

Faust v Consolidated Carpet Assoc., LLC
2012 NY Slip Op 31493(U)
June 4, 2012
Supreme Court, New York County
Docket Number: 100097/2008
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 100097/2008

PART 19

FAUST, LAURA

vs

CONSOLIDATED CARPET

INDEX NO. _____

Sequence Number : 001

MOTION DATE _____

AMEND CAPTION, PARTIES

MOTION SEQ. NO. _____

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

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 accompanying memorandum decision.*

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

JUN 15 2012
CLERK OF COURT

Dated: 6/4/12

[Signature]

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: CIVIL TERM: PART 19

----- X
LAURA FAUST,

Plaintiff,

- against -

Index No.: 100097/2008

Submission Date: 03/28/2012

CONSOLIDATED CARPET ASSOCIATES, LLC.,

Defendant.

----- X

For Plaintiff:
David Horowitz, P.C.
267 Fifth Ave., Suite 305
New York, NY 10001

For Defendant:
Rosenbaum & Taylor, P.C.
445 Hamilton Ave., Suite 1102
White Plains, NY 10601

FILED 03/28/12

Papers considered in review of this motion for summary judgment:

- Notice of plaintiff's motion1
- Aff in Opposition to
Plaintiff's Motion and in
Support of Cross Motion2
- Mem of Law3
- Aff in Opposition to
Cross-Motion and Rely.4
- Aff in Reply.5

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, plaintiff Laura Faust ("Faust") moves (1) pursuant to CPLR § 203(b) to correct a pleading error by adding Consolidated Carpet Workroom LLC ("CCW") and Consolidated Carpet Trade Workroom, Inc. ("CCTW") as defendants; (2) pursuant to CPLR § 3025(b) to amend the caption to include CCW and CCTW as defendants; (3) for an order directing Faust to

serve an amended pleading within a period to be determined by the Court; and (4) for an order extending the deadline for Faust to file the Note of Issue. Defendant Consolidated Carpet Associates, LLC (“CCA”) opposes Faust’s motion to amend as time-barred, and cross-moves for summary judgment dismissing the complaint.

This action arises from injuries Faust sustained on March 3, 2005 when she tripped and fell at the office of her employer, HIP Health Plan (the “HIP office”). Faust commenced this action in January 2008, alleging that CCA negligently installed and repaired the carpeting at the HIP office.

Both CCA’s owner, David Meberg (“Meberg”), and its Vice President, David White (“White”), testified that CCA merely sells carpets, and subcontracts with other entities, including CCW, to install and repair the carpets. Meberg testified that CCA and CCW have the same principals and executives, and that he supervises both companies. He also testified that CCW and CCA share accounting, benefits and technology departments. Though Meberg testified that CCTW and CCW mirrored each other, Meberg stated that he was unsure whether CCTW was still in existence when Faust was injured.

Meberg now attests that CCA and CCW are separate, independent corporate entities and that neither is vicariously liable for the actions of the other. According to Meberg, a judgment against CCA or CCW would not be collective against the other company, and neither CCA nor CCW “operates or directs the work of the other company”

or “exercises control over the work or daily operations of the other company.” Meberg further attests that CCTW changed its name to CCTW Holdings, Inc. before Faust’s accident.

Faust now moves to amend the complaint to add CCW and CCTW as defendants. Though Faust acknowledges that the three-year statute of limitations for negligence actions has expired, she maintains that the new claims are not time-barred because the amended complaint relates back to the previous complaint. In opposition, CCA argues that it is not united in interest with CCW and thus the amended complaint does not relate back. CCA further argues that the Court should not add CCTW as a defendant because CCTW was not in existence at the time of Faust’s accident

In support of its cross-motion for summary judgment, CCA argues that it is not liable for Faust’s injuries because it did not install the carpet the HIP office’s carpet. Faust does not contest this assertion, but maintains that the action should not be dismissed because the Court should add CCW and CCTW as defendants.

Discussion

Pursuant to CPLR § 203(b), a plaintiff may add a new party after the statute of limitations has expired where the amended filing relates back to the previous claims. *Buran v. Coupal*, 87 N.Y.2d 173, 177-78 (1995). An amended complaint relates back only if “(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 (3) the new party knew

or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well.” *Xavier v. RY Mgt. Co., Inc.*, 45 A.D.3d 677, 678 (2d Dept. 2007); *Buran*, 87 N.Y.2d at 178.

Though CCA does not contest that Faust has satisfied the first and third conditions of § 203(b), Faust has failed to show that CCW and CCTW are “united in interest” with CCA. Parties are “united in interest” when they stand or fall together with respect to the plaintiff’s claims, which, in negligence actions, requires that one party be vicariously liable for the actions of the other. *Xavier v. RY Mgt. Co., Inc.*, 45 A.D.3d at 679; *Valmon v. 4 M& M Corp.*, 291 A.D.2d 343, 344 (1st Dept. 2002).

Here, Meberg attests that neither CCA or CCW is vicariously liable for the other’s actions, that a judgment against one would not be collectible against the other, and that neither entity controls the operations of the other. *See Pieszczynsyn v. GMC*, 248 A.D.2d 939, 940 (4th Dept. 1998). Further, the two companies do not share defenses to Faust’s claims. Meberg attests that CCA merely sells carpets, and that CCW installs carpets, and Faust cannot show that a carpet vendor will be liable for the negligent acts of the entity that installed the carpets.

In response, Faust presents no evidence to raise an issue of fact on whether the parties are united in interest. Though the two entities share principals and owners, and have common technology, accounting and benefits departments, these commonalities are insufficient to establish unity of interest in the absence of vicarious liability. *See Valmon*,

291 A.D.2d at 344; *Xavier*, 45 A.D.3d at 678.

Further, because Faust argues that CCW and CCTW mirror each other, and the Court holds that CCW is not united in interest with CCA, the Court also holds that CCTW is not united in interest with CCA.

Lastly, the Court grants CCA's motion for summary judgment dismissing the complaint. Meberg testified, and Faust does not contest, that CCA did not install or repair the carpet at the HIP office. As Faust's claims arise entirely from the carpet's installation, and Faust admits that her case "stands and falls" based on the Court's decision to add CCW and CCTW as defendants, the Court dismisses Faust's complaint. *See Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

In accordance with the foregoing, it is hereby

ORDERED that the motion by plaintiff Laura Faust (1) to correct a pleading error by adding Consolidated Carpet Workroom LLC ("CCW") and Consolidated Carpet Trade Workroom, Inc. ("CCTW") as defendants; (2) to amend the caption to include CCW and CCTW as defendants; (3) for an order directing Faust to serve an amended pleading within a period to be determined by the Court; and (4) to extend the deadline for Laura Faust to file the Note of Issue, is denied; and it is further

ORDERED that the cross-motion for summary judgment dismissing the complaint by defendant Consolidated Carpet Associates, LLC, is granted; and it is further

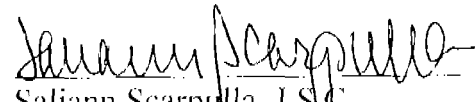
ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
June 4, 2012

1/10/12 2:00

ENTER:


Saliann Scarpulla, J.S.C.