Simington v 152-154 Second Ave. Corp.
2017 NY Slip Op 30824(U)
April 20, 2017
Supreme Court, New York County
Docket Number: 155033/2013
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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KEVIN SIMINGTON,

Plaintiff,

-against-

152-154 SECOND AVE. CORP., B.O.S.S. ASSOCIATES, INC. and 152 SECOND REALTY LLC,

Defendants.

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Index No.155033/2013

Mot. Seq. No. 002 and 003

Decision and Order

Kelly O'Neill Levy, J.:

Defendant 152 Second Realty LLC ("Realty") moves pursuant to CPLR 3211 for an order granting dismissal, with prejudice, of the second amended complaint brought against it by plantiff Kevin Simington (mot. seq. 002). Realty argues that pursuant to CPLR 214, the three-year statute of limitations period has expired as to Plaintiff's personal injury action against it and that the relation back doctrine is inapplicable here. Plaintiff opposes the motion, and moves for an order pursuant to CPLR 3025 granting leave to amend the complaint to add or join Realty's principal owners, Terrence M. Lowenberg and Todd Cohen, as defendants (mot. seq. 003). Realty opposes the motion. The motions are consolidated for disposition.

Background

On November 9, 2010, defendants Realty and 152-154 Second Ave. Corp. ("Second") entered into a lease agreement whereby owner and landlord Second leased its premises to Realty. Pursuant to the lease, Realty, as tenant, agreed to "improve the [p]remises by constructing an alteration of the existing [b]uilding and [i]mprovements, as a 'mixed use' commercial (retail) and

residential building." In addition, Mr. Lowenberg and Mr. Cohen were to serve individually and collectively as Realty's guarantor for all costs associated with the alteration of the existing building. After executing the lease, Realty contracted with B.O.S.S. Associates, Inc. ("Boss") to demolish the existing structure and construct a new building. Plaintiff alleges he was injured at said premises on April 25, 2012 while performing demolition during the course of his employment under Perciballi Industries, Inc.

In May 2013, Plaintiff commenced the instant personal injury action against Second. On August 20, 2013, Plaintiff amended his complaint and added Boss as a defendant. On October 8, 2015, after Second's treasurer testified at his deposition about the landlord-tenant relationship between Second and Realty, Plaintiff moved to add or join Realty as a defendant. On January 27, 2016, this court granted Plaintiff's motion without opposition. On September 16, 2016, Plaintiff moved for leave to amend the complaint to add or join Mr. Lowenberg and Mr. Cohen. Realty now contends that neither it nor Mr. Lowenberg nor Mr. Cohen should be parties to this action as the statute of limitations on the claims against them has expired.

Discussion

Pursuant to CPLR 214, an action to recover damages for a personal injury must be commenced within three years. If a party believes the action has expired under the statute of limitations, it may move pursuant to CPLR 3211(a)(5) for an order granting dismissal of the complaint. The movant must establish prima facie that the time in which to commence the action has expired. *Williams Guillaume v. Bank of Am.*, N.A., 130 A.D.3d 1016, 1016–17 (2d Dep't 2015) (quoting *Baptiste v. Harding-Marin*, 88 A.D.3d 752, 753 [2d Dep't 2011]). The burden then shifts to the non-moving party to raise an issue of fact as to whether the statute of limitations

is tolled or otherwise inapplicable. *Id.*

Under the relation-back doctrine of CPLR 203, a new party may be joined as a defendant in a previously-commenced action after the statute of limitations has expired, where the plaintiff establishes that: (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 (3) the new party knew or should have known that but for a mistake by the plaintiff in failing to identify all proper parties, the action would have been brought against it as well. *Buran v. Coupal*, 87 N.Y.2d 173, 178 (1995); *Higgins v. City of N.Y.*, 144 A.D.3d 511 (1st Dep't 2016); *Lindkvist v. Honest Ballot Ass'n*, 31 Misc. 3d 1234(A) (Sup. Ct. 2011). Under this standard, all three conditions must be satisfied in order for the claim asserted against the new party to relate back to the claim asserted against the original defendant. *Buran* at 178. Where, as here, a defendant has established that the applicable statute of limitations has expired, the burden shifts to the plaintiff to establish that the relation back doctrine applies. *See Austin v. Interfaith Med. Ctr.*, 264 A.D.2d 702, 703 (2d Dep't 1999). The application of the relation back doctrine is ultimately within the sound judicial discretion of the court. *Spodek v. Neiss*, 2011 WL 1480899 (Nassau County 2011) (citing *Buran*, at 177-78).

Realty argues that the only relationship between it and Second was as landlord and tenant, and that Plaintiff fails to establish that Realty and Second are "united in interest." Plaintiff asserts that pursuant to an indemnification provision in the lease agreement between Realty and Second, Realty is vicariously liable to Second, and thus united in interest. The parties also disagree as to whether Realty did know or should have known that the instant action would be brought against it. Similar arguments are made with respect to Mr. Lowenberg and Mr. Cohen. Neither party disputes that both claims arise out of the same conduct, transaction, or occurrence.

The parties are united in interest if their interest in the subject-matter is such that they will "stand or fall together" and that "judgment against one will similarly affect the other." *Brunero v. City of New York Dept. of Parks and Recreation*, 121 A.D.3d 624, 626 (1st Dep't 2014). "A unity of interest will be found where there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other." *Id.* at 625 (internal quotation marks omitted). New York courts have found vicarious liability of one party for the conduct of the other due to a contractual indemnification provision. *See id.* at 626 (finding Parks Department vicariously liable for Central Park Conservancy's "negligence in the course of providing maintenance in Central Park by virtue of the contractual indemnification provision, and the parties are thus united in interest"); *see also Quiroz v. Beitia*, 68 A.D.3d 957, 959-960 (2d Dep't 2009) (finding that employer and the facility were vicariously liable for the negligence of each other pursuant to an indemnification provision, requiring the employer to indemnify the facility for wrongful acts or omissions of its physicians); *Austin*, at 704.

Section 17.01 of the lease agreement between Realty and Second entitled Non-Liability and Indemnification states, in relevant part,

> ". . .Tenant shall indemnify and hold the Landlord Indemnified Parties . . . harmless **from and against**, **any** claims, actions, proceedings, governmental investigations, and any loss, cost, **liability**, damage, violation, reasonable expense (including reasonable attorneys' fees, consultants fees and disbursements), penalty or fine which may be imposed upon by or asserted against any of the Landlord Indemnified Parties **by reason of any** of the following occurring during the Term: any **personal injury** (and wrongful death) in or on the Premises (or the sidewalks and areas appurtenant thereto) to tenant or to any other person or for any damage to, or loss (by theft or otherwise) of, any of tenant's property or of the property of any other person, irrespective of the cause of injury, damage or loss (including the acts of negligence of any Subtenant or other occupant of the Premises) or damage to adjoining properties if **caused by operations, use, occupancy or demolition, construction or alteration** (or tenant's failure to repair and maintain the Premises), to, from or with the Premises . . ." (Emphasis added).

Thus, according to the terms of the lease Realty is broadly required to indemnify Second. *See Brunero* at 625. Wherein the Parks Department was found vicariously liable pursuant to contractual indemnification provision which broadly required Parks Department to indemnify Central Park Conservancy "from and against any and all liabilities . . . arising from all services performed and activities conducted by [the Conservancy] pursuant to this agreement in Central Park". Similarly here, Realty is vicariously liable to Second for negligence claims arising from the demolition at the premises by virtue of the contractual indemnification provisions found in the lease and thus the parties are united in interest.

However, with respect to the third condition of the relation back doctrine, Plaintiff cannot establish that Realty had or should have had notice of the pending action prior to the expiration of the statute of limitations. *See, e.g., Bulow v. Women in Need, Inc.*, 89 A.D.3d 525 (1st Dep't 2011). According to Plaintiff, the law firm Cartafalsa, Slattery, Turpin & Lenoff represented Realty in this action until on or about May 19, 2016. See Exhibit 9, Consent to Change Attorney (April 28, 2016). The same law firm currently represents Second and has represented Second since August 12, 2013. See Exhibit 11, Consent to Change Attorney. Plaintiff contends that because Second and Realty shared counsel, then Realty should have had notice of the pending action prior to the expiration of the statute of limitations. In opposition, Realty contends that it was never represented by the same attorneys as Second until after the decision dated January 27, 2016 granting plaintiff's application to file and serve the second amended complaint. In addition, Mr. Lowenberg states in his affidavit that Realty "did not learn of the lawsuit until March 1, 2016, when it received a copy of the verified answer to second amended summons and complaint dated February 24, 2016."

Plaintiff does not offer sufficient evidence that Cartafalsa, Slattery, Turpin & Lenoff

represented Realty before the statute of limitations expired necessary to raise a genuine issue of fact. As mentioned above, Realty argues that it was never represented by Cartafalsa, Slattery, Turpin & Lenoff prior to this court's order dated January 27, 2016. Plaintiff does not offer any evidence to rebut Realty's argument.

Furthermore, in the absence of a claim by Second against Realty, Plaintiff cannot establish that Realty would have or should have had notice of the pending action due to its relationship with Second and its obligation to defend and indemnify Second as to Plaintiff's negligence claims. *See Quiroz* at 960. In *L.B. Kaye Associates, Ltd. v. Libov*, the First Department reasoned that "[a]bsent a specific provision in the contract of indemnity, an indemnitee is not required to give the indemnitor notice of the claims against him." 139 A.D.2d 440 (1998). Here, Second was not required to give Realty notice of the claims against it because there is no notice requirement in the indemnification provisions of the lease agreement between them.

Additionally, while the standard under CPLR 3025 is different from that of CPLR 3211, Plaintiff cannot establish that Mr. Lowenberg and Mr. Cohen, as members and principal owners of Realty, had or should have had notice of the pending action. In their capacity as principal owners, they would have had notice of the pending action at the same time as Realty. Since the statute of limitations is expired on the claims against Realty, it has also lapsed as to Mr. Lowenberg and Mr. Cohen, and the proposed amendment is denied. *See Heller v. Louis Provenzano, Inc.*, 303 A.D.2d 20, 25 (1st Dep't 2003) (explaining that "[w]hile it is true that motions for leave to amend pleadings are to be liberally granted in the absence of prejudice or surprise, it is equally true that the court should examine the sufficiency of the merits of the proposed amendment when considering such motions. . . . Where, as here, the proposed amendments are totally devoid of merit and are legally insufficient, leave to amend should be

denied"); *see also Lucido v. Mancuso*, 49 A.D.3d 220, 229 (2d Dep't 2008) (under CPLR 3025 "[t]he court need only determine whether the proposed amendment is 'palpably insufficient' to state a cause of action or defense, or is patently devoid of merit").

For the reasons stated above, the court finds that Plaintiff has failed to establish that Realty, Mr. Lowenberg or Mr. Cohen had or should have had notice of the pending action, and the negligence claim against them does not relate back to the original commencement of the action. Thus the statute of limitations has expired as to Plaintiff's personal injury action against Realty, as well as to Mr. Lowenberg and Mr. Cohen. Accordingly, it is hereby

ORDERED that defendant152 Second Realty LLC's motion to dismiss, with prejudice, the second amended complaint brought against it (mot. seq. #002) is granted; and it is further

ORDERED that plaintiff Kevin Simington's motion for leave to amend the complaint to add or join Terrence M. Lowenberg and Todd Cohen as defendants (mot. seq. #003) is denied.

The clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: April 20, 2017 ENTER:

Kelly O'Neill Levy

HON. KELLY O'NEILL LEVY J.S.C.
J.S.C.