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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Joan A. Madden **PART** 11
Justice

Index Number : 115325/2009
TOWER INSURANCE CO OF NEW
VS.
ST. GEORGE HOLDING CORP.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE 11/17/11
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

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

FILED
APR 26 2012
COUNTY CLERK'S OFFICE

Dated: April 20, 2012

_____, J.S.C.

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS Part 11

----------X Index No.: 115325/09

TOWER INSURANCE COMPANY OF NEW YORK
A/S/O CHURRASQUERIA LA FONDA, INC.

Plaintiff,

-against-

RITMO'S "60'S" INC. AND RITMO'S "60'S" INC. D/B/A EL BASURERO'S RESTAURANT AND BAR, ST. GEORGE HOLDING CORP. AND ST. GEORGE HOLDING, CORP. D/B/A EL BASURERO'S RESTAURANT AND BAR

Defendants

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JOAN A. MADDEN, J.:

In this subrogation action, defendants St. George Holding Corp. and St. George Holding Corp. D/B/A El Basurero's Restaurant and Bar ("St. George") move to dismiss the amended complaint on the grounds that: (i) pursuant to CPLR 3211(a)(5), plaintiff's cause of action cannot be maintained as it is barred by the Statute of Limitations; and (ii) pursuant to CPLR 3011, the amended complaint was served prematurely. Plaintiff Tower Insurance Company of New York A/S/O Churrasqueira La Fonda, Inc. ("Tower") opposes the motion, which is granted for the reasons below.

Background

This is a subrogation action seeking recovery of money paid by Tower to its insured, Churrasqueira La Fonda, Inc. ("La Fonda), upon a claim for property damage. La Fonda maintained and operated a restaurant at 32-25 Steinway Street, Long Island City, New York. Tower alleges to have indemnified La Fonda for property damage that resulted from a January 1, 2007 fire that began at the premises located at 32-17 and/or 32-31 Steinway Street, Astoria, which is the location of a bar and restaurant known as

"El Basurero's Restaurant." The fire was allegedly caused by electric wiring issues resulting from the placement of Christmas lights by defendants on and around an oversized tree trunk in the middle of the restaurant. St. George owns El Basurero's Restaurant.

Tower commenced the original action through the filing of a summons with notice, dated October 30, 2009, which named Ritmo's "60's" Inc. and Ritmo's "60's" Inc. D/B/A El Basurero's Restaurant and Bar as defendants. The complaint, dated December 1, 2009, also named Ritmo's "60's" Inc. and Ritmo's "60's" Inc. D/B/A El Basurero's Restaurant and Bar as defendants. Ritmo's served its answer on December 17, 2009.

On or about February 10, 2011, Ritmo's moved for summary judgment, based on the affidavit of its principal, Jorge Morales who stated that Ritmo's has never done business at the fire location and that the fire was not located within the premises occupied by Ritmo's. Tower cross-moved for leave to serve a supplemental summons and amended complaint naming St. George as a defendant.

By decision and order dated July 27, 2011, the court granted the motion to dismiss as to Ritmo's and granted the cross motion and directed that the supplemental summons and amended complaint be served on St. George by plaintiff by August 25, 2011. However, the court noted that it made no determination as to whether St George was timely added as a defendant under the relation back doctrine. Before the court issued its decision and order, Tower served St. George with a supplemental summons and the amended complaint, dated July 1, 2011.

On October 7, 2011, St. George made this motion to dismiss, asserting that as the fire at issue took place over four years prior to the commencement of this action against

St. George, the action is untimely based on the applicable three-year Statute of Limitations for property damage actions set forth in CPLR 214(4). Defendants also argue that St. George was served prematurely on July 1, 2011, as such service was made before the court granted Tower leave to amend the complaint, in violation of CPLR 3011.

Tower opposes the motion, asserting that the amended complaint merely corrected a misnomer in the defendants' name in the original complaint. Additionally, Tower argues that this action was timely commenced against St. George pursuant to the relation back doctrine, as the same facts underlie the claims brought against initial defendant, Ritmo's and the newly added defendant, St. George. Tower also argues that St. George is united in interest with the original defendant, Ritmo's, since St. George and Ritmo's are both wholly owned by Jorge Morales. Tower also argues that St. George was on notice of the action when Ritmo's was served with the original complaint, and thus should have known that this action should have been brought against it.

In reply, St. George argues that the amended complaint does not merely correct a misnomer, but instead adds an entirely new party that is unrelated to Ritmo's and points out that the amended complaint adds twelve substantive paragraphs of allegations and two causes of action against St. George that were not included in the original complaint against Ritmo's. St. George further argues that the relation back doctrine does not apply, as there is no evidence that Ritmo's and St. George are solely owned and operated by Jorge Morales.

Discussion

There is no dispute that the supplemental summons and amended complaint were served on St. George after the expiration of the applicable three-year Statute of Limitations governing claims for property damages. At issue here is whether the claims

asserted against St. George relate back to those asserted in the original complaint against Ritmo's such that the claims are timely and/or whether Ritmo's is simply a misnomer for St. George.

"[T]he relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a co-defendant for Statute of Limitations purposes where the two defendants are 'united in interest.'" Buran v. Coupal, 87 N.Y.2d 173, 177 (1995), quoting CPLR 203(c). For the relation back doctrine to apply, three conditions must be satisfied: "(1) Both claims [arise] 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 he will not be prejudiced in maintaining his defense on the merits, and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff, as to the identity of the proper parties, the action would have been brought against him as well." Buran v. Coupal, 87 N.Y.2d at 178, quoting Brock v. Bua, 83 A.D.2d 61, 69 (2nd Dept 1981) (citations omitted).

Here, the first condition of the relation back doctrine is satisfied since the claim for property damage in the amended complaint arises out of the same incident as described in the complaint, the fire that occurred on January 1, 2007 at the premises located at 32-17 and/or 32-31 Steinway Street, Astoria.

However, Tower has not shown the second condition has been met, that is that newly added defendant St. George is "united in interest" with Ritmo's the defendant in the original complaint. Unity of interest is established "only where the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other…In short, interests will be united only where

one is vicariously liable for the acts of the other." L & L Plumbing & Heating v. DePalo, 253 AD2d 517, 518 (2nd Dept 1998) (internal quotations and citations omitted); see also Valmon v. 4 M & M Corp., 291 A.D.2d 343 (1st Dep't 2002), lv. denied, 98 N.Y.2d 611 (2002); Mercer v. 203 E. 72nd St. Corp., 300 A.D.2d 105 (1st Dep't 2002). Here, there is nothing in the record to indicate that St. George and Ritmo's are vicariously liable for the acts of the other, or that their interests stand and fall together. In fact, the court dismissed the complaint against Ritmo's based on a finding that Ritmo's did not occupy, or do business at, the restaurant where the fire allegedly began while St. George was added as a defendant based on evidence that it owned and operated the restaurant at issue. Thus, Ritmo's and St. George do not have the same defenses and their interests do not rise and fall together since they are separate corporations operating at different locations.

Furthermore, while plaintiffs argue that Ritmo's and St. George share a "unity of interest" as they have a common owner, Jorge Morales, the First Department has held that having common shareholders and officers is not dispositive on the issue of unity of interest and, "such unity of interest will not be found unless there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other." Valmon v. 4 M & M Corp., 291 A.D.2d at 313. Furthermore, there is no evidence that defendants actively concealed that El Basurero's was owned by St. George. Regina v. Broadway Bronx Motel Co., 23 AD3d 255, 255 (1st Dept 2005).

As there is no unity of interest between Ritmo's and St. George, the court need not address whether St. George knew or should have known that but for the mistake, the action would have been brought against it as well.

Tower's next argument, that the claims against St. George are timely under a misnomer theory, is also unavailing. CPLR 305(c) states that the court has discretion to,

"allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced." The provision has been interpreted as allowing a misnomer in the description of the party defendant to be cured, even after the expiration of the Statute of Limitations, where, "(1) there is evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment sought." Ober v. Rye Town Hilton, 159 A.D.2d 16, 19 (2d Dep't 1990), citing Stuyvesant v. Weil, 167 N.Y. 421 (1901).

Here, St. George was not properly and timely served with the summons with notice that commenced this action. Instead, the record reveals that the summons with notice was served on Ritmo's through the Secretary of State pursuant to the Business Corporation Law, with the follow-up mailing sent to Ritmo's at its place of business at 32-33 Steinway Street, Astoria, Queens. Notably, 32-33 Steinway Street is the address of Ritmo's and not El Basurer's Restaurant, where the fire allegedly began, which is located at 33-17 Steinway Street, and owned by St. George.[1] Nor does Tower present any evidence that Ritmo's was a designated agent for service of process upon St. George. Thus, jurisdiction was not acquired over St. George by service on Ritmo's. Ito v. Marvin Windows of New York., Inc. 54 A.D.3d 1002, 1004 (2nd Dept 2008)(denying cross motion to substitute defendant on the ground that the intended defendant was misnamed where plaintiff failed to established that it gained jurisdiction over it by service on named defendant);Achtziger v. Fuji Copian Corp., 299 A.D.2d 946, 947 (4th Dept 2002) lv.

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[1]The first amended summons and complaint was properly served on St. George through the Secretary of State, with the follow up mailing sent to St. George's address at 33-17 Steinway Street; however, such service was made after the expiration of the applicable statute of limitations.

dismissed in part and denied in part 100 N.Y.2d 548 (2003)(trial court erred in granting cross motion to amend summons and complaint to add party defendant under CPLR 305(c) where, inter alia, the service on the original defendant did not constitute service on the misnamed party).

Moreover, when, as here, the originally named party and the party named after the expiration of the Statute of Limitations are not the same entities or united in interest, the courts have found that amendment does not correct a misnomer pursuant CPLR 305(c) but rather adds a new defendant. See Issing v. Madison Square Garden Center, Inc., 62 AD3d 407 (1st Dept 2009); Tricoche v. Warner Amex Satellite Entertainment Co., 48 AD3d 671 (2d Dept 2008).

Since Ritmo's and St. George are not united in interest and jurisdiction was not acquired over St. George prior to the expiration of the Statute of Limitations, the motion to dismiss must be granted, and the court need not reach whether the amended complaint was served prematurely in violation of CPLR 3011.

Conclusion

In view of the above, it is

ORDERED that defendant's motion to dismiss the amended complaint is granted; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint in its entirety.

DATED: ~~March~~ April 19, 2012

J.S.C.

FILED

APR 26 2012

NEW YORK
COUNTY CLERK'S OFFICE