

Short Form Order

**Supreme Court - State of New York
Commercial Division, Part 46, Suffolk County**

Motion Date: 01-18-2007

Submit Date: 02-08-2007

Motion No.: 009 MD

DAVID CHRISTA CONSTRUCTION, INC.,

Plaintiff,
Action #1

Index Number: 17403-01

-against-

**BOARD OF EDUCATION, AMITYVILLE UNION
FREE SCHOOL DISTRICT; SPECTOR ASSOCIATES,
LLP; INTERCOUNTY ROOFING CORP.; SUMART
RESTORATION CORP.; ORISKA INSURANCE
COMPANY; FERRAN DEVELOPMENT CORP.;
HVAC INCORPORATED; AND EMPIRE INTERIOR
SYSTEMS, INC.,**

Defendants.

ORISKA INSURANCE COMPANY,

Plaintiff,
Action #2

Index Number 02360-01

-against-

**SPECTOR ASSOCIATES, LLP., s/h/a SPECTOR
ARCHITECTS and DAVID CHRISTA
CONSTRUCTION COMPANY, INC.,**

Defendants.

ATTORNEYS

Milber Makris Plousadis & Seiden LLP
Three Barker Avenue, Sixth Floor
White Plains, New York 10604

Ernstrom & Drete, LLP
180 Canal View Blvd. Suite 600
Rochester, New York 14623-2849

Bruno, Gerbino & Soriano
445 Broad Hollow Road, Suite 220
Melville, New York 11747

Kernan Professional Group, Of
Counsel
1310 Utica Street, Box 750
Oriskany, New York 13424

John E. Osborn, P.C.
245 Fifth Avenue, 23rd Floor
New York, NY 10016

L'Abbate, Balkan, Colavita & Contini,
LLP
1050 Franklin Avenue
Garden City, New York 11530

O'Connor, Redd & Sklarin LLP
200 Mamaroneck Avenue
White Plains, New York 10601

Canfield, Madden & Ruggiero, LLP
42-24 Douglaston Parkway
Douglaston, New York 11363

Russo, Fox & Karl
400 Townline Road
Hauppauge, New York 11788

Defendant, ORISKA INSURANCE COMPANY ("ORISKA") moves, by
Notice of Motion (motion sequence number 009) for an Order,

pursuant to **CPLR § 3025(b)**, authorizing such Defendant to file and serve an Amended Answer to the Cross-Claims asserted against ORISKA in Action # 1, by Co-Defendant BOARD OF EDUCATION, AMITYVILLE UNION FREE SCHOOL DISTRICT ("SCHOOL DISTRICT"). The specific amendment sought would allow ORISKA to assert the affirmative defenses of release, waiver and estoppel against the SCHOOL DISTRICT, based on the fact that ORISKA has tendered the SCHOOL DISTRICT the full amount of its performance bond.

This is a construction litigation, which arises out of a renovation project for the School District. ORISKA issued a performance bond for the roofing subcontractor, INTERCOUNTY ROOFING, INC. ("INTERCOUNTY"). Both INTERCOUNTY and subsequently ORISKA were declared in default by the SCHOOL DISTRICT and are named as Defendants in Action # 1, where the Plaintiff, general contractor, DAVID CHRISTA CONSTRUCTION, INC., has alleged that ORISKA's default and failure of performance caused damage to the general contractor, as well as to the SCHOOL DISTRICT's property. In the SCHOOL DISTRICT's Answer in Action # 1, it alleged three Cross-Claims against ORISKA. These state, in pertinent part, that ORISKA, as surety, undertook to complete the performance of INTERCOUNTY's work when INTERCOUNTY defaulted, that ORISKA's work on the roof was faulty; and that ORISKA failed to complete performance of the project as required. Those claims were asserted against ORISKA on January 8, 2003. ORISKA served and filed an Answer to the Cross-Claims, dated June 13, 2003, in which it alleged six affirmative defenses and two counterclaims against the SCHOOL DISTRICT. Both counterclaims seek reimbursement from the SCHOOL DISTRICT for the amounts paid on the performance bond.

The SCHOOL DISTRICT opposes the motion, on the grounds of laches and lack of merit. Specifically, the District asserts that ORISKA's first Answer to its Cross-Claims was served in April, 2003 and that ORISKA has already moved and has been granted the opportunity to amend its pleading in its motion of July 10, 2003. According to the School District, the allegation that the bond was accepted "without reservation" has been raised now for the first time almost four years following ORISKA's first Answer. In the interim, the School District has engaged in extensive discovery. As argued, the assertion of new factual allegations at this stage is prejudicial to the SCHOOL DISTRICT, especially when ORISKA provides no evidentiary or factual support for its claims. In addition, the SCHOOL DISTRICT states that the defenses of waiver and release do not apply for amounts over and above the bond, where the surety has actually taken over the work of its principal, as ORISKA did in this case. In support of this assertion, the SCHOOL DISTRICT annexes the deposition testimony of two SCHOOL DISTRICT witnesses setting forth evidence of ORISKA's presence on the jobsite, following INTERCOUNTY's default.

In Reply, ORISKA's counsel annexes proof of payment of the face amount of the bond and states that his client intends to dispute the SCHOOL DISTRICT's assertion that ORISKA performed work on the construction project.

While leave to amend a pleading is to be freely granted, in the absence of surprise or prejudice and laches alone is insufficient cause for denial, an inordinate, unexplained delay coupled with lack of merit gives the Court little basis for granting such application. see, Comsewogue Union Free School District v Allied-Trent Roofing Systems Inc., 15 A.D. 3d 523, 790 N.Y.S. 2d 220 (2d Dep't 2005); Sewkarren v DeBellis, 11 A.D. 3d 445, 783 N.Y.S. 2d 758 (2d Dep't 2004); SRN Corp. v Glass, 244 A.D. 2d 545, 664 N.Y.S. 2d 357 (2d Dep't 1997).

While there is no dispute between the parties to this motion that ORISKA paid the SCHOOL DISTRICT the penal sum of its bond, there is simply no excuse for the almost four year delay before the surety raised the issue which it seeks to interpose in an Amended Answer. Indeed, the fact of the payment is set forth in ORISKA's April, 2003 Counterclaims against the SCHOOL DISTRICT. Accordingly, the issue was clearly being considered when ORISKA interposed its first Answer, which it amended without opposition three months later. This fact is coupled with the argument set forth in the SCHOOL DISTRICT's opposition papers that release and waiver will not apply to relieve a surety, when it has taken over the principal's contract, caused further problems to the roof, and defaulted itself, subjecting it to potential liability in excess of the penal sum of the bond. see, International Fidelity Ins. Co. v County of Rockland, 98 F. Supp. 2d 400 (S.D.N.Y. 2000).

The party seeking leave to serve an amended pleading must make an evidentiary showing establishing merit to its proposal. Joyce v McKenna Associates, Inc., 2 A.D. 3d 592 (2d Dep't 2003); Morgan v Prospect Park Associates Holdings, L.P., 251 A.D. 2d 306 (2d Dep't 1998). The evidentiary showing must be made by one with actual knowledge of the facts surrounding the proposed amendment. Id. The statement of ORISKA's counsel in his reply papers that his client intends to dispute the assertion that ORISKA was on the job is insufficient to raise an issue where countered by the deposition testimony of two witnesses reading from job progress records.

In sum, ORISKA's inexcusable delay in presenting the affirmative defenses of waiver and release when the underlying facts are contained in its counterclaims of almost four years ago, and its failure to present any evidence to support the basis for such defense in light of the factual allegations of the SCHOOL DISTRICT that ORISKA did indeed take over the work of its principal, provide this Court with no basis for granting the motion to amend. Accordingly, ORISKA's motion to Amend its Answer to

assert the proposed Cross-Claims against the School District is hereby denied.

This constitutes the **DECISION** and **ORDER** of the Court.

DATE: 14, 2007

BY: _____, JUDGE

BY: _____

BY: . . .