Furman v Lexington Ave. Hotel
2017 NY Slip Op 30152(U)
January 23, 2017
Supreme Court, New York County
Docket Number: 157175/2014
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. Justice PART 35

Index Number : 157175/2014
FURMAN, EUGENE
vs
LEXINGTON AVENUE HOTEL
Sequence Number : 003
DISMISSAL

INDEX NO. _____
MOTION DATE 11/30/16
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

In this personal injury action, defendants Cross Fire and Security of New York, Inc. ("Cross Fire/Security") move and defendant H&L Electric, Inc. ("H&L") cross-moves pursuant to CPLR 3211 to dismiss plaintiffs' Supplemental Summon and Amended Complaint for failure to commence their action against them within the three-year statute of limitations as prescribed by CPLR 214.

Factual Background

Plaintiff allegedly sustained injuries as a result of a fire at a certain hotel on June 5, 2013, and commenced this action against defendants Diamondrock, NY Lex Owner, LLC, and Diamondrock NY Tenant, LLC, (collectively, "Diamondrock") on July 22, 2014 asserting, *inter alia*, claims of negligence.

The following year, Diamondrock commenced a third party action on June 12, 2015 against Consolidated Edison Company of New York ("ConEd") and H&L Electric Inc. ("H&L").

The following year, on January 28, 2016, Diamondrock commenced a Second Third Party action against Cross Fire/Security.

Plaintiff then moved for leave to file and serve the supplemental summons and amended complaint to name Cross Fire/Security and H&L as direct defendants in the main action. By Order dated August 25, 2016, the Court granted plaintiffs' application for leave to file and serve the supplemental summons and amended complaint, stating that "the issues of relation back and statute of limitations are open to defendants to raise in the amended answers and/or by motion."

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

Dated: _____ _____, **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

Consequently, on September 14, 2016, plaintiffs then served their supplemental summons and amended complaint naming Cross Fire/Security and H&L as direct defendants

Now, in support of dismissal, Cross Fire/Security and H&L (collectively, the "the moving defendants") argue that since the supplemental summons and amended complaint were served and filed after the three year Statute of Limitations expired, this action must be dismissed. CPLR§3025(b) does not permit amendments to be made after the Statute of Limitations has expired. Nor can plaintiffs rely on the "relation back doctrine." Diamondrock, ConEd, and H&L are not alleged to have committed the same negligent act as alleged against CrossFire/Security. There is no allegation that CrossFire/Security had anything to do with the electrical switch panels at the hotel, that CrossFire/Security caused the fire or smoke condition or that CrossFire/Security is negligent for the acts that the Diamondrock are alleged to have committed. Also, the Amended Complaint alleges three different theories of liability against Diamondrock, ConEd, and H&L in three different causes of action. Thus, CrossFire/Security is not united in interested with the original defendants. Any damage was the result of the fire and smoke condition allegedly created by Diamondrock. And, CrossFire/Security does not have the same defenses as the other original defendants. The claim against CrossFire/Security concerns the smoke detectors and alarms, which have nothing to do with the creation of the fire or the electrical panel. Moreover, plaintiffs were aware of CrossFire/Security's identity as late as January 28, 2016 when CrossFire/Security was added as a Second Third-Party Defendant. Therefore, plaintiffs' failure to name CrossFire/Security as a defendant "cannot be characterized as a mistake for the purpose of the third prong of the relation back doctrine."

H&L adds that it is not "united in interest" with the original defendant, Diamondrock. The Amended Complaint asserts that Diamondrock failed to maintain the Hotel's premises in a reasonably safe condition and failed to timely, properly and adequately notify hotel guests of the fire and smoke conditions. However, the Amended Complaint against H&L claims that it failed to inspect, install, service, renovate, repair, and maintain the electrical systems and electrical panel at the Hotel. Thus, Plaintiffs do not allege that H&L is negligent for the same conduct and acts that Diamondrock is alleged to have committed. Furthermore, H&L and Diamondrock do not necessarily have the same defenses to the plaintiffs' claims, as they performed different functions. The Amended Complaint alleges that Diamondrock offers lodging, accommodations, and hospitality services to the public and managed the hotel. Yet, the Amended Complaint seeks to hold Diamondrock liable under the Respondeat Superior Doctrine for its alleged negligent acts, and alleges that H&L was responsible for inspection, installation, service, repair and maintenance of the electrical system and electrical switch panels at the Hotel. Since plaintiffs allege that Diamondrock and H&L perform different roles, and therefore have different defenses to the Plaintiffs' claims, H&L is not "united in interest" with Diamondrock.

In opposition, plaintiffs argue that the cases cited to by defendants are factually distinguishable. The proper rule to be applied is CPLR 203[f], which governs when a claim in an amended pleading is deemed interposed. And, no unity of interest is required for relation back purposes since defendants were timely joined to the action before the statute of limitations expired.

In reply, Cross Fire/Security cites caselaw requiring that certain conditions be satisfied before claims against one defendant to relate back to another defendant.

Discussion

It is uncontested that the three-year statute of limitations applies to plaintiff's personal injury action (see plaintiff's Memorandum of Law, ¶15). Thus, as plaintiff's accident allegedly occurred on June 5, 2013, the statute of limitations of her action expired on June 5, 2016. It is also uncontested that plaintiff served her Amended Complaint naming Cross Fire/Security and H& L on September 14, 2016, after the statute of limitations expired.

It "has been held in all four Departments of this state that under certain circumstances CPLR 203(e) should be construed to allow the plaintiff to assert a claim against the *third-party defendant, after the statute of limitations has expired*, to relate back to the date of service of the third party complaint" (*Gibel v. Resnik Holdings of Mt. Vernon, Inc.*, 42 Misc.3d 887, 978 N.Y.S.2d 675[Supreme Court, Westchester County 2014]; *see Holst v. Edinger*, 93 A.D.2d 313, 461 N.Y.S.2d 813 [1st Dept.1983]; *Schuler v. Grand Metro Bldg. Corp.*, 118 A.D.2d 633, 499 N.Y.S.2d 786 [2d Dept. 1986]; *Jones v. Gelles*, 125 A.D.2d 794, 509 N.Y.S.2d 900 [3d Dept. 1986]; *Boxhorn v. Alliance Imaging, Inc.*, 74 A.D.3d 1735, 901 N.Y.S.2d 891 [4th Dept. 2010] (emphasis added)).

As pointed out by plaintiffs, CPLR 203 [f] provides:

> Claim in amended pleading. A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

"It is evident that when a third party has been served with the third-party complaint, and all prior pleadings in the action as required by CPLR 1007, the third-party defendant has actual notice of the plaintiff's potential claim at that time. The third-party defendant must gather evidence and vigorously prepare a defense. There is no temporal repose [due to the expiration of the statute of limitations]. Consequently, an amendment of the complaint may be permitted, in the court's discretion, and a direct claim asserted against the third-party defendant, which, for the purposes of computing the Statute of Limitations period, relates back to the date of service of the third-party complaint" (*Duffy v. Horton Mem. Hosp.*, 66 N.Y.2d 473, 478, 497 N.Y.S.2d 890, 488 N.E.2d 820 [1985] citing McLaughlin, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, C203:11, p. 124; Siegel, N.Y. Prac. § 49, at 17–18 [1985 Supp.]; 6 Wright and Miller, Federal Practice & Procedure § 1498)).

In *Linares v. Franklin Mfg. Corp.*, (155 A.D.2d 518, 547 N.Y.S.2d 379 [2d Dept 1989]), the plaintiffs moved for leave to amend their complaint naming the third-party defendant Shore Plastics, Inc., as a defendant in the main action and "asserting a new theory of recovery based upon the alleged negligent modification of the injury-causing machine." The original complaint and the third-party complaint were timely served within the three-year Statute of Limitations. However, the new theory was asserted after the three-year Statute of Limitations expired. Nevertheless, and citing, *inter alia*, CPLR 203[e] [sic][1], the Court, in the exercise discretion, held

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[1] CPLR 203 (e) concerns the "Effect upon defense or counterclaim of termination of action because of death or by dismissal or voluntary discontinuance."

that the plaintiffs' direct claim against the third-party defendant, is deemed for Statute of Limitations purposes "to have been interposed as of the date that the third-party complaint was served." The original pleadings together with the third-party pleadings and the plaintiffs' bill of particulars were served upon the third-party defendant and provided adequate notice of the transactions and occurrences out of which the new theory of recovery arises. The Court then applied CPLR 3025(b) because the third-party defendant failed to demonstrate any actual prejudice resulting from the plaintiffs' delay in seeking a retroactive amendment to add it as a defendant in the main action.

Here, as the third party actions against moving defendants were timely filed within the three-year statute of limitations, the direct claims against them are timely and dismissal is unwarranted. The original pleading herein gives sufficient notice of the "transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." (CPLR 203[f]). And, it is also noted that the moving defendants failed to demonstrate sufficient prejudice caused by the amendment at this juncture.

The cases cited by the moving defendants either do not involve a situation in which plaintiff attempted to commence suit or add a new party to the action, do not involve the naming of a third party defendant to a main action, or did not involve the application of CPLR 203[e] (*cf. Rinzler v Jafco Assoc.*, 21 A.D.3d 360, 800 N.Y.S.2d 719 [2d Dept 2005] (dismissing amended complaint against "Fairfield Realty Corp." where original complaint named only "Jafco Associates" as a defendant); *Lessoff v 26 Ct. St. Assoc., LLC*, 58 A.D.3d 610, 872 N.Y.S.2d 144 [2d Dept 2009] (plaintiff sued defendant after the three-year statute of limitations expired); *Tricoche v Warner Amex Satellite Entertainment Co.*, 48 A.D.3d 671, 853 N.Y.S.2d 100 [2d Dept 2008] (plaintiff attempted to add new defendants to complaint for the first time after the statute of limitations expired); *Gem Flooring v Kings Park Indus.*, 5 A.D.3d 542, 773 N.Y.S.2d 442 [2d Dept 2004] (dismissing plaintiff's second complaint against defendant where plaintiff failed to serve said defendant of the complaint in the first action against said defendant within the 120-day period); *Goldberg v Boatmax://, Inc.*, 41 A.D.3d 255, 840 N.Y.S.2d 570 [1st Dept 2007] (failure to establish due diligence in identifying the individuals to replace the originally named "John Doe" defendants); *Buran v. Coupal*, 87 N.Y.2d 173, 661 N.E.2d 978, 638 N.Y.S.2d 405 [1995] (permitting amended complaint adding wife Janet Coupal where plaintiff originally named only husband John Coupal as defendant); *Royce v Dig EH Hotels, LLC*, 2014 NY Slip Op 30830(U) (denying motion to add third-party defendants as main defendants pursuant to CPLR 3025(b) based on failure to establish applicability of relation back doctrine); *but see, Larkin v City of New York*, 2013 NY Slip Op 31534(U) [Supreme Court, New York County] (stating that "the direct claims against M&E are timely as the second-third party action was commenced against M&E in December 2011, which is within three years of the January 2009 accident")).

Therefore, dismissal of the complaint for failure to commence the action against the moving defendants within the three-year statute of limitations is unwarranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants Cross Fire and Security of New York, Inc. ("Cross Fire/Security") pursuant to CPLR 3211 to dismiss plaintiffs' Supplemental Summon and Amended Complaint for failure to commence their action against them within the three-year

statute of limitations as prescribed by CPLR 214 is denied; and it is further

ORDERED that the cross-motion by defendant H&L Electric, Inc. pursuant to CPLR 3211 to dismiss plaintiffs' Supplemental Summon and Amended Complaint for failure to commence their action against them within the three-year statute of limitations as prescribed by CPLR 214, is denied; and it is further

ORDERED that said defendants shall serve their answer within 30 days of the date of this order; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 1/23/17 **ENTER:** _____, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

Check one: ❑ **FINAL DISPOSITION** ❑ **NON-FINAL DISPOSITION**

Check if appropriate: ❑ **DO NOT POST** ❑ **REFERENCE**