At an I.A.S. Part 52 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, located at 80 Centre Street, Borough of New York, City and State of New York, on the 12th day of December 2018

PRESENT:

HON. ALEXANDER M. TISCH, A.J.S.C.

JOHN CARMODY,

Plaintiff(s),

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, 31-33 2ND AVENUE OWNER LLC, 29 SECOND AVENUE REALTY LLC, KUSHNER COMPANIES LLC, 29 EAST 2ND STREET LIMITED PARTNERSHIP, 29 EAST 2ND STREET COMMERICAL LLC., AND 29 EAST 2ND STREET HOUSING DEVELOPMENT FUND COMPANY, INC., and LOUIS BARBATO LANDSCAPING INC.,

Defendant(s).

MOTION SEQ. NO.#7

INDEX NO.: 150090/2016

The following papers numbered 144 to 169 read on this motion	Papers Numbered
Notice of Motion/Order to Show Cause, Affirmation(s), Affidavit(s)	144-151
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Reply Affirmation(s) & Affidavit(s)	168-169
Memorandum/Memoranda of Law	

ALEXANDER M. TISCH, J.

Upon the foregoing papers, defendant Louis Barbato Landscaping, Inc. (LBL) moves pursuant to CPLR 3211 for dismissal of the complaint. For the following reasons, the motion is denied.

On March 12, 2018, plaintiff commenced the instant action against LBL by the filing of a supplemental summons and amended verified complaint. Prior to filing the amended complaint, defendant Louis Barbato Landscaping Maintenance Services, Inc (LBLMS) was dismissed from the action by a December 14, 2017 Decision and Order.

LBL now seeks dismissal on the basis that plaintiff's amended complaint is time-barred by the statute of limitations because it was not commenced within three (3) years after the July 4, 2014 date

of injury. LBL further contends that the "relation back" doctrine of CPLR § 203(c) is inapplicable because LBL is not united in interest with LBLMS, nor was plaintiff's failure to assert a claim against LBL a mistake. In opposition, plaintiff argues the doctrine is applicable because LBL and LBLMS are united in interest, and because LBL was aware plaintiff made a mistake and therefore was not prejudiced.

The relation back doctrine affords a plaintiff the opportunity to "correct a pleading error, by adding a new claim or party, after the statutory limitations has expired" (Buran v Coupal, 87 NY2d 173, 177 [1995]). In order for claims against one defendant to relate back to claims assert against another, three conditions must be satisfied: "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 that relationship can be charged with notice of the action such that the newly added party would not be prejudiced in maintaining a defense; and 3) the new party knew or should have known that, but for a mistake by plaintiff, the action would have been brought against him as well" (Brock v Bua, 83 AD2d 61, 69 [2d Dept 1981]). The doctrine gives courts the "sound judicial discretion … to identify cases that justify the relaxation of limitation structures … if the correction will not cause undue prejudice to the plaintiff's adversary" (Buran, 87 NY2d at 177). In the instant case, LBL does not contest that the first condition exists, therefore the doctrine's applicability turns on the second and third factors.

A unity of interest will generally be found where one of the parties is vicariously liable for the conduct of the other. Stated otherwise, there is unity of interest where the parties' defenses will be the same, and they will stand or fall together (see Brock, 83 AD2d). Here, Anthony Barbato is listed as Chief Executive Officer of the two entities. Additionally, they share a principal executive office and service of the summons and complaint was served to the same address and person (see Uddin v A.T.A. Construction Corp., 164 AD3d 1400 [2d Dept 2018] [finding a unity of interest where two entities were operated by the same owners and service of process was received by the same individual]). Thus, the two entities are united in interest as they "often blurred the distinction between them" (see id. at 1401). LBL maintains that there is no united interest because the two defendants share no property,

EIN numbers, bank accounts, or employees. Further, even though LBL and LBLMS have the same CEO, having the same officers is not "dispositive on the issue of unity of interest" (Valmon v 4 M & M Corp., 291 AD2d 343, 343-45 [1st Dept 2002] ["having common shareholders and officers is not dispositive on the issue of unity of interest"]). This Court is unpersuaded.

In support of its motion, LBL attached Barbato's affidavit asserting the above-mentioned claims regarding shared assets and employees. However, LBL has not provided any documentation to support such claims. It cannot be definitively concluded stated that a judgment against one entity, "will not similarly affect the other" (Mondello v New York Blood Center, 175 AD2d 718, 719 [1st Dept 1991] [citing Prudential Ins. Co. v Stone, 270 NY 154, 159]). LBL also failed to demonstrate that it would be prejudiced by application of the doctrine (see Buran, 87 NY2d at 180 ["the 'linchpin' of the relation back doctrine – [is] notice to the defendant within the applicable limitations period."]). Here, the service of the summons and complaint was provided to the very same address and person as when plaintiff served LBLMS (see Uddin, 164 AD3d). LBL and LBLMS are also represented by the same counsel. Therefore, there is no basis for LBL to argue that it did not have notice within the 3-year limitation period.

Moreover, it is apparent by LBL's conduct that its intention was to let the statute of limitations run out prior to informing plaintiff of the error. LBL contends that they informed plaintiff of the error in both July and November 2016, however the attorney's correspondence to plaintiff made no mention of the wrong party, but rather stated there was "no connection between our client and the sidewalk referenced" (NYSCEF Doc. No. 150, pg. 1-2). Additionally, plaintiff demanded in their August 18, 2016 notice of discovery and inspection the name and address of any entity that in any way contributed to the injuries sustained. (NYSCEF Doc. No. 155, ¶ 35). LBL responded on December 14, 2016 stating it was "not in possession of demanded names and addresses" (id. at ¶ 36). It was only on June 21, 2017, in response to a case scheduling order, wherein LBL provided documents containing the entity's name, did plaintiff learn of the mistake.

With respect to the third consideration, that of the mistake, LBL argues that because plaintiff had notice that they served the wrong defendant prior to running of the statute of limitations, there was no mistake made. LBL further contends that such conduct is intentional when the identification of a defendant is public record (see Wallach v R & Const. Corp., 128 AD3d 566 [1st Dept 2015]). However, such reliance is misguided as New York only requires a mistake, not an excusable mistake (see Buran, 87 NY2d at 179). Moreover, such emphasis on the how excusable the mistake was "focuses attention away from what Brock assumed to be the primary consideration in such cases – whether defendant could have reasonably concluded … that there was no intent to sue" (id. at 180-81 [holding that there was no prejudice where the defendant had notice because her husband, a co-defendant, had been properly served]). Here, LBL was fully aware that plaintiff intended to sue as LBLMS had been properly served with the summons and complaint.

Accordingly, it is hereby ORDERED that the motion is denied.

This shall constitute the decision and order of the Court.

ENTER,

A.J.S.C.

HON. ALEXANDER M. TISCH