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A Collection of Decision-Summaries from the New York Appellate Digest Database Fleshing Out the Issues Relating to Conforming the Pleadings to the Proof at Trial. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There.
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Conforming the
Pleadings to the
Proof

A Collection of
Decision-Summaries
from the New York
Appellate Digest
Database
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*A COLLECTION OF DECISION-SUMMARIES FROM THE NEW YORK APPELLATE DIGEST
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**A Collection of Decision-Summaries from the New York Appellate Digest Database
Fleshing Out the Criteria for Conforming the Pleadings to the Proof at Trial.**

THIS IS THE SEMINAL COURT OF APPEALS CASE IN THIS AREA; THE MOTION TO AMEND THE PLEADINGS TO CONFORM TO THE PROOF WAS PROPERLY GRANTED BY THE TRIAL COURT; ALTHOUGH THE COUNTERCLAIM AT ISSUE WAS NOT PLED, THE SUBJECT OF THE COUNTERCLAIM WAS CENTRAL TO THE TRIAL AND THE AMENDMENT (ADDING THE COUNTERCLAIM) THEREFORE DID NOT PREJUDICE THE PLAINTIFFS.

“... [A]bsent Prejudice, Courts Are Free to Permit Amendment Even After Trial...”.

“Prejudice Is More Than ‘The Mere Exposure of the [Party] to Greater Liability’ ...”.

“... ‘[T]here Must Be Some Indication that the [Party] Has Been Hindered in the Preparation of [The Party’s] Case or Has Been Prevented from Taking Some Measure in Support of [Its] Position’ ...”.

“The Burden of Establishing Prejudice Is on the Party Opposing the Amendment ...”.

“Applications to Amend Pleadings Are Within the Sound Discretion of the Court...”.

“Courts Are Given ‘Considerable Latitude in Exercising Their Discretion’ ...”.

“ ...[W]e Have Found Such an Abuse of Discretion Where the ... Record Established that the Opposing Party Suffered ‘No Operative Prejudice’ as a Result of the Mere Omission to Plead a Defense ...”.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined the Appellate Division abused its discretion when it reversed Supreme Court’s grant of a motion to amend the pleadings to conform to the proof. Although not pled as a counterclaim, whether the defendant was entitled to payments under a settlement agreement, and whether the settlement agreement extinguished defendant’s liability under promissory notes held by the plaintiffs, were central to the lawsuit and were the subject of judicial admissions. Therefore amending the pleadings to conform to the proof did not result in prejudice to the plaintiffs:

Before resting, Gandhi [defendant] moved to conform the pleadings to the proof, seeking to assert a counterclaim for money currently owed him under the settlement agreement. Plaintiff ... opposed, claiming prejudice based on Gandhi’s delay in asserting the counterclaim, and asserting that Gandhi’s claims were time-barred.

Supreme Court granted Gandhi’s motion to amend, and subsequently entered judgment in his favor on the counterclaim against the corporations for \$2,186,787. After finding that the settlement agreement encompassed a release of all claims, including the claims on the notes,

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Supreme Court reasoned that the payments due Gandhi under the settlement agreement, "although not plead [sic] by [Gandhi] in his counterclaims [have] been an intrinsic counterclaim since the onset of this litigation. . . .

The court entered a sum-certain judgment because it was undisputed that the corporations ceased making payments under the settlement agreement in September 2004. The court further denied the corporations' request for a declaratory judgment, and denied all remaining claims and counterclaims. . . .

This Court has in the past recognized that, absent prejudice, courts are free to permit amendment even after trial. . . . Prejudice is more than "the mere exposure of the [party] to greater liability" Rather, "there must be some indication that the [party] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position" The burden of establishing prejudice is on the party opposing the amendment

Applications to amend pleadings are within the sound discretion of the court, and that of the Appellate Division Courts are given "considerable latitude in exercising their discretion, which may be upset by us only for abuse as a matter of law" Nevertheless, we have found such an abuse of discretion where the Appellate Division reversed a trial court's grant of an amendment and the record established that the opposing party suffered "no operative prejudice" as a result of the mere omission to plead a defense [Kimso Apts LLC v Gandhi, 2014 NY Slip OP 08219, CtApp 11-25-14](#)

IT IS THE DEFENDANT'S BURDEN TO DEMONSTRATE PREJUDICE STEMMING FROM THE AMENDMENT OF THE PLEADINGS, I.E., THAT THE OMISSION FROM THE PLEADINGS HINDERED THE PREPARATION OF DEFENDANT'S CASE OR PREVENTED DEFENDANT FROM TAKING SOME MEASURE IN SUPPORT OF DEFENDANT'S POSITION; HERE PLAINTIFF'S MOTION TO CONFORM THE COMPLAINT TO THE PROOF AT TRIAL SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined an enforceable real estate purchase contract had been formed and plaintiff's motion to conform the complaint to the proof at trial should have been granted. (The facts relevant to the motion to conform the complaint to the proof were not described.):

The Supreme Court improvidently exercised its discretion in denying the plaintiff's motion to conform its complaint to the proof at trial (see CPLR 3025[c]). "[A]bsent prejudice, courts are free to permit amendment even after trial" "The burden of establishing prejudice is on the party opposing the amendment" "Prejudice, of course, is not found in the mere exposure of the defendant to greater liability. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" Here, in opposition to the plaintiff's motion, the defendants failed to

show that the amendment would hinder the preparation of their cases or prevent them from taking some measure in support of their positions at trial and, therefore, the plaintiff's motion to conform its complaint to the proof should have been granted. *Metropolitan Lofts of NY, LLC v Metroeb Realty 1, LLC*, 2018 NY Slip Op 02319, Second Dept 4-4-18

PLAINTIFF DID NOT ALLEGE DEFENDANTS WERE NEGLIGENT ON JANUARY 26, 2009, THE DATE WHEN DEFENDANT (SLAVIN) TREATED THE PLAINTIFF; THE TRIAL EVIDENCE ALLEGED SLAVIN WAS NEGLIGENT ON JANUARY 26, 2009, BUT THERE WAS NO PROOF AT TRIAL OF NEGLIGENCE ON THE ACTUAL DATES WHICH WERE ALLEGED IN THE BILLS OF PARTICULARS; DEFENDANTS MOVED FOR A TRIAL ORDER OF DISMISSAL WHICH WAS GRANTED; THE THIRD DEPARTMENT REVERSED FINDING THAT PLAINTIFF'S MOTION TO AMEND THE PLEADINGS TO CONFORM TO THE PROOF AT TRIAL SHOULD HAVE BEEN GRANTED.

If the Defendants Have Acquiesced in the Presentation of Evidence Which Is the Basis for a Motion to Conform the Pleadings to the Proof the Motion Should Be Granted.

The Third Department, reversing Supreme Court, determined plaintiff's motion to conform the pleadings to the proof should have been granted in this medical malpractice action. Defendants submitted proof on the relevant issues (the treatment of plaintiff by defendant Slavin on January 26, 2009) and did not demonstrate amending the pleadings would result in any prejudice to them:

In the bill of particulars and supplemental bill of particulars, plaintiff specified dates upon which she alleged defendants' negligence occurred. Notably, plaintiff did not specifically allege that defendants were negligent on January 26, 2009, the first date upon which plaintiff received treatment from Slavin. However, plaintiff's supplemental bill of particulars identified January 26, 2009 as a date that she received treatment from Slavin and further specified that Slavin was negligent in "failing to inspect, document and treat the alarming degree of misalignment and deformity of . . . [p]laintiff's leg, foot and ankle as a result of repeated imaging studies" and "in failing to perform closed reduction of the left lower extremity fracture to ensure proper alignment." ... [A]fter the conclusion of plaintiff's proof, defendants moved for a trial order of dismissal, based on, among other things, the fact that plaintiff's orthopedic surgeon expert witness addressed the care that plaintiff received on January 26, 2009 but did not specifically address care given on the subsequent dates specified in the bills of particulars. Plaintiff cross-moved to conform the pleadings to the proof aduced at trial. Supreme Court found that the testimony of plaintiff's expert went beyond the scope of the bills of particulars and granted defendants' motion for a trial order of dismissal, implicitly denying plaintiff's cross motion. Plaintiff appeals. ...

As the parties opposing such amendment, defendants had the burden of establishing that they had been prejudiced, that is that they "ha[d] been hindered in the preparation of [their] case or ha[d]

been prevented from taking some measure in support of [their] position” That burden cannot be met when the difference between the original pleading and the evidence results from “proof admitted at the instance or with the acquiescence of [the opposing] party”... . * * *

... [A]s defendants acquiesced to the introduction of the evidence of Slavin’s negligence on January 26, 2009, they could not meet their burden when they later opposed plaintiff’s cross motion to conform the pleadings to the proof adduced at trial Even if this were not the case, defendants failed to meet their burden of establishing prejudice. Defendants’ contentions that they had been unprepared for cross-examination of plaintiff’s expert was conclusory, as defendants failed to offer a single example as to the manner in which the introduction of evidence that Slavin was negligent on January 26, 2009 hindered their cross-examination. Moreover, defendants’ claims that they were prejudiced by the introduction of the January 26, 2009 negligence were unsupported by specific examples or proof in the record. More generally, the record establishes that plaintiffs had plainly notified defendants by their bills of particulars that plaintiff had been treated by Slavin on January 26, 2009 and that Slavin’s negligence included his failure to recognize, from imaging studies, the need to perform a closed reduction on plaintiff’s injured leg. [Noble v Slavin, 2017 NY Slip Op 03578, 3rd Dept 5-4-17](#)

PLAINTIFFS BROUGHT THE ACTION UNDER A NEGLIGENCE THEORY WHICH ALLEGED THE INSTALLATION OF INSULATION WAS NOT DONE IN A GOOD AND WORKMANLIKE MANNER; PLAINTIFFS SHOULD HAVE BEEN ALLOWED TO AMEND THE PLEADINGS TO CONFORM TO THE TRIAL EVIDENCE BY ADDING A BREACH OF CONTRACT THEORY; JUDGMENT SHOULD HAVE BEEN AWARDED TO PLAINTIFFS ON THE BREACH OF CONTRACT CAUSE OF ACTION; THE NEGLIGENCE CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED AS DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION.

Here the Evidence Submitted Under a Negligence Theory Was Deemed to Support a Breach of Contract Theory Which Was Not Pled; The Motion to Amend the Pleadings to Conform to the Trial Evidence Should Have Been Granted; Judgment Should Have Been Granted on the Unpled Breach of Contract Theory and the Negligence Theory Should Have Been Dismissed as Duplicative.

The Second Department determined plaintiffs should have been allowed to amend the pleadings to conform to the proof at trial. The complaint alleged breach of contract and negligence re: the installation of foam insulation. The contract called for the installation to conform to the manufacturer’s specifications. The negligence cause of action alleged the work was not done in a good and workmanlike manner. Because defendant would not have been prejudiced, Supreme Court should have allowed plaintiffs to amend the breach of contract cause of action to allege the work was not done in a good and workmanlike manner. Plaintiffs’ motion pursuant to CPLR 4404(b) for judgment in their favor on the breach of contract cause of action should have been

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granted. The negligence cause of action, which essentially duplicated the breach of contract cause of action, should have been dismissed. With respect the post-trial motion to amend the pleadings, the Second Department wrote:

... [T]he Supreme Court improvidently exercised its discretion in denying that branch of the plaintiffs' motion which was for leave to amend the pleadings to conform to the evidence adduced at trial. "Whether to permit a party to amend a pleading is generally a matter of discretion for the trial court and, on review, the Appellate Division" Absent prejudice, courts are free, pursuant to CPLR 3025(c), to permit the amendment of pleadings, even after trial Leave shall be freely given upon such terms as may be just (see CPLR 3025[b]). "This favorable treatment applies even if the amendment substantially alters the theory of recovery"

Here, the proposed amendment to the breach of contract cause of action does not alter the theory of recovery. The complaint alleged that the defendant failed to perform the work in a good and workmanlike manner, albeit in the context of the cause of action alleging negligence. Furthermore, the defendant, who has the burden of establishing prejudice ..., failed to assert that it would be prejudiced by permitting the plaintiffs to amend the complaint to conform to the evidence adduced at trial that the work was not performed in a good and workmanlike manner *Mack-Cali Realty, L.P. v Everfoam Insulation Sys., Inc.*, 2015 NY Slip Op 04615, 2nd Dept 6-3-15

IN THIS BREACH OF CONTRACT ACTION PLAINTIFF ALLEGED DEFENDANT DELIBERATELY MISREPRESENTED THE INCOME OF THE BUSINESS AT ISSUE; AT TRIAL DEFENDANT TESTIFIED SHE HAD MISTAKENLY PROVIDED PLAINTIFF WITH WRONG INFORMATION ABOUT THE INCOME GENERATED BY THE BUSINESS; PLAINTIFF MOVED TO AMEND THE PLEADINGS TO ADD A CAUSE OF ACTION TO RESCIND THE CONTRACT BASED ON MUTUAL MISTAKE; THE MOTION WAS PROPERLY GRANTED AND JUDGMENT ON THAT THEORY WAS PROPERLY AWARDED TO PLAINTIFF.

Here the Breach of Contract Cause of Action Was Pled Under a Deliberate Misrepresentation Theory But Proof At Trial Indicated the Wrong Information Was Provided by the Defendant by Mistake; The Complaint Was Properly Conformed to the Trial Evidence of Mutual Mistake and Judgment Was Granted on that Ground.

The Third Department determined Supreme Court properly allowed the pleadings to be amended to conform to the evidence at trial. The trial evidence indicated the contract at issue was based upon mutual mistake rather than deliberate misrepresentation. The motion to amend the pleadings to allege mutual mistake was properly granted and the contract was properly rescinded on that ground:

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In the summer of 2010, Sharma contacted James Metz, an officer of defendant with whom Sharma had previously had successful business dealings, to inquire about commercial opportunities in New York. Metz responded that a gas station and convenience store owned by defendant was available for lease. After discussions with Metz and defendant's president, Alicia Metz, plaintiff agreed to take over the store and made certain payments to defendant. Third-party defendants signed a combined lease and contractor agreement but, almost immediately after taking control of the store, discovered records indicating that the store's sales were lower than plaintiff had been led to believe. After attempting unsuccessfully to modify the contract terms, third-party defendants vacated the store and requested a refund of their initial payments, which defendant refused to pay.

Plaintiff brought the instant action for rescission of the contract based upon fraudulent inducement. Defendant joined issue and commenced a third-party breach of contract action against third-party defendants. During the subsequent bench trial, plaintiff moved to conform the pleadings to the proof and pursue rescission based upon an additional theory of mutual mistake. Supreme Court granted the motion, found that a mutual mistake had occurred, awarded damages to plaintiff, rescinded the contract and dismissed the third-party action. Defendant appeals. ...

The burden was upon defendant, as the party opposing plaintiff's motion, to establish that it was "hindered in the preparation of [its] case or . . . prevented from taking some measure in support of [its] position" That burden cannot be met when the difference between the original pleading and the evidence results from "proof admitted at the instance or with the acquiescence of [the opposing] party" Here, the proof upon which plaintiff's motion was based was the testimony of defendant's president that she acted mistakenly in providing the wrong sales figures Given this testimony, defendant cannot have been surprised or unduly prejudiced by plaintiff's assertion of the theory of mutual mistake; thus, leave to conform the pleadings to the proof was properly granted [Lakshmi Grocery & Gas, Inc. v GRJH, Inc., 2016 NY Slip Op 02891, 3rd Dept 4-14-16](#)

THE THEORY THAT A DEFENDANT, BEATTY, WAS NEGLIGENT IN INTERPRETING A CT SCAN (REFERRED TO IN THE DECISION AS THE “BEATTY THEORY”) WAS NOT IN THE PLEADINGS OR THE BILL OF PARTICULARS; BUT THE PROOF OF THE “BEATTY THEORY” NECESSARILY FLOWED FROM THE INFORMATION CONVEYED IN THE PLEADINGS; ALTHOUGH NO MOTION TO CONFORM THE PLEADINGS TO THE PROOF WAS MADE, IN THE ABSENCE OF PREJUDICE TO DEFENDANTS, IT WAS NOT ERROR TO ALLOW THE PRESENTATION OF EVIDENCE OF THE UNPLED “BEATTY THEORY” AT TRIAL.

Here, Although the Plaintiff Did Not Move to Conform the Pleadings to the Proof of an Unpled Theory of Liability, the Trial Court Was Deemed to Have Properly Allowed Evidence of the Unpled Theory Because It “Necessarily Flowed from the Information Conveyed in the Pleadings.”

The Third Department determined evidence of a theory of liability (the so-called Beatty theory) not explicitly included in the pleadings and bill of particulars was not error. The theory was implicit in the pleadings and the defendants could not have been surprised by the related evidence. The Third Department noted it would have been better had the plaintiffs moved to conform the pleadings to the evidence, but found the trial court properly allowed testimony about the Beatty theory. (Ultimately, however, the Third Department ordered a new trial because the defendants were not allowed to present evidence which may have rebutted the Beatty theory.)

Generally, a party is limited to presenting evidence at trial that supports a cause of action or theory of recovery that was either pleaded in the complaint or asserted in the bill of particulars However, evidence concerning a specific theory or injury not mentioned in the bill of particulars may nonetheless avoid exclusion where such proof necessarily flows from the information conveyed in the pleadings and where the defendants should have been aware of the basis thereof. . . .

The contested theory of liability in this case is based on the allegedly erroneous interpretation of plaintiff’s February CT scan by Beatty (hereinafter referred to as the Beatty theory). It is worth noting that, because the complaint and bills of particulars do not contain an express articulation of the Beatty theory, the better practice certainly would have been for plaintiff to seek leave to amend his pleadings in advance of trial or at least have moved to conform the pleadings to the proof after the trial was underway. However, we nonetheless find that Supreme Court’s determinations allowing plaintiff to advance the Beatty theory at trial, including permitting plaintiff’s expert to offer testimony on the theory, do not constitute reversible error. In our view, the complaint— * * * which reference[s] the February CT scan as a basis for a departure from accepted medical practice — [was] sufficient to notify defendants of the Beatty theory and, as such, permit that theory of liability to be advanced at trial without prejudice. Simply put, we are unpersuaded by defendants’ position that they were not aware of the Beatty theory as a basis for a potential finding of medical malpractice. [Boyer v Kamthan, 2015 NY Slip Op 05983, 3rd Dept 7-9-15](#)

THE JUDGE IN THIS BENCH TRIAL, SUA SPONTE, AMENDED THE PLEADINGS TO CONFORM TO THE PROOF AND ALLOWED THE PLAINTIFF TO REOPEN THE CASE TO PRESENT EVIDENCE OF DAMAGES WHICH WAS INADVERTENTLY OMITTED (THE FACTS WERE NOT DESCRIBED).

A Court's Powers in this Area Are Broad. Here the Judge, Sua Sponte (In the Absence of a Motion by the Plaintiff), Conformed the Pleadings to the Proof and Reopened the Case to Allow the Presentation of Damages-Evidence Which Was Inadvertently Omitted.

The Second Department held that Supreme Court properly amended the pleadings sua sponte and properly allowed the plaintiff to reopen its case to present additional proof:

A court may amend pleadings before or after judgment to conform them to the evidence (see CPLR 3025[c]). Where no prejudice is shown, an amendment may be allowed during or even after trial Furthermore, an application for a continuance or adjournment is addressed to the sound discretion of the trial court, and the grant or denial thereof will be upheld on appellate review if the trial court providently exercised its discretion A trial court, in the exercise of discretion and for sufficient reasons, may allow a party to reopen his or her case, and supplement the evidence to cure any defects in the evidence that have inadvertently occurred

Here, under the circumstances of this case, the Supreme Court providently exercised its discretion in, sua sponte, amending the pleadings, continuing the trial, and permitting the plaintiff to reopen its case to present additional proof of damages [MRI Enters Inc v Comprehensive Med Care of NY PC, 2014 NY Slip Op 07482, 2nd Dept 11-5-14](#)

PLAINTIFF-CONTRACTOR BROUGHT THE ACTION UNDER THE LIEN LAW, SEEKING FORECLOSURE OF A MECHANIC'S LIEN; PLAINTIFF'S MOTION TO AMEND THE PLEADINGS AT TRIAL TO ADD QUANTUM MERUIT AS A THEORY OF RECOVERY WAS PROPERLY GRANTED (HOWEVER, PLAINTIFF ULTIMATELY FAILED TO PROVE ALL THE ELEMENTS OF EITHER THEORY).

In an action to foreclose a mechanic's lien, the Second Department determined Supreme Court properly allowed amendment of the pleadings to conform with the proof, which was consistent with an action for quantum meruit. Plaintiff contractor was unable to show the value of the work performed, so plaintiff's Lien Law and quantum meruit actions failed. Similarly, the defendants failed to prove they ended up paying more than the original agreed price for the work. So defendants' counterclaims for breach of contract and damages failed. With respect to the

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amendment of the complaint to conform to the proof, and the flaws in plaintiff's proof of the value of plaintiff's work, the court wrote:

Pursuant to Lien Law § 3, a contractor who performs labor or furnishes materials for the improvement of real property with the consent, or at the request of, the owner "shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . or materials upon the real property improved or to be improved and upon such improvement." "A lienor may seek amounts due from both written contracts and from change orders for extras, depending on whether the owner gave his consent for the extra work" The lienor's right to recover is limited by the contract price or the reasonable value of the labor and materials provided The lienor has the burden of establishing the amount of the outstanding debt by proffering proof either of the price of the contract or the value of labor and materials supplied

... [P]laintiff failed to offer bills, invoices, receipts, time sheets, checks, or any other evidence which would establish the cost of materials, work done by subcontractors, or the number of hours he worked on the job and proffered no explanation for his failure to present this evidence. He likewise failed to provide any detailed description of the work performed, the cost of any portion of the work, or the hourly rate at which he valued his labor. Indeed, at trial, the plaintiff admitted that the sum asserted in his lien was only an estimate. . . .

Pursuant to CPLR 3025(c), a trial court may permit the amendment of pleadings before or after judgment to conform them to the evidence "upon such terms as may be just" Here, although the complaint sought recovery in the form of foreclosure on his mechanic's lien, at trial, the plaintiff sought to conform the pleadings to the proof and assert a cause of action for recovery in quantum meruit. The Supreme Court granted that motion, and therefore, contrary to the defendants' contention, that theory of recovery was properly before the court. * * *

Here, although the plaintiff presented evidence satisfying . . . three elements [of quantum meruit], this cause of action must fail for the same reason that the cause of action to foreclose his mechanic's lien must fail; namely, his failure to present any evidence of the value of the materials supplied or services rendered. [DiSario v Rynston, 2016 NY Slip Op 02611, 2nd Dept 4-6-16](#)