

02/18/2004

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 02-01159

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| _____ | |
| MARCIA RHODES, HAROLD RHODES, |) |
| INDIVIDUALLY, HAROLD RHODES, |) |
| ON BEHALF OF HIS MINOR CHILD |) |
| AND NEXT FRIEND, REBECCA RHODES |) |
| Plaintiffs |) |
| | |
| V. |) |
| | |
| CARLO ZALEWSKI, DRIVER LOGISTICS, |) |
| PENSKE TRUCK LEASING CORP. and |) |
| GAF BUILDING MATERIALS CORP. |) |
| Defendants |) |
| _____ | |

**DEFENDANT BUILDING MATERIALS CORPORATION
OF AMERICA D/B/A GAF MATERIALS CORPORATION'S
OPPOSITION TO PLAINTIFFS' MOTION TO AMEND COMPLAINT**

Pursuant to Mass. R. Civ. P. 15, Defendant Building Materials Corporation of America d/b/a GAF Materials Corporation ("BMCA") hereby opposes Plaintiffs' Motion to Amend Complaint for the following reasons:

1. Plaintiffs filed the original Complaint in this case on July 12, 2002. In the Complaint, the Plaintiffs alleged that BMCA was negligent in exercising control of an independent contractor. Plaintiffs filed their First Amended Complaint on September 5, 2002, in order to properly name BMCA as a defendant.

3. Plaintiffs filed their Second Amended Complaint on February 25, 2003. Plaintiffs added a negligence claim against Penske Truck Leasing, Corp. ("Penske") after documents

produced during discovery disclosed that Penske maintained and repaired the truck brakes that are at issue in this case. See Plaintiffs' Motion to Amend Complaint, Exhibit 1.

4. Discovery in this case was originally scheduled to end on May 8, 2003. Through a joint motion, all parties agreed to extend discovery until August 8, 2003. See Joint Motion to Extend Tracking Order, Exhibit 2. On July 22, 2003, all parties, again, agreed to extend the discovery deadline to September 30, 2003. See Joint Motion to Extend Tracking Order, Exhibit 3.

5. The deadline for filing motions for summary judgment, October 31, 2003, has also passed. Plaintiffs did not move for summary judgment in this matter. See Joint Motion to Extend Tracking Order, Exhibit 3.

6. Plaintiffs now seek, more than one and a half years after filing their Complaint, and four months after the close of discovery, to amend the Complaint for the fourth time to allege a new theory of liability against BMCA.

7. It is well-settled in Massachusetts that: “[A]n unexcused delay in seeking to amend is a valid basis for denial of a motion to amend.” Mathis v. Massachusetts Electric Co., 409 Mass. 256, 264-265 (1991). “Among the good reasons . . . for which a motion to amend may be denied are that no justification for the lateness of the motion is apparent (beyond counsel for the moving party having had a late dawning idea) and that one or more of the nonmoving parties would be caught off balance by the proffered amendment.” DiVenuti v. Reardon, 37 Mass. App. Ct. 73, 77 (1994).

8. Other good reasons for denying a motion to amend include “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of

the amendment, futility of the amendment, etc.” Mathis, at 264-265, quoting Castellucci v. United States Fidelity & Guar. Co., 372 Mass. 288, 289-290 (1977).

9. Furthermore, where the moving party “must have known” about the proposed amendment “from the outset,” and without explanation delays moving to add such an amendment until “after discovery is substantially completed,” denial of the motion to amend is warranted. See Reida v. Cape Code Hospital, 36 Mass. App. Ct. 553, 556-557 (1994).

10. A significant unexplained delay between counsel’s admitted discovery or knowledge of the proposed amendment and his moving to amend, has consistently been found to constitute unreasonable delay justifying the denial of such an amendment. See Highlands Ins. Co. v. Aerovox Inc., et al., 1994 Mass. Super. LEXIS 31, at * 3 (Suffolk Superior Court November 29, 1994) (motion to amend complaint denied where there was a one and a half year unexplained delay between counsel’s admitted awareness of the “new” regulatory estoppel argument and his moving to amend the complaint to include such an argument).

11. This is Plaintiffs’ fourth amendment to the complaint and they have not shown any valid excuse for the delay. Plaintiffs’ only argument for the amendment is that it should be “freely allowed” under M.R.C.P. 15(b). Plaintiffs’ statement that this amendment should be allowed to place BMCA on notice of the applicable statutes and statutory employment doctrine is disingenuous.

12. Plaintiffs knew or should have known about this legal theory from the outset of this litigation. BMCA’s name and the Department of Transportation (“DOT”) number was clearly displayed on the truck involved in the accident. Plaintiffs sent a photographer to take photographs of the vehicle even before they commenced suit.

13. At a minimum, Plaintiffs should have been aware of this theory since Carlo Melia's ("Melia") deposition on October 10, 2003. Moreover, instead of immediately moving to amend the complaint after new information was discovered, Plaintiffs purposely waited four months - - after the close of discovery - - to file this motion to amend.

14. The above facts demonstrate unreasonable and inexcusable delay in filing this Motion to Amend. Plaintiffs knew or suspected a need to amend their Complaint long before they actually choose to do so. The Court should not reward the Plaintiffs for their own strategic misjudgment.

WHEREFORE, BMCA respectfully request that the Court:

1. Deny Plaintiffs' Motion to Amend Complaint;
2. Grant BMCA its attorney fees and costs for Opposing Plaintiffs' Motion to Amend; and
3. Grant such other further relief as it deems just and proper.

Respectfully Submitted,

BUILDING MATERIALS CORP. OF AMERICA,

By its attorneys,



Dennis M. Duggan, Jr., P.C., BBO #137460

Gregory P. Deschenes, BBO # 550830

Grace C. Wu, BBO # 650926

NIXON PEABODY LLP

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Dated: February 18, 2004

CERTIFICATE OF SERVICE

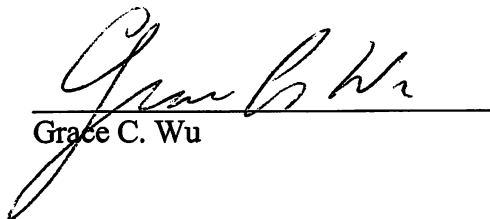
I, Grace C. Wu , hereby certify that on February 18, 2004, I served, via hand delivery, an original and copy of BMCA's Opposition to Plaintiffs Motion to Amend Complaint upon Plaintiffs counsel, Margaret Pinkham, Esq. at Brown Rudnick Berlack Israels LLP, One Financial Center, Boston, MA 02111 and forwarded the same via First Class Mail Postage pre-paid to the following:

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Grace C. Wu