

Scheele v 1120 Ave. of the Americas, LLC

2012 NY Slip Op 30349(U)

February 3, 2012

Supreme Court, New York County

Docket Number: 110095/08

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

DENNIS SCHEELE,
Plaintiff,

- v -

1120 AVENUE OF THE AMERICAS, LLC, EDISON
PROPERTIES, LLC, BOVIS LEND LEASE LMB,
INC.,
Defendants.

Index No.: 110095/08

Motion Date: 10/18/11

Motion Seq. No.: 03

Motion Cal. No.: _____

1120 AVENUE OF THE AMERICAS, LLC, EDISON
PROPERTIES, LLC, BOVIS LEND LEASE LMB,
INC.,
Third-Party Plaintiffs,

- v -

OPTION METAL & GLASS INC.,
Third-Party Defendant.

FILED

FEB 14 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 4 were read on this motion to amend the complaint.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits
Replying Affidavits - Exhibits

PAPERS NUMBERED	
1, 2	
3	
4	

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiff Dennis Scheel moves for an order declaring that Defendant Bovis Lend Lease LMB, Inc.'s (Bovis LMB) discovery responses are formal judicial admissions, that Bovis LMB is a

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

party to the construction contract with building owner 1120 Avenue of the Americas, that plaintiff be allowed to serve a supplemental summons and amended complaint adding Bovis Lend Lease Interiors, Inc. (Bovis Interiors), and declaring that plaintiff's proposed supplemental summons and amended complaint relate back to the time of the filing of the original summons and complaint.

This action arises out of the personal injury claims of plaintiff, who alleges that the property owner (defendants 1120 Avenue of the Americas, LLC and Edison Properties) and the general contractor (defendant Bovis LMB) for the construction site where plaintiff's injury occurred, created a safety hazard by negligently failing to remove waste and debris from the job site. Plaintiff claims that defendants' negligence caused him to step on a nail that was protruding from a piece of wood and suffer serious injuries.

Plaintiff's motions for an order declaring that Defendant Bovis LMB's discovery responses are formal judicial admissions and that Bovis LMB is a party to the construction contract with building owner 1120 Avenue of the Americas are denied without prejudice. The proper procedural vehicles for these applications are a motion for summary judgment or as evidence to be submitted at trial.

Plaintiff also argues that he should be granted leave to file and serve a supplemental summons and amended complaint to

add Bovis Interiors as a defendant. Plaintiff claims that the parties have already engaged in a substantial amount of discovery and that he relied on defendants' representations that Bovis LMB was the general contractor. Plaintiff claims that no prejudice would result to defendants in the addition of Bovis Interiors as a party defendant. In addition, records from the Secretary of State indicate that Bovis LMB and Bovis Interiors share the same chief executive officer and the same principal executive office. Finally, plaintiff points out that Bovis Interiors is listed as a division of Bovis LMB in the contract at issue. Thus, the proposed defendant has had knowledge of this litigation from the beginning.

Defendants oppose allowing plaintiff to amend the complaint. Defendants argue that plaintiff has had ample opportunity to investigate the proper contracting parties but failed to do so, that discovery is nearly at an end, that Bovis LMB and Bovis Interiors are entirely separate entities, and that plaintiff should not now have the opportunity to amend the complaint and have the new claims relate back to the original complaint.

The court shall grant the plaintiff's motion pursuant to CPLR 3025 for leave to file and serve a supplemental summons and amended complaint adding Bovis Interiors as a defendant. In addition, the Court declares that the interposition of the causes of action in the complaint interposed against the new party Bovis Interiors relate back to the filing of the original summons and

[* 4]
complaint.

The court relies on Buran v Coupal, 87 NY2d 173 (1995), which stands for the proposition that "An amended complaint that adds a new party is deemed to 'relate back' to the filing of that complaint against the original named defendant if the two defendants are united in interest." "It is well settled that the relation-back doctrine applies when (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new party is united in interest with the original defendant and, by reason of that relationship, can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement; and (3) the new party knew or should have known that, but for a mistake made by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well." Sciavoni v. Victory Memorial Hospital, 229 AD2d 365 (2nd Dept 2002).

Based on the contract appended to plaintiff's moving papers, Bovis Interiors is listed as a division of Bovis LMB. Plaintiff has also submitted records of New York Department of State which also show Bovis Interiors being listed as a division of Bovis LMB, and that the Bovis entities share the same chief executive officer, Michael Bellaman, and the same principal executive office, 200 Park Avenue, ninth floor. Defendant has come forward with no evidence that the two parties are not so united.

Accordingly, it is

ORDERED that plaintiff's application for an order declaring that Defendant Bovis Lend Lease LMB, Inc.'s (Bovis LMB) discovery responses are formal judicial admissions and that Bovis LMB is a party to the construction contract with building owner 1120 Avenue of the Americas are DENIED without prejudice; and it is further

ORDERED that the motion of the plaintiff for leave to file and serve a supplemental summons and amended complaint adding Bovis Lend Lease Interiors, Inc. as a defendant is GRANTED pursuant to CPLR 3025, and the caption of the complaint will be amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----x
DENNIS SCHEELE,

Plaintiff,

- v -

Index Number: 110095/08

1120 AVENUE OF THE AMERICAS, LLC,
EDISON PROPERTIES, LLC, BOVIS LEND
LEASE LMB, INC., BOVIS LEND LEASE
INTERIORS, INC.

Defendants.

-----x
1120 AVENUE OF THE AMERICAS, LLC,
EDISON PROPERTIES, LLC, BOVIS LEND LEASE
LMB, INC.,

Third-Party Plaintiffs,

- v -

OPTION METAL & GLASS INC.,

Third Party Defendant.

-----x;

and it is further

ORDERED that movant shall, within 30 days from service of a copy of this order with notice of entry, serve the complaint so amended upon defendants and third party defendant and file same with the County Clerk with proof of service; and it is further

ORDERED, that all papers, pleadings, and proceedings in the above entitled action be amended by adding BOVIS LEND LEASE INTERIORS, INC., without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 119, 60 Centre Street), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED and DECLARED that the interposition of the causes of action in the complaint against BOVIS LEND LEASE INTERIORS, INC. relate back to the filing of the original summons and complaint in this action; and it is further

ORDERED that the parties are hereby directed to attend a status conference on February 28, 2012, at 10:00 A.M., at the Courthouse, IAS Part 59, Room 103, 71 Thomas Street, New York 10013.

This is the decision and order of the court.

FILED

Dated: February 3, 2012

ENTER:

FEB 14 2012

NEW YORK
COUNTY CLERK'S OFFICE

Debra A. James
DEBRA A. JAMES J.S.C.
J.S.C.