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SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH COVELLO

Justice

ANCA OANA KRANZ, as Administratrix of the Estate of SIMINA KRANZ, deceased, ANCA OANA KRANZ, as Administratrix of the Estate of MARCUS KRANZ, deceased, and ANCA OANA KRANZ, as Administratrix of the Estate of VICTORIA KRANZ, deceased,

Plaintiffs,

-against-

ANDREI KRANZ, KEYSpan ENERGY, HENRY REBMAN d/b/a REBMAN PLUMBING, RICHARD H. SCHAFFER, INC., RICHARD H. SCHAFFER, DOMINIC CORRENTI, GLADYS CORRENTI, TAUSCHER, CRONACHER, PROFESSIONAL ENGINEERS, P.C., and ARTHUR TAUSCH

Defendants.

CORNELIA GHEORGHIU, as Administratrix of the Goods, Chattels and Credits of EMILIA DUMITRU, Deceased,

Plaintiffs,

-against-

KEYSPAN ENERGY, HENRY REBMAN d/b/a REBMAN PLUMBING, RICHARD H. SCHAEFER, INC., RICHARD H. SCHAEFER, DONINICK CORRENTI, GLADYS CORENTI, TAUSCHER CORNACHER PROFESSIONAL ENGINEERS, P.C., and ARTHUR TAUSCHER,

Defendants.

**TRIAL/IAS, PART 24
NASSAU COUNTY**

Action #:1

Index #: 19348/01

Motion Seq. #: 02&03

Motion Date: 10/27/03

Action No. 2

Index #: 11715/01

**PATRICK MASTERSON, Administratrix of the
Estate fo EMIL IOAN CAMPEANU
and MARIE MIHAELA CAMPEANU, Deceased,**

Action No. 3

Index #: 17130/01

Plaintiffs,

-against-

**ANDREI KRANZ and ANCA KRANZ, LONG ISLAND
POWER AUTHORITY, LONG ISLAND LIGHTING
COMPANY, KEYSpan ENERGY AND TOWN OF
NORTH HEMPSTEAD,**

Defendants.

ANDREI KRANZ and ANCA OANA KRANZ,

Action No. 4

Index #: 15437/02

Plaintiffs,

-against-

**KEYSPAN ENERGY, HENRY REBMAN d/b/a
REBMAN PLUMBING, RICHARD H. SCHAEFER, INC.,
RICHARD H. SCHAEFER, DONINICK CORRENTI,
GLADYS CORRENTI, TAUSCHER
CRONACHER, PROFESSIONAL ENGINEERS, P.C.
and JOHN KELLY,**

Defendants.

The following paper read on this motion:

Notice of Motion	1
Notice of Cross Motion	2
Affirmations in Opposition	3, 4, 5 ,6, 7, 8
Reply Affirmations.....	9, 10
Memorandum of Law	11

Upon the foregoing papers, the motion by plaintiff in Action No.1 for an order pursuant to CPLR 3025(b) granting her leave to amend the complaint to assert claims for conscious pain and suffering on behalf of Simina Kranz, Marcus Kranz and Victoria

Kranz and to assert claims for wrongful death and negligence on behalf of the Estates of Marcus Kranz and Victoria Kranz as against Henry Rebman d/b/a Rebman Plumbing (“Rebman”), is granted. The cross-motion by Rebman for an order pursuant to CPLR 3025(b) granting it leave to amend its answer to the proposed amended complaint to assert affirmative defenses and cross-claims, is granted.

This is an action to recover damages for negligence and wrongful death.

On May 6, 2000 and May 7, 2000, Simina Kranz, Marcus Kranz and Victoria Kranz were caused to suffer carbon monoxide poisoning, while inside the residence owned by defendant Andrei Kranz.

Plaintiff in Action No.1 now seeks permission to include causes of action for pre-death conscious pain and suffering endured by the aforementioned decedents. Notably, the actions commenced on behalf of the deceased victims in Actions Nos.2 and 3 include claims for wrongful death and pre-death conscious pain and suffering.

Defendants in Action No.1 oppose the proposed amendment on the grounds that:
a) it lacks merit; and b) it is barred by the applicable three year statute of limitations.

It is well settled that leave to amend a pleading should be freely granted in the absence of prejudice resulting from the delay and provided that the proposed amendment is not plainly lacking in merit (*Edenwald Contracting Co., Inc. v City of New York*, 60 NY2d 957; *McKenzie v Osterreich*, 300 AD2d 371 *lv to appeal denied* 100 NY2d 510).

The granting of such leave lies within the sound discretion of the trial court. (*St. Paul Fire and Marine Ins. Co. v Town of Hempstead*, 291 AD2d 488, 489; *Schiavone v*

Victory Mem. Hosp., 300 AD2d 294).

The mere fact that the request for leave to serve was delayed, or not made promptly after service of the original pleading does not bar such a request to amend. (*Edenwald supra* at 959; *St. Paul Fire and Marine Ins. Co. v Town of Hempstead*, 291 AD2d 488; *Schiavone v Victory Memorial Hospital*, 300 AD2d 294). Further, a party should be granted leave to serve an amendment where the party opposing the motion has knowledge of the facts surrounding the proposed amendment and fails to establish that significant prejudice will result from permitting the pleadings to be amended. (*Castle v Gaseteria Oil Corp.*, 263 AD2d 523).

It is equally true that the merits of a proposed amendment will not be examined on a motion to amend a pleading - unless insufficiency or lack of merit is clear and free from doubt. (*Norman v Ferrarra*, 107 AD2d 739).

Taking into account these considerations, defendants failed to demonstrate that they would be prejudiced by the proposed amendments and it cannot be said that the proposed amendments are totally devoid of merit.

Here, the proposed amendments of the complaint add new theories of recovery premised on information obtained from the defendants through discovery and / or are based on facts originally set forth. (See *Young v Robert Shaw Controls Co.*, 104 A D2d 84, appeal discontinued by 66 NY2d 613).

Moreover, contrary to defendants' contentions, the proposed claims are supported by evidence establishing merit including photographs, an affirmation of plaintiff, Anca

Oana Kranz, M.D., and an affirmation of Dan Antonescu -Wolf, M.D., an anesthesiologist. Specifically, in his affirmation, Dr. Antonescu - Wolf states that he has reviewed, *inter alia*, the toxicology reports, the New York State Department of Public Service investigation reports, photographs, the video tape and various articles concerning these deaths. Based upon the foregoing, Dr. Antonescu -Wolf concludes that the “decedents herein consciously suffered the progressive effect of carbon monoxide poisoning * * * and [t]he victims of the tragedy became progressively ill before they became unconscious and ultimately died.”

As to defendants’ argument that the proposed amendment is barred by the applicable statute of limitations, this court disagrees.

CPLR §203(f), provides, in pertinent part, that: “A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.” An amended pleading relates back to the date of the original pleading unless the original pleading does not give notice of the transactions, or occurrences to be proved pursuant to the amended pleading. (see generally, *Matter of Smith*, 104 AD2d 445).

There has been no argument offered by opposing counsel that the original pleading did not give notice of the transactions, or occurrences to be proved pursuant to the amended pleading. As noted above, the deceased victims in Action Nos. 2 & 3 included

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claims for pre-death conscious pain and suffering. Accordingly, the relation-back doctrine is applicable. (See Caffaro v Trayna, 35 NY2d 245).

In view of the foregoing, plaintiff's motion and Rebman's cross-motion are granted. Plaintiff is directed to serve the amended complaint within twenty days from the date of this order. The defendant is to serve the amended answer within twenty days thereafter. Both pleadings are to be amended in the form as proposed in the moving papers.

This constitutes the decision and order of the court.

Dated: January 29, 2004



JOSEPH COVELLO, J. S. C.

ENTERED
FEB 04 2004
NASSAU COUNTY
COUNTY CLERK'S OFFICE