2, 2023 at pp. 3, 7, 8, 14 and affidavit of Jason B. Bailey, Esq.,

dated June 2, 2023 at ¶ 16)<sup>2</sup>, and that the request to amend is being made nearly 5 years after the Amended Answer was initially served, that delay is insufficient to demonstrate prejudice. The burden is on the opponent to show prejudice and “mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side.” *Putrelo Constr. Co. v. Town of Marcy*, 137 AD3d 1591, 1593 (4<sup>th</sup> Dept. 2016), quoting *Edenwald Contr. Co. v. City of New York*, 60 NY2d 957, 959 (1983). In *Lakeview Outlets Inc. v. Town of Malta*, Plaintiff claimed that discovery was complete and Plaintiff had made a motion for summary judgment before Defendant sought to amend its Answer. The Third Department affirmed a determination allowing Defendant to amend its Answer, stating that

Delay alone, however, does not warrant denial of a motion for leave to amend (*see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411, 998 NYS2d 740, 23 NE3d 1008 [2014]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959, 459 NE2d 164, 471 NYS2d 55 [1983]; *Tri-Tec Design, Inc. v Zatek Corp.*, 123 AD3d 420, 420, 998 NYS2d 43 [2014]), and plaintiff's contention that its expenditure of time and resources in preparation for the trial constitutes prejudice requiring denial of defendant's motion is without merit. Prejudice in this context exists "where a party has incurred some change in position or hindrance in the preparation of its case which could have been avoided had the original pleading contained the proposed amendment" (*Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 293, 703 NE2d 246, 680 NYS2d 435 [1998]; *see Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23, 429 NE2d 90, 444 NYS2d 571 [1981]; *Crawford v Burkey*, 93 AD3d 1134, 1135, 941 NYS2d 338 [2012]; *Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504, 925 NYS2d 51 [2011]). No such showing has been made by defendant here. Moreover, plaintiff does not concede that this action is untimely, and "there is nothing in the record to suggest that the time and effort expended in discovery would not have been necessary in any event to prosecute plaintiff's claim[s]" (*Mushatt v Tompkins Community Hosp.*, 228 AD2d 925, 926, 644 NYS2d 431 [1996]; *see Smith v Haggerty*, 16 AD3d 967, 968, 792 NYS2d 217 [2005]; *see also Garrison v Clark Mun. Equip.*, 239 AD2d 742, 743, 657 NYS2d 477 [1997]).

*Lakeview Outlets Inc. v. Town of Malta*, 166 AD3d at 1446-1447.

In the present case, although Fahs' delay has been considerable, Putrelo has not articulated any prejudice it will sustain if the amendment is granted. Furthermore, the record shows that the potential claim by Fahs against Putrelo has been asserted on numerous occasions, even prior to this motion. Attorney Pope provided an affidavit date June 3, 2022 (in response to a prior motion) which stated that the project delays were, in part, due to Putrelo's conduct.

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<sup>2</sup> Fahs disputes that discovery is complete (Affidavit of Alan J. Pope, Esq., dated June 13, 2023 at ¶ 6).

Richard Gangemi, Fahs' CEO, testified by deposition on December 29, 2022 and stated that Putrelo caused delays on this project and that Putrelo's work took longer than the scheduled amount of time (Gangemi deposition at p. 86). He further stated that if Putrelo caused delays on the project, Fahs would be responsible to OGS on the OGS-Fahs contract. He noted that if OGS did not pay Fahs the full amount, the Fahs may seek some damages from Putrelo due to Putrelo's delays. Therefore, in contrast to Putrelo's argument, the Court finds that the issue of Putrelo's responsibility for delay on the project has been an issue in the case prior to the current motion. Putrelo declined to agree to the amendment, prompting this motion.

Other than the delay, which is somewhat ameliorated by virtue of the fact that Putrelo was aware of Fahs' position in 2022, and testimony was obtained from Mr. Gangemi touching on those issues, Putrelo has not shown how it was otherwise prejudiced. In the absence of prejudice, the liberal standards underlying CPLR 3025 support granting the motion to amend. Although Putrelo does not agree with the assertions in the proposed Amended Answer, there is no indication that that Fahs' claim is patently insufficient or totally devoid of merit. Thus, the Court will grant the motion to amend.

CPLR 3025(b) specifically states that leave to amend a pleading shall be freely given "upon such terms as may be just." Although the Court is granting the motion to amend, the Court also recognizes that fairness requires that Putrelo have an opportunity for discovery on the new claim, including depositions. The Court is also mindful of the fact that several years have elapsed since this project was performed, and that some witnesses may no longer be available for depositions. If that situation arises, the Court will entertain a motion to determine the appropriate remedy.

## **CONCLUSION**

Based upon all the foregoing, it is hereby

ORDERED, that Defendants' motion to file and serve an Amended Answer to the Amended Complaint is GRANTED, and it is further

ORDERED, that the parties are to conference regarding the time required for completion of discovery, and provide the Court with a stipulated Amended Scheduling Order, within 30 days of the signing of this Order, with said Amended Scheduling Order to includes deadlines up to and including the filing of a Note of Issue.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: September 19, 2023  
Binghamton, New York



HON. EUGENE D. FAUGHNAN  
Supreme Court Justice