NY CLS CPLR R 3025, Part 1 of 4

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Consolidated Laws Service **>**

Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 30 Remedies and Pleading (§§ 3001 — 3045)

R 3025. Amended and supplemental pleadings.

(a) Amendments Without Leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

(b) Amendments and Supplemental Pleadings by Leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

(c) Amendment to Conform to the Evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.

(d) Responses to Amended or Supplemental Pleadings. Except where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. Service of such an answer or reply shall be made within twenty days after service of the amended or supplemental pleading to which it responds.

History

Add, L 1962, ch 308; renumbered Rule 3025, L 1962, ch 318, § 15, eff Sept 1, 1963; L 2011, ch 473, § 3, eff Jan 1, 2012.

Annotations

Notes

Derivation Notes

Earlier statutes and rules: CPA §§ 244, 245, 434 RCP 101, 166 CCP §§ 539– 544; Code Proc §§ 146, 169, 172.

2011 Recommendations of the Advisory Committee on Civil Practice:

The Committee proposes the amendment of subdivision (b) of rule 3025 of the CPLR to require the moving party to attach a copy of the proposed amended pleading to any motion to amend that pleading, clearly showing the proposed changes to the pleading. Many federal courts by local rule require the movant to attach the proposed pleading and to show by redline the changes in the complaint or answer that the movant proposes.

Advisory Committee Notes

Subd (a) of this rule is derived from the first sentence of CPA § 244. No substantial change is intended; the rule has been reworded to clarify its meaning. The period of twenty days after a notice of motion addressed to the pleading has been eliminated, since CPLR rule 3024 contemplates that the motion will be made within twenty days after the pleading is served, a period when amendment is already permitted. Former § 244 did not apply with respect to motions for summary judgment or for judgment on the complaint and affidavits since they were not considered motions addressed to the pleadings. E.g., Earl Commercial Corp. v Then, 259 App Div 787, 18 NYS2d 569 (4th Dept 1940); Morin v Morin, 257 App Div 556, 13 NYS2d 705 (3d Dept 1939); Baker v Reis, 223 App Div 842, 228 NY Supp 307 (2d Dept 1928). Similarly, the

motion under CPLR rule 3211(a) is directed to the merits and does not attack formal defects which could be remedied merely by an amendment. The New York rule retained, allowing amendment without leave of court after issue is joined, is more liberal than Federal rule 15(a). The remainder of former § 244 has been eliminated as the question of abuse seems more aptly covered by a general rule. The limitation to one amendment without leave of court contained in the former New York act has been retained, although New Jersey and Missouri have seen fit to eliminate the identical restriction when adopting the Federal rule. NJ R Civ P 4.15-1; Mo Ann Stat § 509.490 (1952).

Subd (b) of this rule is intended to be declaratory of the inherent power of a court to allow amendments to further justice. E.g., Kalt Lumber Co. v Dupignac, 150 App Div 400, 134 NY Supp 1098 (1st Dept 1912); People v Raquette Falls Land Co. 93 Misc 583, 158 NY Supp 467 (Sup Ct 1916). It is also intended to continue the rule that if a pleading has been once amended without leave of court, leave must be obtained for further amendments. See, e.g., Orlik v National Carbon Co. 176 App Div 600, 163 NY Supp 768 (1st Dept 1917). The power to allow amendments to correct a “mistake, omission, irregularity or defect,” which was granted in CPA § 105, has been utilized to justify broad discretion. The last sentence of this subdivision more explicitly states the policy of liberality. The wording of this subdivision is based upon Federal rule 15(a), but supplemental pleadings are included since similar considerations are applicable. The former sections of the CPA which governed supplemental pleadings, §§ 245, 245-a and 245-b, seemed unnecessarily complex. This subdivision is intended to grant the widest possible discretion to the court in granting leave to serve supplemental pleadings and imposing terms, even if the pleader had no cause of action at the time of the original pleading but has subsequently acquired and stated one in a supplemental pleading.

Subd (c) of this rule is based upon the Illinois practice (Ill Ann Stat c 110, § 46(3) (Smith-Hurd 1955)), and is intended to govern both amendment during trial, when proffered evidence is objected to, and amendment during or after trial in case of variance. The wrongdoing would allow amendment on any party’s motion or by the court, with appropriate power to prevent

prejudice by surprise. The language makes it clear that such amendment must be by leave of court.

Subd (d) of this rule is based upon RCP 101. With respect to supplemental pleadings, this subdivision changed the New York case law which required a second motion for leave to answer.

Amendment Notes

2011. Chapter 473, § 3 amended:

Sub (b) by adding the matter in italics.

Commentary

PRACTICE INSIGHTS:

MOVING TO AMEND TO ADD PARTY AND STATUTE OF LIMITATIONS

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INSIGHT

In commencement by filing courts, like the New York Supreme Court, a party moving for leave to add a party should include a proposed supplemental summons and amended complaint with the motion papers. If the limitations period is about to run, it will be tolled from the filing of the motion until entry of the order deciding the motion.

Nevertheless, in an excess of caution, if the statute of limitations is about to run, the practitioner can file a second action against the new party. In that manner, if the motion to amend the first action is denied for any reason, a motion to consolidate the two actions will then be available. Regardless, the claim against the “new” party will be preserved.

ANALYSIS

Party may amend pleading once, early in litigation, to add party without leave.

A party can amend a pleading once without leave of court within 20 days of service or before the period for answering the pleading expires, or within 20 days after service of the responding pleading. CPLR 3025(a). Similarly, under CPLR 1003, parties can be added once without leave within 20 days of service of the original summons, before the expiration of the responding time, or within 20 days of service of the responsive pleading.

Party can amend pleading at any time by leave of court or by stipulation of parties.

Once the period for amending without leave expires, a party can still amend a pleading, including for the addition of parties, at any time by leave of court or by stipulation of all parties. CPLR 3025(b); CPLR 1003. If the statute of limitations is about to expire, the danger exists that the limitations period might expire between the date that the motion is made and the date it is decided. In *Perez v. Paramount Communications, Inc.*, 92 N.Y.2d 749, 686 N.Y.S.2d 342, 709 N.E.2d 83 (1999), the Court of Appeals held that in commencement by filing courts, the filing of a motion for leave to amend the complaint to add a defendant to a pending case, which motion includes a copy of the proposed supplemental summons and amended complaint, tolls the statute of limitations from the filing until the entry of the order deciding the motion. This rule does not apply to commencement by service courts. *But see Schlapa v. Consolidated Edison Co. of N.Y.*, 174 A.D.3d 934, 106 N.Y.S.3d 115 (2d Dep't 2019) ("We agree with the Supreme Court's determination that the action against the Astoria defendants is barred by the statute of limitations, since the plaintiff's claim accrued on January 6, 2012, and he did not commence this action against those defendants until October 24, 2016. While the limitations period is tolled where, as in this case, a motion for leave to file and serve a supplemental summons and amended complaint is made prior to the expiration of the statute of limitations and includes a copy of the proposed amended pleadings (citations omitted), the toll encompasses only the period from the date the motion for leave to amend is filed until the date the order granting that motion is entered, with the limitations period commencing to run again 'after entry of the order'

(citation omitted). Here, even after deducting the period between the filing of the plaintiff's first motion to amend on September 16, 2014, and the entry of the order granting that relief on March 31, 2015, the plaintiff's commencement of the action against the Astoria defendants by the filing of the amended pleadings on October 24, 2016, occurred long after the expiration of the three-year limitations period."); *Bossung v. Rebaco Realty Holding Co.*, N.V., 169 A.D.3d 538, 92 N.Y.S.3d 636 (1st Dep't 2019) ("Although plaintiffs sought leave to amend the complaint before the applicable statute of limitations had expired, their motion did not toll the statute, because they failed to annex the supplemental summons to their papers (citation omitted)).

In 2005, certain inferior courts adopted version of commencement by filing.

Pursuant to a 2005 amendment, a commencement by filing system, similar but not identical to the Supreme Court system, was adopted in the New York Civil Court, the District Courts (in Nassau and Suffolk) and the City Court. *See* N.Y. City Civ. Ct. Act §§ 400, 409, 411; Uniform Dist. Ct. Act §§ 400, 409, 411; Uniform City Ct. Act §§ 400, 409, 411. Significantly, this amendment conflicts with CPLR 304 with respect to commencement of special proceedings. As discussed above, a 2001 – 2002 amendment removed the requirement of having to file the order to show cause or notice of petition to commence the action in the Supreme and County Courts (that is, only the petition must be filed). The 2005 amendment to the lower court acts revives the problem by requiring that the notice of petition or order to show cause (and the petition) be filed in order to commence the action in those designated inferior courts. Note that the Town and Village Courts remain commencement-by-service courts.

Commence second action to ensure timely claims.

In the first instance, a party could choose instead to file a separate action against the new party and then move to consolidate both actions. Filing a separate action may be more complicated than merely moving to amend the first action. Nevertheless, if plaintiff is up against a limitations period, moving to amend the first action and filing a second action will provide the plaintiff with the security of knowing that the claims will be timely, regardless of how the court rules on the motion to amend in the first action.

LEAVE TO AMEND, WHILE FREELY GIVEN, NONETHELESS REQUIRES SHOWING

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INSIGHT

Discretionary leave to amend should be “freely given” but courts may impose conditions upon showing merit and excuse for delay. CPLR 3025(b). Nevertheless, the practitioner should not presume that leave will always be granted. A practitioner should err on the side of too much information in pleading, rather than not enough. Alternative and even inconsistent claims are permitted, so counsel should not risk the necessity for subsequent amendment, especially if leave of court is required. The practitioner should move for leave to amend as soon as the practitioner learns of necessitating facts. Failure to do so until the eve of trial may result in a very narrowed claim reaching trial or perhaps even dismissal of the action.

ANALYSIS

Discretion freely to grant amendment only available in absence of surprise and prejudice and where the proposed amendment is not palpably insufficient or patently devoid of merit.

The Third Department affirmed a denial of leave to amend the complaint of former radio talk show hosts who sued, alleging breach of contract, fraudulent inducement, age discrimination and prima facie tort after their drop in ratings precipitated termination. The parties agreed to discontinue without prejudice plaintiffs’ tort claims, and defendants moved to dismiss the rest, while the plaintiffs cross-moved to amend and for summary judgment on the contract claims. Denying the cross-motion entirely, the trial court dismissed the age discrimination claims and denied the balance of defendant's motion. Upon appeals by both, the appellate court held that a free grant was limited to amendments which were not wholly without merit and neither surprising nor prejudicial. Plaintiff’s excuses for delay were insufficient, where a trial note of issue had

already been filed and the proposed amendment, a substantial expansion of the original claims, would require further disclosure. *Moon v. Clear Channel Communs., Inc.*, 307 A.D.2d 628, 763 N.Y.S.2d 157 (3d Dep't 2003); *But see United States Fidelity & Guaranty Co., v. Delmar Dev. Partners, LLC*, 22 A.D.3d 1017, 803 N.Y.S.2d 254 (3d Dep't 2005). *See also, Carr v. Birnbaum*, 75 A.D.3d 972, 905 N.Y.S.2d 705 (3d Dep't 2010).

Note that, until 2017, the Third Department had continued to require an evidentiary showing of merit on a motion to amend. However, in *NYAHSA Servs., Inc. Self-Insurance Trust v. People Care Inc.*, 156 A.D.3d 99, 101-102, 64 N.Y.S.3d 730, 733 (3d Dep't 2017), the Court joined the other Departments, adopting the palpably insufficient or patently devoid of merit standard:

We have previously adhered to a rule requiring the proponent of a motion for leave to amend a pleading to make a "sufficient evidentiary showing to support the proposed claim" (citation omitted), that is, to make an "evidentiary showing that the proposed amendments have merit" (citation omitted). However, we are persuaded to depart from that line of authority and follow the lead of the other three Departments, and we now hold that "[n]o evidentiary showing of merit is required under CPLR 3025 (b)" (citations omitted). Thus, the rule on a motion for leave to amend a pleading is that the movant need not establish the merits of the proposed amendment and, "[i]n 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" (citations omitted). The rationale for adopting this rule is that the liberal standard for leave to amend that was adopted by the drafters of the CPLR is inconsistent with requiring an evidentiary showing of merit on such a motion. "If the opposing party [on a motion to amend] 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" (citation omitted).

See also Gurewitz v. City of New York, 175 A.D.3d 655, 108 N.Y.S.3d 33 (2d Dep't 2019) ("Turning to the City defendants' cross motion for leave to amend their answer, '[i]n 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' (citations omitted). Here, Conti demonstrated that it would be prejudiced by the late amendment because it had not conducted discovery relating to the cross claims, had relied upon the City defendants' original answer to its prejudice by forgoing independent questioning of the witnesses during depositions, and had been hindered in the preparation of its defense. Accordingly, the Supreme Court providently exercised its discretion in determining that Conti would be prejudiced by the proposed amendment on the eve of trial and in denying the City defendants' cross motion to amend their answer to assert cross claims against Conti.").

There appears to be some confusion, however, in at least the First Department, which appears to require an affidavit of merit when seeking to amend to add a wrongful death cause of action. *See Kamara v. 767 Fifth Partners, LLC*, 188 A.D.3d 602, 132 N.Y.S.3d 762 (1st Dep't 2020), *lv denied*, 6 N.Y.3d 1085, 142 N.Y.S.3d 884, 166 N.E.3d 1062 (2021) ("To support the amendment sought here, plaintiff was required to submit competent medical proof of a causal connection between decedent's 2015 work-related injury and his death, which plaintiff claims was due to complications stemming from a 2018 epidural injection (citations omitted). Having reviewed the record, we agree with Supreme Court that plaintiffs failed to make this showing."); *Frangiadakis v 51 W. 81st St. Corp.*, 161 A.D.3d 478, 73 N.Y.S.3d 420 (1st Dep't 2018) ("[A]s we have stated, to support amending a personal injury complaint to add a cause of action for wrongful death, plaintiffs were required to submit 'competent medical proof of the causal connection between the alleged malpractice and the death of the original plaintiff' (citation omitted). The affirmation of plaintiffs' expert, which stated that to a reasonable degree of medical certainty the decedent's injury led to his death, was sufficient, for the purposes of CPLR 3025(b), to establish a causal connection between the decedent's death and the originally alleged negligence by defendants (citations omitted). Plaintiff's submission of the expert's affirmation on reply is not fatal to the motion, because defendant was permitted to submit a surreply."). *See also* David L. Ferstendig, *Confusion and Uncertainty Continue With Respect to the Standard to Apply on Motion to Amend Under CPLR 3025(b)*, 725 N.Y.S.L.D. 4 (2021).

Factual and procedural circumstances of particular application often dictate result.

Denial of leave to amend the complaint by a driver injured in a rear end collision to assert punitive damages was reversed, since the claim rested on the same factual basis contained in her original complaint: defendant driver had pleaded guilty to reckless driving and passing cars on the right shoulder at 70 miles per hour. *Acker v. Garson*, 306 A.D.2d 609, 759 N.Y.S.2d 609 (3d Dep't 2003). Unexcused lateness and prejudice justified denial of leave. *Clark v. MGM Textile Indus., Inc.*, 18 A.D.3d 1006, 794 N.Y.S.2d 735 (3d Dep't 2005).

Claim's lack of merit must be free from doubt to preclude amendment.

The Second Department, in a closely split decision, modified the trial court's denial of leave to amend the complaint to assert claims by a surviving child allegedly injured *in utero* by a fraudulent statement relied upon by her mother. *Ruffing v. Union Carbide Corp.*, 308 A.D.2d 526, 764 N.Y.S.2d 462 (2d Dep't 2003), appeal discontinued, 3 N.Y.3d 703, 785 N.Y.S.2d 30, 818 N.E.2d 672 (2004). The majority permitted amendment of the complaint for the infant with severe birth defects to assert fraudulent misrepresentation and concealment, negligent misrepresentation and constructive fraud against her mother's employer, who allegedly told the latter that her work at an IBM semiconductor plant would not harm her fetus, even though the mother's claim could not be similarly amended to circumvent the statute of limitations. The majority recognized that a false representation to a third party is actionable if it results in injury to the plaintiff, whose claim as a minor remained timely. 308 A.D.2d 526, 528. The dissent found no cognizable cause of action for fraud upon an unborn child. 308 A.D.2d 526, 531. Only a proposed amendment palpably insufficient as a matter of law or totally meritless should be denied. *Morton v. Brookhaven Mem'l Hosp.*, 32 A.D.3d 381, 820 N.Y.S.2d 294 (2d Dep't 2006). *But see* *Surgical Design Corp. v. Correa*, 31 A.D.3d 744, 819 N.Y.S.2d 542 (2d Dep't 2006).

Amendments sought on eve of trial often prejudicial; thus, rarely granted.

Denial of leave to amend a bill of particulars was affirmed in *Rosse-Glickman v. Beth Israel Med. Center-Kings Highway Div.*, 309 A.D.2d 846, 766 N.Y.S.2d 67 (2d Dep't 2003). In *Rosse-Glickman v. Beth Israel* the appeals court underscored the unreasonable delay in seeking leave, as well as the absence of an excuse for the delay or an affidavit of merit.

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I. Under CPLR

A. In General

1. Generally

Appellate Division had power to grant leave to plaintiffs to amend their complaint. England v Sanford, 78 N.Y.2d 928, 573 N.Y.S.2d 639, 578 N.E.2d 437, 1991 N.Y. LEXIS 1002 (N.Y. 1991).

Although defendants opposed a motion to amend upon the ground they had been prejudiced by plaintiffs' extended delay in seeking amendment, the mere delay in seeking to amend to simply add a new legal theory of recovery was not sufficient for denial of the motion since the original complaints gave notice of the occurrence giving rise to the proposed new cause of action. Goldstein v Brogan Cadillac Oldsmobile Corp., 90 A.D.2d 512, 455 N.Y.S.2d 19, 1982 N.Y. App. Div. LEXIS 18554 (N.Y. App. Div. 2d Dep't 1982).

In an action to foreclose a mortgage, which action, as initially commenced, was predicated on the allegations that the mortgage payment due in June was not timely made, Special Term erred in concluding that plaintiff's second complaint was an amended complaint which replaced the original complaint, where the second complaint was identical to the first except for asserting claims as to mortgage payments that accrued subsequent to the service of the first complaint, so that the second complaint was in fact a supplemental complaint which did not undermine the effect of the court's determination of the first complaint. The decision that the tender of the June payment was unlawfully refused, inasmuch as no overt act was taken or attempted to notify

defendant of plaintiff's intention to exercise its right of acceleration, necessarily made the refusal of the tender of payments for July through December also unlawful. Jeferne, Inc. v Capanegro, 96 A.D.2d 577, 465 N.Y.S.2d 270, 1983 N.Y. App. Div. LEXIS 19110 (N.Y. App. Div. 2d Dep't 1983).

The trial court "exalted form over substance" in dismissing the "amended" complaint against defendant attorney, purportedly on the grounds that leave of court had not been obtained for the amendment and that another action was pending between the parties, where the first complaint had been ordered dismissed for improper service (but by clerical error had not actually been dismissed), and the second complaint was in fact a mirror image of the first, despite its characterization as "amended." Grand White Realty Corp. v Berman, 110 A.D.2d 582, 488 N.Y.S.2d 6, 1985 N.Y. App. Div. LEXIS 48486 (N.Y. App. Div. 1st Dep't 1985).

Where plaintiff failed to state cause of action under particular statute in his amended complaint, any cause of action under that statute in original complaint could not be considered. Augsbury v Adams, 135 A.D.2d 941, 522 N.Y.S.2d 691, 1987 N.Y. App. Div. LEXIS 52851 (N.Y. App. Div. 3d Dep't 1987).

Filing of amended pleading does not automatically abate motion to dismiss that was addressed to original pleading; moving party has option to decide whether its motion should be applied to new pleadings. Sage Realty Corp. v Proskauer Rose L.L.P., 251 A.D.2d 35, 675 N.Y.S.2d 14, 1998 N.Y. App. Div. LEXIS 6437 (N.Y. App. Div. 1st Dep't 1998).

Plaintiff's appeal from order denying his motion for leave to amend his complaint would be dismissed as academic where plaintiff had since been granted leave and had amended his complaint. Frew v Dime Sav. Bank, FSB, 251 A.D.2d 622, 675 N.Y.S.2d 878, 1998 N.Y. App. Div. LEXIS 7886 (N.Y. App. Div. 2d Dep't 1998).

In injured worker's action for common-law negligence and violation of CLS Labor §§ 240(1) and 241(6), defendants should have moved to amend their answer to assert defense based on CLS Work Comp § 29(6) before including that defense in their motion for summary judgment. Jones v

Bartlett, 275 A.D.2d 956, 713 N.Y.S.2d 407, 2000 N.Y. App. Div. LEXIS 9771 (N.Y. App. Div. 4th Dep't 2000), app. denied, 96 N.Y.2d 705, 723 N.Y.S.2d 131, 746 N.E.2d 186, 2001 N.Y. LEXIS 202 (N.Y. 2001).

Delay in seeking to amend complaint was satisfactorily explained by stay that was in effect pending attorney disqualification motion; moreover, plaintiffs promptly notified defendants of additional damage, and brought motion within one month after disqualification matter was decided. Kassis v Teachers' Ins. & Annuity Ass'n, 279 A.D.2d 265, 719 N.Y.S.2d 24, 2001 N.Y. App. Div. LEXIS 5 (N.Y. App. Div. 1st Dep't 2001).

Leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay; the trial court’s denial of a motion to amend the answer to include the failure to exhaust administrative remedies under the Prison Litigation Reform Act, 42 USCS § 1997e(a), was reversed. Ancrum v St. Barnabas Hosp., 301 A.D.2d 474, 755 N.Y.S.2d 28, 2003 N.Y. App. Div. LEXIS 701 (N.Y. App. Div. 1st Dep't 2003).

Trial court should have allowed a would-be buyer of real property to amend its complaint to add causes of action clarifying that it sought declarations both that the buyer had a right of first refusal and that it was entitled to the return of money advanced to the seller. M&A Oasis, Inc. v MTM Assocs., L.P., 307 A.D.2d 872, 764 N.Y.S.2d 9, 2003 N.Y. App. Div. LEXIS 9005 (N.Y. App. Div. 1st Dep't 2003).

While N.Y. C.P.L.R. § 3025 provides that leave to amend a pleading shall be freely granted, leave to amend should not be granted upon the mere request of a party without a proper basis; rather, it is incumbent upon the movant to make some evidentiary showing that the claim can be supported. Joyce v McKenna Assocs., 2 A.D.3d 592, 768 N.Y.S.2d 358, 2003 N.Y. App. Div. LEXIS 13363 (N.Y. App. Div. 2d Dep't 2003).

Leave to amend a pleading is, in the absence of prejudice or surprise to the opposing party, freely granted; however, where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay. Oil Heat Inst. v

RMTS Assocs., LLC, 4 A.D.3d 290, 772 N.Y.S.2d 313, 2004 N.Y. App. Div. LEXIS 2052 (N.Y. App. Div. 1st Dep't 2004).

Trial court erred in granting defendants' cross motion to preclude a pedestrian from presenting evidence of a new diagnosis during the retrial of her personal injury action; the new claim had merit because it was based on the findings of the pedestrian's treating physician and inclusion of the additional diagnosis would not prejudice defendants. French v Schiavo, 9 A.D.3d 279, 780 N.Y.S.2d 131, 2004 N.Y. App. Div. LEXIS 9408 (N.Y. App. Div. 1st Dep't 2004).

Motion to dismiss on ground of incapacity to sue was not timely where incapacity to sue arose after issue had been joined and defendant had opportunity to amend answer to assert incapacity as an affirmative defense and motion came at the opening of trial. Thomas v Grupposo, 73 Misc. 2d 427, 341 N.Y.S.2d 819, 1973 N.Y. Misc. LEXIS 2208 (N.Y. Civ. Ct. 1973).

Where an amended complaint is lawfully served, it supersedes the original and becomes the only complaint in the case and the action must proceed as though the original pleading had never been served; accordingly, motions addressed to the original complaint are rendered moot and must be denied. Lipary v Posner, 96 Misc. 2d 578, 409 N.Y.S.2d 363, 1978 N.Y. Misc. LEXIS 2644 (N.Y. Sup. Ct. 1978).

PINS petitions can be amended under CLS CPLR § 3025(b) providing adequate time is given to allow for trial preparation. In re Jeanette M., 178 Misc. 2d 99, 677 N.Y.S.2d 916, 1998 N.Y. Misc. LEXIS 407 (N.Y. Fam. Ct. 1998).

Plaintiff timely sought amendment of complaint to plead inapplicability of CLS CPLR Art 16 two months before trial in action against county stemming from alleged failure to provide plaintiff's decedent with protection after police had been directly notified that decedent's husband had violated order of protection. Mastroianni v County of Suffolk, 184 Misc. 2d 125, 705 N.Y.S.2d 504, 2000 N.Y. Misc. LEXIS 85 (N.Y. Sup. Ct. 2000).

2. Amendments and supplemental pleadings with leave

On a motion for amendment of pleadings before trial one cannot successfully claim prejudice when he has had full knowledge of all the facts and an opportunity to present his theory of the case is allowed. Rife v Union College, 30 A.D.2d 504, 294 N.Y.S.2d 460, 1968 N.Y. App. Div. LEXIS 2972 (N.Y. App. Div. 3d Dep't 1968).

It was error to permit plaintiff to amend her pleading at the close of her proof to set forth a new theory of liability not asserted in the original pleading. Woods v Pisillo, 35 A.D.2d 597, 313 N.Y.S.2d 541, 1970 N.Y. App. Div. LEXIS 4042 (N.Y. App. Div. 2d Dep't 1970).

With reference to the amendment of pleadings, the words “additional” and “subsequent” appearing in CPLR 3025(b) apply to supplemental material but not to an amendment. Katz-Waisman Weber Strauss v Kingsbrook Jewish Medical Center, 36 A.D.2d 807, 320 N.Y.S.2d 306, 1971 N.Y. App. Div. LEXIS 4293 (N.Y. App. Div. 1st Dep't 1971).

In deciding motions for a leave to amend a bill of particulars, the standard to be employed is akin to that governing applications for leave to supplement or amend pleadings. Maloney v Union Free School Dist., 46 A.D.2d 789, 360 N.Y.S.2d 699, 1974 N.Y. App. Div. LEXIS 3662 (N.Y. App. Div. 2d Dep't 1974).

Fact that new causes of action set forth in amended complaint might have been barred in a separate action de novo does not affect granting of permission to amend complaint; there is relation back as long as the earlier pleading gives the adverse party sufficient notice of the transactions out of which the new claims arise. Cerrato v R. H. Crown Co., 58 A.D.2d 721, 396 N.Y.S.2d 716, 1977 N.Y. App. Div. LEXIS 12833 (N.Y. App. Div. 3d Dep't 1977).

In determining whether to grant leave to amend a pleading, Special Term need only satisfy itself that the timing or scope of the requested amendment does not prejudice the right of another party. Zoizack v Holland Hitch Co., 58 A.D.2d 980, 397 N.Y.S.2d 33, 1977 N.Y. App. Div. LEXIS 13189 (N.Y. App. Div. 4th Dep't 1977).

In an action involving a dispute over a lease between the parties for a portion of a food market, the amended complaint failed to allege new facts sufficient to support a newly-alleged cause of

action, based upon the failure of consideration, impossibility or frustration of purpose, where the amended pleadings and affidavits did not lay before the court any different or additional factual basis, but merely repeated what was in the original complaint. Guthartz v New York, 84 A.D.2d 707, 443 N.Y.S.2d 841, 1981 N.Y. App. Div. LEXIS 15860 (N.Y. App. Div. 1st Dep't 1981), app. dismissed, 55 N.Y.2d 975, 449 N.Y.S.2d 198, 434 N.E.2d 267, 1982 N.Y. LEXIS 3153 (N.Y. 1982), app. dismissed, 57 N.Y.2d 635, 454 N.Y.S.2d 60, 439 N.E.2d 869, 1982 N.Y. LEXIS 3588 (N.Y. 1982), app. dismissed, 62 N.Y.2d 632, 476 N.Y.S.2d 111, 464 N.E.2d 479, 1984 N.Y. LEXIS 4258 (N.Y. 1984).

Plaintiff’s cross motion for leave to serve an amended complaint in a medical malpractice action was improperly granted where the facts upon which the cross motion was based did not lie peculiarly within the knowledge of the attorney, so that the affidavit of plaintiff’s counsel did not constitute a sufficient affidavit of merit. However, where the facts lay within the knowledge of the plaintiff, she would be afforded an opportunity to submit a sufficient affidavit. De Rosa v Di Benedetto, 86 A.D.2d 648, 446 N.Y.S.2d 410, 1982 N.Y. App. Div. LEXIS 15189 (N.Y. App. Div. 2d Dep't 1982).

In an action against an owner of premises by an employee of a tenant and her husband for damages resulting from injuries sustained by the employee as a result of a violent and sudden closing of an elevator door in the building, it was error to preclude plaintiffs from offering testimony as to defendant’s actual notice of the defective condition despite failure to seek leave of court to amend their pleading on this issue, where allegations of such notice were contained in plaintiffs’ second supplemental bill of particulars which had been served six months prior to service of a note of issue and statement of readiness and where the property owner could not and did not claim surprise. Altman v Broadway Realty Co., 101 A.D.2d 83, 474 N.Y.S.2d 797, 1984 N.Y. App. Div. LEXIS 17775 (N.Y. App. Div. 2d Dep't 1984).

In a negligence action to recover for injuries plaintiff suffered when she tripped and fell on a sidewalk adjacent to defendant’s property, reversal and a new trial would not be granted the basis that the trial court, on the eve of trial and after the complaint against the codefendant city

had been dismissed, allowed plaintiff to amend the complaint to change the theory of liability from one of negligence due to failure to repair the sidewalk defect to one of negligence in making prior repairs, where defendant failed to institute further disclosure against plaintiffs during the five-month interval between service of the amended complaint and the trial, so that defendant failed to make a showing of prejudice from its belated knowledge of plaintiffs' new liability theory. Becker v New York, 106 A.D.2d 595, 482 N.Y.S.2d 888, 1984 N.Y. App. Div. LEXIS 21589 (N.Y. App. Div. 2d Dep't 1984).

Motion for leave to serve amended complaint was properly granted where defendants were apprised from outset of nature of action and amended complaint involved same transaction and set of facts, and thus there could be no valid claim of surprise or prejudice. Long Island Ski Center, Inc. v Hartford Fire Ins. Co., 121 A.D.2d 368, 502 N.Y.S.2d 800, 1986 N.Y. App. Div. LEXIS 58307 (N.Y. App. Div. 2d Dep't 1986).

In breach of employment contract action, counterclaims interposed in defendants' answer to supplemental complaint should be stricken without prejudice to application for leave to serve amended answer where counterclaims were not responsive to matters alleged in supplemental complaint and could have been interposed in original answer; in order to assert new matter in their answer which was not responsive to plaintiff's supplemental complaint, defendants should have sought leave of court. Garden State Brickface Co. v Stecker, 130 A.D.2d 707, 515 N.Y.S.2d 821, 1987 N.Y. App. Div. LEXIS 46727 (N.Y. App. Div. 2d Dep't 1987).

Plaintiff was entitled to leave to serve amended complaint, even though request for leave was made only in memorandum of law, since there had been neither prejudice nor unfair surprise to defendant. Mallory Factor, Inc. v Schwartz, 146 A.D.2d 465, 536 N.Y.S.2d 752, 1989 N.Y. App. Div. LEXIS 72 (N.Y. App. Div. 1st Dep't 1989).

Plaintiff's failure to obtain leave pursuant to CLS CPLR §§ 3025(b) and 1003 to serve amended summons and complaint joining individuals as party defendants constituted jurisdictional defect requiring dismissal of action against them in absence of waiver. Crook v E. I. Du Pont de

Nemours & Co., 181 A.D.2d 1039, 582 N.Y.S.2d 657, 1992 N.Y. App. Div. LEXIS 4640 (N.Y. App. Div. 4th Dep't 1992).

Defendant opposing amendment of complaint must show actual prejudice, which requires some indication that defendant has been hindered in preparation of case or prevented from taking some measure in support of position, and is not found in mere exposure of defendant to greater liability. Brewster v Baltimore & O. R. Co., 185 A.D.2d 653, 585 N.Y.S.2d 647, 1992 N.Y. App. Div. LEXIS 9183 (N.Y. App. Div. 4th Dep't 1992).

To extent that petitioners requested Appellate Division to grant them leave to amend their pending complaint against city and its police department and housing authority to include individual police officers as respondents, they should first apply to IAS Court for such relief. Delgado v Connolly, 246 A.D.2d 484, 667 N.Y.S.2d 255, 1998 N.Y. App. Div. LEXIS 698 (N.Y. App. Div. 1st Dep't 1998).

Defendant was not entitled to dismissal of cause of action for tortious interference with contract, without leave to re-plead, on ground that plaintiff failed to allege breach of contract, where motion court had properly granted plaintiff leave to re-plead its cause of action for breach of contract. Harvest Moon, Inc. v Arochas, 255 A.D.2d 195, 679 N.Y.S.2d 813, 1998 N.Y. App. Div. LEXIS 12433 (N.Y. App. Div. 1st Dep't 1998).

To establish prejudice that will bar amendment, party must show that it has been hindered from preparation of its case or has been prevented from taking some measure in support of its position. State v Super Value, Inc., 257 A.D.2d 708, 682 N.Y.S.2d 492, 1999 N.Y. App. Div. LEXIS 97 (N.Y. App. Div. 3d Dep't), app. denied, 93 N.Y.2d 815, 697 N.Y.S.2d 562, 719 N.E.2d 923, 1999 N.Y. LEXIS 2141 (N.Y. 1999).

Party seeking leave to amend complaint must show merit of proposed pleading. Amended complaint adding third-party defendants as first-party defendants related back to time of service of third-party complaint, which gave them notice of first-party claims. Peretich v City of New

York, 263 A.D.2d 410, 693 N.Y.S.2d 576, 1999 N.Y. App. Div. LEXIS 8239 (N.Y. App. Div. 1st Dep't 1999).

Plaintiff should have been allowed to amend her complaint pursuant to CLS CPLR 3025(b) where there was no prejudice to defendants since the depositions had prevented any claim of surprise. Valdes v Marbrose Realty Inc., 289 A.D.2d 28, 734 N.Y.S.2d 24, 2001 N.Y. App. Div. LEXIS 11698 (N.Y. App. Div. 1st Dep't 2001).

Trial court properly denied a lender’s motion to amend a complaint seeking to recover on a promissory note to allege fraud claims against the lender’s son-in-law; although leave to amend a pleading normally would be freely given, N.Y. C.P.L.R. 3025(b), the lender knew of her son-in-law’s alleged fraud well before the motion was made on the eve of trial, and the trial court properly considered the delay in filing the motion and the prejudice toward the son-in-law, and properly denied the motion. Haller v Lopane, 305 A.D.2d 370, 759 N.Y.S.2d 504, 2003 N.Y. App. Div. LEXIS 5115 (N.Y. App. Div. 2d Dep't 2003).

Although a trial court properly denied a successor bank’s motion for summary judgment and allowed a developer to amend its breach of contract complaint pursuant to N.Y. C.P.L.R. 3025(b), the trial court erred by denying summary judgment on the bank’s motion to dismiss a counterclaim for contribution, since contribution was unavailable when the complaint sought damages solely for economic loss resulting from the alleged breach of contract. Ruby Land Dev. v Toussie, 4 A.D.3d 518, 771 N.Y.S.2d 701, 2004 N.Y. App. Div. LEXIS 1813 (N.Y. App. Div. 2d Dep't 2004).

Finding that neither the prisoner nor the Attorney General would suffer prejudice from its decision to grant the Attorney General leave to amend its answer to the prisoner’s challenge to a disciplinary ruling, the court, under N.Y. Civil Practice Law and Rules 3025(d), remitted the matter to supreme court to permit the Attorney General to serve an answer. Taylor v Katz, 6 A.D.3d 836, 773 N.Y.S.2d 915, 2004 N.Y. App. Div. LEXIS 3990 (N.Y. App. Div. 3d Dep't 2004).

Trial court properly entered judgment for a contractor on a counterclaim against a construction company; trial court properly granted the contractor's motion pursuant to N.Y. C.P.L.R. 3025 to amend its counterclaim to include recovery for costs of over-excavation, and issues of fact were raised regarding how a subcontractor's payment was to be calculated, and the trial court properly determined the issue. KMT Constr. Corp. v Mega Contr., Inc., 8 A.D.3d 194, 781 N.Y.S.2d 1, 2004 N.Y. App. Div. LEXIS 8843 (N.Y. App. Div. 1st Dep't 2004).

Trial court did not err in permitting the father to amend the father's visitation modification petition to include custody as well; leave to amend pleadings was to be freely given pursuant to N.Y. C.P.L.R. 3025(b) and N.Y. Fam. Ct. Act § 165(a), and the grandmother neither requested a continuance nor showed that the grandmother was prejudiced by the lack of notice in violation of the grandmother's due process rights under N.Y. Const. art. I, § 6. Mack v Grizoffi, 13 A.D.3d 912, 786 N.Y.S.2d 648, 2004 N.Y. App. Div. LEXIS 15819 (N.Y. App. Div. 3d Dep't 2004).

Amendment of pleadings was allowed at any time, even after trial, if the opposing party was unable to establish prejudice from the amendment; because it had a full and fair opportunity to contest any placement of a child with a nurse, the department of social services failed to establish prejudice from the amendment converting the petition from one seeking custody to one seeking guardianship. Amy H. v Chautauqua County Dep't of Soc. Servs., 13 A.D.3d 1048, 788 N.Y.S.2d 737, 2004 N.Y. App. Div. LEXIS 14966 (N.Y. App. Div. 4th Dep't 2004), amended, 789 N.Y.S.2d 455, 2005 N.Y. App. Div. LEXIS 1265 (N.Y. App. Div. 4th Dep't 2005).

Where, in a constructive trust action, the single-motion rule under N.Y. C.P.L.R. 3211(e) barred defendant's motion to dismiss, defendant was entitled to amend the answer pursuant to N.Y. C.P.L.R. 3025(b) to assert a defense that had been waived under N.Y. C.P.L.R. 3211(e); the amendment, which was to assert the defense of lack of capacity to claim an ownership interest in the property, did not cause plaintiff prejudice or surprise resulting from the delay. Nunez v Mousouras, 21 A.D.3d 355, 800 N.Y.S.2d 185, 2005 N.Y. App. Div. LEXIS 8223 (N.Y. App. Div. 2d Dep't 2005).

Because a lessee failed to demonstrate that he would be unduly prejudiced if a creditor, as the lessor's assignee, was allowed to assert a counterclaim for contractual indemnification under the lease, and failed to clearly establish that the creditor could not succeed on the same, the Supreme Court correctly adhered to its prior determination permitting leave for the creditor to assert said counterclaim. Zwiebel v Guttman, 26 A.D.3d 429, 809 N.Y.S.2d 214, 2006 N.Y. App. Div. LEXIS 2159 (N.Y. App. Div. 2d Dep't 2006).

Because an owner and a contractor agreed to load hay pursuant to a scheme devised by the contractor, the administratrix's claims against them had sufficient merit to amend the complaint under N.Y. C.P.L.R. 3025(b) to allege concerted action liability. Raney v Seldon Stokoe & Sons, Inc., 42 A.D.3d 617, 839 N.Y.S.2d 577, 2007 N.Y. App. Div. LEXIS 8163 (N.Y. App. Div. 3d Dep't 2007).

Because a plaintiff's motion for leave to file and serve an amended complaint asserting an additional cause of action to recover damages for wrongful death was not palpably without merit and would result in no surprise or prejudice to the defendants, pursuant to N.Y. C.P.L.R. 3025(b), the trial court properly granted the motion. Hines v City of New York, 43 A.D.3d 869, 841 N.Y.S.2d 374, 2007 N.Y. App. Div. LEXIS 9580 (N.Y. App. Div. 2d Dep't 2007).

Because an employee was well aware that one of the defendants was a co-employee, the employee would be neither surprised nor prejudiced by the defendants' proposed amendment; consequently, leave to amend the answer should have been granted in accordance with N.Y. C.P.L.R. 3025(b). Alatorre v Hee Ju Chun, 44 A.D.3d 596, 848 N.Y.S.2d 174, 2007 N.Y. App. Div. LEXIS 10425 (N.Y. App. Div. 2d Dep't 2007).

Because a broker's proposed amendment to its action to recover a brokerage commission was not patently devoid of merit, and because there was no showing of prejudice by the defendants, the broker's N.Y. C.P.L.R. 3025 motion for leave to amend should not have been denied. RCLA, LLC v 50-09 Realty, LLC, 48 A.D.3d 538, 852 N.Y.S.2d 211, 2008 N.Y. App. Div. LEXIS 1341 (N.Y. App. Div. 2d Dep't 2008).

Because a tree company did not owe a duty of care to an employee by virtue of a contract with the employer, the tree company was entitled to summary judgment in the employee's personal injury action; because the employee's proposed amendment was palpably insufficient or patently devoid of merit, leave to amend a complaint under N.Y. C.P.L.R. 3025(b) was properly denied. Spano v Northwood Tree Care, Inc., 48 A.D.3d 667, 852 N.Y.S.2d 289, 2008 N.Y. App. Div. LEXIS 1483 (N.Y. App. Div. 2d Dep't 2008).

Because there was no showing of prejudice or surprise to a tenant resulting from the delay in asserting new claims by a co-tenant, and because the moving papers were not unreliable or insufficient to support the claims, pursuant to N.Y. C.P.L.R. 3025(b), the co-tenant's motions to interpose a counterclaim and affirmative defense were properly granted. Peach Parking Corp. v 346 W. 40th St., LLC, 52 A.D.3d 260, 859 N.Y.S.2d 424, 2008 N.Y. App. Div. LEXIS 4865 (N.Y. App. Div. 1st Dep't 2008).

Because a passenger's personal injury action was commenced under N.Y. C.P.L.R. § 304 by a verified complaint prior to August 10, 2005, the effective date of 49 U.S.C.S. § 30106(c), the passenger's N.Y. C.P.L.R. § 3025(b) motion to amend to add a second rental truck company should have been granted as the action was removed from the pre-emptive reach of § 30106(c) and also based on the concept of defendants united in interest under N.Y. C.P.L.R. § 203(c). Tirado v Elrac Inc., 54 A.D.3d 261, 862 N.Y.S.2d 44, 2008 N.Y. App. Div. LEXIS 6345 (N.Y. App. Div. 1st Dep't 2008).

Inasmuch as the attorneys' proposed amended complaint would have been dismissed in its entirety after their service credits were restored and they were guaranteed the right to a timely hearing and predetermination of their membership status in a retirement system even though they had not yet applied for retirement, their challenge to the denial of their N.Y. C.P.L.R. 3025(b) motion to amend was moot. Swergold v Cuomo, 70 A.D.3d 1290, 896 N.Y.S.2d 495, 2010 N.Y. App. Div. LEXIS 1571 (N.Y. App. Div. 3d Dep't 2010).

In light of the husband's failure to demonstrate prejudice or surprise, the trial court providently exercised its discretion in granting that branch of an administrator's motion in a medical

malpractice case which was for leave to amend her answer to plead the affirmative defense of setoff, as provided by N.Y. Gen. Oblig. Law § 15-108. Schaffer v Batheja, 76 A.D.3d 970, 908 N.Y.S.2d 82, 2010 N.Y. App. Div. LEXIS 6684 (N.Y. App. Div. 2d Dep't 2010).

Because a surviving spouse's proposed amendment to include a defense based upon the statute of frauds was neither palpably insufficient nor patently devoid of merit, and as there was no evidence that the amendment would prejudice or surprise a co-owner, pursuant to N.Y. C.P.L.R. 3025(b), the trial court should have allowed the amendment. Clark v Clark, 93 A.D.3d 812, 941 N.Y.S.2d 192, 2012 N.Y. App. Div. LEXIS 2248 (N.Y. App. Div. 2d Dep't 2012).

Trial court properly denied a motion filed by a general contractor and its CEO to dismiss a worker's personal injury complaint because the worker's proposed amendments were neither palpably insufficient nor patently devoid of merit, and did not prejudice or surprise any defendant, the CEO's affidavit was not documentary evidence, did not conclusively establish that a fact alleged in the complaint was undisputedly not a fact at all, and the CEO's evidentiary submissions did not utterly refute the worker's allegations of negligence and violation of various provisions of the Labor Law. Hartnagel v FTW Contr., 147 A.D.3d 819, 47 N.Y.S.3d 96, 2017 N.Y. App. Div. LEXIS 958 (N.Y. App. Div. 2d Dep't 2017).

In city judge's age discrimination and retaliation action, the trial court erred in denying her cross motion for leave to amend the complaint to assert an alternative First Amendment retaliation cause of action pursuant to 42 U.S.C.S. § 1983 because leave to amend should be freely granted in the absence of prejudice or surprise to the opposing party, and her claim was not palpably insufficient or patently devoid of merit. Mirro v City of New York, 159 A.D.3d 964, 74 N.Y.S.3d 356, 2018 N.Y. App. Div. LEXIS 2077 (N.Y. App. Div. 2d Dep't 2018).

Former service workers were entitled to amend their complaint because their claim of protection under the New York City Displaced Building Service Workers Protection Act — discharge without a 90-day transition and failure to continue employing the workers whose work was satisfactory — stated a viable cause of action, and the defendants' evidence did not conclusively establish that the hotel or its owner, as part of a subsidiary or an affiliated entity, did not retain a

building service contractor or building service workers or own or manage the hotel. Fratello v County of Suffolk, 199 A.D.3d 760, 157 N.Y.S.3d 80, 2021 N.Y. App. Div. LEXIS 6189 (N.Y. App. Div. 2d Dep't 2021).

The formerly discernible line between supplemental and amended pleadings has been somewhat blurred by CPLR 3025(b) but the term “amended” as used in CPLR 203(e) should be construed to embrace supplemental pleadings at least to the extent that supplemental pleadings as defined by CPLR 3025(b) would also have qualified as amended pleadings under prior law. Inasmuch as the availability of amendments and supplemental pleadings are governed by similar standards, the form requested should make no difference. Town Board of Fallsburgh v National Surety Corp., 53 Misc. 2d 23, 277 N.Y.S.2d 872, 1967 N.Y. Misc. LEXIS 1817 (N.Y. Sup. Ct. 1967), aff'd, 29 A.D.2d 726, 286 N.Y.S.2d 122, 1968 N.Y. App. Div. LEXIS 4818 (N.Y. App. Div. 3d Dep't 1968).

Where a divorce complaint contained allegations concerning conduct which occurred after institution of the action, those allegations were stricken since no application pursuant to CPLR 3025(b) had been made. Houck v Houck, 59 Misc. 2d 1070, 300 N.Y.S.2d 999, 1968 N.Y. Misc. LEXIS 1029 (N.Y. Sup. Ct. 1968).

Where defendant seeks permission to amend his answer to assert affirmative defenses, if the defenses have merit, the court may, in its discretion, grant the relief requested. Annacchino v Annacchino, 61 Misc. 2d 636, 306 N.Y.S.2d 603, 1969 N.Y. Misc. LEXIS 986 (N.Y. Sup. Ct. 1969).

Pleading may be amended to set forth subsequent or additional occurrences at any time by leave of court. B v B, 78 Misc. 2d 112, 355 N.Y.S.2d 712, 1974 N.Y. Misc. LEXIS 1341 (N.Y. Sup. Ct. 1974).

In a medical malpractice action, plaintiff is entitled to serve an amended bill of particulars to include the “wrong ward” theory in that plaintiff’s decedent required the care of doctors and nurses trained in internal medicine but was placed in a ward where she was cared for by

personnel trained in obstetrics and gynecology, the Appellate Division having reversed a verdict in favor of plaintiff and having granted a new trial since plaintiff did not include the “wrong ward” theory in his bill of particulars, rendering that theory improper in the case although inexplicably charged to the jury, and of the six theories properly presented to the jury three were not sustained by the evidence; inasmuch as the law of the case doctrine does not have binding force on appeal and the Appellate Division did not limit the issues in the new trial, the parties have another opportunity to supply evidence where it was deficient in the first trial, and moreover, defendant will not be prejudiced by the amendment since it knew plaintiff would assert the “wrong ward” theory (see CPLR 3025, subd [b]). Killeen v Community Hospital at Glen Cove, 101 Misc. 2d 367, 420 N.Y.S.2d 990, 1979 N.Y. Misc. LEXIS 2685 (N.Y. Sup. Ct. 1979).

Court would deny defendants’ motion for order precluding plaintiff from introducing evidence concerning new allegations of malpractice allegedly first set forth in plaintiff’s amended bill of particulars, even though statement of readiness had been filed, since party in medical malpractice action may amend his or her bill of particulars as of right under CLS CPLR § 3042(g) before note of issue is filed; under circumstances, plaintiff was not required to obtain permission to amend by showing adequate reason for delay and merit under CLS CPLR § 3025(b). Whalen v Marshall, 146 Misc. 2d 149, 548 N.Y.S.2d 878, 1989 N.Y. Misc. LEXIS 826 (N.Y. Sup. Ct. 1989).

Because an insurer’s proposed counterclaim pertained to a defense that was precluded by its untimely denials, the trial court properly denied its N.Y. C.P.L.R. 3025(b) motion seeking leave to amend its answer to assert the counterclaim. Cornell Med., P.C. v Mercury Cas. Co., 884 N.Y.S.2d 558, 24 Misc. 3d 58, 2009 N.Y. Misc. LEXIS 1299 (N.Y. App. Term 2009).

Amended invalidation petition, which was filed with leave of court prior to the service of any pleading responsive to the initial invalidation petition, corrected a scrivener’s error to correctly allege that, at all relevant times the petitioner candidate was the designee of a political party for

the public office of Lt. Governor of the State of New York. Matter of Ellman v Grace, 75 Misc. 3d 776, 171 N.Y.S.3d 306, 2022 N.Y. Misc. LEXIS 2028 (N.Y. Sup. Ct. 2022).

3. —Abuse of process proceeding

Allegations in the nature of abuse of process in an action already commenced are not properly part of a supplemental pleading, but should more appropriately be raised in an independent action. Dashew v Cantor, 104 A.D.2d 477, 479 N.Y.S.2d 76, 1984 N.Y. App. Div. LEXIS 19931 (N.Y. App. Div. 2d Dep't 1984).

4. —Amendment of caption

Petitioners should be granted leave to amend their caption where respondents' objection to the caption is unrelated to the substantive issues and no prejudice will result. Times-Union of Capital Newspaper Div. of Hearst Corp. v Harris, 71 A.D.2d 333, 423 N.Y.S.2d 263, 1979 N.Y. App. Div. LEXIS 13479 (N.Y. App. Div. 3d Dep't 1979), app. dismissed, 50 N.Y.2d 801, 1980 N.Y. LEXIS 2942 (N.Y. 1980).

Since the sponsors of a real estate development did not contend that they would be prejudiced or surprised by an amendment to the residents' complaint, and since there was no evidence in the record to support such a contention, the trial court improvidently exercised its discretion in denying the residents' cross-motion, filed pursuant to N.Y. C.P.L.R. 3025(b), for leave to amend the caption and the complaint. Degregorio v American Mfrs. Mut. Ins. Co., 90 A.D.3d 694, 934 N.Y.S.2d 457, 2011 N.Y. App. Div. LEXIS 8909 (N.Y. App. Div. 2d Dep't 2011).

As amending the caption of a complaint to reflect plaintiff's current name did not prejudice defendant, plaintiff's motion to amend under N.Y. C.P.L.R. 3025 was granted. 1212 Ocean Ave. Hous. Dev. Corp. v Brunatti, 237 N.Y.L.J. 108, 2007 N.Y. Misc. LEXIS 4188 (N.Y. Sup. Ct. May 9, 2007), aff'd in part, modified, 50 A.D.3d 1110, 857 N.Y.S.2d 649, 2008 N.Y. App. Div. LEXIS 3853 (N.Y. App. Div. 2d Dep't 2008).

In a litigant's discrimination action against an engineer, the litigant's bankruptcy trustee's motion to amend the caption to substitute the trustee for the litigant was granted under the Supremacy Clause, U.S. Const. art. VI, cl. 2, because when the litigant failed to list the discrimination action as an asset in the litigant's bankruptcy petition, the bankruptcy court ordered the trustee to move the court presiding over the discrimination action to substitute the trustee for the litigant. Berry v Rampersad, 939 N.Y.S.2d 798, 21 Misc. 3d 851, 2008 N.Y. Misc. LEXIS 5876 (N.Y. Sup. Ct. 2008).

There was no provision of the Civil Practice Law and Rules or Uniform Rules, N.Y. Comp. Codes R. & Regs. tit. 22, pt. 202, that provided for amendment of a caption, but, rather, the designation of the parties was determined by the allegations of the complaint, which may have been amended pursuant to N.Y. C.P.L.R. 3025; however, because buyers failed to filed a proposed amended summons and complaint, their motion to amend was insufficient. Lezell v Forde, 891 N.Y.S.2d 606, 26 Misc. 3d 435, 2009 N.Y. Misc. LEXIS 2820 (N.Y. Sup. Ct. 2009).

5. —Article 78 proceeding

The trial court in an Article 78 proceeding brought against a school district by a group of terminated and reassigned employees erred in dismissing, as time barred, a petitioner displaced classroom teacher's "affidavit" in which she noted the original petition's failure to challenge the validity of one of the school district's actions as to tenured employees, where the "affidavit" was a valid amendment to the original petition pursuant to CPLR § 3025(a) in that it contained the necessary elements of a pleading, in that the affiant teacher had a right to have her distinct interests represented in the proceeding, and in that the trial court had earlier granted the teacher leave to serve additional papers in response to an earlier letter from the teacher, where the "affidavit" as an amended pleading, related back to the date of the original pleading under CPLR § 203(e) in that the pertinent transactions and occurrences underlying the teacher's claims were fully set forth in the original petition, and the teacher's affidavit merely specified that those actions were unlawful, and where respondents offered nothing to support a claim of prejudice. In

re Smith, 104 A.D.2d 445, 478 N.Y.S.2d 963, 1984 N.Y. App. Div. LEXIS 19897 (N.Y. App. Div. 2d Dep't 1984).

Leave to supplement a taxpayer's petition/complaint with identical allegations related to the later years should have been granted and the trial court should have determined, on the merits, whether the city council had a ministerial duty to make determinations on the later applications. Matter of Level 3 Communications, LLC v DeBellis, 72 A.D.3d 164, 895 N.Y.S.2d 110, 2010 N.Y. App. Div. LEXIS 510 (N.Y. App. Div. 2d Dep't 2010).

Trial court erred in granting a village's motion to dismiss an owner's N.Y. C.P.L.R. art. 78 petition because the village neither amended its answer within the time limits set forth in N.Y. C.P.L.R. 3025(a) nor sought leave to amend under § 3025(b). Matter of Kowalczyk v Monticello, 107 A.D.3d 1365, 969 N.Y.S.2d 566, 2013 N.Y. App. Div. LEXIS 4779 (N.Y. App. Div. 3d Dep't 2013).

When parents of public school students sought leave to amend the parents' petition contesting the decision of state officials to allow the location of a charter school in the community school district in which the parents resided, leave was granted because (1) the proposed new claims were not clearly without merit, as the claims were based in specific sections of the Education Law and supported by facts set forth in the initial petition, (2) there were few new facts alleged in the amended petition, and only one additional exhibit, and (3) no colorable claim of prejudice was made, as the new claims were foreshadowed by the facts alleged in the initial petition, and the claims mirrored those asserted in related litigation. Matter of Norris v Walcott, 950 N.Y.S.2d 535, 36 Misc. 3d 711, 2012 N.Y. Misc. LEXIS 2651 (N.Y. Sup. Ct. 2012).

6. —Attorney fee at issue

Trial court erred in conditioning an order that granted a motion by a deceased employee's estate for leave to amend its complaint on payment of the employer's reasonable legal fees, as no prejudice was shown by the proposed amendment and the condition undermined the public policy under N.Y. C.P.L.R. 3025(b) of allowing liberal amendments to pleadings. Estate of Vitale

v Eventquest, Inc., 38 A.D.3d 330, 832 N.Y.S.2d 37, 2007 N.Y. App. Div. LEXIS 2867 (N.Y. App. Div. 1st Dep't 2007).

A motion by plaintiff for leave to serve and file an amended complaint interposing a tenth cause of action for additional legal fees incurred in connection with an action commenced by an assignee of nine claims for payment of overdue or denied no-fault benefits and attendant attorney's fees and for leave to amend the ad damnum clause to reflect the additional damages would be granted since, notwithstanding that the amount of legal fees recoverable in an action for overdue or denied no-fault benefits is ordinarily determined pursuant to the Regulations of the Insurance Department based on the particular arbitration forum before which such a claim would be heard if it proceeded to arbitration, and the proposed amendment might therefore exceed the maximum fees allowable, the parties provided no information as to the nature of the subject disputes so as to enable the court to determine the particular schedule of attorney's fees applicable to each claim and since it is conceivable that plaintiff might be entitled to the amount of legal fees sought by amendment, the motion to amend should not be denied as a matter of law and since the matter before the court is as yet to be decided by a New York appellate court it may still be considered novel and unique requiring extraordinary services on the attorney's part so as to qualify under applicable administrative rules for an award of fees in excess of the limitations set by the regulations. Staten Island Hospital v Liberty Mut. Ins. Co., 122 Misc. 2d 523, 471 N.Y.S.2d 506, 1984 N.Y. Misc. LEXIS 2866 (N.Y. Dist. Ct. 1984).

7. —Punitive damages at issue

In action for defamation in which defendants moved to amend answer to plead qualified privilege defense just prior to opening statements, plaintiff could not claim surprise, even though he was required to establish malice to overcome defense, since (1) facts and circumstances with respect to qualified privilege were fully explored during discovery, and (2) plaintiff placed question of malice in issue by pleading that statements were made maliciously and by seeking punitive damages. Norwood v City of New York, 203 A.D.2d 147, 610 N.Y.S.2d 249, 1994 N.Y.

App. Div. LEXIS 4165 (N.Y. App. Div. 1st Dep't), app. dismissed, 84 N.Y.2d 849, 617 N.Y.S.2d 139, 641 N.E.2d 160, 1994 N.Y. LEXIS 2624 (N.Y. 1994).

In action seeking declaration that plaintiff was not obligated to defend or indemnify defendants in underlying action, court improperly denied plaintiff's motion for leave to serve amended complaint, even though plaintiff did not fully explain delay in seeking to amend complaint to add, inter alia, allegations that liability policies it had issued to its insured contained absolute pollution exclusions, where documentary evidence indicated that proposed amendments had merit, and there was no showing of prejudice as result of amendments. Eagle Ins. Co. v Queens Tunnel Serv. Station, Inc., 287 A.D.2d 434, 730 N.Y.S.2d 867, 2001 N.Y. App. Div. LEXIS 9210 (N.Y. App. Div. 2d Dep't 2001).

In a personal injury action filed by an administrator on behalf of a decedent's estate, the trial court did not abuse its discretion by allowing the administrator to amend the complaint to include a claim for punitive damages as the mall against whom the action was filed did not show it would be prejudiced and the administrator showed the claim was not plainly lacking in merit. La Porta v Wilmorite, Inc., 298 A.D.2d 920, 748 N.Y.S.2d 83, 2002 N.Y. App. Div. LEXIS 9083 (N.Y. App. Div. 4th Dep't 2002).

Where adjoining landowners would not have been prejudiced in any way by the addition of a count claiming a prescriptive easement, it was an abuse of discretion to deny permission to a property owner to amend a complaint that already raised triable issues regarding adverse possession. Gjokaj v Fox, 25 A.D.3d 759, 809 N.Y.S.2d 156, 2006 N.Y. App. Div. LEXIS 934 (N.Y. App. Div. 2d Dep't 2006).

Trial court erred in granting plaintiff leave to amend the complaint under N.Y. C.P.L.R. 3025(b) to include a demand for punitive damages; only speculation and intimation supported the allegation that the conduct in designing the forklift on which plaintiff was injured manifested a high degree of moral culpability or flagrant, willful, or wanton negligence or recklessness. Thone v Crown Equip. Corp., 27 A.D.3d 723, 810 N.Y.S.2d 925, 2006 N.Y. App. Div. LEXIS 3800 (N.Y. App. Div. 2d Dep't 2006).

In a medical malpractice action for permanent nerve damage to a patient's arm allegedly caused by an improper venipuncture, leave to amend the complaint under N.Y. C.P.L.R. 3025(b) to add a punitive damage claim against a physician should have been denied because, while leave to amend was to be liberally granted under N.Y. C.P.L.R. 3025(b), the merits of a proposed amendment were also to be scrutinized; there was no evidence of willful or wanton negligence on the physician's part warranting a punitive damage award. Morton v Brookhaven Mem. Hosp., 32 A.D.3d 381, 820 N.Y.S.2d 294, 2006 N.Y. App. Div. LEXIS 9779 (N.Y. App. Div. 2d Dep't 2006).

In an action to recover damages for personal injuries, the trial court erred in granting plaintiffs' motion for leave to amend the complaint pursuant to N.Y. C.P.L.R. 3025(b) to add a demand for punitive damages. Nothing beyond speculation was presented in support of the allegation that defendants' record of servicing and maintaining the electrical system at the garden apartment complex at which plaintiffs resided manifested a high degree of moral culpability or flagrant, willful, or wanton negligence or recklessness leading to the fire that was the subject of the action. Buckholz v Maple Garden Apts., LLC, 38 A.D.3d 584, 832 N.Y.S.2d 255, 2007 N.Y. App. Div. LEXIS 3390 (N.Y. App. Div. 2d Dep't 2007).

Because the plaintiffs' proposed amendment failed to show that a hospital's conduct evinced a high degree of moral culpability, or constituted willful or wanton negligence or recklessness, the trial court properly denied their N.Y. C.P.L.R. 3025(b) motion for leave to amend the complaint to add a claim for punitive damages against the hospital. Hill v 2016 Realty Assoc., 42 A.D.3d 432, 839 N.Y.S.2d 801, 2007 N.Y. App. Div. LEXIS 8469 (N.Y. App. Div. 2d Dep't 2007).

8. —Second or subsequent amendments

Court properly allowed third-party plaintiffs to serve second amended third-party complaint where no prejudice or surprise would accrue to third-party defendant given that circumstances of incident, parties involved, and theory of liability were clearly set forth in pleadings in main action

and in first amended third-party complaint. Serratore v Vetere, 137 A.D.2d 750, 524 N.Y.S.2d 829, 1988 N.Y. App. Div. LEXIS 1900 (N.Y. App. Div. 2d Dep't 1988).

Court did not abuse its discretion in granting plaintiff's motion to serve second amended and supplemental bill of particulars, although plaintiff had filed note of issue and certificate of readiness 2 months earlier, where plaintiff demonstrated that special circumstances existed supporting grant of relief. Glionna v Kubota, Ltd., 154 A.D.2d 920, 546 N.Y.S.2d 992, 1989 N.Y. App. Div. LEXIS 12949 (N.Y. App. Div. 4th Dep't 1989).

Proposed causes of action in second amended complaint, which arose from formal termination of parties' contracts, did not relate back to anticipatory repudiation claims asserted in first amended complaint and were time-barred, as they were premised on facts that occurred after service of first amended complaint, and would impermissibly shift focus of claims asserted in first amended complaint away from defendants' alleged repudiation of parties' contractual relationship. Maxon v Franklin Traffic Serv., 261 A.D.2d 830, 689 N.Y.S.2d 559, 1999 N.Y. App. Div. LEXIS 4860 (N.Y. App. Div. 4th Dep't 1999).

Trial court did not abuse its discretion in denying petitioners' second motion for leave to amend their petition, pursuant to N.Y. C.P.L.R. 3025(b), in order to add additional claims against a school district board of education and others, as the board would have suffered significant prejudice by the amendment; further, the claims were time-barred, and they lacked merit where indispensable parties were not included as required by N.Y. C.P.L.R. 1001 and 1003. Matter of Jae v Bd. of Educ. of Pelham Union Free Sch. Dist., 22 A.D.3d 581, 802 N.Y.S.2d 228, 2005 N.Y. App. Div. LEXIS 10872 (N.Y. App. Div. 2d Dep't 2005), app. denied, 6 N.Y.3d 714, 816 N.Y.S.2d 749, 849 N.E.2d 972, 2006 N.Y. LEXIS 1311 (N.Y. 2006).

Court should have granted that branch of the plaintiff's cross motion which was for leave to file a second amended complaint because the plaintiff proposed an amendment to add a cause of action which alleged facts setting forth a cognizable cause of action to recover damages sounding in intentional tort, and the cause of action was not palpably insufficient or patently

devoid of merit. Ciminello v Sullivan, 120 A.D.3d 1176, 992 N.Y.S.2d 291, 2014 N.Y. App. Div. LEXIS 5994 (N.Y. App. Div. 2d Dep't 2014).

Trial court did not improvidently exercise its discretion in granting the client's motion for leave to serve a second amended complaint because there was no prejudice or surprise to defendants, and the proposed second amended complaint was not palpably insufficient or patently devoid of merit. Lauder v Goldhamer, 122 A.D.3d 908, 998 N.Y.S.2d 79, 2014 N.Y. App. Div. LEXIS 8270 (N.Y. App. Div. 2d Dep't 2014).

9. —Statute of frauds defense

Defendant's motion for leave to amend its answer to include the defense of the Statute of Frauds was improperly denied, inasmuch as plaintiffs' contentions that defendant could have made its motion on five earlier occasions and that plaintiffs had completely prepared the case for trial based upon defendant's existing pleadings were insufficient to show prejudice or surprise, where there was no explanation of how the proposed amendment would cause their preparation to suffer. Doell v County of Monroe, 86 A.D.2d 751, 447 N.Y.S.2d 541, 1982 N.Y. App. Div. LEXIS 15320 (N.Y. App. Div. 4th Dep't 1982).

Defendants involved in car accident were entitled to amend their answer to assert emergency doctrine defense where amendment would not prejudice plaintiff and was not patently lacking in merit. Nahrebeski v Molnar, 286 A.D.2d 891, 730 N.Y.S.2d 646, 2001 N.Y. App. Div. LEXIS 8894 (N.Y. App. Div. 4th Dep't 2001).

In an action by plaintiffs, 1st tenant and 2nd tenant, to recover damages for, inter alia, personal injuries that the 1st tenant suffered after stepping outside the door of the building where the tenants lived and tripping on a piece of plywood, the trial court erred in granting defendant landlord leave to amend its answer to assert a counterclaim against the 2nd tenant, as there was no basis for the landlord's theory that the 2nd tenant's removal of a door check caused the 1st tenant's accident. Pasalic v O'Sullivan, 294 A.D.2d 103, 741 N.Y.S.2d 39, 2002 N.Y. App. Div. LEXIS 4370 (N.Y. App. Div. 1st Dep't 2002).

Since a borrower's proposed amendment to assert a statute of frauds defense to the lender's action for repayment of loans was neither palpably insufficient as a matter of law nor totally devoid of merit, and since no prejudice or surprise was shown, leave to amend was properly granted under N.Y. C.P.L.R. 3025(b). Long Is. Tit. Agency, Inc. v Frisa, 45 A.D.3d 649, 846 N.Y.S.2d 253, 2007 N.Y. App. Div. LEXIS 11826 (N.Y. App. Div. 2d Dep't 2007).

10. Amendments and supplemental pleadings without leave

In a negligence action, defendants, a vehicle's owner and its driver, who omitted from an answer a defense based on lack of personal jurisdiction, did not waive said defense when they corrected the omission before the time to amend the answer without leave of court expired; further, said actions were consistent with both N.Y. C.P.L.R. 3211 and 3025. Iacovangelo v Shepherd, 5 N.Y.3d 184, 800 N.Y.S.2d 116, 833 N.E.2d 259, 2005 N.Y. LEXIS 1465 (N.Y. 2005).

Plaintiff was entitled to serve amended complaint as matter of right without seeking leave of court within 20 days of service of defendant's motion to dismiss on jurisdictional grounds, where amendment did not attempt to add new cause of action but was limited to changing pleading solely with respect to jurisdictional matter. Badger v Lehigh V. R. Co., 45 A.D.2d 601, 360 N.Y.S.2d 523, 1974 N.Y. App. Div. LEXIS 3748 (N.Y. App. Div. 4th Dep't 1974).

Fact that plaintiff did not request leave to re-plead at time original pleading was dismissed did not require that plaintiff's subsequent amended complaint be dismissed, for each party is entitled to amend his pleading once without leave of court. Where Appellate Division specifically limited its affirmance of trial court's dismissal of case to plaintiff's failure to plead an essential element of cause of action, dismissal did not constitute final determination of case which would bar plaintiff's filing of amended petition. Rochester Poster Advertising Co. v Penfield, 51 A.D.2d 870, 380 N.Y.S.2d 153, 1976 N.Y. App. Div. LEXIS 11490 (N.Y. App. Div. 4th Dep't 1976).

Amended answer of right can interpose a jurisdictional defense. Britt v Freidus, 95 A.D.2d 751, 464 N.Y.S.2d 193, 1983 N.Y. App. Div. LEXIS 18651 (N.Y. App. Div. 1st Dep't 1983).

Statute of frauds defense was timely interposed in amended answer made as of right to amended complaint, even though defense was not interposed in original answer to original complaint. Aeromar C. Por A. v Port Authority of New York & New Jersey, 145 A.D.2d 584, 536 N.Y.S.2d 173, 1988 N.Y. App. Div. LEXIS 13866 (N.Y. App. Div. 2d Dep't 1988).

In proceeding to review tax assessments under CLS RPTL Art 7, in which respondents sought to dismiss petition prior to interposing answers on ground that ownership status of petitioner was erroneously stated, petitioner was entitled to serve amended petition as of right under CLS CPLR §§ 3211(f) and 3025(a). EFCO Products v Cullen, 161 A.D.2d 44, 560 N.Y.S.2d 158, 1990 N.Y. App. Div. LEXIS 11112 (N.Y. App. Div. 2d Dep't 1990), app. dismissed, 77 N.Y.2d 822, 566 N.Y.S.2d 581, 567 N.E.2d 975, 1991 N.Y. LEXIS 38 (N.Y. 1991).

Defendant waived objection to jurisdiction, despite plaintiffs' failure to obtain leave of court before serving supplemental summons and complaint joining defendant as party to action, where defendant answered amended pleading and then delayed 3 months, until after statute of limitations had run, before moving to dismiss. Santopolo v Turner Constr. Co., 181 A.D.2d 429, 580 N.Y.S.2d 755, 1992 N.Y. App. Div. LEXIS 3111 (N.Y. App. Div. 1st Dep't 1992).

Defendant was not required to seek leave of court to assert counterclaim in its amended answer made pursuant to CLS CPLR § 3025(d) where counterclaim was responsive to new matter included in plaintiff's amended complaint. Madison-Murray Assocs. v Perlbinder, 188 A.D.2d 362, 591 N.Y.S.2d 773, 1992 N.Y. App. Div. LEXIS 13732 (N.Y. App. Div. 1st Dep't 1992).

Court should not have dismissed amended complaint that was served without leave of court beyond time within which amendment could have been made as of right where defendants accepted complaint and attempted to interpose answer, thereby waiving objection. Chiulli v Coyne, 210 A.D.2d 450, 620 N.Y.S.2d 998, 1994 N.Y. App. Div. LEXIS 13182 (N.Y. App. Div. 2d Dep't 1994).

In tenant's action against landlord for fall on landlord's premises, landlord's "supplemental" bill of particulars, which actually was amended bill of particulars, alleging for first time that tenant was

intoxicated at time of accident, was nullity where it was served without leave of court and after filing of note of issue. Boland v Koppelman, 251 A.D.2d 176, 674 N.Y.S.2d 349, 1998 N.Y. App. Div. LEXIS 7305 (N.Y. App. Div. 1st Dep't 1998).

Court improperly found that plaintiffs could not amend their verified complaint “as of right” where defendants’ motion to dismiss complaint under CLS CPLR § 3211(a)(7) extended defendants’ time to answer (CLS CPLR § 3211(f)) and thus extended time in which plaintiffs could amend their complaint as of right (CLS CPLR § 3025(a)), plaintiffs were also entitled to additional 5 days since defendants served answer by mail (CLS CPLR § 2103(b)(2)), and plaintiffs amended complaint within 25 days after answer was served. STS Mgmt. Dev. v New York State Dep't of Taxation & Fin., 254 A.D.2d 409, 678 N.Y.S.2d 772, 1998 N.Y. App. Div. LEXIS 11105 (N.Y. App. Div. 2d Dep't 1998).

Where answers were filed to a father’s negligence and wrongful death complaint, and where the father filed an amended summons and amended complaint more than 20 days after the answers were filed, he was required by N.Y. C.P.L.R. 3025(b) to either seek leave of court or stipulation of the parties to file the amended complaint. Since the father did not take either action before filing and serving the amended complaint, the service was a nullity; therefore, the father’s motion to deem the amended complaint served nunc pro tunc to the date of the original complaint was properly denied. Nikolic v Fed'n Empl. & Guidance Serv., 18 A.D.3d 522, 795 N.Y.S.2d 303, 2005 N.Y. App. Div. LEXIS 5075 (N.Y. App. Div. 2d Dep't 2005).

Affirmation of defendant’s attorney was insufficient to establish the date that the answer was served, as it did not specifically state that the affiant himself served the answer, nor did it describe the method used to effectuate service in a manner specified by N.Y. C.P.L.R. 2103(b); the denial of defendant’s motion to strike the amended summons and complaint for failure to comply with N.Y. C.P.L.R. 3025 was proper. Gigante v Arbucci, 34 A.D.3d 425, 823 N.Y.S.2d 539, 2006 N.Y. App. Div. LEXIS 13397 (N.Y. App. Div. 2d Dep't 2006).

Since owners’ second amended complaint was served before the congregation interposed an answer with respect to the first amended complaint, the second amended complaint was

properly served as of right, pursuant to N.Y. C.P.L.R. 3025(a). Merkos L'Inyonei Chinuch, Inc. v Sharf, 59 A.D.3d 403, 873 N.Y.S.2d 148, 2009 N.Y. App. Div. LEXIS 729 (N.Y. App. Div. 2d Dep't 2009).

Trial court properly denied that portion of a manufacturer's motion to dismiss asserting that the worker's amended complaint was invalid because the worker did not obtain leave of the court or act on an effective stipulation as required by N.Y. C.P.L.R. 1003, 3025(b); because the worker served the amended complaint naming the manufacturer as a defendant after the service of the third-party complaint upon the manufacturer and before the manufacturer served a third-party answer, the worker properly commenced a direct action against the manufacturer pursuant to N.Y. C.P.L.R. 1009. Bevilacqua v Bloomberg, L.P., 70 A.D.3d 411, 895 N.Y.S.2d 347, 2010 N.Y. App. Div. LEXIS 721 (N.Y. App. Div. 1st Dep't 2010).

Penthouse purchaser was entitled to amend a reinstated complaint under N.Y. C.P.L.R. 3025(a) after the appellate court modified the dismissal of the purchaser's original complaint, reinstating a cause of action for breach of contract. Plaza PH2001 LLC v Plaza Residential Owner LP, 98 A.D.3d 89, 947 N.Y.S.2d 498, 2012 N.Y. App. Div. LEXIS 5036 (N.Y. App. Div. 1st Dep't 2012).

Former student's amended negligence complaint was a legal nullity warranting dismissal insofar as asserted against a religious order for lack of personal jurisdiction where the student sought to add the order as a party after the time for amendment had expired and without seeking leave from the supreme court, as required by CPLR 1003 and 3025. Moreover, this was not a case where the party was misnamed, but the former student was seeking to add or substitute a party. Raiola v Roman Catholic Diocese of Brooklyn, 2025 N.Y. App. Div. LEXIS 3009 (N.Y. App. Div. 2d Dep't 2025).

Timely amendment of a complaint to convert an action for rescission of a contract to one for its specific performance is permitted under subd (a) of this section. Ronga v Alpern, 45 Misc. 2d 1029, 258 N.Y.S.2d 731, 1964 N.Y. Misc. LEXIS 1160 (N.Y. Sup. Ct. 1964).

Plaintiff was not required to obtain leave of court under CLS CPLR § 3211(e) before serving amended complaint after defendant, on last day of period in which to respond or move with respect to complaint, moved to dismiss for failure to state cause of action, since (1) CLS CPLR § 3025(a) permits party to amend pleading without leave of court so long as he does so within 20 days after it is served, before any responsive pleading is due, or within 20 days after responsive pleading is served, (2) defendant's motion to dismiss had effect of extending its time to answer complaint under CLS CPLR § 3211(f), thus rendering plaintiff's amendment, served 3 days after motion to dismiss, timely, and (3) § 3211(e), which allows party, by requesting leave to plead again, to respond to motion to dismiss for failure to state cause of action, should not be read to obviate availability of amendment as of right under § 3025(a). Sholom & Zuckerbrot Realty Corp. v Coldwell Banker Commercial Group, Inc., 138 Misc. 2d 799, 525 N.Y.S.2d 541, 1988 N.Y. Misc. LEXIS 197 (N.Y. Sup. Ct. 1988).

Although an employee's original complaint for promissory estoppel and violation of the Labor Law §§ 215, 740 of the Whistleblower Act were derived from the same factual background, the employee amended the complaint as of right to withdraw the Whistleblower claim under N.Y. C.P.L.R. 3025(a); therefore, the employee's amended complaint asserted a cognizable claim for promissory estoppel. Bones v Prudential Fin., Inc., 847 N.Y.S.2d 348, 17 Misc. 3d 656, 238 N.Y.L.J. 46, 2007 N.Y. Misc. LEXIS 6637 (N.Y. Sup. Ct. 2007), rev'd, 54 A.D.3d 589, 863 N.Y.S.2d 368, 2008 N.Y. App. Div. LEXIS 6732 (N.Y. App. Div. 1st Dep't 2008).

Plaintiff's contention that defendant was required to move pursuant to N.Y. C.P.L.R. 3025(b) for leave to amend the answer was unavailing; defendant was entitled to amend the answer with counterclaims without leave of the court pursuant to N.Y. C.P.L.R. 3025, 3211(f) and his amended answer was not subject to being stricken. Toikach v Basmanov, 918 N.Y.S.2d 844, 31 Misc. 3d 615, 2011 N.Y. Misc. LEXIS 529 (N.Y. Sup. Ct. 2011).

11. —Multi-party litigation

A party may amend his pleading only once without leave of court within 20 days after service of the last pleading responding to it (CPLR 3025, subd [a]); such a literal construction of CPLR 3025 (subd [a]) outweighs the possible prejudice in multi-party litigation to a party served with an amended pleading beyond 20 days from the time such party responded by virtue of an extension of time granted to another party, since it avoids forcing the pleader to amend his pleading without an opportunity to view all responsive pleadings, avoids fostering a hesitancy to grant time extensions in multiparty litigation, and would rarely have a prejudicial effect at such an early stage of the litigation. Citibank, N.A. v Suthers, 68 A.D.2d 790, 418 N.Y.S.2d 679, 1979 N.Y. App. Div. LEXIS 11318 (N.Y. App. Div. 4th Dep't 1979).

Summary judgment dismissing the complaint was properly denied as to defendants, which were added as parties defendant to wrongful death action, where the defendants waived objection to the plaintiffs' failure to obtain leave to add new parties as required by CPL 1003, where the defendants were served with the amended pleadings in May, 1975, participated in all phases of discovery without objection, and first moved to dismiss the complaint in May, 1980, where none of the defendants preserved the objection to their joinder in the action, either by answer or by motion, and where the defendants were served with the pleading clearly denominated "Amended" complaint. McDaniel v Clarkstown Cent. Dist. No. 1, 83 A.D.2d 624, 441 N.Y.S.2d 532, 1981 N.Y. App. Div. LEXIS 14919 (N.Y. App. Div. 2d Dep't 1981).

Plaintiff's failure to obtain leave of court before service of its supplemental summons and amended complaint to add new party defendant constituted jurisdictional defect requiring dismissal of action against new party defendant, notwithstanding consent of all existing parties; joinder of new party defendant without court approval is nullity unless waived by new party defendant. Dauernheim v Lendlease Cars, 202 A.D.2d 624, 609 N.Y.S.2d 302, 1994 N.Y. App. Div. LEXIS 2963 (N.Y. App. Div. 2d Dep't 1994).

12. Constitutional considerations

Court properly treated dismissal motion, which was addressed to original pleading, as directed to amended complaint where plaintiffs' counsel was present at hearing and fully argued issues in dispute without contemporaneously objecting to court's treatment of motion, thus satisfying any due process concerns. Sage Realty Corp. v Proskauer Rose L.L.P., 251 A.D.2d 35, 675 N.Y.S.2d 14, 1998 N.Y. App. Div. LEXIS 6437 (N.Y. App. Div. 1st Dep't 1998).

In proceeding to have 13-year-old daughter of petitioner declared to be person in need of supervision (PINS), petitioner was not entitled to amend deficient petition since CLS CPLR § 3025(a) could not be applied in PINS proceeding to cure jurisdictional defects, and child was entitled to same constitutional protections afforded in delinquency proceedings. In re Cassandra R., 155 Misc. 2d 756, 589 N.Y.S.2d 739, 1992 N.Y. Misc. LEXIS 490 (N.Y. Fam. Ct. 1992).

13. Declaratory judgment at issue

In an action brought by a landowner for a declaratory judgment that her pro perty was not subject to an easement in favor of defendant adjoining landowners for the use of a water line that ran across her property or for any other purpose, the trial court erred in denying defendants' motion, pursuant to CPLR § 3025(b), for leave to amend their answer so as to assert a counterclaim that they had an irrevocable license coupled with an interest based on allegations that plaintiff and defendants' predecessor in tit le had agreed that the subject water line would be maintained for the use of both parcels and that defendants' predecessor in title had incurred the joint expense of installing the water line in reliance upon such agreement, where plaintiff made no claim that she had been prejudiced by defendants' motion, and where plaintiff had previously admitted that she and defendants' predecessor in title had entered into an oral agreement regarding the water line, so that defendants' counterclaim was not palpably insufficient on its face. Prosser v Gouveia, 98 A.D.2d 992, 470 N.Y.S.2d 231, 1983 N.Y. App. Div. LEXIS 21350 (N.Y. App. Div. 4th Dep't 1983).

In action on performance bond, failure of defendant insurance company to obtain leave of court to amend its third party complaint against owners of construction company, so as to include

request for declaratory judgment regarding contract whereby owners indemnified insurance company on performance bond, was mere irregularity which could be ignored where amendment did not add any substantive factual issues or new theories of recovery so as to prejudice owners. State University Constr. Fund v Aetna Casualty & Surety Co., 169 A.D.2d 52, 571 N.Y.S.2d 135, 1991 N.Y. App. Div. LEXIS 8338 (N.Y. App. Div. 3d Dep't 1991).

14. Discovery considerations

Need for additional discovery or additional time to prepare defense does not constitute prejudice sufficient to justify denial of motion to amend pleadings. Rutz v Kellum, 144 A.D.2d 1017, 534 N.Y.S.2d 293, 1988 N.Y. App. Div. LEXIS 14576 (N.Y. App. Div. 4th Dep't 1988).

Defendant in action for legal fees was not entitled to amend his answer to interpose counterclaim for legal malpractice where summary judgment was properly entered in underlying action on ground that defendant had waived his defenses and ratified his obligations on promissory note by soliciting and accepting extension of time to fulfill his obligations at time when he was, or should have been, aware of underlying plaintiff’s antecedent fraud, and thus defendant did not prove that he would not have sustained damages but for his attorney’s alleged negligence. Davis & Davis, P.C. v Morson, 286 A.D.2d 584, 730 N.Y.S.2d 293, 2001 N.Y. App. Div. LEXIS 8337 (N.Y. App. Div. 1st Dep't 2001).

Where the trial court allowed plaintiffs to amend the complaint to allege a new theory of liability, the trial court should have, pursuant to N.Y. C.P.L.R. 3025(b), (c), granted defendants’ request for additional disclosure. Adams v Hilton Hotels, Inc., 4 A.D.3d 232, 772 N.Y.S.2d 64, 2004 N.Y. App. Div. LEXIS 1846 (N.Y. App. Div. 1st Dep't 2004).

15. Discretion of court, generally

Whether to permit a party to amend a pleading is generally a matter of discretion for trial court and, on review, Appellate Division. Krichmar v Krichmar, 42 N.Y.2d 858, 397 N.Y.S.2d 775, 366 N.E.2d 863, 1977 N.Y. LEXIS 2184 (N.Y. 1977).

Under CPLR 3025 (subd [b]), which provides that a party may amend his pleading at any time by leave of court, and that leave shall be freely given upon such terms as may be just, the matter of allowing an amendment is committed almost entirely to the court's discretion to be determined on a sui generis basis, with the widest possible latitude being extended to the court. Murray v New York, 43 N.Y.2d 400, 401 N.Y.S.2d 773, 372 N.E.2d 560, 1977 N.Y. LEXIS 2474 (N.Y. 1977).

Permission to increase the ad damnum clause in an action for damages for personal injuries lies within sound discretion of court. Soulier v Harrison, 21 A.D.2d 725, 250 N.Y.S.2d 141, 1964 N.Y. App. Div. LEXIS 3668 (N.Y. App. Div. 3d Dep't 1964).

Where case has been long delayed and a statement of readiness has been filed, judicial discretion in allowing amendments should be discreet, circumspect, prudent and cautious. Symphonic Electronic Corp. v Audio Devices, Inc., 24 A.D.2d 746, 263 N.Y.S.2d 676, 1965 N.Y. App. Div. LEXIS 3288 (N.Y. App. Div. 1st Dep't 1965).

Permission to increase ad damnum clause in action for damages for personal injuries lies within sound discretion of court. In determining sound discretion of court in permitting increase in ad damnum clause in action for damages for personal injuries, prejudice to defendant is consideration. Finn v Crystal Beach Transit Co., 55 A.D.2d 1001, 391 N.Y.S.2d 925, 1977 N.Y. App. Div. LEXIS 10327 (N.Y. App. Div. 4th Dep't 1977).

While permission to amend complaint should be freely given in proper exercise of discretion, motion for that relief should be made promptly after discovery or awareness of facts upon which such amendment is predicated. CPLR 3025(b). De Carlo v Economy Baler Div. of American Hoist & Derrick Co., 57 A.D.2d 1002, 394 N.Y.S.2d 468, 1977 N.Y. App. Div. LEXIS 12292 (N.Y. App. Div. 3d Dep't 1977).

Although it should be freely granted, leave to amend rests in sound discretion of court. Birdsall v New York, 60 A.D.2d 522, 399 N.Y.S.2d 686, 1977 N.Y. App. Div. LEXIS 14419 (N.Y. App. Div. 1st Dep't 1977).

Broad discretion vested in trial court to rule on motion pursuant to CLS CPLR 3025(b) to amend complaint by increasing ad damnum clause is not absolute, and granting of such motion will be overturned when discretion has been abused; it is well settled that where defendant demonstrates actual prejudice will result from amendment, motion must be denied; however, prejudice is not to be found, ipso facto, in belatedness of amendment or in mere exposure of defendant to greater liability, but there must be some indication that defendant has been hindered in preparation of case or has been prevented from taking some measures in support of position. Dolan v Garden City Union Free School Dist., 113 A.D.2d 781, 493 N.Y.S.2d 217, 1985 N.Y. App. Div. LEXIS 52453 (N.Y. App. Div. 2d Dep't 1985).

There was no error where defendant’s motion to amend its answer by adding affirmative defense was intially denied by Special Term, but then granted after defendant filed motion to “reargue,” which Special Term deemed motion to “renew,” and where first decision was never reduced to formal order; regardless of proper term for motion, until entry of formal order Special Term had inherent power to reconsider or correct its decision. Levinger v General Motors Corp., 122 A.D.2d 419, 504 N.Y.S.2d 819, 1986 N.Y. App. Div. LEXIS 59730 (N.Y. App. Div. 3d Dep't 1986).

Despite rule of CLS CPLR § 3025 that leave to amend be freely given, motion to amend must be made in reasonably timely fashion and should not be granted where late amendment would be prejudicial to opposing party. Adams Drug Co. v Knobel, 129 A.D.2d 401, 513 N.Y.S.2d 674, 1987 N.Y. App. Div. LEXIS 45133 (N.Y. App. Div. 1st Dep't 1987).

Even if court improperly denied buyer’s motion to conform pleadings to proof which tended to show that previously rescinded written land contract between parties had been orally renewed, statute of frauds prevented court from finding that purported oral contract was valid. Jo-Cook

Realty Corp. v Lorge, 133 A.D.2d 447, 519 N.Y.S.2d 664, 1987 N.Y. App. Div. LEXIS 49918 (N.Y. App. Div. 2d Dep't 1987).

Motion for leave to amend pleading rests in sound discretion of trial court, whose decision will not be lightly set aside on appeal. Sperber v Sperber, 140 A.D.2d 323, 527 N.Y.S.2d 822, 1988 N.Y. App. Div. LEXIS 4624 (N.Y. App. Div. 2d Dep't 1988).

While leave to amend should be freely given, proposed amendment to complaint which is devoid of merit should not be permitted, thereby obviating needless, time-consuming litigation. Brown v Samalin & Bock, P. C., 155 A.D.2d 407, 547 N.Y.S.2d 80, 1989 N.Y. App. Div. LEXIS 13997 (N.Y. App. Div. 2d Dep't 1989).

In determining motion to amend answer, court must consider whether there has been gross delay in asserting amendment, whether action has long been certified ready for trial, how long party seeking amendment was aware of facts on which motion was predicated, and whether reasonable excuse has been offered for delay. Rose v Velletri, 202 A.D.2d 566, 612 N.Y.S.2d 868, 1994 N.Y. App. Div. LEXIS 2632 (N.Y. App. Div. 2d Dep't 1994).

Judicial discretion in allowing amendment of pleadings should be discreet, circumspect, prudent, and cautious where amendment is sought after long delay, and statement of readiness has been filed. Cseh v New York City Transit Auth., 240 A.D.2d 270, 658 N.Y.S.2d 618, 1997 N.Y. App. Div. LEXIS 6563 (N.Y. App. Div. 1st Dep't 1997).

In determining whether amendment of pleading should be allowed, prejudice is less significant criterion where note of issue and certificate of readiness have been filed, because court must also consider how long amending party was aware of facts on which motion is based and whether reasonable excuse is offered for delay. Murray-Gardner Mgmt. v Iroquois Gas Transmission Sys., L.P., 251 A.D.2d 954, 674 N.Y.S.2d 820, 1998 N.Y. App. Div. LEXIS 7730 (N.Y. App. Div. 3d Dep't 1998).

In considering motion to amend pleadings, court should consider how long amending party was aware of facts on which motion is predicated, whether reasonable excuse for delay is offered,

and whether prejudice will result. Amendment that creates prejudice or surprise to opposing party should not be permitted. Court must examine underlying merit of proposed amendment since to do otherwise would be waste of judicial resources. Sidor v Zuhoski, 257 A.D.2d 564, 683 N.Y.S.2d 590, 1999 N.Y. App. Div. LEXIS 127 (N.Y. App. Div. 2d Dep't 1999).

Medical malpractice plaintiff's motion to amend complaint to add cause of action for wrongful death was properly denied where she failed to prove reasonable excuse for over 2-year delay in making motion, indicating only that failure was result of "inadvertent oversight." Jablonski v County of Erie, 286 A.D.2d 927, 730 N.Y.S.2d 626, 2001 N.Y. App. Div. LEXIS 8906 (N.Y. App. Div. 4th Dep't 2001).

Pursuant to N.Y. C.P.L.R. art. 3025(c), pleadings should be freely amended in the court's discretion providing that the other party is not unduly prejudiced; the trial court erred in denying a mortgage broker's motion to amend its pleadings, in an action to recover brokerage fees, and granting a lender and a borrower's cross-motions for summary judgment because there were issues of fact to be determined, and there was no prejudice to any party by allowing the amended pleadings. Multiloan Mortg. Co., LLC v Asian Gardens Ltd., 303 A.D.2d 658, 757 N.Y.S.2d 312, 2003 N.Y. App. Div. LEXIS 3131 (N.Y. App. Div. 2d Dep't 2003).

The test as to whether the court should exercise its discretion and permit an amendment is whether the adversary will be prejudiced by such amendment. Colon v Bermudez, 61 Misc. 2d 255, 305 N.Y.S.2d 630, 1969 N.Y. Misc. LEXIS 1081 (N.Y. Civ. Ct. 1969).

The statutory language of CPLR 3025(b) is strongly indicative of a discretion vested in the court to grant or deny leave to amend a pleading, and courts have traditionally adopted a liberal posture in the exercise of this discretion. Cadran v Fanni, 72 Misc. 2d 1, 338 N.Y.S.2d 532, 1972 N.Y. Misc. LEXIS 1413 (N.Y. Dist. Ct. 1972).

Manufacturer of allegedly defective pacemaker lead wire was not barred from amending its answer on eve of trial to assert federal preemption defense where case law to support giving federal preemption to such devices was relatively recent, and plaintiffs failed to show prejudice

as result of proposed amendment. Fogal v Steinfeld, 163 Misc. 2d 497, 620 N.Y.S.2d 875, 1994 N.Y. Misc. LEXIS 574 (N.Y. Sup. Ct. 1994).

16. —Abuse of discretion in allowing amendment

The granting of a plaintiff's motion to amend her complaint and bill of particulars made more than four years after the accident which was the subject of the suit and 20 months after the alleged incurring of additional expense and discovery of further injuries was an improvident exercise of discretion. Miller v Davis, 24 A.D.2d 730, 263 N.Y.S.2d 421, 1965 N.Y. App. Div. LEXIS 3376 (N.Y. App. Div. 4th Dep't 1965).

Where defendant's answer consisted of general denials, and he moved to amend his answer by setting forth affirmative defenses of fraud and illegality at a time when the case had reached the top of the trial calendar, the granting of the leave to amend was an improvident exercise of discretion. James-Smith v Rottenberg, 32 A.D.2d 792, 302 N.Y.S.2d 355, 1962 N.Y. App. Div. LEXIS 12269 (N.Y. App. Div. 2d Dep't 1962).

It was an abuse of discretion and prejudicial to plaintiff to permit defendant in automobile negligence case to amend answer, after note of issue was filed and examination taken, to allege that defendant had not given his employee permission to operate vehicle at place where accident occurred, where facts concerning the operation of defendant's vehicle by employee were known, or should have been known by defendant prior to the service of the answer to the amended complaint. Schultz v Ellenbogen, 42 A.D.2d 810, 346 N.Y.S.2d 413, 1973 N.Y. App. Div. LEXIS 4600 (N.Y. App. Div. 2d Dep't 1973).

Absent physician's affidavit indicating causal connection between death and initial accident, granting of leave to serve proposed amended complaint so as to add cause of action for wrongful death and to increase ad damnum clause was improvident exercise of discretion. Smith v Hellman, 57 A.D.2d 566, 393 N.Y.S.2d 734, 1977 N.Y. App. Div. LEXIS 11538 (N.Y. App. Div. 2d Dep't 1977).

Grant of leave to amend reply on day of trial to assert statute of limitations to defendants' counterclaims was abuse of discretion where motion was apparently not made on notice and no excuse was offered for delay of over 13 months in asserting defense. Pick v McCombs, 57 A.D.2d 1078, 395 N.Y.S.2d 819, 1977 N.Y. App. Div. LEXIS 12395 (N.Y. App. Div. 4th Dep't 1977).

Where no new matter was asserted in attorney's affidavit or proposed supplemental bill which sought to increase ad damnum clause of complaint from $50,000 to $1,000,000 and where plaintiff's mental condition, which provided the basis for the desired increase in damages, was fully alleged in the original bill, it was an abuse of discretion to permit the amendment. St. George v Dennis, 58 A.D.2d 740, 395 N.Y.S.2d 858, 1977 N.Y. App. Div. LEXIS 12865 (N.Y. App. Div. 4th Dep't 1977).

In an action in which both plaintiffs and defendants moved to amend their pleadings more than three years after the complaint was served, the trial court did not abuse its discretion in denying plaintiff's motion due solely to such delay. However, the court erred in granting defendants' motion where it was made four years after service of their answer, and a year and one-half after plaintiff filed a statement of readiness, and where defendants' change of counsel did not constitute unusual or unanticipated conditions which would justify the delay. Ward v Rensselaer, 106 A.D.2d 719, 483 N.Y.S.2d 763, 1984 N.Y. App. Div. LEXIS 21661 (N.Y. App. Div. 3d Dep't 1984).

Supreme Court abused its discretion by allowing insured in action arising from fire loss claim to re-plead his claim for punitive damages and attorney's fees where proposed amendment merely speculated that insurer engaged in general business practice and failed to demonstrate by affidavit or otherwise that insurer engaged in any activities harmful to general public; court should have denied leave to re-plead claim for punitive damages and attorney's fees without prejudice to renewal upon proper papers pursuant to CLS CPLR § 3211(e). Piduch v Lumbermens Mut. Casualty Co., 124 A.D.2d 999, 508 N.Y.S.2d 790, 1986 N.Y. App. Div. LEXIS 62325 (N.Y. App. Div. 4th Dep't 1986).

Special Term erred in granting guarantor's motion to serve amended pleadings where his proposed defense (based on bank's security interest) in bank's action to enforce guarantee was "palpably invalid," in that, pursuant to guarantee, guarantor expressly agreed that his obligation would not be affected by loss or change in priority of bank's security interest. Marine Midland Bank, N. A. v Bob Daubney Bowling Enterprises, Inc., 136 A.D.2d 963, 524 N.Y.S.2d 945, 1988 N.Y. App. Div. LEXIS 1304 (N.Y. App. Div. 4th Dep't), app. denied, 72 N.Y.2d 810, 534 N.Y.S.2d 938, 531 N.E.2d 658, 1988 N.Y. LEXIS 2916 (N.Y. 1988).

It was improvident exercise of discretion for court to grant leave to plaintiff in personal injury action to amend ad damnum clause by doubling amount sought and to supplement and amend bill of particulars where plaintiff had already prevailed at trial on issue of liability and then sought to make amendments without submitting either her own affidavit or medical affidavit demonstrating causal relationship between more severe injuries claimed and accident. Ligon v Metropolitan Suburban Bus Authority, 151 A.D.2d 462, 542 N.Y.S.2d 252, 1989 N.Y. App. Div. LEXIS 7492 (N.Y. App. Div. 2d Dep't 1989).

Individuals who received copy of private offering, and subsequently invested in corporation, were improperly granted leave to amend complaint to re-plead their cause of action sounding in fraud against law firm and its members who prepared private offering for corporation where proposed pleading contained very few particulars as to circumstances under which plaintiffs invested in corporation, amount of money invested, and damages plaintiffs sustained as result of their investments. Metral v Horn, 213 A.D.2d 524, 624 N.Y.S.2d 177, 1995 N.Y. App. Div. LEXIS 2918 (N.Y. App. Div. 2d Dep't 1995).

It was abuse of discretion to grant plaintiff's motion for leave to serve amended summons and complaint under CLS CPLR §§ 305(c) and 3025 where there was no evidence that individual in question, intended defendant who was misnamed in original in original process, was properly served; under circumstances, court never obtained jurisdiction over individual and lacked power to grant amendment. Vandermallie v Liebeck, 225 A.D.2d 1069, 639 N.Y.S.2d 208, 1996 N.Y. App. Div. LEXIS 2908 (N.Y. App. Div. 4th Dep't), reh'g denied, 647 N.Y.S.2d 653, 1996 N.Y.

App. Div. LEXIS 10988 (N.Y. App. Div. 4th Dep't 1996), app. dismissed, 89 N.Y.2d 916, 653 N.Y.S.2d 919, 676 N.E.2d 501, 1996 N.Y. LEXIS 4357 (N.Y. 1996).

It was abuse of discretion to grant defendant's motion for leave to serve second amended answer where plaintiff showed that he would be significantly prejudiced by defendant's delayed assertion of Statute of Limitations as affirmative defense. Taylor v Village of Ilion, 231 A.D.2d 923, 648 N.Y.S.2d 362, 1996 N.Y. App. Div. LEXIS 10820 (N.Y. App. Div. 4th Dep't 1996).

In action seeking damages primarily under liquidated damages portion of Letter of Credit Guarantee and Indemnification Agreement, where court dismissed defendants' claim that there had been effective oral modification of agreement following trial conducted solely on that issue, it was abuse of discretion for court to then allow defendants to amend their answer to assert that plaintiff did not comply with notice provisions of agreement when serving particular document, and to dismiss complaint based on claim belatedly raised by amendment, as (1) plaintiff's method of mailing constituted violation of parties' agreement only under defendants' interpretation, and (2) defendants' course of conduct through trial, including their substantial payment to plaintiff on receipt of disputed mailing, waived issue of notice respecting particular document. Seacom, Inc. v Joseph Tobias & Sons, 234 A.D.2d 180, 651 N.Y.S.2d 467, 1996 N.Y. App. Div. LEXIS 12559 (N.Y. App. Div. 1st Dep't 1996).

While there was jurisdictional predicate for service of supplemental summons and amended complaint on un-joined defendants who were united in interest with named defendants, it was error to grant plaintiff leave to amend judgment by adding un-joined defendants, where judgment was entered on default and there was no basis to hold default of original defendants against parties who were not joined. Cruz v Vinicio, 259 A.D.2d 294, 686 N.Y.S.2d 409, 1999 N.Y. App. Div. LEXIS 2392 (N.Y. App. Div. 1st Dep't 1999).

It was abuse of discretion to grant leave to amend complaint to add new theory of liability and to increase ad damnum clause, considering inexcusable delay of 6 ½ years in seeking to amend, and lack of any evidentiary showing of merit. It was abuse of discretion to allow plaintiff to amend her complaint to add third-party defendants as direct defendants because, although she

contended that proposed legal malpractice claims related back to defendant law firm's third-party negligence claims, record revealed that her legal malpractice claims were barred by 3-year statute of limitations when defendant's third-party action was commenced. Spence v Bear Stearns & Co., 264 A.D.2d 601, 694 N.Y.S.2d 654, 1999 N.Y. App. Div. LEXIS 9093 (N.Y. App. Div. 1st Dep't 1999).

Because plaintiff's slander claims were not viable, Supreme Court erred in giving him permission to re-plead them; Appellate Division modified order by granting summary judgment to defendant and dismissing complaint. Gelbard v Bodary, 270 A.D.2d 866, 706 N.Y.S.2d 801, 2000 N.Y. App. Div. LEXIS 3607 (N.Y. App. Div. 4th Dep't), app. denied, 95 N.Y.2d 756, 712 N.Y.S.2d 448, 734 N.E.2d 760, 2000 N.Y. LEXIS 1849 (N.Y. 2000).

Trial court abused its discretion in granting plaintiffs' motion for leave to amend their complaint to assert direct claims against third-party defendants in an action arising out of the collapse of an insurance trust fund; plaintiffs failed to provide a reasonable excuse for their delay in bringing the direct claims against third-party defendants, and third-party defendants would be prejudiced if plaintiffs were allowed to file the amended complaint. Oil Heat Inst. v RMTS Assocs., LLC, 4 A.D.3d 290, 772 N.Y.S.2d 313, 2004 N.Y. App. Div. LEXIS 2052 (N.Y. App. Div. 1st Dep't 2004).

Trial court erred in granting a survivor's motion pursuant to N.Y. C.P.L.R. 3025(b) to amend a wrongful death action, as the survivor's claims that a holding company caused the death of a decedent were sheer speculation. Guzov v Manor Lodge Holding Corp., 13 A.D.3d 482, 787 N.Y.S.2d 84, 2004 N.Y. App. Div. LEXIS 15581 (N.Y. App. Div. 2d Dep't 2004), app. dismissed, 5 N.Y.3d 821, 804 N.Y.S.2d 31, 837 N.E.2d 731, 2005 N.Y. LEXIS 2573 (N.Y. 2005).

Supreme court abused its discretion in granting an employee's motion for leave to amend his complaint, 18 years after filing his original complaint for unpaid wages, without offering an explanation for his failure to plead in his complaint or bill of particulars that the owner was liable based on his status as an owner or stockholder of the employee's former employer, as said delay prejudiced the owner and deprived him of the opportunity to obtain corporate information when it most likely would have been available, considering that the owner had no reason to

obtain those records without any allegation that he owned the employee's former employer; thus, on remand, the motion was to be denied, and the owner was entitled to dismissal of the complaint against him. Clark v MGM Textiles Indus., 18 A.D.3d 1006, 794 N.Y.S.2d 735, 2005 N.Y. App. Div. LEXIS 5176 (N.Y. App. Div. 3d Dep't 2005).

Lower court improperly dismissed the claims against the individual employer physicians based upon their workers' compensation law exclusivity affirmative defense since the motion to amend their complaint to add that defense was late under N.Y. C.P.L.R. 3025(b) as it was made on the eve of trial and the physicians failed to meet their heavy burden to show extraordinary circumstances to justify the amendment and otherwise give an adequate explanation for the delay. Sweeney v Purcell Constr. Corp., 20 A.D.3d 872, 798 N.Y.S.2d 613, 2005 N.Y. App. Div. LEXIS 7485 (N.Y. App. Div. 4th Dep't 2005).

Because the tenants sought to introduce separate causes of action of which the landlord was reportedly unaware, and because some of the actions were untimely and/or would prejudice the landlord, the trial court erred in granting the tenants' N.Y. C.P.L.R. § 3025(b) motion for leave to amend the complaint. Krioutchkova v Gaad Realty Corp., 28 A.D.3d 427, 814 N.Y.S.2d 171, 2006 N.Y. App. Div. LEXIS 4066 (N.Y. App. Div. 2d Dep't 2006).

Pursuant to N.Y. C.P.L.R. 3025, the trial court erroneously granted the insured parties' cross motion for leave to serve an amended complaint, as the cross motion, made in response to the insurer's motion to dismiss under former N.Y. C. P.L.R. 3211(e), which remained applicable because the action was commenced before January 1, 2006, did not establish a good ground to replead; there was no cause of action for bad faith refusal to comply with an insurance contract, and there was no basis to recover punitive damages since there was no alleged pattern of conduct directed at the public generally. Johnson v Allstate Ins. Co., 33 A.D.3d 665, 823 N.Y.S.2d 415, 2006 N.Y. App. Div. LEXIS 12284 (N.Y. App. Div. 2d Dep't 2006).

Because an expert's affirmation in support of a plaintiff's N.Y. C.P.L.R. 3025(b) motion to amend did not demonstrate a causal connection between a doctor's alleged failure to monitor a decedent's Lithium levels and death, the plaintiff's proposed amendment to the bill of particulars

lacked merit, and the trial court erred in granting the motion. Katechis v Our Lady of Mercy Med. Ctr., 36 A.D.3d 514, 828 N.Y.S.2d 58, 2007 N.Y. App. Div. LEXIS 599 (N.Y. App. Div. 1st Dep't 2007).

In a mortgage action, the trial court improperly granted a corporation's oral application for leave to amend the complaint pursuant to N.Y. C.P.L.R. 3025(b), as the oral application not only caused surprise and prejudice to defendants, but they were not allowed to submit an amended answer to the pleading being amended. Countrywide Funding Corp. v Reynolds, 41 A.D.3d 524, 839 N.Y.S.2d 108, 2007 N.Y. App. Div. LEXIS 7413 (N.Y. App. Div. 2d Dep't 2007).

Since the trial court lacked jurisdiction under N.Y. Ct. Cl. Act § 9(2) over an action against the State Insurance Fund, it erred in allowing a corporate president to amend a complaint against the Fund under N.Y. C.P.L.R. 3025(b). D'Angelo v State Ins. Fund, 48 A.D.3d 400, 852 N.Y.S.2d 192, 2008 N.Y. App. Div. LEXIS 1066 (N.Y. App. Div. 2d Dep't 2008).

In his claim arising from his dealings with a mortgage broker, a borrower failed to allege a material omission of fact which was false and which the mortgage broker knew to be false; further, the mortgage broker's conduct, as alleged by the borrower, did not evidence a high degree of moral culpability, was not so flagrant as to transcend mere carelessness, and did not constitute willful or wanton negligence or recklessness, and thus did not support an award of punitive damages. Therefore, the trial court erred in granting the borrower's cross motion for leave to amend his complaint to add a cause of action alleging fraud and a demand for punitive damages. Shovak v Long Is. Commercial Bank, 50 A.D.3d 1118, 858 N.Y.S.2d 660, 2008 N.Y. App. Div. LEXIS 3885 (N.Y. App. Div. 2d Dep't), app. dismissed, app. denied, 11 N.Y.3d 762, 864 N.Y.S.2d 806, 894 N.E.2d 1196, 2008 N.Y. LEXIS 2663 (N.Y. 2008).

Trial court erred in granting leave to amend to assert counterclaims for abuse of process and malicious prosecution under N.Y. C.P.L.R. 3025(b) because there was no evidence that the suit was brought with an intent to do harm without excuse or justification, and the suit did not give rise to a malicious prosecution counterclaim; further, New York did not recognize a separate cause of action to impose a sanction, and thus the motion to amend to assert a counterclaim to

impose a sanction pursuant to N.Y. Comp. Codes R. & Regs. tit. 22, § 130-1.1 should have been denied. Greco v Christoffersen, 70 A.D.3d 769, 896 N.Y.S.2d 363, 2010 N.Y. App. Div. LEXIS 929 (N.Y. App. Div. 2d Dep't 2010).

Trial court erred in granting a patient's motion for leave to serve an amended complaint to assert causes of action alleging negligent hiring and negligent supervision against a hospital because the mere reference to “negligence” in her original complaint for medical malpractice and lack of informed consent did not give the hospital notice of her proposed causes of action, the proposed causes of action accrued outside the applicable three-year statute of limitations, and the patient failed to allege the due diligence element of equitable estoppel. Calamari v Panos, 131 A.D.3d 1088, 16 N.Y.S.3d 824, 2015 N.Y. App. Div. LEXIS 6792 (N.Y. App. Div. 2d Dep't 2015).

In a suit for damages for breach of a collective bargaining agreement, it was error to grant a county leave to amend an answer to assert a statute of limitations defense because (1) the county's motion was filed six years after service of the county's answer, after discovery was completed, and after the note of issue was filed, causing significant prejudice to a union and the union's member, and (2) the county was aware of the facts supporting the statute of limitations defense when serving the answer but offered no excuse for the delay in asserting this defense. Civil Serv. Empls. Assn. v County of Nassau, 144 A.D.3d 1075, 43 N.Y.S.3d 390, 2016 N.Y. App. Div. LEXIS 7882 (N.Y. App. Div. 2d Dep't 2016).

Trial court erred in granting a lender’s motion for leave to amend the complaint to add a nonparty as a defendant and to add a declaration that any ownership interest in the subject property by the nonparty was subject to the lender’s mortgage interest, and to foreclose the nonparty’s ownership interest, and denied a borrower’s cross-motion to dismiss the complaint insofar as asserted against her as abandoned because the lender failed to demonstrate that it had a reasonable excuse for its delay in taking proceedings for entry of a default judgment, failed to meet its burden to show sufficient cause why the complaint should not be dismissed. HSBC Bank USA, N.A. v Cross, 205 A.D.3d 779, 169 N.Y.S.3d 94, 2022 N.Y. App. Div. LEXIS 3040 (N.Y. App. Div. 2d Dep't 2022).

Substituting a cause of action alleging a violation of an allegedly injured party's procedural due process rights under § 1983 in place of the party's cause of action alleging an unlawful taking was error because the city was prejudiced and surprised by the addition of the cause of action after the parties had rested, and the city was precluded from offering evidence regarding the procedural due process claim. Mega Beverage Redemption Ctr., Inc. v City of Mount Vernon, 2025 N.Y. App. Div. LEXIS 3406 (N.Y. App. Div. 2d Dep't 2025).

In personal injury action transferred from Supreme Court, Civil Court of City of New York improperly granted plaintiff's motion at close of testimony to amend ad damnum clause from $1 million to $3 million, since Civil Court has no authority to entertain such motions in actions transferred to that court pursuant to CLS CPLR § 325; accordingly, damage award of $2.5 million would be reduced to $1 million. Reyes v Jaquez, 135 Misc. 2d 48, 515 N.Y.S.2d 172, 1987 N.Y. Misc. LEXIS 2175 (N.Y. App. Term 1987).

17. —Abuse of discretion in denying amendment

Where the defendant had three years before the trial served a notice on plaintiff stating that upon trial it would move for leave to amend its answer, the trial court's denial of defendant's motion was an abuse of discretion in view of the fact that plaintiff was neither surprised nor prejudiced by the motion. Godell v Greyhound Rent A Car, Inc., 24 A.D.2d 568, 262 N.Y.S.2d 318, 1965 N.Y. App. Div. LEXIS 3694 (N.Y. App. Div. 2d Dep't 1965).

Leave to serve a supplemental complaint should be freely given, and the denial of such leave was an improvident exercise of discretion. Greenwald v Howard Stores Corp., 24 A.D.2d 626, 262 N.Y.S.2d 642, 1965 N.Y. App. Div. LEXIS 3479 (N.Y. App. Div. 2d Dep't 1965).

It was an improvident exercise of discretion to deny leave to the owner of an automobile to serve an amended answer alleging a cross-claim against the service station that had possession of the vehicle and its employee who drove the vehicle at the time of the accident. Lucas v St. Johns-Ralph Service Center, Inc., 26 A.D.2d 646, 272 N.Y.S.2d 409, 1966 N.Y. App. Div. LEXIS 3695 (N.Y. App. Div. 2d Dep't 1966).

Where injuries sustained could result in verdict in excess of that prayed for in original complaint, special term improvidently exercised its discretion in denying plaintiffs' motion to increase ad damnum clause in complaint. Moore v Wilson, 51 A.D.2d 973, 380 N.Y.S.2d 301, 1976 N.Y. App. Div. LEXIS 11705 (N.Y. App. Div. 2d Dep't 1976).

In absence of any showing of prejudice, trial court abused its discretion in denying motion of defendant for permission to serve an amended answer. Albany Crane Service, Inc. v Pettibone Mulliken Corp., 54 A.D.2d 794, 387 N.Y.S.2d 740, 1976 N.Y. App. Div. LEXIS 14483 (N.Y. App. Div. 3d Dep't 1976).

In action to recover balance due for work, labor and services, in which defendants' bill of particulars specified that full extent of damages being suffered by them was not yet ascertainable because of continuing nature of damage, trial court abused its discretion in denying defendants' motion for leave to amend ad damnum clause of the counterclaim, in absence of showing of prejudice to plaintiff. Sheldon Electric Co. v Oriental Boulevard Corp., 56 A.D.2d 886, 392 N.Y.S.2d 485, 1977 N.Y. App. Div. LEXIS 11272 (N.Y. App. Div. 2d Dep't 1977).

In a personal injury action, the plaintiff's motion to increase the ad damnum clause should have been granted where there appeared no showing of prejudice to the defendants. Person v Noya Cab Corp., 83 A.D.2d 607, 441 N.Y.S.2d 813, 1981 N.Y. App. Div. LEXIS 14895 (N.Y. App. Div. 2d Dep't 1981).

Where plaintiffs were not examined before trial in relation to the facts and circumstances pertaining to the existence of the agreement waiving claims of contribution or indemnity as between themselves, where the necessary disclosure proceedings had not been completed until after an order was made denying the insurer's motion to strike the action from the trial calendar on condition that the plaintiffs appear for examination before trial, and where a copy of the alleged agreement was not supplied to the insurer until shortly after February 6, 1980, the motion made by the defendant insurer on February 14, 1980, shortly after the conclusion of the discovery status of the matter, for leave to amend its answer, was neither untimely nor

prejudicial to the plaintiffs, and the denial of this branch of the insurer's motion constituted an improvident exercise of the court's discretion. Milgo Industrial, Inc. v United States Fire Ins. Co., 83 A.D.2d 832, 441 N.Y.S.2d 558, 1981 N.Y. App. Div. LEXIS 15204 (N.Y. App. Div. 2d Dep't 1981).

In an action for an accounting and judgment for money due, defendant was entitled to amend his answer and to interpose a counterclaim, even though the counterclaim had been previously dismissed by Special Term for improper pleading, and defendant had since retained counsel, where, although leave to amend a pleading ordinarily lies in the sound discretion of the trial court, the counterclaim defendant sought to assert in the amended pleading was for a setoff against amounts claimed by plaintiffs, and it would be counterproductive to judicial economy to require defendant to commence a separate action so closely related to plaintiffs' claim, and where there could be no valid claim of surprise by plaintiffs nor would any actual prejudice result by permitting defendant to amend his answer to assert the counterclaim. Pignataro v Balsamo, 108 A.D.2d 1086, 485 N.Y.S.2d 656, 1985 N.Y. App. Div. LEXIS 43388 (N.Y. App. Div. 3d Dep't 1985).

Although prospective buyer's action for breach of agreement to purchase property contained in decedent's estate was properly dismissed for failure to state claim, court erred in refusing to grant leave to serve amended complaint seeking return of $5,000 down payment where valid questions of fact were raised as to whereabouts of money and who was entitled to it. Cohn v United States Trust Co., 127 A.D.2d 523, 512 N.Y.S.2d 37, 1987 N.Y. App. Div. LEXIS 42999 (N.Y. App. Div. 1st Dep't 1987).

In fraud action, trial court abused its discretion by denying defendant's motion to serve amended verified answer absent substantial prejudice to plaintiffs or patent futility of proposed amendment where all affirmative defenses and counterclaims sought to be interposed were supported by facts already developed and known to both parties since inception of case, and case was not even on trial calendar when motion for leave to serve amended verified answer was made.

Cutwright v Central Brooklyn Urban Dev. Corp., 127 A.D.2d 731, 512 N.Y.S.2d 128, 1987 N.Y. App. Div. LEXIS 43219 (N.Y. App. Div. 2d Dep't 1987).

In divorce action, Special Term abused its discretion in refusing to permit husband to serve supplemental complaint in order to add allegations of cruel and inhuman treatment where wife failed to demonstrate that she would be unduly prejudiced. Getz v Getz, 130 A.D.2d 710, 516 N.Y.S.2d 26, 1987 N.Y. App. Div. LEXIS 46729 (N.Y. App. Div. 2d Dep't 1987).

Court should have granted defendant’s motion to amend his answer to interpose affirmative defense of statute of limitations where (1) defendant’s answer, which included affirmative defense of lack of personal jurisdiction, alerted plaintiffs to fact that veracity of their process server was being challenged, and put them on notice that statute of limitations problem might exist, (2) it could not be said that proposed amendment clearly lacked merit, and (3) there was no inordinate delay in bringing motion to amend. Rothfarb v Brookdale Hospital, 139 A.D.2d 720, 527 N.Y.S.2d 473, 1988 N.Y. App. Div. LEXIS 4478 (N.Y. App. Div. 2d Dep't 1988).

Delay in seeking amendment to pleadings, even delay of several years, is not sufficient ground for denying amendment and, absent showing of prejudice or surprise resulting directly from delay, it is abuse of discretion as matter of law to deny motion to amend. Stengel v Clarence Materials Corp., 144 A.D.2d 917, 534 N.Y.S.2d 28, 1988 N.Y. App. Div. LEXIS 14367 (N.Y. App. Div. 4th Dep't 1988).

It was error to deny defendant’s motion to serve amended answer to assert new affirmative defenses and counterclaim where no discovery had been conducted, motion was brought within 6 months of filing of original answer, and plaintiff failed to show that he would be prejudiced; mere fact that plaintiff had expended time and money to initiate lawsuit, and that proposed amendments might defeat cause of action, was not kind of prejudice law contemplated to deny amendment. Ozen v Yilmaz, 181 A.D.2d 666, 580 N.Y.S.2d 468, 1992 N.Y. App. Div. LEXIS 3006 (N.Y. App. Div. 2d Dep't 1992).

It was abuse of discretion to deny defendants' motion to amend answer to assert affirmative defense of unavoidable accident due to brake failure where proposed amendment did not prejudice plaintiffs, and affirmative defense was not patently lacking in merit. Suitor v Boivin, 219 A.D.2d 799, 631 N.Y.S.2d 960, 1995 N.Y. App. Div. LEXIS 10801 (N.Y. App. Div. 4th Dep't 1995).

In consolidated actions to recover on promissory notes, it was abuse of discretion to deny defendants' motion to amend their answers to interpose affirmative defense and counterclaim alleging undue influence over individual defendant where that defense was based on same factual allegations already contained in defendants' answers, and there had already been 2 court orders acknowledging that defendants were mounting such defense. Union State Bank v STPT Realty, 231 A.D.2d 623, 648 N.Y.S.2d 37, 1996 N.Y. App. Div. LEXIS 9472 (N.Y. App. Div. 2d Dep't 1996).

Court abused its discretion by denying defendant's motion for leave to amend answer to allege affirmative defense of duress, merely on basis of delay, where plaintiffs failed to show prejudice as result of delay. Schafer v Albro, 233 A.D.2d 900, 649 N.Y.S.2d 260, 1996 N.Y. App. Div. LEXIS 13389 (N.Y. App. Div. 4th Dep't 1996).

Trial court erred in denying the motion by the wheelchair service and its employee to serve an amended answer to an injured party's personal injury action that arose from an automobile accident, as under the circumstances, the trial court abused its discretion because the injured party showed no prejudice pursuant to N.Y. C.P.L.R. 3025(b). Bender v Rodriguez, 302 A.D.2d 882, 754 N.Y.S.2d 475, 2003 N.Y. App. Div. LEXIS 1145 (N.Y. App. Div. 4th Dep't 2003).

In plaintiff injured party's action to recover for personal injuries, the trial court erred in denying the injured party's cross motion pursuant to N.Y. C.P.L.R. 3025(b) for leave to amend the bill of particulars to plead a "significant disfigurement," as defendants, an individual and others, did not demonstrate prejudice from allowing the amendment and the allegation that the injured party's head scar constituted a "significant disfigurement" within the meaning of N.Y. Ins. Law § 5102(d)

was not patently without merit. Luberda v Spameni, 303 A.D.2d 384, 755 N.Y.S.2d 662, 2003 N.Y. App. Div. LEXIS 2166 (N.Y. App. Div. 2d Dep't 2003).

Trial court erred in denying an injured party's motion to vacate a default judgment pursuant to N.Y. C.P.L.R. 2005 in a personal injury action, because the injured party set forth a reasonable excuse for the default, as one attorney failed to appear due to a medical emergency and another attorney appeared in the wrong location due to an office diary error, and the underlying negligence claim was meritorious; the trial court further erred in denying a motion for leave to amend the complaint pursuant to N.Y. C.P.L.R. 3025 (2003) to add a necessary party and new claims and to issue a supplemental summons to correct a misnomer and to add a new party, because while the injured party named an entity that did not exist in the initial complaint, defendants should have been estopped from any claim of a defective filing, since they knew from the outset that but for a mistake, the action would have been properly brought. Cardinale v Woolworth's, Inc., 304 A.D.2d 351, 758 N.Y.S.2d 296, 2003 N.Y. App. Div. LEXIS 3765 (N.Y. App. Div. 1st Dep't 2003).

Trial court erred in denying plaintiff's motion for leave to amend, pursuant to N.Y. C.P.L.R. 3025(b), four causes of action to recover damages for breach of contract; defendant did not demonstrate prejudice based on such an amendment, or even oppose the motion. AYW Networks, Inc. v Teleport Communs. Group, Inc., 309 A.D.2d 724, 765 N.Y.S.2d 379, 2003 N.Y. App. Div. LEXIS 10477 (N.Y. App. Div. 2d Dep't), app. dismissed, 1 N.Y.3d 566, 775 N.Y.S.2d 783, 807 N.E.2d 896, 2003 N.Y. LEXIS 4172 (N.Y. 2003).

Where defendants moved promptly for leave to amend their answer upon learning of a plaintiff's bankruptcy, that plaintiff did not show any surprise or prejudice, and the proposed amendment was not patently devoid of merit, leave to amend the answer should have been allowed pursuant to N.Y. C.P.L.R. 3025(b). Ortega v Bisogno & Meyerson, 2 A.D.3d 607, 769 N.Y.S.2d 279, 2003 N.Y. App. Div. LEXIS 13326 (N.Y. App. Div. 2d Dep't 2003).

In a dispute between an landlord and a tenant, where determination of issues surrounding an estoppel certificate was not determinative of the parties' rights at this juncture, it was appropriate

to grant the landlord's motion to amend its complaint so that a resolution of all of the parties' obligations arising under the landlord-tenant relationship could be achieved in the same proceeding. Bush Realty Assocs. v A.M. Cosmetics, Inc., 2 A.D.3d 270, 770 N.Y.S.2d 19, 2003 N.Y. App. Div. LEXIS 13577 (N.Y. App. Div. 1st Dep't 2003).

Where mere lateness was not a barrier to amendment of the pleadings and a defendant-appellant was entitled to contribution and indemnity on its tort claims pursuant to N.Y. C.P.L.R. 1401, the amendment of the answer to assert the cross claim should have been granted. Masterwear Corp. v Bernard, 3 A.D.3d 305, 771 N.Y.S.2d 72, 2004 N.Y. App. Div. LEXIS 27 (N.Y. App. Div. 1st Dep't 2004).

Since applicable statute of limitations for personal injury actions against the Triborough Bridge and Tunnel Authority was the one-year period found in N.Y. Pub. Auth. Law § 569-a(2), and not the one-year and 90-day period found in N.Y. Gen. Mun. Law § 50-i(1) and since the Authority was not a not a N.Y. Gen. Mun. Law § 50-i(1) entity, trial court should have granted Authority's motion to amend its answer, under under N.Y. C.P.L.R. § 3025(b), to add that defense (even though the time period had elapsed, the plaintiff was not prejudiced) and should have dismissed the plaintiff's complaint against the Authority. Arcuri v Ramos, 7 A.D.3d 741, 776 N.Y.S.2d 895, 2004 N.Y. App. Div. LEXIS 7292 (N.Y. App. Div. 2d Dep't 2004).

Trial court erred in denying an inmate's motion pursuant to N.Y. C.P.L.R. 3025(b) to amend a medical malpractice claim against the State; the new allegations referred to separate and distinct acts of malpractice occurring outside of the limited time frame originally specified. Bastian v State, 8 A.D.3d 764, 779 N.Y.S.2d 589, 2004 N.Y. App. Div. LEXIS 7922 (N.Y. App. Div. 3d Dep't 2004).

In an employee's personal injury suit against a manufacturer of certain equipment on which the employee was injured while he was at work, the trial court abused its discretion in denying the employee's motion for leave to incorporate additional allegations against the manufacturer because the employee's proposed amendments merely reflected new facts uncovered during discovery and were consistent with the employee's existing theories. Thus, they had merit and

would not result in significant prejudice or surprise under N.Y. C.P.L.R. 3025(b). Saldivar v I.J. White Corp., 9 A.D.3d 357, 780 N.Y.S.2d 28, 2004 N.Y. App. Div. LEXIS 9342 (N.Y. App. Div. 2d Dep't 2004).

In the medical malpractice case, where plaintiff failed to demonstrate prejudice or surprise, the trial court erred by vacating its order granting defendants' motion for leave to amend their answers pursuant to N.Y. C.P.L.R. 3025 in order to plead the affirmative defense of setoff under N.Y. Gen. Oblig. Law § 15-108 and denying defendants' motion. Frenz v Mettu, 15 A.D.3d 539, 789 N.Y.S.2d 897, 2005 N.Y. App. Div. LEXIS 1874 (N.Y. App. Div. 2d Dep't 2005).

Trial court erred in denying the neighbor leave to serve a supplemental pleading to allege the owner's continuing failure to maintain sewage and draining pipes and the resultant damages to the neighbor pursuant to N.Y. C.P.L.R. 3025(b); the neighbor's recent inspection of the owner's building showed an improper drainage system on the property. Garner v Agiovlasitis, 18 A.D.3d 368, 795 N.Y.S.2d 556, 2005 N.Y. App. Div. LEXIS 5694 (N.Y. App. Div. 1st Dep't 2005).

Trial court improvidently denied a cross motion of a contractor and an insurance company for leave to serve an amended answer to include a claim for delay damages against a subcontractor; the claim proposed was not palpably insufficient, the delay in asserting it was brief, and the subcontractor failed to show that it would be prejudiced or surprised by the claim. Oakwood Realty Corp. v HRH Constr. Corp., 19 A.D.3d 668, 798 N.Y.S.2d 89, 2005 N.Y. App. Div. LEXIS 7251 (N.Y. App. Div. 2d Dep't 2005).

Since the proposed amended unfair competition claim was not patently without merit and merely sought to add a new theory of recovery, without alleging new or different transactions, the former employee and corporation would not have been surprised or prejudiced by the amendment as the brewing company had already asserted an unfair competition claim. Beverage Mktg. USA v S. Beach Bev. Co., 20 A.D.3d 439, 799 N.Y.S.2d 242, 2005 N.Y. App. Div. LEXIS 7730 (N.Y. App. Div. 2d Dep't 2005).

Because a wrongful death action, filed more than two years after the death of the decedent, was not tolled pursuant to N.Y. C.P.L.R. § 208 by the infancy of the decedent's children, the action was untimely under N.Y. Est. Powers & Trusts Law § 5-4. 1; therefore, the trial court erred in denying a general contractor's motion for leave to amend its answer under N.Y. C.P.L.R. § 3025(b). Public Adm'r v Hossain Constr. Corp., 27 A.D.3d 714, 815 N.Y.S.2d 621, 2006 N.Y. App. Div. LEXIS 3808 (N.Y. App. Div. 2d Dep't 2006).

Plaintiff's motion to leave to serve an amended bill of particulars alleging new injuries should have been granted; plaintiff, who sought to amend her bill of particulars 10 months after she discharged her former attorneys for cause and obtained new counsel, established a reasonable excuse for the delay and a physician's affidavit showed that plaintiff's later epileptic seizures were causally related to the subject accident. Andre-Long v Verizon Corp., 31 A.D.3d 353, 819 N.Y.S.2d 56, 2006 N.Y. App. Div. LEXIS 8698 (N.Y. App. Div. 2d Dep't 2006).

In an action for medical malpractice, it was error for the trial court to deny plaintiffs' motion for leave to amend the bill of particulars because at the time the motion was made discovery was not complete and the motion was not made on the eve of trial. Singh v Rosenberg, 32 A.D.3d 840, 821 N.Y.S.2d 121, 2006 N.Y. App. Div. LEXIS 10628 (N.Y. App. Div. 2d Dep't 2006).

Trial court improperly denied property buyers' cross motion to amend the ad damnum clause of their complaint pursuant to N.Y. C.P.L.R. 3025(b) to add a claim for monetary damages based on anticipatory breach of contract because the amendment did not prejudice an estate administrator, who was substituted for the deceased seller and his wife. Thomas v Laustrup, 34 A.D.3d 1115, 825 N.Y.S.2d 555, 2006 N.Y. App. Div. LEXIS 13802 (N.Y. App. Div. 3d Dep't 2006).

Corporation, its president, and its chief executive officer should have been permitted to amend under N.Y. C.P.L.R. 3025(b) their reply to counterclaims regarding the validity of letter agreements with limited liability companies (LLCs) to assert an affirmative defense of fraud in the inducement as the cross-motion was made before any discovery was conducted, there was no inordinate delay in seeking such relief, and there was no showing of prejudice to the LLCs.

Torvec, Inc. v CXO on GO of Del., LLC, 38 A.D.3d 1175, 831 N.Y.S.2d 800, 2007 N.Y. App. Div. LEXIS 3411 (N.Y. App. Div. 4th Dep't 2007).

Trial court erred in denying defendant's motion pursuant to N.Y. C.P.L.R. 3025(b) to amend her counterclaim alleging legal malpractice, as a law firm's contention that it did not depart from the ordinary standard of care applicable in a matrimonial action involved factual issues not properly resolved on a motion to dismiss or for leave to amend. Caruso, Caruso & Branda, P.C. v Hirsch, 41 A.D.3d 407, 837 N.Y.S.2d 734, 2007 N.Y. App. Div. LEXIS 6963 (N.Y. App. Div. 2d Dep't 2007).

While a plaintiff's excuse for a delay in seeking to amend her bill of particulars could have been more compelling, the delay itself was short, and the ambulance company failed to demonstrate meaningful prejudice by the delay; therefore, the motion court improvidently exercised its discretion by denying the plaintiff's N.Y. C.P.L.R. 3025(b) motion. Cherebin v Empress Ambulance Serv., Inc., 43 A.D.3d 364, 841 N.Y.S.2d 277, 2007 N.Y. App. Div. LEXIS 9415 (N.Y. App. Div. 1st Dep't 2007).

Subcontractor should have been granted leave to amend the complaint under N.Y. C.P.L.R. 3025 to add a claim and parties because defendants were not hindered with regard to their case; further, the claims arose out of the same transaction, the new parties were united in interest with the original defendants, and the new parties should have known that, but for a mistake by the subcontractor, the action would have been brought against them as well. Pansini Stone Setting, Inc. v Crow & Sutton Assoc., Inc., 46 A.D.3d 784, 850 N.Y.S.2d 133, 2007 N.Y. App. Div. LEXIS 12851 (N.Y. App. Div. 2d Dep't 2007).

Denial of an insurance company's motion for leave to amend its answer to assert a defense based on N.Y. Ins. Law § 3407(a) was error because, absent prejudice or surprise, leave to amend should have been freely granted unless the proposed amendment was palpably insufficient or patently devoid of merit; further, this defense was not waived. Gongolewsky v Empire Ins. Co., 51 A.D.3d 720, 858 N.Y.S.2d 306, 2008 N.Y. App. Div. LEXIS 4190 (N.Y. App. Div. 2d Dep't 2008).

Denial of plaintiff's motion for leave to amend his complaint pursuant to N.Y. C.P.L.R. 3025(b) was error because the allegations supporting the proposed claims for waste and for imposition of a constructive trust were similar to the claims made in the original complaint and arose out of the same facts, defendant would not have been unduly prejudiced or surprised by the addition of his wholly-owned corporation as a defendant, there was no undue delay in bringing the motion, and the proposed claims were not devoid of merit. Fellner v Morimoto, 52 A.D.3d 352, 862 N.Y.S.2d 349, 2008 N.Y. App. Div. LEXIS 5455 (N.Y. App. Div. 1st Dep't 2008).

Trial court erred in denying owners' motion to add the defense of statute of frauds pursuant to N.Y. Gen. Oblig. Law § 5-703 to buyers' specific performance cause of action because, although the buyers claimed that they had partly performed the obligations of the purported oral agreement, the proposed amendment was neither palpably insufficient nor totally devoid of merit, and the buyers failed to show any prejudice or surprise from the proposed amendment. Mackenzie v Croce, 54 A.D.3d 825, 864 N.Y.S.2d 474, 2008 N.Y. App. Div. LEXIS 6798 (N.Y. App. Div. 2d Dep't 2008).

Under circumstances in which an investor's claim against lawyers was litigated in federal court until late 2005, the lawyer's interposed their motion to dismiss in February 2006, and the investor's capacity to bring derivative claims on behalf of a limited liability company had only recently been resolved, and, given that the detailed facts concerning the extent of the lawyers' involvement in the alleged fraudulent scheme were peculiarly within the knowledge of other parties and the substance of the alleged wrongdoing was set forth in the affidavits of the investor and her brother, the circumstances surrounding the proposed cause of action were sufficiently stated to support amendment of the complaint; moreover, at this stage of the proceedings, before joinder of issue and discovery, the lawyers would not have sustained prejudice as a result of the amendment. Yuko Ito v Suzuki, 57 A.D.3d 205, 869 N.Y.S.2d 28, 2008 N.Y. App. Div. LEXIS 9123 (N.Y. App. Div. 1st Dep't 2008).

Denial of a distributor's N.Y. C.P.L.R. 3025(b) motion for leave to amend his complaint to remedy deficiencies in his 42 U.S.C.S. § 1983 claim against a liquor authority was error because

leave to amend should have been freely granted and the proposed allegation of personal involvement was not plainly lacking in merit at the early pleading stage and appeared to have been based on more than mere speculation; under N.Y. Alco. Bev. Cont. Law §§ 10, 17(1), it could reasonably have been inferred that the conduct complained of, authorizing communication of a decision by the authority, would have required the direct knowledge and/or participation of at least one of the commissioners. Shelton v New York State Liquor Auth., 61 A.D.3d 1145, 878 N.Y.S.2d 212, 2009 N.Y. App. Div. LEXIS 2626 (N.Y. App. Div. 3d Dep't 2009).

Because it was clear that an owner's son was the intended defendant in a driver's personal injury action, and because the driver did not delay in seeking to amend the complaint to add the owner as a defendant, the driver's N.Y. C.P.L.R. 3025(b) cross-motion for leave to serve an amended complaint should have been granted. Kiaer v Gilligan, 63 A.D.3d 1009, 883 N.Y.S.2d 224, 2009 N.Y. App. Div. LEXIS 5153 (N.Y. App. Div. 2d Dep't 2009).

Corporation's cross motion seeking leave to serve an amended answer to a contractor's breach of contract claim to include affirmative defenses and counterclaims based on commercial bribery should have been granted pursuant to N.Y. C.P.L.R. 3025(b) because the corporation sufficiently pleaded all the elements of commercial bribery; specifically, the corporation alleged that the contractor conferred a benefit upon the corporation's employee, without the corporation's consent and with the intent to influence the employee's conduct. Tag Mech. Sys., Inc. v V.I.P. Structures, Inc., 63 A.D.3d 1504, 880 N.Y.S.2d 437, 2009 N.Y. App. Div. LEXIS 4413 (N.Y. App. Div. 4th Dep't 2009), app. dismissed, 77 A.D.3d 1317, 907 N.Y.S.2d 891, 2010 N.Y. App. Div. LEXIS 6952 (N.Y. App. Div. 4th Dep't 2010).

Trial court erred in denying companies leave to amend their answer to include affirmative defenses; the proposed affirmative defenses had merit, and the buyers failed to show surprise or prejudice. Pike v New York Life Ins. Co., 72 A.D.3d 1043, 901 N.Y.S.2d 76, 2010 N.Y. App. Div. LEXIS 3411 (N.Y. App. Div. 2d Dep't 2010).

Denial of a sergeant's cross motion for leave to amend to assert an N.Y. Gen. Mun. Law § 205-e claim was error because, inter alia, under § 205-e, a plaintiff did not need to establish that the

defendant’s violation of law was “proximate” cause of the injuries, but only that the injuries occurred directly or indirectly as a result of a violation; the motorist did not establish in her opposition to the cross motion that the proposed § 205-e claim was patently devoid of merit. Jablonski v Jakaitis, 85 A.D.3d 969, 926 N.Y.S.2d 137, 2011 N.Y. App. Div. LEXIS 5337 (N.Y. App. Div. 2d Dep't 2011).

Because neither the company nor the successor provided copies of records reasonably requested by the agency pursuant to the agreement, the trial court erred in denying the agency’s motion under N.Y. C.P.L.R. 3025(b) to amend the contract to add a cause of action for conversion against the successor. LHR, Inc. v T-mobile Usa, Inc., 88 A.D.3d 1301, 930 N.Y.S.2d 731, 2011 N.Y. App. Div. LEXIS 6992 (N.Y. App. Div. 4th Dep't 2011).

Trial court should have granted the defendants' motion for leave to because they sufficiently alleged that the plaintiff waived its entitlement to the remaining contract sum by entering into a second agreement, their assertion of the failure of a condition precedent set forth allegations based on factual matters that were not palpably insufficient or patently devoid of merit, and the plaintiff would not be prejudiced or surprised by the assertion of the proposed affirmative defenses. Marcum, LLP v Silva, 117 A.D.3d 917, 986 N.Y.S.2d 508, 2014 N.Y. App. Div. LEXIS 3604 (N.Y. App. Div. 2d Dep't 2014).

Trial court improperly denied an injured guest's cross-motion for leave to amend the complaint insofar as asserted against one of the owners because no surprise or prejudice would result from any delay in the motion and the proposed amendment was neither palpably insufficient nor patently without merit insofar as it pertained to that owner. Tirpack v 125 N. 10, LLC, 130 A.D.3d 917, 14 N.Y.S.3d 110, 2015 N.Y. App. Div. LEXIS 6108 (N.Y. App. Div. 2d Dep't 2015), app. dismissed, 2017 N.Y. App. Div. LEXIS 5847 (N.Y. App. Div. 2d Dep't July 5, 2017).

Trial court erred in denying a mortgage nominee's motions for leave to substitute a bank as the named plaintiff, for an order of reference, and for leave to enter a default judgment, because the substitution was unopposed and would not result in surprise or prejudice to the defendants, the appointment of a referee to compute the amount due on the mortgage was proper, and the

nominee submitted proof of service of a copy of the summons and complaint, proof of the facts constituting the claim, proof of the borrower's withdrawal of her answer, as well as evidence of the other defendants' failures to answer, appear, or limited appearance. Mortgage Elec. Registration Sys., Inc. v Holmes, 131 A.D.3d 680, 17 N.Y.S.3d 31, 2015 N.Y. App. Div. LEXIS 6553 (N.Y. App. Div. 2d Dep't 2015).

In a foreclosure action, the trial court abused its discretion by denying plaintiff's motion to substitute a second bank as plaintiff and amend the caption accordingly, as it was undisputed that plaintiff had ceased operations and, at the time the motion was decided, the other bank was the holder of the note and mortgage. Washington Mut. Bank v Nussen, 138 A.D.3d 828, 29 N.Y.S.3d 522, 2016 N.Y. App. Div. LEXIS 2682 (N.Y. App. Div. 2d Dep't 2016).

Trial court erred in denying the first driver's cross-motion for leave to serve an amended complaint adding causes of actions against the employer because the first driver established the applicability of the relation-back doctrine where there was no showing that the first driver's failure to initially join the employer as a defendant was in bad faith or that the employer was prejudiced, and the employer should have known that, but for the first driver's mistake in identifying the named defendant as the second driver's employer, the action would have been timely brought against it as well. Marrone v Miloscio, 145 A.D.3d 996, 44 N.Y.S.3d 502, 2016 N.Y. App. Div. LEXIS 8702 (N.Y. App. Div. 2d Dep't 2016).

After a brother's petition against coexecutrices to compel the turnover of information about a decedent's estate's assets was dismissed, it was error to deny the coexecutrices' motion to amend to assert claims against the brother on the ground the amended pleading changed the coexecutrices' status to petitioners and that the relief the coexecutrices sought had to be initiated by a petition because (1) the counterclaims were viable despite the dismissal, (2) in properly asserting the counterclaims the coexecutrices were, in substance, petitioners and the only remaining “petitioners” in the proceeding, and (3) nothing showed the amended pleading was palpably insufficient or patently devoid of merit, or that the brother would be unfairly

surprised or prejudiced by the delay in serving an amended pleading. Matter of Eshaghian, 144 A.D.3d 1155, 43 N.Y.S.3d 378, 2016 N.Y. App. Div. LEXIS 7918 (N.Y. App. Div. 2d Dep't 2016).

Trial court erred in denying a police officer's motion to amend the bill of particulars to allege a violation of the Vehicle and Traffic Law because the proposed amendment was not palpably insufficient or patently devoid of merit, and there was no evidence that it would prejudiced or surprised the lessor and lessee. Lynch v Baker, 138 A.D.3d 695, 30 N.Y.S.3d 126, 2016 N.Y. App. Div. LEXIS 2502 (N.Y. App. Div. 2d Dep't 2016).

Trial court erred in denying the assignees' motion to amend the caption because the original lender assigned its interest in the note, mortgage, and the action to the first assignee after the action had been commenced, the assignee assigned a security interest in the note and mortgage to the second assignee, and the borrower did not oppose the substitution request. Flushing Sav. Bank v Chester Latham, 139 A.D.3d 663, 32 N.Y.S.3d 206, 2016 N.Y. App. Div. LEXIS 3346 (N.Y. App. Div. 2d Dep't 2016).

Trial court should have granted plaintiff's cross motion for leave to amend the complaint because plaintiff sought leave to amend her complaint before defendants served their answer, and her proposed cause of action alleging a violation of the labor law prohibiting a health care employer from penalizing an employee because of complaints of employer violations was neither palpably insufficient nor patently devoid of merit. Fough v August Aichhorn Ctr. for Adolescent Residential Care, Inc., 139 A.D.3d 665, 30 N.Y.S.3d 677, 2016 N.Y. App. Div. LEXIS 3408 (N.Y. App. Div. 2d Dep't 2016).

Trial court erred in denying two partners' cross-motion for leave to serve an amended complaint alleging a cause of action to recover damages for aiding and abetting a breach of fiduciary duty because the proposed amendment was neither palpably insufficient nor patently devoid of merit and the competitor would not be prejudiced as a result of the amendment where a third partner, prior to withdrawing from the partnership, had a fiduciary duty to the partners, the competitor and at least one of its principals knew of the duty and nevertheless participated with the third partner in conduct designed to breach his fiduciary duty, and the partners sustained damages as

a result. Smallberg v Raich Ende Malter & Co., LLP, 140 A.D.3d 942, 35 N.Y.S.3d 134, 2016 N.Y. App. Div. LEXIS 4545 (N.Y. App. Div. 2d Dep't 2016).

Motion court erred in denying an owner's motions for summary judgment and to amend his answer to add the affirmative defense of standing because the loan sub-servicer's vice president did not authenticate the servicing agreement, either by identifying the signatures or by laying a business records foundation, and failed to plead that he was familiar with the assignee's record-keeping practices, and the assignee was inconsistent as to whether it physically held the note at the time it commenced the foreclosure action. B & H Fla. Notes LLC v Ashkenazi, 149 A.D.3d 401, 51 N.Y.S.3d 59, 2017 N.Y. App. Div. LEXIS 2532 (N.Y. App. Div. 1st Dep't 2017).

Trial court erred in denying the parents' motions for leave to substitute the father, as administrator of a deceased child's estate, as a party plaintiff, and for leave to amend the complaint to assert a wrongful death cause of action because the medical malpractice action was commenced in the mother's individual and representative capacities, while the delay in seeking substitution was protracted, the defendants were on notice of the claims against them, the original complaint gave notice of the transactions and occurrences on which the wrongful death cause of action was based, making it timely under the relation-back doctrine, and the defendants failed to demonstrate prejudice or that the causes of action lacked potential merit. Petion v New York City Health & Hosps. Corp., 175 A.D.3d 519, 109 N.Y.S.3d 426, 2019 N.Y. App. Div. LEXIS 6120 (N.Y. App. Div. 2d Dep't 2019).

Trial court erred in granting summary judgment to a lender in its foreclosure action and in denying the borrower's cross-motion for leave to amend her answer to assert the affirmative defense of lack of standing because the lender's affidavit was insufficient to establish the facts preventing the production of the note, and contrary to the lender's contention, the borrower did not waive the affirmative defense of lack of standing. Deutsche Bank Natl. Trust Co. v Kreitzer, 203 A.D.3d 800, 165 N.Y.S.3d 96, 2022 N.Y. App. Div. LEXIS 1436 (N.Y. App. Div. 2d Dep't 2022).

Surrogate’s Court erred in denying motion filed by a decedent’s sons for leave to amend their answers and for summary judgment on the executor’s petition for the discovery and turnover of, inter alia, funds which were distributed to the decedent from an annuity before his death because the executor failed to demonstrate that she would be prejudiced or surprised by the proposed amendment or that the proposed amendment was palpably insufficient or patently devoid of merit, the sons demonstrated that the executor’s claim was time-barred. Matter of Chustckie, 203 A.D.3d 820, 165 N.Y.S.3d 93, 2022 N.Y. App. Div. LEXIS 1439 (N.Y. App. Div. 2d Dep't 2022).

Worker’s cross-motion per CPLR 3025(b) for leave to amend the bill of particulars to add a violation of Labor Law § 241(6) should have been granted where he made a showing of merit, and the proposed amendment did not prejudice the pipeline owner or general contractor and did not involve new factual allegations or raise new theories of liability. Castano v Algonquin Gas Transmission, LLC, 213 A.D.3d 905, 184 N.Y.S.3d 816, 2023 N.Y. App. Div. LEXIS 1001 (N.Y. App. Div. 2d Dep't 2023).

Supreme court should have granted the brother leave amend his answer where the proposed counterclaim against the principal sounding in constructive trust was not palpably insufficient or patently devoid of merit, and no evidentiary showing of merit was required under CPLR 3025(b). Choudhari v Choudhari, 220 A.D.3d 835, 199 N.Y.S.3d 75, 2023 N.Y. App. Div. LEXIS 5215 (N.Y. App. Div. 2d Dep't 2023).

Homebuilder’s motion for leave to amend to add a breach of contract claim should have been granted where the homebuilder had previously alleged that the buyers breached the contract when they filed the notice of pendency, and thus, the buyers were not surprised or prejudiced by the proposed claim. Underhill Venture, LLC v Sarang, 231 A.D.3d 996, 220 N.Y.S.3d 406, 2024 N.Y. App. Div. LEXIS 5385 (N.Y. App. Div. 2d Dep't 2024).

Civil Court abused its discretion in denying landlord’s motion to amend owner occupancy petition and, sua sponte, dismissing proceeding where (1) irregularities in petition consisted of failure to state manner in which notice of non-renewal and 30-day notice of termination had

been served, failure to contain annexed copy of notice of termination, and misstatement as to precise date of original lease agreement governing tenancy, (2) tenant was not prejudiced by proposed amendment. Jordan v McCauley, 178 Misc. 2d 216, 679 N.Y.S.2d 880, 1998 N.Y. Misc. LEXIS 523 (N.Y. App. Term 1998).

18. —No abuse of discretion in allowing amendment

The Appellate Division has the power to grant the discretionary remedy of permission to amend an answer in a Dram Shop Act action to include the defenses of setoff and apportionment, and where it could not be said that the proposed defenses plainly lacked merit, or that a showing of prejudice to plaintiff in allowing the amendment had been made, there was no abuse of discretion as a matter of law in permitting the amendment, and in the absence of such abuse, the Court of Appeals has no power of review. Herrick v Second Cuthouse, Ltd., 64 N.Y.2d 692, 485 N.Y.S.2d 518, 474 N.E.2d 1186, 1984 N.Y. LEXIS 4856 (N.Y. 1984).

Special term properly exercised its discretion by permitting additional cause of action for malicious prosecution to be added to complaint charging false arrest, assault and negligence, on affidavit of plaintiff’s attorney submitted in support of motion where record disclosed that attorney represented plaintiff in prior criminal proceedings and that changes in pleading involved matters within attorney’s competence. Davis v Troy, 57 A.D.2d 990, 394 N.Y.S.2d 470, 1977 N.Y. App. Div. LEXIS 12282 (N.Y. App. Div. 3d Dep't 1977).

Granting of motion to amend complaint was not an abuse of discretion where, though such motion was not made until more than two years after service of initial complaint and more than four and one-half years after cause of action arose and though the allegations proposed to be added to complaint were not claimed to have been outside of plaintiff’s knowledge at time of the original pleading, order granting motion did nothing more than formalize that which had occurred six months earlier when a motion by plaintiff to amend pleadings to conform to the proof had been granted. CPLR 3025(b, c). Bernard v Zeppetelli, 57 A.D.2d 999, 394 N.Y.S.2d 312, 1977 N.Y. App. Div. LEXIS 12290 (N.Y. App. Div. 3d Dep't 1977).

In an action to recover under a homeowner’s insurance policy, Special Term did not abuse its discretion in granting plaintiffs’ motion for leave to “supplement,” or more properly “amend,” their first cause of action, in accordance with CPLR § 3025(b), where the court could properly have concluded that defendant would not be prejudiced by the amendment, and plaintiffs did not seek to increase the damages sought. Clarke v Government Employees Ins. Co., 83 A.D.2d 570, 441 N.Y.S.2d 141, 1981 N.Y. App. Div. LEXIS 14863 (N.Y. App. Div. 2d Dep't 1981).

Trial court properly granted defendant leave to serve amended answer, because in absence of prejudice or surprise, leave to amend should be freely granted unless proposed amendment is clearly and patently insufficient on its face. Williams v Ludlow's Sand & Gravel Co., 122 A.D.2d 612, 504 N.Y.S.2d 901, 1986 N.Y. App. Div. LEXIS 59898 (N.Y. App. Div. 4th Dep't 1986).

Court properly granted plaintiff leave to amend complaint to include additional causes of action where defendants made no claim of prejudice or surprise, and added claims were premised on additional or subsequent occurrences of acts alleged in original complaint. Flatley v Hartmann, 138 A.D.2d 345, 525 N.Y.S.2d 637, 1988 N.Y. App. Div. LEXIS 2125 (N.Y. App. Div. 2d Dep't 1988).

Court did not abuse its discretion in granting plaintiff leave to amend complaint in breach of contract action where proposed amendments would not create prejudice or surprise. Monovar Enters. Suffolk v Calcanes, 216 A.D.2d 446, 628 N.Y.S.2d 543, 1995 N.Y. App. Div. LEXIS 6481 (N.Y. App. Div. 2d Dep't 1995).

It was not error to permit plaintiff building contractor to change his theory of liability from breach of express contract to breach of implied contract where defendants failed to show that they were prejudiced thereby. Higgins v Moran, 217 A.D.2d 945, 629 N.Y.S.2d 896, 1995 N.Y. App. Div. LEXIS 8365 (N.Y. App. Div. 4th Dep't 1995).

In action alleging that plaintiff received negligent medical treatment in hospital’s emergency room, wherein hospital commenced third-party indemnification/contribution claim against company that contracted to provide emergency physician services and physician employed by

that company, court properly exercised its discretion in permitting plaintiff's amended complaint against third-party defendants to relate back to her original complaint against hospital as (1) both claims arose out of same occurrence, (2) third-party defendants were united in interest with hospital and thus could be charged with timely notice of action, and (3) there was no showing of bad faith on part of plaintiff or prejudice to third-party defendants in failing to identify them initially. Austin v Interfaith Med. Ctr., 264 A.D.2d 702, 694 N.Y.S.2d 730, 1999 N.Y. App. Div. LEXIS 9062 (N.Y. App. Div. 2d Dep't 1999).

Plaintiff's three and one-half year delay in filing a motion to amend its complaint to add a claim did not oblige the trial court to deny the motion; the delay did not prejudice the defendant, as the original complaint and bill of particulars referred to the facts on which the amended claim was based. Selective Ins. Co. v Northeast Fire Prot. Sys., 300 A.D.2d 883, 752 N.Y.S.2d 145, 2002 N.Y. App. Div. LEXIS 12429 (N.Y. App. Div. 3d Dep't 2002).

In an insurance company's subrogation action against a tenant and a contractor the tenant hired to renovate part of a building, the trial court did not abuse its discretion by granting the insurance company's motion for leave to amend its complaint so it could add the owner of the building as an additional subrogor. Liberty Mut. Ins. Co. v Perfect Knowledge, Inc., 299 A.D.2d 524, 752 N.Y.S.2d 677, 2002 N.Y. App. Div. LEXIS 11459 (N.Y. App. Div. 2d Dep't 2002).

In granting the taxpayers' motion for class certification in a declaratory action involving an alleged violation of their due process rights under the Statewide Offset Program, N.Y. Tax Law § 171-f, a motion court properly determined that issues common to the proposed class predominated and that the proposed amendments under N.Y. C.P.L.R. § 3025(c) did not add new factual allegations. Watts v Wing, 308 A.D.2d 391, 765 N.Y.S.2d 18, 2003 N.Y. App. Div. LEXIS 9706 (N.Y. App. Div. 1st Dep't 2003).

Administrator suing a nursing home was properly allowed to amend his complaint, under N.Y. C.P.L.R. 3025(b), four months after it was filed, to include a claim under N.Y. Pub. Health Law § 2801-d because the delay was minimal, little discovery had yet occurred, and the nursing home was aware of the regulatory violations on which the claim was based. Fleming v Barnwell

Nursing Home & Health Facilities, Inc., 309 A.D.2d 1132, 766 N.Y.S.2d 241, 2003 N.Y. App. Div. LEXIS 11209 (N.Y. App. Div. 3d Dep't 2003).

Trial court properly denied motions for summary judgment pursuant to N.Y. C.P.L.R. 3212 by plaintiff, a property owner, and defendants, a city and others, as to a claim for slander of title, as there was triable issues of fact as to whether the claimed slander of title occurred, and as to the matter of damages, because while the complaint did not adequately plead special damages, the defect was remedied in the owner's opposing affidavits, and the trial court providently exercised its discretion in accepting a de facto amendment of the pleadings pursuant to N.Y. C.P.L.R. 3025(b). Rosenbaum v City of New York, 5 A.D.3d 154, 773 N.Y.S.2d 872, 2004 N.Y. App. Div. LEXIS 2335 (N.Y. App. Div. 1st Dep't 2004).

Court did not abuse its discretion in allowing a petitioner to amend, under N.Y. C.P.L.R. 3025(b), his petition for back pay because the amendment reflected facts brought forth in his superior's affidavit, which established that his employer, the New York National Guard, had retroactively promoted him to Brigadier General. Because the proof of this claim was already in the State's possession, it could not successfully argue that it was prejudiced by the claim. McIntosh v State, 7 A.D.3d 890, 776 N.Y.S.2d 381, 2004 N.Y. App. Div. LEXIS 6765 (N.Y. App. Div. 3d Dep't 2004).

Appellate court affirmed the trial court's order denying a corporation's motion to dismiss plaintiff's complaint seeking damages for personal injury on grounds that plaintiff's allegations were not sufficiently particular to give notice of the location and nature of the incident, and also properly granted plaintiff leave to amend her complaint within 30 days after the date of its order. Leitner v Jasa Hous. Mgmt. Servs. for the Aged, Inc., 6 A.D.3d 667, 776 N.Y.S.2d 588, 2004 N.Y. App. Div. LEXIS 4968 (N.Y. App. Div. 2d Dep't 2004).

Trial court properly exercised its discretion in granting a cross motion of a company seeking leave to amend its answer to allege a defense to an injured worker's claim based upon the special employment doctrine and the exclusivity provision of N.Y. Workers' Comp. Law § 29(6), as the worker was not surprised or prejudiced by the proposed amendment, and the proposed

amendment appeared to be meritorious. Nastasi v Span, Inc., 8 A.D.3d 1011, 778 N.Y.S.2d 795, 2004 N.Y. App. Div. LEXIS 8148 (N.Y. App. Div. 4th Dep't 2004).

Permitting a village to amend its answer to add affirmative defenses after retirees moved for summary judgment in their action for a declaratory judgment interpreting a collective bargaining agreement (CBA) to require the village to provide their health insurance coverage at rates specified in the CBA was not an abuse of discretion because the retirees showed no prejudice and almost no discovery had taken place. Hudock v Village of Endicott, 28 A.D.3d 923, 814 N.Y.S.2d 286, 2006 N.Y. App. Div. LEXIS 4292 (N.Y. App. Div. 3d Dep't 2006).

Trial court properly granted a purchaser’s cross motion to amend his complaint pursuant to N.Y. C.P.L.R. 3025 to add a corporation as a defendant in an action for specific performance of a contract for the sale of land, as affidavits submitted in support of the cross motion to amend, which detail the purported power and authority to sell the land of an individual defendant who was the part owner of the corporation, established that the proposed amendment was not plainly lacking in merit, and granting the cross motion did not cause prejudice to the corporation since the corporate entity was named in the original complaint and the individual defendant was aware of the germane facts. Greene v Hayes, 30 A.D.3d 808, 817 N.Y.S.2d 421, 2006 N.Y. App. Div. LEXIS 7963 (N.Y. App. Div. 3d Dep't 2006).

Supreme Court providently exercised its discretion in granting a cross motion for leave to amend and supplement an answer, pursuant to N.Y. C.P.L.R. 3025(b), as there was neither an inordinate delay nor a showing of significant prejudice; moreover, the proposed amendment was palpably insufficient or patently devoid of merit. Iannone v Iannone, 31 A.D.3d 713, 820 N.Y.S.2d 86, 2006 N.Y. App. Div. LEXIS 9619 (N.Y. App. Div. 2d Dep't 2006).

Because the determination of what a borrower actually owed on a promissory note required specific factual determinations, the trial court properly denied its N.Y. C.P.L.R. 5015(d) motion for restitution; moreover, N.Y. C.P.L.R. 3025(c) permitted the trial court to amend the lenders’ counterclaims to conform them to the evidence of a default on the promissory note. Dinizio &

Cook, Inc. v Duck Cr. Mar. at Three Mile Harbor, Ltd., 32 A.D.3d 989, 821 N.Y.S.2d 649, 2006 N.Y. App. Div. LEXIS 11474 (N.Y. App. Div. 2d Dep't 2006).

In an action to foreclose on a mechanic's lien, it was not error for the trial court to allow defendant to amend her pleadings, pursuant to N.Y. C.P.L.R. 3025(b) so that defendant could assert a counterclaim for a constructive trust, but defendant should not have been allowed to file a new notice of pendency on the subject property when the original notice of pendency was cancelled due to defendant's own pleading error. Old World Custom Homes, Inc. v Crane, 33 A.D.3d 600, 822 N.Y.S.2d 155, 2006 N.Y. App. Div. LEXIS 11905 (N.Y. App. Div. 2d Dep't 2006).

It was not error for the trial court to grant plaintiffs' motion for leave to amend. Although plaintiffs had not explained why the request was made at a late point in the proceedings, defendants had not provided any evidence that they would suffer significant prejudice from the proposed amendment. Abrahamian v Tak Chan, 33 A.D.3d 947, 824 N.Y.S.2d 117, 2006 N.Y. App. Div. LEXIS 13017 (N.Y. App. Div. 2d Dep't 2006).

Because a proposed amendment was sufficient, had merit, and would not prejudice or surprise an administratrix, pursuant to CPLR 3025(b), the trial court did not abuse its discretion in allowing a shareholder to amend the answer. Matter of Roberts v Borg, 35 A.D.3d 617, 824 N.Y.S.2d 906, 2006 N.Y. App. Div. LEXIS 16069 (N.Y. App. Div. 2d Dep't 2006).

Because an owner's proposed amended complaint sufficiently stated a cause of action for common-law negligence causing property damage, a violation of New York City, N.Y., Admin. Code § 27-2027 could also be considered as evidence supporting the action; therefore, the owner was entitled to amend the complaint pursuant to N.Y. C.P.L.R. 3025(b). Livichusca v M & T Mtge., Co., 49 A.D.3d 822, 854 N.Y.S.2d 226, 2008 N.Y. App. Div. LEXIS 2782 (N.Y. App. Div. 2d Dep't 2008).

Trial court properly granted an insurance fund's motion pursuant to N.Y. C.P.L.R. 3025(b) to amend the complaint to increase the ad damnum clause in its suit to recover unpaid premiums

for a workers' compensation insurance policy because the proposed amendment was not palpably insufficient or patently devoid of merit, and the corporation failed to establish any prejudice; while the amended ad damnum clause would expose the corporation to additional liability, this fact, standing alone, did not amount to prejudice. Commissioners of State Ins. Fund v Service Unlimited, USA, Inc., 50 A.D.3d 1085, 857 N.Y.S.2d 231, 2008 N.Y. App. Div. LEXIS 3854 (N.Y. App. Div. 2d Dep't 2008).

Trial court did not err in permitting an amendment to a patient's complaint against a nursing home to add a Public Health Law claim because the pleadings, the verified bill of particulars, the amended complaint, and an affidavit from the patient's counsel provided sufficient evidentiary support to permit the amendment; further, the nursing home did not demonstrate actual prejudice due to the delay. Leclaire v Fort Hudson Nursing Home, Inc., 52 A.D.3d 1101, 861 N.Y.S.2d 436, 2008 N.Y. App. Div. LEXIS 5531 (N.Y. App. Div. 3d Dep't 2008).

Trial court properly granted a mortgagee leave to amend its answer pursuant to N.Y. C.P.L.R. 3025(b) to add cross claims to recover for breach of fiduciary duty against an agent; the newly-asserted cross claims were not palpably insufficient or patently devoid of merit and the proposed amendment did not cause prejudice or surprise. Dickinson v Igoni, 76 A.D.3d 943, 908 N.Y.S.2d 85, 2010 N.Y. App. Div. LEXIS 6666 (N.Y. App. Div. 2d Dep't 2010).

Trial court did not improvidently exercise its discretion in granting a city's motion to amend its complaint to add a defense, as the motion was not palpably insufficient or patently meritless, and plaintiffs were not prejudiced by the city's delay in seeking leave to amend, as its defense of qualified immunity was based on documents provided to them over a year before the city moved for summary judgment. Turturro v City of New York, 77 A.D.3d 732, 908 N.Y.S.2d 738, 2010 N.Y. App. Div. LEXIS 7389 (N.Y. App. Div. 2d Dep't 2010).

As the city failed to establish that the acts attributed to it in the amended complaint constituted an integral part of the judicial process, thereby warranting dismissal of the amended complaint on the ground of judicial immunity, the city was not entitled to dismissal of a decedent's estate's

amended complaint which alleged, inter alia, negligence. Gotlin v City of New York, 90 A.D.3d 605, 936 N.Y.S.2d 208, 2011 N.Y. App. Div. LEXIS 8739 (N.Y. App. Div. 2d Dep't 2011).

Trial court did not improvidently exercise its discretion in granting those branches of a worker's motion which were for leave to amend the complaint to add causes of action alleging violations of N.Y. Lab. Law § 200 and Occupational Safety and Health Act regulations, and alleging negligent entrustment and negligent failure to warn; the owners were not unduly prejudiced or surprised by the timing of the motion, and the causes of action that the trial court permitted the worker to add were neither palpably insufficient nor patently devoid of merit. Ramos v Baker, 91 A.D.3d 930, 937 N.Y.S.2d 328, 2012 N.Y. App. Div. LEXIS 809 (N.Y. App. Div. 2d Dep't 2012).

Trial court properly granted a psychologist leave to amend the answer pursuant to N.Y. C.P.L.R. 3025(b) in plaintiff's suit because the affirmative defense of lack of capacity had merit and plaintiff failed to demonstrate prejudice or surprise; plaintiff's failure to schedule the instant claims in her bankruptcy proceeding deprived her of legal capacity to pursue this case. However, the psychologist failed to offer a reasonable justification for not presenting such facts on the prior motion, and the existence of the bankruptcy proceeding was easily discovered, so the psychologist was not entitled to renewal of earlier summary judgment motion. Webber v Scarano-Osika, 94 A.D.3d 1304, 943 N.Y.S.2d 240, 2012 N.Y. App. Div. LEXIS 2928 (N.Y. App. Div. 3d Dep't 2012).

Lower court properly granted the claimant's motion to amend to add a claim alleging a violation of N.Y. Lab. Law § 241(6) based on an alleged violation of N.Y. Comp. Codes R. & Regs. tit. 12, § 23-8.2(b)(2)(iii); the State was not unduly prejudiced or surprised by the motion, and the claim was neither palpably insufficient nor patently devoid of merit. Gomez v State of New York, 106 A.D.3d 870, 965 N.Y.S.2d 542, 2013 N.Y. App. Div. LEXIS 3384 (N.Y. App. Div. 2d Dep't 2013).

Trial court properly granted a lender's motion for leave to amend its complaint to add a cause of action to foreclose the subject mortgage because one borrower failed to establish that she was directly prejudiced or surprised by the lender's delay in seeking leave to amend the complaint, the borrowers' affirmative defenses made specific allegations that the lender did not have the

“authority to foreclose” the mortgage, and the proposed amendment was not palpably insufficient or patently devoid of merit. US Bank N.A. v Murillo, 171 A.D.3d 984, 98 N.Y.S.3d 115, 2019 N.Y. App. Div. LEXIS 2732 (N.Y. App. Div. 2d Dep't 2019).

In an action seeking rescission of a contract and damages alleging that defendant fraudulently induced plaintiff to enter into a lease by certain misrepresentations, plaintiff’s motion for leave to serve an amended complaint following dismissal of the original complaint on default would be granted although no affidavit of merits was submitted, since plaintiff was in effect making an application to vacate the prior dismissal and the court would treat the verified complaint as an equivalent of the necessary affidavit. Ultrashmere House, Ltd. v 38 Town Associates, 123 Misc. 2d 102, 473 N.Y.S.2d 120, 1984 N.Y. Misc. LEXIS 2949 (N.Y. Sup. Ct. 1984).

In legal malpractice action brought by plaintiff who had failed to include malpractice action as unliquidated asset in her bankruptcy schedule, court properly exercised its discretion in granting defendant’s motion to amend his answer to include lack of capacity defense, thereby reserving for trial issue of whether defendant’s 3-year delay in seeking to amend so prejudiced plaintiff that he should be estopped from relying on such defense. Daughtry v Rosengarten, 180 Misc. 2d 102, 689 N.Y.S.2d 614, 1999 N.Y. Misc. LEXIS 170 (N.Y. App. Term 1999).

Because the plaintiffs’ initial complaint alleged that the doctors failed to warn, diagnose, or care for a patient’s liver cancer, and because the doctors would not suffer any undue prejudice by the proposed amendment, an amendment under N.Y. C.P.L.R. 3025(b) to add a wrongful death claim was the logical medical progression of plaintiffs’ complaint. Gosse v Saint Peter's Hosp. of the City of Albany, 873 N.Y.S.2d 882, 23 Misc. 3d 892, 2009 N.Y. Misc. LEXIS 287 (N.Y. Sup. Ct. 2009).

19. —No abuse of discretion in denying amendment

N.Y. C.P.L.R. 3025(a) gives a party 20 days after serving a pleading to correct it or improve upon it, and the addition of a jurisdictional defense is no less proper a correction or improvement than any other; thus, a party who adds such a defense by an amendment as of right raises such

objection in the responsive pleading within the meaning of N.Y. C.P.L.R. 3211(e). Iacovangelo v Shepherd, 5 N.Y.3d 184, 800 N.Y.S.2d 116, 833 N.E.2d 259, 2005 N.Y. LEXIS 1465 (N.Y. 2005).

Trial court's denial of defendant's oral motion to amend his answer to plead statute of frauds was a proper exercise of discretion, where the defendant's sole argument to the court was that leave to amend under CPLR 3025 should be freely granted and where defendant offered no excuse for his delay in making the motion and made no attempt to demonstrate that there was merit to the defense. J. M. Heinike Associates, Inc. v Chili Lumber Co., 83 A.D.2d 751, 443 N.Y.S.2d 512, 1981 N.Y. App. Div. LEXIS 15067 (N.Y. App. Div. 4th Dep't 1981).

In an action in which both plaintiffs and defendants moved to amend their pleadings more than three years after the complaint was served, the trial court did not abuse its discretion in denying plaintiff's motion due solely to such delay. However, the court erred in granting defendants' motion where it was made four years after service of their answer, and a year and one-half after plaintiff filed a statement of readiness, and where defendants' change of counsel did not constitute unusual or unanticipated conditions which would justify the delay. Ward v Rensselaer, 106 A.D.2d 719, 483 N.Y.S.2d 763, 1984 N.Y. App. Div. LEXIS 21661 (N.Y. App. Div. 3d Dep't 1984).

Motion to amend complaint should be accompanied by affidavit from one with knowledge of underlying facts, not by attorney lacking such knowledge; accordingly, in action seeking damages for negligence and medical malpractice, Special Term did not abuse its discretion in refusing to grant plaintiff's application to amend complaint to include informed consent claim since motion was accompanied by attorney's affidavit and such attorney clearly did not have personal knowledge of factual basis for informed consent claim. Polak v Schwenk, 115 A.D.2d 142, 495 N.Y.S.2d 519, 1985 N.Y. App. Div. LEXIS 54405 (N.Y. App. Div. 3d Dep't 1985).

In action for breach of contractual non-competition clause, Supreme Court did not abuse its discretion in awarding costs of defendant's delay to plaintiff and denying defendant's motion to compel examinations where defendant waited 9 years after original answer before moving to

interpose counterclaims in his amended answer. Coleman, Grasso, & Zasada Appraisals v Coleman, 246 A.D.2d 893, 667 N.Y.S.2d 828, 1998 N.Y. App. Div. LEXIS 525 (N.Y. App. Div. 3d Dep't 1998), app. dismissed, 91 N.Y.2d 1002, 676 N.Y.S.2d 129, 698 N.E.2d 958, 1998 N.Y. LEXIS 1294 (N.Y. 1998), app. dismissed, 94 N.Y.2d 849, 703 N.Y.S.2d 71, 724 N.E.2d 766, 1999 N.Y. LEXIS 3989 (N.Y. 1999).

Plaintiff’s gross delay of some 12 years justified denial of her motion to amend complaint. Dingle v Glass, 247 A.D.2d 507, 668 N.Y.S.2d 478, 1998 N.Y. App. Div. LEXIS 1493 (N.Y. App. Div. 2d Dep't 1998).

In a personal injury case, after summary judgment was entered for the injured parties on the issue of liability, and jury selection had begun in the damages trial, the trial court did not abuse its discretion, under N.Y. C.P.L.R. 3025(b), in denying the injured parties leave to serve a supplemental bill of particulars when they did not provide a reasonable excuse for the delay or an affidavit in support of the proposed supplemental bill. Torres v Educ. Alliance, Inc., 300 A.D.2d 469, 752 N.Y.S.2d 80, 2002 N.Y. App. Div. LEXIS 12267 (N.Y. App. Div. 2d Dep't 2002).

Where the causes of action which plaintiff landlord sought to add against defendant, a tenant’s insurance broker, were plainly without merit, the trial court properly denied the landlord’s cross motion for leave to serve a second amended complaint to allege the additional causes of action. Benjamin Shapiro Realty Co., LLC v Kemper Nat'l Ins. Cos., 303 A.D.2d 245, 756 N.Y.S.2d 45, 2003 N.Y. App. Div. LEXIS 2749 (N.Y. App. Div. 1st Dep't), app. denied, 100 N.Y.2d 573, 764 N.Y.S.2d 382, 796 N.E.2d 473, 2003 N.Y. LEXIS 1753 (N.Y. 2003).

Trial court did not abuse its discretion in denying leave for the survivors of a deceased worker to amend their complaint to specify particular violations of New York’s Industrial Code for which they alleged the worker’s subcontractor employer, the construction manager, and the landowner were responsible, because the survivors failed to provide any explanation for their long delay in seeking leave to amend. Reilly v Newireen Assocs., 303 A.D.2d 214, 756 N.Y.S.2d 192, 2003 N.Y. App. Div. LEXIS 2527 (N.Y. App. Div. 1st Dep't), app. denied, 100 N.Y.2d 508, 764 N.Y.S.2d 235, 795 N.E.2d 1244, 2003 N.Y. LEXIS 1733 (N.Y. 2003).

Where the record showed that (1) a conversion action by plaintiff individual against defendants, an individual and others, was commenced in 1995; (2) plaintiff's 2000 motion for leave to serve an amended complaint to add a defendant was granted in August 2000 on the condition that the amended pleading be served within 30 days; and (3) plaintiff took no action until May 2001 when plaintiff claimed lack of notice of the August 2000 order and claimed disability from a stroke, but offered no medical evidence of the stroke, the trial court providently exercised its discretion in refusing to vacate plaintiff's default in complying with the condition imposed by the prior order, on the ground that plaintiff had been dilatory in asserting plaintiff's rights in an overly protracted action. Novak v Papish, 303 A.D.2d 477, 756 N.Y.S.2d 444, 2003 N.Y. App. Div. LEXIS 2349 (N.Y. App. Div. 2d Dep't 2003).

Trial court properly denied plaintiffs' motion pursuant to N.Y. C.P.L.R. 3025 (2003) for leave to amend their pleading in a trespass action to add claims for punitive damages and attorneys' fees, because plaintiffs made no showing that the trespass at issue was maliciously motivated, or that it constituted a wanton, willful, or reckless disregard of plaintiffs' right of possession, and as to a claim for attorneys' fees, plaintiffs failed to set forth a statutory, contractual, or other legal basis for an award of such fees. Cassata v N.Y. New Eng. Exch., 304 A.D.2d 371, 756 N.Y.S.2d 845, 2003 N.Y. App. Div. LEXIS 3761 (N.Y. App. Div. 1st Dep't 2003).

Where plaintiff pedestrian's notice of claim against defendant city in a personal injury suit incorrectly specified the location where the pedestrian allegedly tripped and fell over broken asphalt, and the correct location also was not made apparent either in the pedestrian's testimony at a N.Y. Gen. Mun. Law § 50-h hearing, or in the pedestrian's complaint and bill of particulars, the trial court properly denied the pedestrian's motion to amend the notice of claim pursuant to N.Y. Gen. Mun. Law § 50-e(6) and the complaint to correct the erroneous description, as the motion was made nearly three years after the accident and after the pedestrian's filing of a note of issue, and the error and the delay in correcting it prejudiced the city's ability to conduct a prompt investigation. Rivera v City of New York, 303 A.D.2d 318, 757 N.Y.S.2d 273, 2003 N.Y. App. Div. LEXIS 3259 (N.Y. App. Div. 1st Dep't 2003).

Trial court did not abuse its discretion in denying plaintiffs' motions to supplement and amend a bill of particulars pursuant to N.Y. C.P.L.R. 3025 (2003), as plaintiffs waited until the first day of trial, almost seven years after serving their bill of particulars, before moving to amend, proffered no excuse for the delay, and such delay would have been prejudicial to defendants. Sadler v Town of Hurley, 304 A.D.2d 930, 758 N.Y.S.2d 417, 2003 N.Y. App. Div. LEXIS 3825 (N.Y. App. Div. 3d Dep't 2003).

In a case in which plaintiff, an individual doing business as a land exchange company, sued defendants, three transferees and a decedent's estate, pursuant to N.Y. Debt. & Cred. Law art. 10, to set aside an allegedly fraudulent conveyance of certain real property in Oswego County, New York, from the decedent to the transferees, the trial court properly denied the individual's motion for leave to amend the complaint to allege that the decedent also fraudulently conveyed real property in Oneida County, New York, to the transferees and seeking to set aside that conveyance as well, given that (1) in light of N.Y. C.P.L.R. 203(g), 213(1), the proposed amendment, asserted more than eight years after the Oneida County conveyance and more than two years after the individual discovered the conveyance, was untimely; (2) the proposed amendment did not relate back to the claims in the original complaint because that complaint did not give notice of the transactions or occurrences to be proved pursuant to the amended pleading within the meaning of N.Y. C.P.L.R. 203(f); and (3) even if the proposed amendment was not time-barred as against the decedent's estate, the proper venue for the claims asserted was Oneida County, not Oswego County, where the action was brought. Helmand v Webb, 305 A.D.2d 980, 758 N.Y.S.2d 567, 2003 N.Y. App. Div. LEXIS 4730 (N.Y. App. Div. 4th Dep't 2003).

Trial court properly denied a hospital's motion pursuant to N.Y. C.P.L.R. 3025(b) to serve an amended verified answer adding an affirmative defense of release, as the release in question applied only to a prior federal civil rights action and not the instant personal injury action. Hughes v Long Island Univ., 305 A.D.2d 462, 762 N.Y.S.2d 401, 2003 N.Y. App. Div. LEXIS 5377 (N.Y. App. Div. 2d Dep't 2003).

Trial court did not abuse its discretion in denying a shareholder's motion to amend his complaint where: (1) the litigation had been pending for nine years; (2) a trial date was upcoming; (3) the shareholder had amended his complaint once before; (4) the proposed amendment added two additional corporate plaintiffs and contained 29 separate causes of action; and the protracted delay would clearly prejudice the defendants, including the majority shareholder, by the additional discovery burden presented by the proposed amendment. Albany-Plattsburgh United Corp. v Bell, 307 A.D.2d 416, 763 N.Y.S.2d 119, 2003 N.Y. App. Div. LEXIS 7723 (N.Y. App. Div. 3d Dep't 2003), app. denied, 1 N.Y.3d 620, 777 N.Y.S.2d 14, 808 N.E.2d 1273, 2004 N.Y. LEXIS 229 (N.Y. 2004).

Trial court did not abuse its discretion in denying leave to amend a dissolution complaint to add a claim for necessaries where the movant failed to explain a six-year delay in seeking leave to amend and also failed to explain why a separate lawsuit seeking an award for necessaries was inadequate. Koeth v Koeth, 309 A.D.2d 786, 765 N.Y.S.2d 640, 2003 N.Y. App. Div. LEXIS 10647 (N.Y. App. Div. 2d Dep't 2003).

Trial court did not abuse its discretion in denying an inmate's motion to amend his petition, pursuant to N.Y. C.P.L.R. 3025(b), which originally sought review of disciplinary actions taken by the Commissioner of Correctional Services, where the new claims sought to be asserted either constituted a rehashing and restatement of claims already made, or were a new challenge to two additional determinations by the Commissioner as to disciplinary rule violations which improperly expanded the scope of the action; in order to be granted a motion to amend a pleading under N.Y. C.P.L.R. 3025(b), a movant must demonstrate some evidence of merit as to a new cause of action. Miller v Goord, 1 A.D.3d 647, 766 N.Y.S.2d 466, 2003 N.Y. App. Div. LEXIS 11581 (N.Y. App. Div. 3d Dep't 2003).

Injured party was properly denied leave to amend the pleading pursuant to N.Y. C.P.L.R. 3025(b) to add a wrongful death claim against defendants; the injured party failed to establish a causal connection between the decedent's fall from a ladder and the decedent's cancer death more than two years after the fall, and defendants would have been prejudiced by the addition of

the claim, because they had not been made aware of any cancer-related claim by a bill of particulars, and they were unable to adequately prepare a defense in such a case. Griffin v N.Y. City Transit Auth., 1 A.D.3d 141, 767 N.Y.S.2d 15, 2003 N.Y. App. Div. LEXIS 11647 (N.Y. App. Div. 1st Dep't 2003), overruled, Lucido v Mancuso, 49 A.D.3d 220, 851 N.Y.S.2d 238, 2008 N.Y. App. Div. LEXIS 587 (N.Y. App. Div. 2d Dep't 2008).

Plaintiff’s motion for leave to amend his summons and complaint to add a corporation as a defendant was properly denied where the statute of limitations expired, the plaintiff failed to demonstrate that the relation-back doctrine was applicable, and the plaintiff failed to establish that the corporation had any relationship with either of the named defendants that would give rise to vicarious liability, so he could not show that the corporation was united in interest with any of the named defendants. Scoma v Doe, 2 A.D.3d 432, 767 N.Y.S.2d 840, 2003 N.Y. App. Div. LEXIS 12925 (N.Y. App. Div. 2d Dep't 2003).

Lower court did not abuse its discretion when it denied plaintiff’s motion for leave to amend the complaint because plaintiff could not show that his failure to add the proposed defendant at the onset of the litigation was the result of a mistake so that the amended complaint would relate back. Pappas v 31-08 Cafe Concerto, Inc., 5 A.D.3d 452, 773 N.Y.S.2d 108, 2004 N.Y. App. Div. LEXIS 2443 (N.Y. App. Div. 2d Dep't 2004).

Trial court properly denied a motion for leave to amend a third-party complaint add an additional third-party plaintiff, where that additional party was an allegedly active tortfeasor, and thus vicarious liability could not be imputed to his employer. Ruddock v Boland Rentals, Inc., 5 A.D.3d 368, 774 N.Y.S.2d 50, 2004 N.Y. App. Div. LEXIS 2158 (N.Y. App. Div. 2d Dep't 2004).

Where an employee failed to make any evidentiary showing of merit for three proposed causes of action in his case against an employer for breach of an employment agreement, the supreme court properly exercised its discretion in denying the employee’s motion to amend his complaint. Butt v N.Y. Med. College, 7 A.D.3d 744, 776 N.Y.S.2d 897, 2004 N.Y. App. Div. LEXIS 7231 (N.Y. App. Div. 2d Dep't 2004).

It was error to grant a tenant’s motion to amend a complaint to add a cause of action for damages based on a landlord’s breach of the original lease agreement for a rent stabilized apartment because a previous order vacating a consent declaratory judgment, to which the tenant was bound, determined that the original lease was invalid; no breach of lease cause of action could be based on an invalid lease. Moreover, the four year statute of limitations under N.Y. C.P.L.R. 213-a would likely bar that cause of action. Levinson v 390 W. End Assoc., L.L.C., 22 A.D.3d 397, 802 N.Y.S.2d 659, 2005 N.Y. App. Div. LEXIS 11298 (N.Y. App. Div. 1st Dep't 2005).

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In installing modular workstations, a corporation did not demolish, erect, or alter any structure, nor did it perform work or furnish materials for its permanent improvement; accordingly, the trial court properly granted that branch of the owner’s motion which was to vacate the corporation’s demand for a verified statement pursuant to N.Y. Lien Law § 76(5) relating to the installation of the workstations. As the trial court properly determined that the lien law was not applicable, its denial of the corporation’s motion to amend to include a lien law claim was proper. Negvesky v United Interior Resources, Inc., 32 A.D.3d 530, 821 N.Y.S.2d 107, 2006 N.Y. App. Div. LEXIS 10452 (N.Y. App. Div. 2d Dep't 2006).

Trial court properly denied a cross motion by plaintiffs for leave to amend their complaint against defendants, because while leave to amend pleadings should be freely granted, N.Y. C.P.L.R. 3025(b), leave was properly denied where the proposed amendment plainly lacked merit, and

the proposed fraudulent concealment cause of action could not be independently asserted because it arose from the same facts that served as the basis for a breach of contract cause of action, and the breach of contract cause of action was barred by the statute of limitations. Dionisio v Geo. De Rue Contrs., Inc., 38 A.D.3d 1172, 833 N.Y.S.2d 786, 2007 N.Y. App. Div. LEXIS 3409 (N.Y. App. Div. 4th Dep't 2007).

Although leave to amend pleadings was to be liberally granted by the courts, where the movant's proposed amendment was insufficient as a matter of law or completely lacked merit, leave to amend was properly denied. Jackson Hgts. Care Ctr., LLC v Bloch, 39 A.D.3d 477, 833 N.Y.S.2d 581, 2007 N.Y. App. Div. LEXIS 4198 (N.Y. App. Div. 2d Dep't 2007).

Petitioners were not entitled pursuant to N.Y. C.P.L.R. 3025(b) to leave to amend their verified petition in a declaratory judgment action seeking title to property by adverse possession, as the proposed causes of action did not state a claim. Matter of Xander Corp. v Haberman, 41 A.D.3d 489, 838 N.Y.S.2d 133, 2007 N.Y. App. Div. LEXIS 6950 (N.Y. App. Div. 2d Dep't 2007).

In an action seeking to set aside an assignment of judgment and direct an accounting, in the absence of any evidence of breach of an alleged fiduciary duty or constructive trust, or misappropriated funds, the trial court providently exercised its discretion in denying that branch of petitioners' motion which was for leave to amend the petition pursuant to N.Y. C.P.L.R. 3025(b). Madeline Lee Bryer, P.C. v Samson Equities, LLC, 41 A.D.3d 554, 836 N.Y.S.2d 428, 2007 N.Y. App. Div. LEXIS 9856 (N.Y. App. Div. 2d Dep't 2007).

In a shareholder's derivative action to recover damages for breach of fiduciary duty and other causes of action, the trial court properly denied the shareholders' motion pursuant to N.Y. C.P.L.R. 3025(b) to serve an amended complaint, based on the extended delay in moving for leave to serve the amended complaint and the lack of a reasonable excuse for the delay. Pergament v Roach, 41 A.D.3d 569, 838 N.Y.S.2d 591, 2007 N.Y. App. Div. LEXIS 7395 (N.Y. App. Div. 2d Dep't 2007).

Because a school construction authority unreasonably delayed seeking to assert certain defenses and counterclaims that were based on fraud until the eve of trial, despite its long-standing awareness of their availability, the trial court properly denied its N.Y. C.P.L.R. 3025(b) motion for leave to amend its answer to assert the defenses and counterclaims. Trataros Constr., Inc. v New York City School Constr. Auth., 46 A.D.3d 874, 849 N.Y.S.2d 86, 2007 N.Y. App. Div. LEXIS 13357 (N.Y. App. Div. 2d Dep't 2007).

Trial court correctly denied a representative's motion to amend his bills of particulars in his medical malpractice case under circumstances in which the amended bill of particulars raised a new theory of liability and at the time the motion was filed, 8 years had passed since the surgery in question was performed, 6 years had passed since the action was commenced, 2 years had passed since the plaintiff served his bills of particulars, and only 6 days remained before the scheduled commencement of the trial; the information underlying the new theories of liability was discoverable from records which the representative had obtained more than 4 years before he moved for leave to amend his bills of particulars. Moreover, the hospital would have been prejudiced had leave been granted as it could not have discerned the new theories of liability from either the complaint or the original bills of particulars. Navarette v Alexiades, 50 A.D.3d 869, 855 N.Y.S.2d 260, 2008 N.Y. App. Div. LEXIS 3370 (N.Y. App. Div. 2d Dep't 2008).

Denial of a motion filed by a limited liability partnership (LLP) for leave to amend its answer pursuant to N.Y. C.P.L.R. 3025(b) to assert an affirmative defense and counterclaim alleging fraudulent inducement in a breach of contract suit was proper because the LLP failed to establish the materiality of plaintiff's alleged misrepresentation; further, the counterclaim was time barred because, as of the date that the action was commenced, N.Y. C.P.L.R. 203(d), the counterclaim was barred by the applicable limitations period, i.e., the longer of six years from the alleged fraud, or two years from when the fraud reasonably could have been discovered pursuant to N.Y. C.P.L.R. 213(8), 203(g). Kuslansky v Kuslansky, Robbins, Stechel & Cunningham, LLP, 50 A.D.3d 1101, 858 N.Y.S.2d 212, 2008 N.Y. App. Div. LEXIS 3873 (N.Y.

App. Div. 2d Dep't 2008), dismissed, 107 A.D.3d 764, 966 N.Y.S.2d 674, 2013 N.Y. App. Div. LEXIS 4221 (N.Y. App. Div. 2d Dep't 2013).

Denial of a patient's motion amend his medical malpractice complaint pursuant to N.Y. C.P.L.R. 3025(b) to include causes of action for lack of informed consent and breach of warranty was proper because the patient failed to demonstrate that the delay in seeking leave to amend over two years after the original complaint was served was excusable; service of the doctor's amended answer, which was later withdrawn, did not entitle the patient to amend his complaint as of right under N.Y. C.P.L.R. 3025(a), and neither the patient's bankruptcy proceeding nor the untimely death of the trial judge initially assigned to the matter constituted satisfactory excuses for the delay. Lack of informed consent required proof of facts not contemplated by a negligence action, and the trial court properly found that the doctor would have been prejudiced by the proposed amendment. Pagan v Quinn, 51 A.D.3d 1299, 858 N.Y.S.2d 818, 2008 N.Y. App. Div. LEXIS 4349 (N.Y. App. Div. 3d Dep't 2008).

Trial court properly denied owners' motion to add a defense of statute of frauds pursuant to N.Y. Gen. Oblig. Law § 5-703 to buyers' cause of action seeking imposition of a constructive trust; the statute of frauds was not a defense to the buyers' properly pleaded cause of action, as a constructive trust, by its very nature, did not require a writing. Mackenzie v Croce, 54 A.D.3d 825, 864 N.Y.S.2d 474, 2008 N.Y. App. Div. LEXIS 6798 (N.Y. App. Div. 2d Dep't 2008).

Although an owner was precluded from recovering use and occupancy of certain premises in a 100-plus building under N.Y. Mult. Dwell. Law § 4(1), (7), a tenant's N.Y. C.P.L.R. 3025(b) motion to add defenses under the Rent Stabilization Law, New York City, N.Y., Admin. Code § 26-501 et seq., and the Loft Law, N.Y. Mult. Dwell. Law art. 7-C, lacked merit as those statutes did not apply. Sheila Props., Inc. v A Real Good Plumber, Inc., 59 A.D.3d 424, 874 N.Y.S.2d 145, 2009 N.Y. App. Div. LEXIS 736 (N.Y. App. Div. 2d Dep't 2009).

Corporation's cross motion seeking leave to serve an amended answer to a contractor's breach of contract claim to include an affirmative defense and counterclaim based on fraud was properly denied; the proposed amended answer contained no allegation of reasonable reliance

upon a representation of the contractor, which allegation was a necessary element of fraud. The failure to plead reliance rendered the proposed affirmative defense and counterclaim patently without merit. Tag Mech. Sys., Inc. v V.I.P. Structures, Inc., 63 A.D.3d 1504, 880 N.Y.S.2d 437, 2009 N.Y. App. Div. LEXIS 4413 (N.Y. App. Div. 4th Dep't 2009), app. dismissed, 77 A.D.3d 1317, 907 N.Y.S.2d 891, 2010 N.Y. App. Div. LEXIS 6952 (N.Y. App. Div. 4th Dep't 2010).

Corporation’s cross motion seeking leave to serve an amended answer to a contractor’s breach of contract claim to include a counterclaim based on commercial bribery with respect to a contract that was not at issue in the complaint was properly denied; the proposed counterclaim sought affirmative relief unrelated to any matters addressed during the course of discovery. Tag Mech. Sys., Inc. v V.I.P. Structures, Inc., 63 A.D.3d 1504, 880 N.Y.S.2d 437, 2009 N.Y. App. Div. LEXIS 4413 (N.Y. App. Div. 4th Dep't 2009), app. dismissed, 77 A.D.3d 1317, 907 N.Y.S.2d 891, 2010 N.Y. App. Div. LEXIS 6952 (N.Y. App. Div. 4th Dep't 2010).

Trial court properly denied tenant’s N.Y. C.P.L.R. 3025(b) motion, made on the eve of trial, for leave to amend the complaint to add causes of action sounding in breach of contract, common-law indemnification, and indemnification under the Navigation Law; the trial court properly considered how long the tenant was aware of the facts upon which the motion was predicated, the fact that the tenant failed to offer a reasonable excuse for the delay, and whether prejudice resulted therefrom. American Cleaners, Inc. v American Intl. Specialty Lines Ins. Co., 68 A.D.3d 792, 891 N.Y.S.2d 127, 2009 N.Y. App. Div. LEXIS 8995 (N.Y. App. Div. 2d Dep't 2009).

Because a trial court was without authority to alter or modify a federal court requirement that a city obtain a state pollutant discharge elimination system (SPDES) permit, there was no abuse in its decision denying the city’s motion to amend its answer to include a defense asserting that the SPDES permit was not required. Matter of Catskill Mtns. Ch. of Trout Unlimited, Inc. v Sheehan, 71 A.D.3d 235, 892 N.Y.S.2d 651, 2010 N.Y. App. Div. LEXIS 49 (N.Y. App. Div. 3d Dep't), app. denied, 14 N.Y.3d 713, 905 N.Y.S.2d 128, 931 N.E.2d 97, 2010 N.Y. LEXIS 1262 (N.Y. 2010).

Motion to amend to add fraudulent conveyance claim against a wife was properly denied because the proposed amendments were patently devoid of merit; conveyances which satisfied antecedent debt made while the debtor was insolvent were not fraudulent, even if their effect was to prefer one creditor over another. Matter of Town of Southampton v Chiodi, 75 A.D.3d 604, 907 N.Y.S.2d 25, 2010 N.Y. App. Div. LEXIS 6248 (N.Y. App. Div. 2d Dep't 2010).

Trial court properly denied a seller's N.Y. C.P.L.R. 3025(b) motion to amend his complaint against buyers because the proffered amendment was devoid of merit; although the seller sought to bring a fraudulent inducement claim, under any interpretation, it was impossible to conclude that the seller, a sophisticated investor, reasonably relied on the buyers' alleged representations. The seller asserted that the buyers told him that the changes to the agreement were for their own internal benefit and tax advantage and that the rewording would not prejudice the seller, but failed to explain how he acted reasonably when he executed a writing which, on its face, contradicted those representations and was highly prejudicial to him as it relieved the buyers of personal liability for all but a small percentage of the total amount due thereunder. Perrotti v Becker, Glynn, Melamed & Muffly LLP, 82 A.D.3d 495, 918 N.Y.S.2d 423 (1st Dept 2011).

Trial court providently exercised its discretion in denying a saleman's separate motion for leave to amend the complaint since the proposed amended complaint was patently devoid of merit. Martin v Southern Container Corp., 92 A.D.3d 647, 938 N.Y.S.2d 335, 2012 N.Y. App. Div. LEXIS 985 (N.Y. App. Div. 2d Dep't), app. denied in part, 19 N.Y.3d 839, 946 N.Y.S.2d 95, 969 N.E.2d 212, 2012 N.Y. LEXIS 906 (N.Y. 2012).

Trial court properly denied an injured worker's motion to amend the complaint to add a manufacturer as a new defendant because he failed to come forward with evidence that there was any type of interrelationship between the named defendants and the manufacturer that would give rise to vicarious liability and entitle the injured worker to rely upon the relation back doctrine. Stokes v Komatsu Am. Corp., 117 A.D.3d 1152, 984 N.Y.S.2d 657, 2014 N.Y. App. Div. LEXIS 2958 (N.Y. App. Div. 3d Dep't 2014).

Trial court properly granted a city's motion to dismiss an arrestee's cause of action, alleging civil rights violations, and denied his cross-motion for leave to amend the complaint, and to amplify the cause of action because, inter alia, the complaint and the proposed amendment failed to allege facts concerning the nature of the alleged misconduct and its connection to alleged policies and customs, the original complaint failed to give notice of the proposed causes of action for malicious prosecution, supplying the prosecutor with falsified evidence, and against the arresting officer. Martin v City of New York, 153 A.D.3d 693, 61 N.Y.S.3d 63, 2017 N.Y. App. Div. LEXIS 6132 (N.Y. App. Div. 2d Dep't 2017).

Motion court properly denied a patient's motion for leave to amend his medical malpractice complaint because his proposed causes of action for fraud and breach of fiduciary duty were palpably insufficient, patently devoid of merit, or duplicative where the allegations of fraud only alleged that the doctor concealed the alleged malpractice and the proposed cause of action alleging breach of fiduciary duty was duplicative of the medical malpractice cause of action. Freely v Donnenfeld, 150 A.D.3d 695, 54 N.Y.S.3d 63, 2017 N.Y. App. Div. LEXIS 3424 (N.Y. App. Div. 2d Dep't 2017), app. dismissed, 2017 N.Y. App. Div. LEXIS 5847 (N.Y. App. Div. 2d Dep't July 5, 2017).

While the trial court properly denied a son’s motion for leave to serve an amended answer, the court erred in denying the son’s motion to vacate a judgment in favor of his mother because the affidavits and documentary evidence submitted by the son in support of his motion, taken together, set forth a detailed and credible explanation for the son’s failure to appear at the hearing and for any delay in moving to vacate his default, there was no showing of prejudice to the mother, and no evidence that the son willfully defaulted or otherwise intended to abandon his defense of this action, and the son’s submissions demonstrated a potentially meritorious defense to the complaint. Gately v Drummond, 161 A.D.3d 947, 77 N.Y.S.3d 519, 2018 N.Y. App. Div. LEXIS 3479 (N.Y. App. Div. 2d Dep't 2018).

Trial court, inter alia, properly denied the cross-motion of a city and its transportation department for leave to amend their answer to assert cross claims against a general contractor because the

general contractor would be prejudiced by the late amendment since it had not conducted discovery relating to the cross-claims, relied on the city defendants' original answer to its prejudice by forgoing independent questioning of the witnesses during depositions, and was hindered in preparing its defense. Gurewitz v City of New York, 175 A.D.3d 655, 108 N.Y.S.3d 33, 2019 N.Y. App. Div. LEXIS 6413 (N.Y. App. Div. 2d Dep't), app. dismissed in part, 175 A.D.3d 658, 109 N.Y.S.3d 167, 2019 N.Y. App. Div. LEXIS 6437 (N.Y. App. Div. 2d Dep't 2019).

Trial court properly denied a patient's motion to amend the pleadings because her proposed amendments were palpably insufficient and patently devoid of merit since they did not amount to either a violation of the Penal Law or the Victims of Gender-Motivated Violence Protection Law. Doe v Advantagecare Physicians, P.C., 190 A.D.3d 819, 136 N.Y.S.3d 784, 2021 N.Y. App. Div. LEXIS 295 (N.Y. App. Div. 2d Dep't 2021).

Trial court properly denied a pedestrian's motion for leave to amend her personal injury complaint against the property owner because the pedestrian failed to provide a sufficient explanation for the eight-month delay in moving for leave to amend the bill of particulars, her medical records were insufficient to establish that the proposed amendment had merit, the factual circumstances alleged in the proposed amendment had been known to her well before discovery had been completed and the note of issue served, and her proposed amendment was prejudicial to the owner. Blumenthal v 1979 Marcus Ave. Assoc., LLC, 203 A.D.3d 1122, 163 N.Y.S.3d 420, 2022 N.Y. App. Div. LEXIS 1998 (N.Y. App. Div. 2d Dep't 2022).

Since a mother and infant filed the amended complaint outside of the time period specified in CPLR 3025(a), and before obtaining leave of court or a stipulation of the parties who had appeared in the action, the amended complaint was a nullity. J. B. v City of New York, 231 A.D.3d 696, 220 N.Y.S.3d 345, 2024 N.Y. App. Div. LEXIS 5039 (N.Y. App. Div. 2d Dep't 2024).

Although leave to amend a pleading should be freely granted unless the opposing party would sustain prejudice (CPLR 3025, subd [b]), a court should exercise its discretion and deny an application for leave to amend where a matter sought to be added is palpably insufficient on its face such as where the cause of action is barred by the applicable Statute of Limitations.

Williams v Cordice, 100 Misc. 2d 425, 418 N.Y.S.2d 995, 1979 N.Y. Misc. LEXIS 2477 (N.Y. Sup. Ct. 1979).

There was no error in denying plaintiff's request for leave to amend its complaint in order to allege that defendant was a third-party beneficiary to a construction agreement, such that a claim for unjust enrichment could be added against defendant, as the proposed amendments were palpably insufficient and devoid of merit in the circumstances pursuant to N.Y. C.P.L.R. 3025(b). N.F. Gozo Corp. v Kiselman, 960 N.Y.S.2d 846, 38 Misc. 3d 48, 2012 N.Y. Misc. LEXIS 5593 (N.Y. App. Term 2012).

20. Intervening change in law

Special term properly granted plaintiff's motion to reargue prior motion to amend her complaint based on intervening change in law, and upon reargument, correctly determined her motion on merits, since her motion to reargue was made prior to dismissal of her appeal from initial denial of her motion to amend. Ferrizz v Jahelka, 125 A.D.2d 537, 509 N.Y.S.2d 613, 1986 N.Y. App. Div. LEXIS 62837 (N.Y. App. Div. 2d Dep't 1986).

21. Intervention

In wrongful death action in which plaintiffs sought to amend complaint in manner that would have caused prejudice to defendant's insurance company, but not to defendant, insurance company was real party in interest and was clearly aggrieved by amendment within meaning of CLS CPLR § 5511; thus, insurance company should have been permitted to intervene and its affirmation in opposition to motion to amend complaint should have been considered by court. Frost v Monter, 202 A.D.2d 632, 609 N.Y.S.2d 308, 1994 N.Y. App. Div. LEXIS 2968 (N.Y. App. Div. 2d Dep't 1994).

In action against medical insurance company and its HMO for, inter alia, breach of contract designating plaintiff as "preferred provider" of MRI services for defendants, plaintiff was not

entitled to amend its complaint to conform pleadings to proof where plaintiff did not so move until trial and did not otherwise provide defendants with notice that it would seek to recover damages sustained by other providers of technical and professional services, and defendants were not given opportunity to investigate claims of third-party damages and thus would have been prejudiced by proposed amendment. Amherst Magnetic Imaging Assocs., P.C. v Cmty. Blue, 286 A.D.2d 896, 730 N.Y.S.2d 639, 2001 N.Y. App. Div. LEXIS 8974 (N.Y. App. Div. 4th Dep't 2001), app. denied, 2001 N.Y. App. Div. LEXIS 12854 (N.Y. App. Div. 4th Dep't Dec. 21, 2001), app. denied, 97 N.Y.2d 612, 742 N.Y.S.2d 605, 769 N.E.2d 352, 2002 N.Y. LEXIS 512 (N.Y. 2002).

22. Joinder or consolidation of actions

Notwithstanding plaintiff's failure to strictly adhere to CLS CPLR § 3025 by seeking permission to amend complaint to add additional action, it was improvident exercise of discretion for court to deny consolidation of 2 actions where both actions clearly involved similar issues of fact and law. Flaherty v RCP Assocs., 208 A.D.2d 496, 616 N.Y.S.2d 801, 1994 N.Y. App. Div. LEXIS 9326 (N.Y. App. Div. 2d Dep't 1994).

Where parties to action stipulated in writing that plaintiff could file supplemental summons and amended complaint naming additional parties defendant and stating new causes of action against them, service of papers on additional defendants was not nullity, even though they were served without prior court approval, since (1) although CLS CPLR § 1003 does not contain provision permitting joinder on agreement of all parties, absent objection there was no basis for court to reject existing parties' desire to have additional defendants added, (2) no rights of nonparties were affected by their joinder, as any defenses they possessed could be raised after joinder, and (3) because of unusual factual pattern presented, parties sought to be added were already before court. Seavey v Korte, 156 Misc. 2d 984, 595 N.Y.S.2d 628, 1993 N.Y. Misc. LEXIS 68 (N.Y. Sup. Ct.), recalled, dismissed, 159 Misc. 2d 407, 605 N.Y.S.2d 181, 1993 N.Y. Misc. LEXIS 476 (N.Y. Sup. Ct. 1993).

23. Jurisdictional matters

Where summons and complaint have been served under misnomer of party which plaintiff intended as defendant, amendment will be permitted if court has acquired jurisdiction over intended but misnamed defendant provided (1) that intended but misnamed defendant was fairly apprised that it was party which action was intended to affect, and (2) that intended but misnamed defendant would not be prejudiced. Simpson v Kenston Warehousing Corp., 154 A.D.2d 526, 546 N.Y.S.2d 148, 1989 N.Y. App. Div. LEXIS 12803 (N.Y. App. Div. 2d Dep't 1989).

Plaintiff's failure to obtain leave pursuant to CLS CPLR §§ 1003 and 3025(b) to serve amended summons and complaint purporting to join new party defendant constituted jurisdictional defect requiring dismissal of action against such party. Youngs v Kissing Bridge Ski Corp., 216 A.D.2d 967, 628 N.Y.S.2d 925, 1995 N.Y. App. Div. LEXIS 7414 (N.Y. App. Div. 4th Dep't 1995).

Inasmuch as the attorneys' proposed amended complaint would have been dismissed in its entirety after their service credits were restored and they were guaranteed the right to a timely hearing and predetermination of their membership status in a retirement system even though they had not yet applied for retirement, their challenge to the denial of their N.Y. C.P.L.R. 3025(b) motion to amend was moot. Swergold v Cuomo, 70 A.D.3d 1290, 896 N.Y.S.2d 495, 2010 N.Y. App. Div. LEXIS 1571 (N.Y. App. Div. 3d Dep't 2010).

Jurisdictional defense interposed by the defendant for the first time after plaintiff served an amended complaint was timely under the general rule that an amendment relates back to the service of the original pleading. Blatz v Benschine, 53 Misc. 2d 352, 278 N.Y.S.2d 533, 1967 N.Y. Misc. LEXIS 1633 (N.Y. Sup. Ct. 1967), disapproved, DeFilippis v Perez, 148 A.D.2d 490, 539 N.Y.S.2d 22, 1989 N.Y. App. Div. LEXIS 2713 (N.Y. App. Div. 2d Dep't 1989).

In proceeding to have 13-year-old daughter of petitioner declared to be person in need of supervision (PINS), petitioner was not entitled to amend deficient petition since CLS CPLR § 3025(a) could not be applied in PINS proceeding to cure jurisdictional defects, and child was

entitled to same constitutional protections afforded in delinquency proceedings. In re Cassandra R., 155 Misc. 2d 756, 589 N.Y.S.2d 739, 1992 N.Y. Misc. LEXIS 490 (N.Y. Fam. Ct. 1992).

24. —Court's jurisdictional amount limitation

There is no requirement that measure of damages be stated in complaint so long as facts are alleged from which damages may properly be inferred, and where complaint alleged damages exceeding jurisdictional limits of all lower courts which have jurisdiction over action, court would amend complaint striking all references to jurisdictional limits of lower courts and substituting therefor allegation of damages exceeding minimum sum required for jurisdiction of court. Rhodes v Alberto-Culver, 132 Misc. 2d 916, 505 N.Y.S.2d 989, 1986 N.Y. Misc. LEXIS 2803 (N.Y. Civ. Ct. 1986).

Civil Court of City of New York did not have authority to allow plaintiff to amend complaint's ad damnum clause to state demand for $1,000,000 where he had sued for $300,000 but obtained jury verdict for $1,000,000, since suit had originally been filed in Superior Court and was transferred to Civil Court pursuant to CLS CPLR § 325, and so Civil Court's jurisdictional limit was amount stated in original complaint; however, plaintiff was free to bring motion in Superior Court for retransfer of case and then move for leave to make amendment, but if that proved unsuccessful, plaintiff would be limited to accepting amount originally stated in his complaint. Gordon v Board of Education, 134 Misc. 2d 284, 510 N.Y.S.2d 824, 1987 N.Y. Misc. LEXIS 2031 (N.Y. Civ. Ct. 1987).

Plaintiff in a case transferred under N.Y. Uniform Dist. Ct. Act § 1805-A(b) and N.Y. Comp. Codes R. & Regs. tit. 22, § 212.41-a(f-1) and 212.41(f-1) (District Court Rules) need not limit its claim to $5,000, and where warranted, it may seek damages up to the usual $15,000 monetary limitation that applies to other New York District Court actions for monetary damages under N.Y. Uniform Dist. Ct. Act. § 202; however, to do so, the plaintiff must request and obtain leave of the court, by motion to amend under N.Y. C.P.L.R. 3025(b). To the extent the "amendment as of right" provisions apply to commercial small claims matters under N.Y. Uniform Dist. Ct. Act §

1804-A, they do not justify service of an amended complaint as of right after a matter is transferred to a regular civil part. Jem Transp. Corp. v Blennau, 951 N.Y.S.2d 664, 37 Misc. 3d 787, 2012 N.Y. Misc. LEXIS 4537 (N.Y. Dist. Ct. 2012).

25. Liberal construction

Motion for leave to serve amended complaint should have been granted where the proposed amendment presented no new fact but merely asserted different legal theory on which plaintiff desired to proceed. Gonzalez v Concourse Plaza Syndicates, Inc., 27 A.D.2d 516, 275 N.Y.S.2d 302, 1966 N.Y. App. Div. LEXIS 2932 (N.Y. App. Div. 1st Dep't 1966).

Leave to amend should be freely given. McCabe v Queensboro Farm Products, Inc., 27 A.D.2d 936, 278 N.Y.S.2d 779, 1967 N.Y. App. Div. LEXIS 4521 (N.Y. App. Div. 2d Dep't 1967).

A party may amend his pleadings at any time by leave of the court and such leave should be freely given. McSweeney v Levin, 32 A.D.2d 760, 301 N.Y.S.2d 347, 1969 N.Y. App. Div. LEXIS 3718 (N.Y. App. Div. 1st Dep't), app. dismissed, 25 N.Y.2d 906, 304 N.Y.S.2d 599, 252 N.E.2d 132, 1969 N.Y. LEXIS 1079 (N.Y. 1969).

Leave to amend should be freely given and where no prejudice is claimed to result from the amendment, leave to amend should be granted. Merchants Nat'l Bank & Trust Co. v Duplex Truck & Equipment Sales, Inc., 33 A.D.2d 988, 307 N.Y.S.2d 382, 1970 N.Y. App. Div. LEXIS 5762 (N.Y. App. Div. 4th Dep't 1970).

Policy of courts is to liberally permit amendments of pleadings unless rights of a party are substantially prejudiced thereby. Mitchell v New York, 44 A.D.2d 852, 355 N.Y.S.2d 805, 1974 N.Y. App. Div. LEXIS 4914 (N.Y. App. Div. 2d Dep't 1974).

In the absence of a showing of prejudice, leave to amend or supplement a bill of particulars should be freely granted. Cossart v Fredenburgh, 50 A.D.2d 993, 376 N.Y.S.2d 261, 1975 N.Y. App. Div. LEXIS 11964 (N.Y. App. Div. 3d Dep't 1975).

Policy of courts is to liberally permit amendments of pleadings unless rights of party are substantially prejudiced. Sheldon Electric Co. v Oriental Boulevard Corp., 56 A.D.2d 886, 392 N.Y.S.2d 485, 1977 N.Y. App. Div. LEXIS 11272 (N.Y. App. Div. 2d Dep't 1977).

Leave to amend pleadings should be freely given. Chicago Title Ins. Co. v King, 59 A.D.2d 731, 398 N.Y.S.2d 582, 1977 N.Y. App. Div. LEXIS 13723 (N.Y. App. Div. 2d Dep't 1977).

Leave to amend pleadings should be freely given. Mosley v Baker, 59 A.D.2d 936, 399 N.Y.S.2d 452, 1977 N.Y. App. Div. LEXIS 14171 (N.Y. App. Div. 2d Dep't 1977).

Special Term is empowered freely to grant leave to litigants to amend pleadings, absent a showing that amendment would be futile, palpably insufficient or immaterial. Van Dussen-Storto Motor Inn, Inc. v Rochester Tel. Corp., 63 A.D.2d 244, 407 N.Y.S.2d 287, 1978 N.Y. App. Div. LEXIS 11341 (N.Y. App. Div. 4th Dep't 1978).

CPLR § 3025 is specific in its direction that leave should be freely given to a party to amend his pleading at any time; direction has been repeatedly held to apply to defenses deemed waived under CPLR § 3211 when not raised either by motion or in the responsive pleading, where it does not appear that some special right has been lost or that there had been some change of position or some significant trouble or expense that could have been avoided had the original pleading contained the new defense. A.J. Pegno Constr. Corp. v New York, 95 A.D.2d 655, 463 N.Y.S.2d 214, 1983 N.Y. App. Div. LEXIS 18556 (N.Y. App. Div. 1st Dep't 1983).

CPLR § 3025 motions are to be liberally granted in absence of prejudice and fact that defendants may be exposed to greater liability does not suffice to constitute prejudice. Bossert v Jay Dee Transp., Inc., 114 A.D.2d 833, 494 N.Y.S.2d 744, 1985 N.Y. App. Div. LEXIS 53841 (N.Y. App. Div. 2d Dep't 1985).

Leave to amend complaint should be freely granted absent showing of prejudice or surprise to opposing party, and court should not examine merits or legal sufficiency of proposed added cause of action unless it is clearly or patently insufficient on its face or, at very least, unless substantial question is raised as to sufficiency or meritoriousness of proposed pleading. Fisher v

Ken Carter Industries, Inc., 127 A.D.2d 817, 512 N.Y.S.2d 408, 1987 N.Y. App. Div. LEXIS 43309 (N.Y. App. Div. 2d Dep't 1987).

When proposed amendment to complaint does not set forth new facts but merely adds additional theory of recovery, leave to amend should generally be granted. Brewster v Baltimore & O. R. Co., 185 A.D.2d 653, 585 N.Y.S.2d 647, 1992 N.Y. App. Div. LEXIS 9183 (N.Y. App. Div. 4th Dep't 1992).

In light of CLS CPLR § 3026, which provides for liberal construction of pleadings and states that "[d]efects shall be ignored if a substantial right of a party is not prejudiced," proper remedy is dismissal of pleading with leave to re-plead where party has failed to separately set forth and number allegations of pleading as required by CLS CPLR § 3014. Gerena v New York State Div. of Parole, 266 A.D.2d 761, 698 N.Y.S.2d 750, 1999 N.Y. App. Div. LEXIS 12140 (N.Y. App. Div. 3d Dep't 1999).

Trial court properly denied an employee's cross motion for leave to serve and file an amended complaint as the proposed amendment was palpably insufficient and devoid of merit. Staskowski v Nassau Community Coll., 53 A.D.3d 611, 862 N.Y.S.2d 544, 2008 N.Y. App. Div. LEXIS 6202 (N.Y. App. Div. 2d Dep't 2008).

Leave to serve an amended or supplemental pleading may be given at any time and such leave should, by statutory direction, be freely given. Town Board of Fallsburgh v National Surety Corp., 53 Misc. 2d 23, 277 N.Y.S.2d 872, 1967 N.Y. Misc. LEXIS 1817 (N.Y. Sup. Ct. 1967), aff'd, 29 A.D.2d 726, 286 N.Y.S.2d 122, 1968 N.Y. App. Div. LEXIS 4818 (N.Y. App. Div. 3d Dep't 1968).

Under the CPLA the court is granted the widest latitude possible. Fitzpatrick v Fitzpatrick, 55 Misc. 2d 7, 284 N.Y.S.2d 355, 1967 N.Y. Misc. LEXIS 1215 (N.Y. Sup. Ct. 1967).

Leave to amend service of process should be liberally granted in the absence of substantial prejudice to one of the parties. State v Richard A. Viguerie Co., 86 Misc. 2d 506, 382 N.Y.S.2d

622, 1976 N.Y. Misc. LEXIS 2475 (N.Y. Sup. Ct.), modified, 55 A.D.2d 534, 389 N.Y.S.2d 548, 1976 N.Y. App. Div. LEXIS 15182 (N.Y. App. Div. 1st Dep't 1976).

While liberality is generally shown in permitting amendments to pleadings, lack of legal standing to sue is not amendable, particularly in statutory proceedings. Zisser v Bronx Cigar Corp., 91 Misc. 2d 1025, 399 N.Y.S.2d 109, 1977 N.Y. Misc. LEXIS 2472 (N.Y. Civ. Ct. 1977).

Leave to amend a pleading, in the absence of prejudice, should be freely given upon such terms as may be just (CPLR 3025, subd [b]). Killeen v Community Hospital at Glen Cove, 101 Misc. 2d 367, 420 N.Y.S.2d 990, 1979 N.Y. Misc. LEXIS 2685 (N.Y. Sup. Ct. 1979).

26. Limitations considerations

Amendment of complaint to allege new cause of action may be allowed, even where it would be time barred standing alone, if new cause relates back to facts, circumstances and proof underlying original complaint. Pinchback v New York, 51 A.D.2d 733, 379 N.Y.S.2d 124, 1976 N.Y. App. Div. LEXIS 11231 (N.Y. App. Div. 2d Dep't 1976).

Delivery of summons and amended complaint to sheriff pursuant to CLS CPLR § 203(b)(5)(i) did not toll running of statute of limitations for purpose of making motion to serve amended complaint. Mekkelson v Morris L. Cleverley Engineering, P.C., 179 A.D.2d 1056, 579 N.Y.S.2d 287, 1992 N.Y. App. Div. LEXIS 2402 (N.Y. App. Div. 4th Dep't 1992).

Court properly denied plaintiffs' cross motion for leave to serve second amended complaint and for order vacating note of issue where application for leave to amend was made more than 2 years after filing of note of issue, proposed amendment was based on factual circumstances known at time action was commenced, and plaintiffs failed to show reasonable excuse for their inordinate delay in moving to amend. Deni v Air Niagara, 190 A.D.2d 1011, 594 N.Y.S.2d 468, 1993 N.Y. App. Div. LEXIS 1199 (N.Y. App. Div. 4th Dep't 1993).

Late assertion of statute of limitations defense is no barrier to amendment of pleadings, absent significant prejudice to plaintiff. Cseh v New York City Transit Auth., 240 A.D.2d 270, 658 N.Y.S.2d 618, 1997 N.Y. App. Div. LEXIS 6563 (N.Y. App. Div. 1st Dep't 1997).

Appellate Division lacked power to amend medical malpractice complaint to revive claims sought to be asserted against New York City Health and Hospitals Corporation where that corporation was never made party to action, and statute of limitations had run. Oxley v City of New York, 240 A.D.2d 643, 658 N.Y.S.2d 697, 1997 N.Y. App. Div. LEXIS 6830 (N.Y. App. Div. 2d Dep't), app. denied, 91 N.Y.2d 802, 666 N.Y.S.2d 564, 669 N.E.2d 534, 1997 N.Y. LEXIS 4165 (N.Y. 1997).

Mere lateness, in absence of prejudice, is not barrier to amendment of pleading. Huntington v Frank Trotta Auto Wreckers, Inc., 257 A.D.2d 647, 684 N.Y.S.2d 570, 1999 N.Y. App. Div. LEXIS 685 (N.Y. App. Div. 2d Dep't 1999).

Court properly denied defendant’s motion for leave to amend his answer and (on amendment of answer) for summary judgment dismissing complaint based on lack of capacity to sue, and properly granted plaintiff’s motion to amend caption by substituting trustee in bankruptcy as plaintiff, nunc pro tunc, because defendant, who was admittedly aware of plaintiff’s bankruptcy proceeding before trial, was deemed to have waived such defense by waiting until more than 16 months after trial ended and his motion for judgment notwithstanding verdict was denied. Nisselson v Stephens, 268 A.D.2d 463, 701 N.Y.S.2d 636, 2000 N.Y. App. Div. LEXIS 559 (N.Y. App. Div. 2d Dep't 2000).

Failure to offer excuse for delay does not, alone, bar amendment of pleading absent showing of prejudice resulting from delay. Northbay Constr. Co. v Bauco Constr. Corp., 275 A.D.2d 310, 711 N.Y.S.2d 510, 2000 N.Y. App. Div. LEXIS 8594 (N.Y. App. Div. 2d Dep't 2000).

Party’s failure to offer excuse for delay in moving to amend pleading does not alone bar granting of such motion, absent showing of prejudice resulting from delay. Hilltop Nyack Corp. v TRMI

Holdings Inc., 275 A.D.2d 440, 712 N.Y.S.2d 888, 2000 N.Y. App. Div. LEXIS 8955 (N.Y. App. Div. 2d Dep't 2000).

Fire company was properly allowed to amend the complaint under N.Y. C.P.L.R. 3025(b), as the express breach of warranty claim was not time-barred under N.Y. U.C.C. Law § 2-725(2); the warranty fell under an exception to the limitations period, as it was a future performance warranty that guaranteed the performance of the product for five years. Wyandanch Volunteer Fire Co. v Radon Constr. Corp., 19 A.D.3d 590, 798 N.Y.S.2d 484, 2005 N.Y. App. Div. LEXIS 6946 (N.Y. App. Div. 2d Dep't 2005).

In a construction defect action, the trial court properly granted defendants' motions to strike the amended complaint; the complaint was served after defendants' motions to dismiss the original complaint had been submitted for consideration. The amended complaint was not served as of right, as it was served outside the time period for amendments without leave. Sutton Apts. Corp. v Bradhurst 100 Dev. LLC, 107 A.D.3d 646, 968 N.Y.S.2d 483, 2013 N.Y. App. Div. LEXIS 4816 (N.Y. App. Div. 1st Dep't 2013).

Although a new counterclaim, involving an occurrence subsequent to the service of the original answer, requires a supplemental rather than an amended pleading, such supplemental pleading is embraced within the term "amended" as used in CPLR 203(e), which permits a time-barred claim in an amended pleading, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences sought to be proven in the amended pleading. Werner Spitz Constr. Co. v Vanderlinde Electric Corp., 64 Misc. 2d 157, 314 N.Y.S.2d 567, 1970 N.Y. Misc. LEXIS 1330 (N.Y. County Ct. 1970).

Statute of limitations did not bar amendment of answer to assert a counterclaim for property damage arising out of an automobile collision where original answer was timely filed and gave notice of the occurrence of the accident and of a possible existence of a property damage counterclaim. Emerich v Pfister, 74 Misc. 2d 728, 345 N.Y.S.2d 317, 1973 N.Y. Misc. LEXIS 1928 (N.Y. Sup. Ct. 1973).

When a solicitor who was sued by an investor for fraud, conversion and unjust enrichment sought, under N.Y. C.P.L.R. 3025(b), to amend the solicitor's answer to assert a statute of limitations defense, the motion was properly denied as to the fraud and conversion claims because the six-year statute of limitations in N.Y. C.P.L.R. 213(8) governed and suit was timely filed within six years from the date those claims accrued, when the investor allegedly transferred funds in reliance on the solicitor's alleged false representations. Ingrami v Rovner, 45 A.D.3d 806, 847 N.Y.S.2d 132, 2007 N.Y. App. Div. LEXIS 12120 (N.Y. App. Div. 2d Dep't 2007).

When a solicitor who was sued by an investor for fraud, conversion and unjust enrichment sought, under N.Y. C.P.L.R. 3025(b), to amend the solicitor's answer to assert a statute of limitations defense, the motion was improperly denied as to the unjust enrichment claim because the three-year statute of limitations in N.Y. C.P.L.R. 214(3) governed, since the investor sought monetary, as opposed to equitable, relief, and the limitations period began to run upon the occurrence of the alleged wrongful act giving rise to a duty of restitution, so the suit was arguably untimely as the alleged wrongful acts occurred more than three years before suit was filed. Ingrami v Rovner, 45 A.D.3d 806, 847 N.Y.S.2d 132, 2007 N.Y. App. Div. LEXIS 12120 (N.Y. App. Div. 2d Dep't 2007).

27. Misnomer of party

Where summons and complaint have been served under misnomer of party which plaintiff intended as defendant, amendment will be permitted if court has acquired jurisdiction over intended but misnamed defendant provided (1) that intended but misnamed defendant was fairly apprised that it was party which action was intended to affect, and (2) that intended but misnamed defendant would not be prejudiced. Simpson v Kenston Warehousing Corp., 154 A.D.2d 526, 546 N.Y.S.2d 148, 1989 N.Y. App. Div. LEXIS 12803 (N.Y. App. Div. 2d Dep't 1989).

Where service of process has been effected under a misnomer upon the party which the plaintiff intended to sue, it is the duty of the court to determine whether, notwithstanding the error, the

defendant was fairly apprised that it was the party the action was intended to affect. If so, the court has acquired jurisdiction. Luce v Pierce Muffler Shops, 51 Misc. 2d 256, 272 N.Y.S.2d 845, 1966 N.Y. Misc. LEXIS 1774 (N.Y. Sup. Ct. 1966), aff'd, 28 A.D.2d 826, 282 N.Y.S.2d 724, 1967 N.Y. App. Div. LEXIS 7382 (N.Y. App. Div. 4th Dep't 1967).

In an action by a surviving spouse to set aside, under a constructive trust theory, a conveyance of property by the deceased spouse to a relative, the prior history of the case, including untimely submission of proposed amended pleadings, made it inappropriate to allow an amendment that would belatedly change the entire theory of the case; nonethless, the surviving spouse was allowed to replead with a more modest amendment, adding that the action was brought both as surviving spouse and as administrator of the deceased spouse’s estate, as that dual capacity might have the same effect, in terms of avoiding limitations issues, as the more drastic proposed amendment. Bolla v Bolla, 810 N.Y.S.2d 853, 10 Misc. 3d 906, 2005 N.Y. Misc. LEXIS 2675 (N.Y. Sur. Ct. 2005).

28. Removal of action

Proper procedure dictates that motion to remove action from Civil Court to Supreme Court pursuant to CLS CPLR § 325(b) must be accompanied by request for leave to amend ad damnum clause of complaint pursuant to CLS CPLR § 3025(b). Francilion v Epstein, 144 A.D.2d 633, 535 N.Y.S.2d 65, 1988 N.Y. App. Div. LEXIS 12435 (N.Y. App. Div. 2d Dep't 1988).

Motion to remove action from Civil Court to Supreme Court under CLS CPLR § 325(b) must be accompanied by request for leave to amend ad damnum clause of complaint under CLS CPLR § 3025(b). Martin v Waldbaum's Supermarket, 172 A.D.2d 804, 569 N.Y.S.2d 174, 1991 N.Y. App. Div. LEXIS 5391 (N.Y. App. Div. 2d Dep't 1991).

Service of copy of proposed order granting motion to amend complaint to increase damages beyond the amount of $10,000 started running of 30-day period within which action might be removed to federal court and petition for removal coming more than 30 days subsequent to date

of service of copy of such proposed order came too late. Gibson v Atlantic C. L. R. Co., 299 F. Supp. 268, 1969 U.S. Dist. LEXIS 8526 (S.D.N.Y. 1969).

29. Res judicata; collateral estoppel

Where defendant's cross motion for leave to amend answer so as to set up counterclaim for fraud was denied by Special Term in granting plaintiff's motion for summary judgment, denial of leave to amend was not res judicata against defendant in separate suit to recover for alleged fraud. Goldman v Business Factors Corp., 15 N.Y.2d 983, 260 N.Y.S.2d 5, 207 N.E.2d 603, 1965 N.Y. LEXIS 1452 (N.Y. 1965).

Order of the Supreme Court, Appellate Division, reversing order granting plaintiff's motion to amend complaint to allege a products liability cause of action in tort settled the law of the case with respect to the products liability cause of action and operated to preclude the plaintiff from seeking on remand to amend his complaint to allege a new cause of action sounding in strict liability in tort. Rainbow v Rosenberg, 54 A.D.2d 1121, 388 N.Y.S.2d 792, 1976 N.Y. App. Div. LEXIS 15103 (N.Y. App. Div. 4th Dep't 1976), app. dismissed, 41 N.Y.2d 901, 1977 N.Y. LEXIS 3318 (N.Y. 1977).

Where amended complaint is served, original complaint cannot constitute law of case. Berne Investors, Inc. v Wechsler, 152 A.D.2d 804, 543 N.Y.S.2d 585, 1989 N.Y. App. Div. LEXIS 9346 (N.Y. App. Div. 3d Dep't 1989).

Court erred in denying defendant's motion for leave to amend his answer to add defense of collateral estoppel where defendant sought to assert such defense only as to 2 narrow issues, claims as to which preclusion was sought were identical to claims that were subject of arbitration and decided therein, and plaintiff appeared in arbitration and was represented by same counsel who had successfully represented him in 2 prior arbitrations. Acevedo v Holton, 239 A.D.2d 194, 657 N.Y.S.2d 407, 1997 N.Y. App. Div. LEXIS 5156 (N.Y. App. Div. 1st Dep't 1997).

Civil court erred in denying a medical provider's motion for summary judgment and in granting an insurer's cross-motion to amend in the provider's action to recover assigned first-party no-fault benefits because the provider's assignor executed an assignment of benefits in favor of the provider more than three months prior to the insurer's commencement of a declaratory judgment action, the court did not award the insurer a declaratory judgment against the provider, and the insurer's cross-motion seeking leave to amend the answer to assert that the action was barred by the doctrine of res judicata was patently devoid of merit. Ultimate Health Prods., Inc. v Ameriprise Auto & Home, 57 Misc. 3d 9, 56 N.Y.S.3d 770, 2017 N.Y. Misc. LEXIS 2751 (N.Y. App. Term 2017).

30. Stipulation

On appeal pursuant to stipulation for judgment absolute, Court of Appeals was prohibited from addressing plaintiff's motion to amend her complaint; while CLS CPLR § 3025 authorizes amendment to pleadings "at any time," after stipulation, time to amend had passed. Morales v County of Nassau, 94 N.Y.2d 218, 703 N.Y.S.2d 61, 724 N.E.2d 756, 1999 N.Y. LEXIS 3749 (N.Y. 1999).

Court properly dismissed husband's action against wife for rescission of stipulation of settlement of their divorce action on ground that it had been fraudulently induced by wife and her attorney, where husband refused to proceed to trial pending receipt of answers to his amended complaint which alleged new cause of action for fraud, deceit, and conspiracy against other defendants, since amended complaint was prepared 5 days after pretrial conference at which court directed parties to proceed to trial; husband could not contravene court's pretrial ruling by serving amended complaint and then claiming that existence of amended complaint precluded him from proceeding to trial on original complaint. Montalbo v Montalbo, 134 A.D.2d 414, 521 N.Y.S.2d 38, 1987 N.Y. App. Div. LEXIS 50602 (N.Y. App. Div. 2d Dep't 1987), app. dismissed in part, app. denied, 72 N.Y.2d 1002, 534 N.Y.S.2d 664, 531 N.E.2d 296, 1988 N.Y. LEXIS 2753 (N.Y. 1988).

Defendants waived defense of lack of personal jurisdiction by failing to raise it in their answer to original complaint or in their motion to dismiss under CLS CPLR § 3211(a)(7), and defense was not revived by parties' stipulation giving plaintiffs right to serve amended complaint and providing that defendants could amend their answer as "a matter of course" since (1) stipulation was silent as to jurisdictional issue and thus could not be construed to permit revival of defense of lack of jurisdiction, and (2) fact that defendants were permitted to serve responsive pleadings as of right did not preclude finding of waiver. DeFilippis v Perez, 148 A.D.2d 490, 539 N.Y.S.2d 22, 1989 N.Y. App. Div. LEXIS 2713 (N.Y. App. Div. 2d Dep't 1989).

31. Sufficiency of pleadings

Motion to amend after case has been certified ready for trial should be made upon notice. Pick v McCombs, 57 A.D.2d 1078, 395 N.Y.S.2d 819, 1977 N.Y. App. Div. LEXIS 12395 (N.Y. App. Div. 4th Dep't 1977).

It is an established rule that the legal sufficiency or merits of a proposed amendment of a pleading will not be examined on a motion to amend unless the insufficiency or lack of merit is clear and free from doubt. Goldstein v Brogan Cadillac Oldsmobile Corp., 90 A.D.2d 512, 455 N.Y.S.2d 19, 1982 N.Y. App. Div. LEXIS 18554 (N.Y. App. Div. 2d Dep't 1982).

Special Term did not err in granting plaintiff's motion to amend its complaint to add a cause of action for breach of contract in addition to its action seeking rescission of a contract and money damages after discovering that wine purchased from defendant was not of the quality represented by defendant, where the fact that the motion to amend came after plaintiff had filed a note of issue did not automatically require application of a rule different than a rule that a party may amend its pleading at any time by permission of court and leave is to be freely given, and where, inasmuch as the original summons had noted that the nature of the action was to recover money damages for breach of contract, there was no prejudice or surprise to defendant as it had been apprised from the outset of the nature of the action and the amended complaint involved the same transaction and set of facts. Plattsburgh Distributing Co. v Hudson Valley Wine Co.,

108 A.D.2d 1043, 485 N.Y.S.2d 616, 1985 N.Y. App. Div. LEXIS 43363 (N.Y. App. Div. 3d Dep't 1985).

Defendants were properly permitted to amend answers where plaintiff did not claim either prejudice or surprise, but argued that amendment should have been denied on ground that proposed affirmative defenses had no merit; legal sufficiency or merits of proposed amendments will not be examined on motion to amend unless insufficiency or lack of merit is clear and free from doubt. Sentry Ins. Co. v Kero-Sun, Inc., 122 A.D.2d 204, 504 N.Y.S.2d 739, 1986 N.Y. App. Div. LEXIS 59534 (N.Y. App. Div. 2d Dep't 1986).

Defendants were not entitled to dismissal of amended complaint on ground that plaintiff failed to conform to order which had dismissed original complaint with leave to re-plead where plaintiff had properly responded to court’s direction to clarify causes of action and provide factual details, and defendants were not led to believe that action had been abandoned despite passage of long period of time between dismissal of original complaint and service of amended complaint. State v St. James Nursing Home, 128 A.D.2d 694, 513 N.Y.S.2d 195, 1987 N.Y. App. Div. LEXIS 44381 (N.Y. App. Div. 2d Dep't 1987).

In action for negligence, inter alia, it was error to deny motion by ambulance company to amend its answer to assert 2 affirmative defenses under provisions of CLS Pub Health § 3013 exempting voluntary ambulance services from liability for ordinary negligence, since plaintiffs were not prejudiced or surprised by amendment and, notwithstanding that ambulance company billed plaintiffs for its services, proposed affirmative defenses were not clearly and patently insufficient on their face. Hopper v Hise, 131 A.D.2d 814, 517 N.Y.S.2d 178, 1987 N.Y. App. Div. LEXIS 48259 (N.Y. App. Div. 2d Dep't 1987).

Action commenced in 1994 to recover damages arising from contamination of wells that served plaintiff’s apartment building was time barred, where contamination had been confirmed in 1985; however, court should have denied summary judgment to defendants and permitted plaintiff to amend its complaint to state cause of action based on quasi contract, as allegations that defendants provided bottled water to plaintiff’s tenants for nearly 6 years as remedy for

contamination gave rise to inference that plaintiff was satisfied with its tenants' receipt of bottled water as appropriate remedy and therefore elected not to pursue action against defendants, during which time statute of limitations ran on plaintiff's action, resulting in detriment to plaintiff in loss of its remedy at law and benefit to defendants in their avoidance of potential liability for damages caused by contamination of plaintiff's wells. Wood Realty Trust v N. Storonske Cooperage Co., 229 A.D.2d 821, 646 N.Y.S.2d 410, 1996 N.Y. App. Div. LEXIS 7960 (N.Y. App. Div. 3d Dep't 1996).

Trial court erred in denying plaintiffs' motion to file a supplemental complaint, pursuant to N.Y. C.P.L.R. 3025, which added damages in their action against a board of education, where plaintiffs had sufficiently informed the board of their claims, had substantially complied with the notice requirements of N.Y. Educ. Law § 3813(1), and the board had a full opportunity to investigate the claims and was aware that further damages were accruing, due to the nature of the dispute and the fact that plaintiffs had sought injunctive relief against future miscalculations which caused the damages. Varsity Transit, Inc. v Bd. of Educ., 304 A.D.2d 358, 759 N.Y.S.2d 4, 2003 N.Y. App. Div. LEXIS 3737 (N.Y. App. Div. 1st Dep't 2003), rev'd, 5 N.Y.3d 532, 806 N.Y.S.2d 457, 840 N.E.2d 569, 2005 N.Y. LEXIS 3217 (N.Y. 2005).

Leave to amend to add a counterclaim for indemnification in an action involving a construction contract was improperly denied as, instead of applying the summary judgment standard, the trial court only had to assess whether the school district had made the required evidentiary showing under N.Y. C.P.L.R. 3025(b) sufficient to support its proposed claim; the district was not required to plead or prove under N.Y. C.P.L.R. 3015(a) that it gave notice of its claim within the 21-day period prescribed in the parties' construction contract as a condition precedent but was only required to provide some evidence that a claim had been made against and that facts existed to support is claim for indemnification, which it did with evidence of the existence of the electrical subcontractor's claim for delay damages. Bast Hatfield, Inc. v Schalmont Cent. School Dist., 37 A.D.3d 987, 830 N.Y.S.2d 799, 2007 N.Y. App. Div. LEXIS 1966 (N.Y. App. Div. 3d Dep't 2007).

No evidentiary showing of merit is required under N.Y. C.P.L.R. § 3025(b) regardless of the type of cause of action contained in the proposed amendment; the court need only determine whether the proposed amendment is “palpably insufficient” to state a cause of action or defense or is patently devoid of merit. Lucido v Mancuso, 49 A.D.3d 220, 851 N.Y.S.2d 238, 2008 N.Y. App. Div. LEXIS 587 (N.Y. App. Div. 2d Dep't 2008).

Because the condominium owners’ proposed amendments were neither palpably insufficient nor patently devoid of merit on their face, pursuant to N.Y. C.P.L.R. 3025(b), the owners’ cross-motion for leave to amend their complaint was properly granted. Stein v Garfield Regency Condominium, 65 A.D.3d 1126, 886 N.Y.S.2d 54, 2009 N.Y. App. Div. LEXIS 6414 (N.Y. App. Div. 2d Dep't 2009).

Trial court erred in denying an owner’s cross-motion for leave to amend the complaint to assert causes of action alleging private nuisance and trespass because, notwithstanding the lengthy gap in time between the commencement of the action and the cross-motion, the neighbor made no showing that it was surprised by the new allegations or would be significantly prejudiced where some portion of the delay was attributable to the neighbor’s effort to vacate its default and the parties’ subsequent motion practice and negotiations, there was no contention that discovery had concluded, and the allegations of the proposed amendment and the submissions in support of it adequately set forth the requisite elements for private nuisance and trespass. Krakovski v Stavros Assoc., LLC, 173 A.D.3d 1146, 103 N.Y.S.3d 553, 2019 N.Y. App. Div. LEXIS 5147 (N.Y. App. Div. 2d Dep't 2019).

Mortgagee’s motion for leave to amend the complaint should have been granted where the allegations and submissions adequately set forth the requisite elements for a cause of action for reforeclosure under RPAPL 1503. Bank of N.Y. v Karistina Enters., LLC, 209 A.D.3d 820, 177 N.Y.S.3d 91, 2022 N.Y. App. Div. LEXIS 5713 (N.Y. App. Div. 2d Dep't 2022).

In determining whether to grant leave to serve an amended or supplemental complaint, the court’s scope of inquiry should be restricted to the propriety of an amended or supplemental pleading in the circumstances of the case before it and the court should not become involved in

the merits of the litigation or the sufficiency of the pleadings. Town Board of Fallsburgh v National Surety Corp., 53 Misc. 2d 23, 277 N.Y.S.2d 872, 1967 N.Y. Misc. LEXIS 1817 (N.Y. Sup. Ct. 1967), aff'd, 29 A.D.2d 726, 286 N.Y.S.2d 122, 1968 N.Y. App. Div. LEXIS 4818 (N.Y. App. Div. 3d Dep't 1968).

Court will not concern itself with merits of the litigation or the sufficiency of the pleadings, and will allow amendment unless merit is plainly lacking. Fitzpatrick v Fitzpatrick, 55 Misc. 2d 7, 284 N.Y.S.2d 355, 1967 N.Y. Misc. LEXIS 1215 (N.Y. Sup. Ct. 1967).

CPLR 3025(b) allows amendments of pleadings freely, regardless of the merits or sufficiency of the pleading. Grant v Rochester, 68 Misc. 2d 358, 326 N.Y.S.2d 691, 1971 N.Y. Misc. LEXIS 1065 (N.Y. Sup. Ct. 1971).

Ordinarily the courts will not determine the merits and sufficiency of the proposed amended pleading unless the insufficiency is clear and free from doubt. Cadran v Fanni, 72 Misc. 2d 1, 338 N.Y.S.2d 532, 1972 N.Y. Misc. LEXIS 1413 (N.Y. Dist. Ct. 1972).

It was incumbent upon Civil Court, reviewing plaintiff’s motion to amend its complaint to assert an additional cause of action in landlord-tenant dispute, to determine whether or not amended complaint stated cause of action. Kaplan v Coulston, 85 Misc. 2d 745, 381 N.Y.S.2d 634, 1976 N.Y. Misc. LEXIS 2051 (N.Y. Civ. Ct. 1976).

Plaintiff who was demoted to associate professor after college found that he committed plagiarism would be permitted to amend cause of action for intentional infliction of emotional distress to substitute named professors for fictitious names, where named professors allegedly exceeded scope of any qualified privilege by needlessly and indiscriminately disclosing false and defamatory plagiarism charges to campus community in violation of college rules; unprivileged publication of charge of plagiarism in academic community, if false or made with reckless indifference to truth, could constitute actionable conduct. Klinge v Ithaca College, 167 Misc. 2d 458, 634 N.Y.S.2d 1000, 1995 N.Y. Misc. LEXIS 532 (N.Y. Sup. Ct. 1995).

In action by plaintiffs who allegedly became afflicted with cancer as result of cigarette smoking, where complaint asserted that defendant cigarette manufacturers were jointly and severally liable and defendants sought dismissal under CLS CPLR § 3016(b) for failure to plead with particularity, plaintiffs were granted leave to serve amended complaint alleging what brand or brands of cigarettes each of them had smoked, to enable defendants to knowledgeably respond to complaint. DaSilva v American Tobacco Co., 175 Misc. 2d 424, 667 N.Y.S.2d 653, 1997 N.Y. Misc. LEXIS 607 (N.Y. Sup. Ct. 1997).

32. —Insufficiency

Although leave to amend should generally be freely given, it should be denied where the proposed amendment is plainly insufficient on its face. Raymond v Ormsby, 54 A.D.2d 1021, 388 N.Y.S.2d 365, 1976 N.Y. App. Div. LEXIS 14984 (N.Y. App. Div. 3d Dep't 1976).

In an action to replevy collateral pursuant to a retail installment sales contract, defendants' motion to amend the first counterclaim of her answer to add a claim based on a construction of the Truth in Lending Act rejected by the United States Supreme Court was properly denied, since a motion to amend a pleading to add a claim that is patently without merit should be denied to avoid the possibility of needless litigation. General Motors Acceptance Corp. v Shickler, 96 A.D.2d 926, 466 N.Y.S.2d 369, 1983 N.Y. App. Div. LEXIS 19564 (N.Y. App. Div. 2d Dep't 1983).

Insurer of film production company allegedly injured by negligence and breach of warranty of manufacturer of film stock was not entitled to amend pleadings where original pleadings required dismissal due to failure to allege facts with requisite degree of specificity and where proposed amended pleadings were no improvement over original; although leave to amend is freely given pursuant to CLS CPLR § 3025, when leave is sought to amend pleadings properly dismissed pursuant to § 3211, court must be satisfied that sufficient grounds exist to support proposed amended pleadings. Travelers Ins. Co. v Ferco, Inc., 122 A.D.2d 718, 511 N.Y.S.2d 594, 1986 N.Y. App. Div. LEXIS 59257 (N.Y. App. Div. 1st Dep't 1986).

On motion for leave to amend answer, court should not examine merits or legal insufficiency of proposed amendments unless causes of action set forth in amendment are palpably insufficient on their faces. Clark v Taylor Wine Co., 148 A.D.2d 908, 539 N.Y.S.2d 536, 1989 N.Y. App. Div. LEXIS 4092 (N.Y. App. Div. 3d Dep't 1989).

Although leave to amend pleadings under CLS CPLR § 3025 is to be freely given in exercise of trial court's discretion, provided that there is no prejudice to nonmoving party, proposed amendment must not be plainly lacking in merit. Bombard v Central Hudson Gas & Elec. Co., 205 A.D.2d 1018, 614 N.Y.S.2d 577, 1994 N.Y. App. Div. LEXIS 6727 (N.Y. App. Div. 3d Dep't), app. dismissed, 84 N.Y.2d 923, 621 N.Y.S.2d 521, 645 N.E.2d 1221, 1994 N.Y. LEXIS 3860 (N.Y. 1994).

In action arising from contract concededly awarded to plaintiff, where defendant city was denied summary judgment on plaintiff's claim for account stated, it was error to grant leave to amend complaint to add causes of action for fraudulent inducement, because alleged fraudulent inducement related to contract itself and damages could be recovered for its breach. Big Apple Car v City of New York, 234 A.D.2d 136, 650 N.Y.S.2d 730, 1996 N.Y. App. Div. LEXIS 12517 (N.Y. App. Div. 1st Dep't 1996).

Leave to amend pleading should be denied where proposed amendment is patently lacking in merit. Baker v Keller, 241 A.D.2d 947, 661 N.Y.S.2d 330, 1997 N.Y. App. Div. LEXIS 7892 (N.Y. App. Div. 4th Dep't 1997).

In plaintiff's action to recover its initial capital contribution in partnership formed to develop software-based commodities trading system, court properly denied motion to amend complaint to predicate recovery on tort theory of fraudulent misrepresentation, where proposed amended complaint intimated that defendant had misrepresented amount of resources it would devote to project, while affidavit of plaintiff's president suggested that defendant misrepresented to plaintiff that it had already developed trading system. Non-Linear Trading Co. v Braddis Assocs., 243 A.D.2d 107, 675 N.Y.S.2d 5, 1998 N.Y. App. Div. LEXIS 6410 (N.Y. App. Div. 1st Dep't 1998).

In action for rescission of lease, conversion and damages for use and occupancy, plaintiffs were not entitled to amend their complaint to allege continuous trespass where court had determined, on motion to dismiss original complaint on statute of limitations grounds, that plaintiffs' factual allegations were insufficient to state continuous trespass claim. Romano v Kassebaum, 250 A.D.2d 661, 672 N.Y.S.2d 904, 1998 N.Y. App. Div. LEXIS 5497 (N.Y. App. Div. 2d Dep't 1998).

Allegations that insurance broker's negligence and misrepresentations led to lack of coverage asserted private wrongs resulting from ordinary fraud, breach of fiduciary duty and negligence, and thus court should not have permitted plaintiff to amend complaint to add punitive damages claim. Chase Manhattan Bank, N.A. v Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A89005, 258 A.D.2d 1, 690 N.Y.S.2d 570, 1999 N.Y. App. Div. LEXIS 6180 (N.Y. App. Div. 1st Dep't 1999).

Statute of limitations was tolled for applicable period of infancy even though infant plaintiff timely filed notice of claim under CLS Gen Mun § 50-e, and thus motion for leave to serve amended answer, asserting affirmative defense of statute of limitations, should have been denied. Aponte v Brentwood Union Free Sch. Dist., 270 A.D.2d 295, 704 N.Y.S.2d 285, 2000 N.Y. App. Div. LEXIS 2706 (N.Y. App. Div. 2d Dep't 2000).

In action by present and former subscribers to defendants' Digital Subscriber Line service, it was error to grant leave to amend to add claim for fraudulent inducement because (1) plaintiffs failed to sufficiently allege that defendants, with scienter, misrepresented any material fact in order to induce plaintiffs' reliance, and that plaintiffs reasonably relied on defendants' representations to their detriment, and (2) proposed amendment that cannot survive motion to dismiss should not be permitted. Scott v Bell Atl. Corp., 282 A.D.2d 180, 726 N.Y.S.2d 60, 2001 N.Y. App. Div. LEXIS 4822 (N.Y. App. Div. 1st Dep't 2001), aff'd in part, modified, 98 N.Y.2d 314, 746 N.Y.S.2d 858, 774 N.E.2d 1190, 2002 N.Y. LEXIS 1900 (N.Y. 2002).

In an action for the partition and sale of real property, first defendant was properly denied leave to amend to add a cross claim against second defendant for interference with pre-contractual relations as her allegations failed to establish that a contract would have been entered into but

for the actions of second defendant if his sole purpose was to damage first defendant or if the means employed to induce termination of the relationship were dishonest, unfair, or otherwise improper. Ricca v Valenti, 24 A.D.3d 647, 807 N.Y.S.2d 123, 2005 N.Y. App. Div. LEXIS 14321 (N.Y. App. Div. 2d Dep't 2005).

Because the defendants' submission of their initial partnership agreement did not support their claim that the agreement's terms would govern the parties' obligations upon the attorney's withdrawal from the law firm, and because defendants have deliberately delayed the litigation and wasted the time of the court and counsel, the trial court properly denied their N.Y. C.P.L.R. 3025(b) motion to amend; pursuant to N.Y. C.P.L.R. 3126, the trial court's remedy would not be disturbed. D'Orazio v Mainetti, 39 A.D.3d 981, 833 N.Y.S.2d 727, 2007 N.Y. App. Div. LEXIS 4452 (N.Y. App. Div. 3d Dep't 2007).

Trial court properly denied an employee's cross motion for leave to serve and file an amended complaint as the proposed amendment was palpably insufficient and devoid of merit. Staskowski v Nassau Community Coll., 53 A.D.3d 611, 862 N.Y.S.2d 544, 2008 N.Y. App. Div. LEXIS 6202 (N.Y. App. Div. 2d Dep't 2008).

Plaintiff could not be granted leave to serve a late notice of claim against defendants, a school district and others, alleging, inter alia, breach of contract as the statute of limitations had run on the claim itself under Education Law § 3813(2-a) and General Municipal Law § 50-e(5); due to those circumstances, plaintiff was also properly denied leave to amend under CPLR 3025(b) as the proposed amendment would be palpably insufficient. Boakye-Yiadom v Roosevelt Union Free School Dist., 57 A.D.3d 929, 871 N.Y.S.2d 314, 2008 N.Y. App. Div. LEXIS 10216 (N.Y. App. Div. 2d Dep't 2008).

Although court will not concern itself with sufficiency of proposed pleading; yet, if it is patently insufficient, the application to serve it will be denied, as no useful purpose will be served by allowing it. Keller v Greyhound Corp., 41 Misc. 2d 255, 244 N.Y.S.2d 882, 1963 N.Y. Misc. LEXIS 1599 (N.Y. Sup. Ct. 1963).

Although generally the better practice is to leave questions relating to the sufficiency and merits of a proposed amended pleading for determination on a proper motion or on trial, it is appropriate to deny a motion to amend where the proposed amendment is sought as an obviously prejudicial practice for avoiding or denying summary judgment, without legal or factual foundation. Woodhouse, Drake & Carey, Ltd. v Anderson, 61 Misc. 2d 951, 307 N.Y.S.2d 113, 1970 N.Y. Misc. LEXIS 1979 (N.Y. Sup. Ct. 1970).

Although courts should not ordinarily determine questions relating to the merits and sufficiency of the defense sought to be interposed, leave to amend should be denied when it is apparent that the proposed amendment is palpably insufficient on its face. Bellefeuille v City & County Sav. Bank, 74 Misc. 2d 534, 345 N.Y.S.2d 409, 1973 N.Y. Misc. LEXIS 1818 (N.Y. Sup. Ct. 1973), modified, 43 A.D.2d 335, 351 N.Y.S.2d 738, 1974 N.Y. App. Div. LEXIS 5833 (N.Y. App. Div. 3d Dep't 1974).

If matter sought to be added by amendment to pleadings is palpably insufficient or immaterial, court may not exercise its discretion and leave to amend should be denied. B v B, 78 Misc. 2d 112, 355 N.Y.S.2d 712, 1974 N.Y. Misc. LEXIS 1341 (N.Y. Sup. Ct. 1974).

Ordinarily, leave to serve an amended complaint is freely granted absent prejudice or surprise to defendant, but denial of leave to serve a supplemental pleading is appropriate when the new material is clearly insufficient to state a cause of action. Simone v Long Island Jewish Hillside Medical Center, 81 Misc. 2d 163, 364 N.Y.S.2d 714, 1975 N.Y. Misc. LEXIS 2350 (N.Y. Sup. Ct. 1975).

Cross motion by claimant is denied to extent it seeks to amend claim pursuant to CLS CPLR 3025(b) inasmuch as pleading is fatally deficient as it does not contain copy of proposed amendment. Ausderau v State, 130 Misc. 2d 848, 498 N.Y.S.2d 253, 1985 N.Y. Misc. LEXIS 3279 (N.Y. Ct. Cl. 1985), aff'd, 127 A.D.2d 980, 512 N.Y.S.2d 790, 1987 N.Y. App. Div. LEXIS 43471 (N.Y. App. Div. 4th Dep't 1987).

Court denied motion by garment manufacturer to amend its answer to assert affirmative defense that plaintiff's claims were preempted by Federal Flammable Fabrics Act because proposed affirmative defense was devoid of merit or palpably insufficient as matter of law. Askenazi v Hymil Mfg. Co., 170 Misc. 2d 461, 648 N.Y.S.2d 895, 1996 N.Y. Misc. LEXIS 379 (N.Y. Sup. Ct. 1996).

In action by plaintiffs who owned property fronting on navigable lake, alleging that defendants' erection of boat house in area below water line constituted trespass and violated their littoral rights, plaintiffs were not entitled to amend their complaint to plead adverse possession or prescriptive easement, as such claims did not state valid causes of action against defendants. Rogers v South Slope Holding Corp., 172 Misc. 2d 33, 656 N.Y.S.2d 169, 1997 N.Y. Misc. LEXIS 90 (N.Y. Sup. Ct. 1997), modified, aff'd, 255 A.D.2d 898, 680 N.Y.S.2d 772, 1998 N.Y. App. Div. LEXIS 12090 (N.Y. App. Div. 4th Dep't 1998).

In action to recover balance allegedly due under parties' credit card agreement, defendant was not entitled to amend his answer to allege that credit card agreement was unconscionable due to unequal bargaining power based on his assertion that he was unsophisticated consumer lacking comparable education to plaintiff's representatives, where he failed to specifically allege facts concerning subject transaction that would indicate existence of any procedural or substantive unconscionability. Albank, FSB v Foland, 177 Misc. 2d 569, 676 N.Y.S.2d 461, 1998 N.Y. Misc. LEXIS 274 (N.Y. City Ct. 1998).

In the guardian appointment proceedings where the petition was inadequate, because respondents did not suggest that they would have suffered prejudice due to amendment of the petition and due to the important nature of such proceedings, amendment was allowed under N.Y. C.P.L.R. 3025(b). In re Meisels, 807 N.Y.S.2d 268, 10 Misc. 3d 659, 2005 N.Y. Misc. LEXIS 2515 (N.Y. Sup. Ct. 2005).

Because a company did not state the circumstances of its proposed breach of fiduciary duty claims in detail, it was unclear whether the claims were based on a founder's unauthorized expenditures or the stock purchase transaction; accordingly, the company's motion for leave to

serve an amended answer was denied with leave to renew upon a proposed pleading stating in detail the circumstances constituting the breach of fiduciary duty claims. Hecht v Components Intl, Inc., 867 N.Y.S.2d 889, 22 Misc. 3d 360, 2008 N.Y. Misc. LEXIS 6578 (N.Y. Sup. Ct. 2008).

In wrongful death action against city, requirements of CLS Gen Mun § 50-i(1)(b) were not satisfied by filing and service of amended complaint, where original complaint was never served on defendants, who thus were not given notice of action within 2-year limitations period. Mroz v City of Tonawanda, 999 F. Supp. 436, 1998 U.S. Dist. LEXIS 4577 (W.D.N.Y. 1998).

33. Supporting and opposing papers being amended

Although leave to amend is to be freely given, the affidavit accompanying a notice of motion should be the affidavit of the parties themselves, and an attorney’s affidavit cannot be accepted in lieu of the affidavit of the party unless the facts upon which the motion is based are peculiarly within the attorney’s knowledge. Leonard Hospital v Messier, 32 A.D.2d 596, 299 N.Y.S.2d 360, 299 N.Y.S. 360, 1969 N.Y. App. Div. LEXIS 4152 (N.Y. App. Div. 3d Dep't 1969).

The privilege of serving an amended pleading must now rest not only upon formal corrections in the deficient pleading, but also upon an evidentiary demonstration to satisfy a court that the party has good ground to support his cause of action. Moss v Kadish, 33 A.D.2d 1008, 307 N.Y.S.2d 793, 1970 N.Y. App. Div. LEXIS 5485 (N.Y. App. Div. 1st Dep't 1970).

Where papers adequately support motion for leave to amend, but are not sufficient to support decision on matter of substance, better practice is to allow amendment, with leave to party so desiring to raise substantive issue at later date. Vastola v Maer, 48 A.D.2d 561, 370 N.Y.S.2d 955, 1975 N.Y. App. Div. LEXIS 9940 (N.Y. App. Div. 2d Dep't 1975), aff'd, 39 N.Y.2d 1019, 387 N.Y.S.2d 246, 355 N.E.2d 300, 1976 N.Y. LEXIS 2953 (N.Y. 1976).

Where case has long been certified ready for trial, affidavit of reasonable excuse for delay in making motion together with showing of merit in proposed amendment is required. Pick v

McCombs, 57 A.D.2d 1078, 395 N.Y.S.2d 819, 1977 N.Y. App. Div. LEXIS 12395 (N.Y. App. Div. 4th Dep't 1977).

Personal injury plaintiff’s amended motion for special trial preference was properly denied where it sought same relief as original motion, it was not served with supporting affidavits or documents, and no excuse was given for failure to timely submit those items. Betke v Archwood Estates, Inc., 266 A.D.2d 328, 698 N.Y.S.2d 172, 1999 N.Y. App. Div. LEXIS 11521 (N.Y. App. Div. 2d Dep't 1999).

Although motion to amend pleadings should be freely granted, such motion should generally be supported and opposed by affidavit of person with knowledge of events, not by attorney’s affirmation. Dunn v Catholic Home Bureau for Dependent Children, 142 Misc. 2d 316, 537 N.Y.S.2d 742, 1989 N.Y. Misc. LEXIS 7 (N.Y. Sup. Ct. 1989).

Claimant’s failure to attach formal proposed amended claim to his motion to amend claim that was conditionally dismissed due to inadvertent failure to state accrual date of claim, as required by CLS Ct C Act § 11, did not require denial of motion where claimant specified accrual date in notice of intention and in his motion papers. Where proposed amendment of claim is purely formal, or is of character which does not affect issues, it is sufficient to set out exact language of proposed amendment in notice of motion to amend conditionally dismissed claim, and it is not necessary that copy of proposed amended claim itself be served with motion papers. Rodriguez v State, 153 Misc. 2d 363, 581 N.Y.S.2d 972, 1992 N.Y. Misc. LEXIS 62 (Ct. Cl. 1992).

34. —Answer

On motion for leave to serve amended answer containing defense going to jurisdiction, defendant is under no burden to disclose its evidence to establish a prima facie case, and if proposed pleading is manifestly good, leave should be granted. Van Wie v C. M. Gridley & Son, Inc., 21 A.D.2d 842, 250 N.Y.S.2d 986, 1964 N.Y. App. Div. LEXIS 3467 (N.Y. App. Div. 3d Dep't 1964).

Affidavit of plaintiff's counsel was insufficient to support motion for leave to amend pleading where counsel offered no excuse for 4-year delay following defendant's answer, and counsel had no personal knowledge of underlying facts. Bonanni v Straight Arrow Publishers, Inc., 133 A.D.2d 585, 520 N.Y.S.2d 7, 1987 N.Y. App. Div. LEXIS 51621 (N.Y. App. Div. 1st Dep't 1987).

Merit of proposed amended pleading must be sustained unless alleged insufficiency or lack of merit is clear and free from doubt; thus, party opposing motion to amend must overcome presumption of validity in favor of moving party and demonstrate that facts alleged and relied on in moving papers are obviously not reliable or are insufficient; however, this does not mean that those facts need to be proven at this stage. Daniels v Empire-Orr, Inc., 151 A.D.2d 370, 542 N.Y.S.2d 614, 1989 N.Y. App. Div. LEXIS 8121 (N.Y. App. Div. 1st Dep't 1989).

Court properly denied defendant's motion for leave to amend its answer, even though amendment would not result in prejudice to plaintiff, where defendant failed to include proposed amended answer with its motion papers, and defense counsel did not present proposed amendment in his supporting affirmation. Loehner v Simons, 224 A.D.2d 591, 639 N.Y.S.2d 700, 1996 N.Y. App. Div. LEXIS 1441 (N.Y. App. Div. 2d Dep't 1996).

Federal court's dismissal of plaintiffs' constitutional equal protection claim did not collateral estoppel effect on their New York State equal protection claims that had never been heard in the federal proceeding; therefore, the governmental defendant's motions for summary judgment of dismissal and to amend its answer to include a collateral estoppel defense were both properly denied, although the defendant was to be permitted to amend its answer in other ways, to clarify its denials relating to equal protection. Brown v State, 9 A.D.3d 23, 776 N.Y.S.2d 643, 2004 N.Y. App. Div. LEXIS 6707 (N.Y. App. Div. 3d Dep't 2004).

Because the proposed claim of fraud was offered only to counter the contractual rights asserted, no danger existed that the proposed amendment effectively changed the original action from one sounding in breach of contract to an action alleging tortious conduct. Thus, the developer's motion for leave to serve an amended answer was granted pursuant to N.Y. C.P.L.R. 3025(b).

United States Fid. & Guar. Co. v Delmar Dev. Partners, LLC, 22 A.D.3d 1017, 803 N.Y.S.2d 254, 2005 N.Y. App. Div. LEXIS 11406 (N.Y. App. Div. 3d Dep't 2005).

In a medical malpractice action, a trial court erred by denying the affirmative defenses asserted by the defending physician and medical association in its answer to the amended complaint as the answer served to an amended complaint under N.Y. C.P.L.R. 3025(d) was, in fact, an original answer and, thus, affirmative defenses raised were not limited to those asserted in the original answer. As a result, the defending parties were entitled to raise a statute of limitations defense for the first time in their answer to the amended complaint. Mendrzycki v Cricchio, 58 A.D.3d 171, 868 N.Y.S.2d 107, 2008 N.Y. App. Div. LEXIS 8592 (N.Y. App. Div. 2d Dep't 2008).

35. —Bill of particulars

A motion to increase the allegations of damages in a complaint and to amend a bill of particulars with respect to specifications of negligence, injury, and special damages, made upon the eve of trial, should not be granted solely upon the affidavit of the plaintiff's attorney, but that on such an application of this nature, the moving papers should include an affidavit by the plaintiff showing the merits of the case, the reason explaining or excusing the delay in making the motion and the facts showing that the increase is warranted, and also a physician's affidavit should also be submitted, demonstrating with some degree of specificity the nature of the plaintiff's injuries and the causal connection between those injuries and the accident which is the basis for the action. Maasch v Edward Corning Co., 29 A.D.2d 774, 287 N.Y.S.2d 116, 1968 N.Y. App. Div. LEXIS 4612 (N.Y. App. Div. 2d Dep't 1968).

Permission to amend a bill of particulars should be freely given as a matter of discretion but the application must be supported by an affidavit of a person with knowledge of the facts. St. George v Dennis, 58 A.D.2d 740, 395 N.Y.S.2d 858, 1977 N.Y. App. Div. LEXIS 12865 (N.Y. App. Div. 4th Dep't 1977).

Plaintiff's motion to amend bill of particulars in action to recover for personal injuries did not seek to increase ad damnum clause of complaint, and therefore submission of physician's affidavit

was not required. Miller v Danchak, 144 A.D.2d 825, 534 N.Y.S.2d 784, 1988 N.Y. App. Div. LEXIS 10968 (N.Y. App. Div. 3d Dep't 1988).

Since the trial was adjourned without objection by defendants and they were afforded ample opportunity to conduct further discovery at plaintiffs' expense, the trial court did not err in excusing plaintiffs' untimely disclosures in a personal injury case; N.Y. Comp. Codes R. & Regs. tit. 22, § 202.17(h) did not compel preclusion where there was no prejudice and a contrary order was made. Similarly, as for a supplemental bill of particulars, if it alleged new injuries as defendants asserted, then its untimeliness was also excusable given the postponement, the lack of any prejudice, and the public policy favoring the resolution of cases on their merits. Jessmer v Martin, 46 A.D.3d 1059, 847 N.Y.S.2d 288, 2007 N.Y. App. Div. LEXIS 12640 (N.Y. App. Div. 3d Dep't 2007).

In a personal injury/wrongful death case, because claimant made a radical reversal in theories of liability on the eve of trial from a defective traffic control device to defects in a guardrail's design and placement, the court of claims properly denied leave to amend a bill of particulars under N.Y. C.P.L.R. § 3025(b); the change of attorneys for claimant on the eve of trial was not, standing alone, a sufficiently exceptional circumstance to permit the amendment. Schreiber-Cross v State of New York, 57 A.D.3d 881, 870 N.Y.S.2d 438, 2008 N.Y. App. Div. LEXIS 9878 (N.Y. App. Div. 2d Dep't 2008).

Since an employer did not oppose that branch of the representative's cross motion which was for leave to amend the bill of particulars as to the employer to add allegations sounding in its failure to adequately train its employees, and because the record did not indicate that the employer would have been prejudiced by such an amendment, that branch of the cross motion should have been granted. Ruiz v Griffin, 71 A.D.3d 1112, 898 N.Y.S.2d 590, 2010 N.Y. App. Div. LEXIS 2725 (N.Y. App. Div. 2d Dep't 2010).

Worker's Notice of Intention to Make Claim satisfied specific requirements regarding time and content, and along with his timely filing of a complaint, vested the trial court with subject matter jurisdiction; the trial court did not abuse its discretion in granting the worker leave to serve a

supplemental bill of particulars for the purpose of amplifying and clarifying allegations based on additional factors uncovered during discovery. Despite the worker's delay in seeking leave to supplement, the port authority could not have claimed prejudice, as the supplement set forth claims identical to those previously asserted in the complaint and bill of particulars filed by the worker's coplaintiffs. DaSilva v C & E Ventures, Inc., 83 A.D.3d 551, 922 N.Y.S.2d 32, 2011 N.Y. App. Div. LEXIS 3115 (N.Y. App. Div. 1st Dep't 2011).

Trial court should have permitted an injured worker's amendment to the bill of particulars because, notwithstanding his delay in seeking leave to serve an amended bill of particulars to add a new claim, the proposed amendment was not palpably insufficient or patently devoid of merit, and there was no evidence that it would prejudice or surprise the opposing party, since it arose out of the same facts as the complaint. Rocha v GRT Constr. of N.Y., 145 A.D.3d 926, 44 N.Y.S.3d 149, 2016 N.Y. App. Div. LEXIS 8408 (N.Y. App. Div. 2d Dep't 2016).

Alleged injured parties bringing a design defect claim against a town were granted leave to amend the parties' bill of particulars to include regulations, standards and guidelines in effect when an allegedly defective guardrail was originally installed because (1) to prevail on the parties' design claim, the parties had to establish that the guardrail did not meet applicable standards when the guardrail was installed or that the town thereafter violated a duty to upgrade the guardrail, (2) the parties sought leave to amend the bill of particulars to identify design standards in effect when the guardrail was originally installed, and (3) the town did not contest the parties' assertion regarding when the approximate time of the guardrail's construction was established. Madden v Town of Greene, 949 N.Y.S.2d 326, 36 Misc. 3d 852, 2012 N.Y. Misc. LEXIS 3053 (N.Y. Sup. Ct. 2012).

36. —Complaint

Upon a motion to amend and supplement the complaint by adding a cause of action for wrongful death and by increasing the ad damnum clause, an affidavit of merits is necessary. Goldfarb v

65 East 11th Street Corp., 40 A.D.2d 657, 336 N.Y.S.2d 464, 1972 N.Y. App. Div. LEXIS 3710 (N.Y. App. Div. 1st Dep't 1972).

Plaintiff failed to set forth in his affidavit sufficient facts in support of motion to amend complaint to increase ad damnum clause, in absence of any statement of any new or aggravating condition which was not known to exist when the original pleading was prepared and motion did not include a medical affidavit containing facts in support of contention. Walter v Le Cesse Corp., 54 A.D.2d 1136, 388 N.Y.S.2d 776, 1976 N.Y. App. Div. LEXIS 15135 (N.Y. App. Div. 4th Dep't 1976).

Where defendants appeared in action in response to service of summons alone, defendants would not be prejudiced by a proper amendment to complaint seeking to recover, for the first time, monetary damages, but the amendment, sought long after date of original and first amended complaints had to be supported by factual affidavits of merits by party having knowledge thereof and factual demonstration of adequate excuse for delay; affidavits submitted were deficient in both respects. Lagin v Lagin, 57 A.D.2d 775, 394 N.Y.S.2d 433, 1977 N.Y. App. Div. LEXIS 11940 (N.Y. App. Div. 1st Dep't 1977).

In application to increase ad damnum, plaintiff must show sufficient reasons for delay in making motion, and that increase is warranted by reason of information recently coming to attention of plaintiff; as to causes of action involving personal injuries, plaintiff is also required to submit affidavit of physician showing nature of injuries and causal relation to occurrence sued on. Davis v Troy, 57 A.D.2d 990, 394 N.Y.S.2d 470, 1977 N.Y. App. Div. LEXIS 12282 (N.Y. App. Div. 3d Dep't 1977).

Affidavit supporting motion to amend complaint in personal injury action by increasing an ad damnum clause should be made by party with knowledge of circumstances justifying such application, not by attorney lacking personal knowledge of such facts, and should be further supported by documentation from physician. De Carlo v Economy Baler Div. of American Hoist & Derrick Co., 57 A.D.2d 1002, 394 N.Y.S.2d 468, 1977 N.Y. App. Div. LEXIS 12292 (N.Y. App. Div. 3d Dep't 1977).

In a personal injury action brought on behalf of an infant, the trial court properly denied plaintiff's motion for leave to increase the ad damnum clause of the complaint and for a transfer of the action from Civil Court to Supreme Court, to which the case had been previously transferred pursuant to CPLR § 325(d), where plaintiff failed to submit an affidavit of merits or an affidavit from plaintiff's physician (an un-sworn letter from plaintiff's doctor was insufficient); plaintiff would be afforded a further opportunity to submit a renewed application, supported by an affidavit of merit and a physician's affidavit pertaining to a recent physical examination of the plaintiff, specifying the change or deterioration of plaintiff's condition, the injuries which had not been considered previously or the extent to which plaintiff's condition had been aggravated and containing an opinion as to their prospective consequences and prognosis, the resulting disability in terms of permanency and the causal relationship with the original injury and accident; in addition, since plaintiff claimed an under-evaluation of the original ad damnum clause, sufficient factual and medical support would be required so as to afford the court an opportunity to render an informed determination that the original amount demanded was now insufficient and that a re-evaluation was necessary. Brennan v New York, 99 A.D.2d 445, 470 N.Y.S.2d 621, 1984 N.Y. App. Div. LEXIS 16609 (N.Y. App. Div. 1st Dep't 1984).

In an action between a buyer and a seller of an apartment building concerning the seller's liability for improperly connecting the building's sewer system to that of an adjoining building, the trial court properly considered the declaration of buyer's attorney in denying seller's motion for summary judgment based on the "as is" clause contained in the sales agreement and granting buyer's motion to amend its complaint to allege the seller's fraud, where the attorney's personal knowledge was shown by his long-term involvement in the sales transactions as well as related litigation. Beberman v Halbrecht, 105 A.D.2d 876, 482 N.Y.S.2d 75, 1984 N.Y. App. Div. LEXIS 21006 (N.Y. App. Div. 3d Dep't 1984).

Plaintiff's motion to amend his complaint to assert an additional cause of action was denied, where the motion was supported solely by an attorney's affidavit. Beekman v Sylvan Lawrence,

Inc., 111 A.D.2d 658, 490 N.Y.S.2d 216, 1985 N.Y. App. Div. LEXIS 49926 (N.Y. App. Div. 1st Dep't 1985).

Plaintiff was not entitled to amend complaint under CLS CPLR § 3025(b) to increase ad damnum clause where she failed to submit either affidavit of merits containing reasons for delay and facts which warranted increase, or affidavit of physician in support of her motion demonstrating nature of injuries and resulting disabilities, and causal relationship between disabilities and original injury. Briggs v New York City Transit Authority, 132 A.D.2d 451, 517 N.Y.S.2d 511, 1987 N.Y. App. Div. LEXIS 49016 (N.Y. App. Div. 1st Dep't 1987).

In order for plaintiff in personal injury action to establish entitlement to increase in ad damnum clause of complaint, his motion papers must (1) demonstrate merits of case, reasons for delay, and that increase was warranted by facts which had recently come to plaintiff's attention, and (2) include physician's affidavit or affirmation establishing causal connection between injury and consistent course of treatment for accident-caused injuries. Coerbell v New York, 132 A.D.2d 514, 517 N.Y.S.2d 532, 1987 N.Y. App. Div. LEXIS 49046 (N.Y. App. Div. 2d Dep't 1987).

Notice to amend ad damnum clause must be supported by proper showing as to merits of request for amendment and explanation for failure to initially assert increased amount of damages. Century Resources Corp. v Weir, 134 A.D.2d 398, 521 N.Y.S.2d 28, 1987 N.Y. App. Div. LEXIS 50589 (N.Y. App. Div. 2d Dep't 1987).

Court properly granted plaintiff's motion to amend their pleadings to add punitive damages claim in action for injuries sustained in elevator accident where deposition testimony stated that it was elevator service company's practice to have unlicensed mechanics perform unsupervised maintenance and repairs to elevators, that repair was made to cables of elevator in question about 1 ½ months before accident, and that prior to accident, elevator company submitted inspection certificates to city that were signed by licensed mechanic who did not perform or even supervise inspections by unlicensed employees. Sosa v Ideal Elevator Corp., 216 A.D.2d 128, 629 N.Y.S.2d 253 (N.Y. App. Div. 1st Dep't 1995).

Party requesting amendment of complaint to increase claimed damages based on new or aggravated injuries must submit medical proof substantiating nature, severity, and cause of such injuries. Parsons v Borden, Inc., 273 A.D.2d 749, 710 N.Y.S.2d 446, 2000 N.Y. App. Div. LEXIS 7445 (N.Y. App. Div. 3d Dep't 2000).

Plaintiff would be permitted to amend the complaint, despite defendant’s contention that the amendment would result in prejudice to it because the statute of limitations had run, since the papers were wholly devoid of any showing that the lapse of time had in fact prejudiced the defendant in any way in preparing its defense, deprived it of material witnesses, or made unavailable pertinent evidence with which to defend its case. Luce v Pierce Muffler Shops, 51 Misc. 2d 256, 272 N.Y.S.2d 845, 1966 N.Y. Misc. LEXIS 1774 (N.Y. Sup. Ct. 1966), aff'd, 28 A.D.2d 826, 282 N.Y.S.2d 724, 1967 N.Y. App. Div. LEXIS 7382 (N.Y. App. Div. 4th Dep't 1967).

Proper supporting affidavits are necessary to amend the “ad damnum” clause; such requirement is enforced with strictness. Geller v Mahsons Realty Corp., 82 Misc. 2d 599, 370 N.Y.S.2d 332, 1975 N.Y. Misc. LEXIS 2740 (N.Y. Civ. Ct. 1975).

Absence of requisite evidentiary support in papers on application for leave to amend complaint, made in conjunction with motion for re-argument, compelled conclusion that case was not proper one for such relief in exercise of court’s discretion, and where affidavit submitted, by same person whose affidavit had been relied upon in original motion, took same facts and argued the required different conclusion, motion for re-argument and renewal was in all respects denied. American Trading Co. v Fish, 87 Misc. 2d 193, 383 N.Y.S.2d 943, 1975 N.Y. Misc. LEXIS 3349 (N.Y. Sup. Ct. 1975).

Where an employee did not produce evidentiary material showing a violation of the safety standards in N.Y. Comp. Codes R. & Regs. tit. 12, §§ 23-8.1(i), 23-8.2(b)(2)(iii), there was not a legitimate claim under N.Y. Lab. Law § 241(6); however, because the defenses to the third-party’s N.Y. Workers’ Comp. Law § 11 claim were insufficient, summary judgment was not available and the complaint could be amended in accordance with N.Y. C.P.L.R. 3025(b). Field

v New York Univ., 764 N.Y.S.2d 810, 1 Misc. 3d 559, 2003 N.Y. Misc. LEXIS 1203 (N.Y. Sup. Ct. 2003).

37. Waiver

Retention of annexed pleading not warranted by the order granting leave to amend, without moving to strike out excessive portions, waives such defect. Ias Bicor Corp. v Mezrahi, 22 A.D.2d 898, 255 N.Y.S.2d 402, 1964 N.Y. App. Div. LEXIS 2570 (N.Y. App. Div. 2d Dep't 1964).

Although at the time of the decision of the prior appeal, defendants had waived the partial defense of the statute of limitations with respect to the Fourth and Fifth causes of action under CPLR 3211(e), they were free to apply at special term for leave to allege the partial defenses to these causes of action. Ross v Epstein, 28 A.D.2d 919, 282 N.Y.S.2d 66, 1967 N.Y. App. Div. LEXIS 3569 (N.Y. App. Div. 2d Dep't 1967).

Where an affirmative defense is not interposed in an answer because the plaintiff’s complaint does not state the cause of action to which such a defense would be available, a defendant must be permitted to amend his responsive pleading under CPLR 3025 before that pleading can be pointed to as evidence of a waiver of the affirmative defense. Belott v State, 40 A.D.2d 729, 336 N.Y.S.2d 468, 1972 N.Y. App. Div. LEXIS 3716 (N.Y. App. Div. 3d Dep't 1972).

Defendants waived defense of lack of personal jurisdiction by failing to raise it in their answer to original complaint or in their motion to dismiss under CLS CPLR § 3211(a)(7), and defense was not revived by parties’ stipulation giving plaintiffs right to serve amended complaint and providing that defendants could amend their answer as “a matter of course” since (1) stipulation was silent as to jurisdictional issue and thus could not be construed to permit revival of defense of lack of jurisdiction, and (2) fact that defendants were permitted to serve responsive pleadings as of right did not preclude finding of waiver. DeFilippis v Perez, 148 A.D.2d 490, 539 N.Y.S.2d 22, 1989 N.Y. App. Div. LEXIS 2713 (N.Y. App. Div. 2d Dep't 1989).

Defendant waived defense of lack of personal jurisdiction by failing to include it in answer to original complaint, and could not raise such defense in answer to plaintiff's amended complaint where time in which to amend original complaint as of right had expired; defendant's pleading in which lack of personal jurisdiction was asserted for first time was not pleading amended as of right pursuant to CLS CPLR § 3025, but was second answer to complaint. Boulay v Olympic Flame, Inc., 165 A.D.2d 191, 565 N.Y.S.2d 905, 1991 N.Y. App. Div. LEXIS 1545 (N.Y. App. Div. 3d Dep't 1991).

Waiver of personal jurisdiction defense was not sufficient to overcome plaintiffs' failure to properly join non-municipal defendants in action, and such failure was not corrected by serving them copy of original summons and complaint and adding their names to caption; in order to add new defendants, plaintiffs were required to seek leave under CLS CPLR §§ 3025(b) and 1003 to serve amended summons and complaint purporting to join nonmunicipal defendants as party defendants. Halliday v Town of Halfmoon, 235 A.D.2d 709, 652 N.Y.S.2d 158, 1997 N.Y. App. Div. LEXIS 101 (N.Y. App. Div. 3d Dep't 1997).

Proposed amended answers were properly rejected where not verified, and there was no merit to contention that plaintiff waived lack of verification by failing to return proposed amended answers where plaintiff had never been served with them. Key Bank v Zahn, 241 A.D.2d 922, 661 N.Y.S.2d 372, 1997 N.Y. App. Div. LEXIS 7856 (N.Y. App. Div. 4th Dep't 1997).

Court properly denied defendant's motion for leave to amend his answer and (on amendment of answer) for summary judgment dismissing complaint based on lack of capacity to sue, and properly granted plaintiff's motion to amend caption by substituting trustee in bankruptcy as plaintiff, nunc pro tunc, because defendant, who was admittedly aware of plaintiff's bankruptcy proceeding before trial, was deemed to have waived such defense by waiting until more than 16 months after trial ended and his motion for judgment notwithstanding verdict was denied. Nisselson v Stephens, 268 A.D.2d 463, 701 N.Y.S.2d 636, 2000 N.Y. App. Div. LEXIS 559 (N.Y. App. Div. 2d Dep't 2000).

Although a client's supplemental summons and complaint were filed without leave of court under N.Y. C.P.L.R. 3025a, by failing to object and by interposing answers thereto, the lawyers waived any right to dispute their propriety. Moran v Hurst, 32 A.D.3d 909, 822 N.Y.S.2d 564, 2006 N.Y. App. Div. LEXIS 10884 (N.Y. App. Div. 2d Dep't 2006).

Branch of defendant's cross-motion that was for leave to amend her answer to assert the affirmative defense of lack of personal jurisdiction should have been granted, even though she did not assert lack of personal jurisdiction in her answer and thus waived the defense, because such a defense can be interposed in an answer amended by leave of court. Deutsche Bank Natl. Trust Co. v Groder, 218 A.D.3d 542, 192 N.Y.S.3d 563, 2023 N.Y. App. Div. LEXIS 3781 (N.Y. App. Div. 2d Dep't 2023).

State waived any defense it may have had with respect to an inmate's failure to meet the verification requirements of N.Y. Ct. Cl. Act § 11(b) in his bailment suit because the State served two answers, both of which were served and filed on the same date, and whichever answer was the second to be served and filed constituted an amendment of the first, original answer as a matter of law under N.Y. C.P.L.R. 3025(a); to the extent the answer containing the verification defense was first filed and served, that defense was withdrawn, and thus a waiver of the defense was effected, by filing and service of the second answer which did not include that defense and, to the extent the answer asserting the verification defense was the second to be served and filed, it was ineffective to negate the waiver which previously occurred through service of the answer without this defense. The State waived any defense it had with respect to the inmate's failure to meet the verification requirements of N.Y. Ct. Cl. Act § 11(b) because it was required to both notify the inmate of its rejection of an unverified or improperly verified claim with due diligence and assert the failure as an affirmative defense in the answer or by motion to dismiss. Gillard v State of New York, 905 N.Y.S.2d 835, 28 Misc. 3d 1139, 2010 N.Y. Misc. LEXIS 2963 (N.Y. Ct. Cl. 2010).

Tenant did not irretrievably waive a personal jurisdiction defense by virtue of the tenant's pro se answer when the tenant later retained counsel because pro se litigants in summary nonpayment

proceedings often rushed to answer without fully understanding potential defenses like lack of personal jurisdiction. Allowing revival of the defense after the tenant retained counsel and no prejudice to the other party was shown best served the interests of justice and adjudication on the merits. Fairmont 88 LLC v Fang Yu, 229 N.Y.S.3d 843, 2025 N.Y. Misc. LEXIS 861 (N.Y. Civ. Ct. 2025).

Research References & Practice Aids

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