

Mar 2023 | [Articles Blog: The Westchester Litigator](#)

## Is it Ever Too Late to Make a Change? Westchester Supreme Court Commercial Division Grants a Post-Note of Issue Motion for Leave to Amend Under NY CPLR 3025(b)

While the CPLR permits an early pleading amendment as of right, any subsequent or “late in the game” amendment requires agreement among the parties or leave of court under CPLR 3025(b). That provision counsels courts that “[l]eave shall be freely given upon such terms as may be just . . .” But how “free” should courts be in allowing supplemental pleadings? Does the close of discovery foreclose further amendments, or will a motion for leave to amend be entertained even after the note of issue has been filed?

A recent case from the Commercial Division of the Westchester County Supreme Court suggests that a “mere delay” will not be enough to defeat a motion for leave to amend, and absent unfair prejudice or surprise to the non-moving party, an amendment may be permitted even after the note of issue has been filed.

### The Case: *Rotonde, et al. v. Shallo, et al.*

In *Rotonde, et al. v. Shallo, et al.*, Index No. 53123/2021 (Westchester Sup. Ct. September 15, 2022), the plaintiffs moved for leave to amend their complaint approximately seven months after the note of issue was filed, and the defendants’ motion for summary judgment had been fully briefed. The plaintiffs’ proposed amended complaint included direct allegations against the third-party defendants in the action and four new causes of action asserted jointly against the defendants and third-party defendants. The defendants and third-party defendants opposed the motion, claiming surprise and significant prejudice if the plaintiffs were permitted to file an amended pleading that was “essentially a new lawsuit.” The defendants also argued that granting the motion would mean reopening discovery, delaying a protracted lawsuit.

Justice Linda S. Jamieson rejected these arguments and granted the motion. The court first concluded that there was no undue surprise or prejudice because the plaintiffs’ supplemental allegations and claims “relie[d] upon the very same underlying facts and transactions that [were] at issue from the outset of th[e] action.” The court further held that even though the motion was made after the note of issue was filed, “mere delay” was insufficient to defeat a motion for leave to amend, particularly given that the case had only been pending for 18 months. Importantly, to avoid further delay, the court cabined any additional discovery to 45 days, “narrowly limited to new legal and factual issues arising from the . . . amended complaint,” and denied the defendants’ motion for summary judgment with leave to renew following this limited discovery period.

## Takeaway

CPLR 3025(b) encourages trial courts to grant motions for leave to amend "upon such terms as may be just," thereby imposing a high bar on a party opposing such amendments. At the same time, in Westchester County, the Commercial Division has taken a creative and measured approach to these motions – granting them when no surprise or prejudice is present but limiting discovery to prevent excessive delay and to keep cases moving toward resolution.